Consultation Response

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Trade Policy Working Group welcomes the opportunity to consider and respond to the Scottish Affairs Committee's inquiry into *Scotland and Brexit: Trade and Foreign Investment*.[1] The Society has the following comments to put forward for consideration.

Summary and General Remarks

Trade agreements can be used to effect a wide range of changes in the relationship between states and regions. In many such agreements provisions are a means to promote or reinforce the application of the rule of law. Trade negotiations should take into consideration the need to ensure minimum standards or norms and respect for the rule of law and the interests of justice and access to justice.

Other aspects of the legal framework play a similarly important role in facilitating trade. This extends, for example, to continuing protection of intellectual property rights, promotion of competition and facilitating flows of data.

In the context of negotiations for a new relationship with the EU, it is important that every effort is made to continue cooperation in terms of mutual recognition and enforcement of judgments which are so important in allowing citizens and businesses to resolve disputes. Enabling access to justice gives businesses greater confidence in their commercial relationships and is important to underpin continued trade between the UK and remaining EU countries post withdrawal.

1https://www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/inquiries/parliament-2017/brexit-trade-investment-17-19/

Furthermore, the agreement should make provision for disputes between the UK and EU in relation to the interpretation and enforcement of whatever agreements are concluded.[2]

We emphasise the importance of recognising that Scotland is a distinct jurisdiction with its own law, court system and separately regulated legal profession. This should be taken into account in pursuing trade agreements including negotiations with the EU. It may be helpful to highlight a few statistics which relate specifically to the Scottish legal services sector:

- Scottish solicitors contribute £1.5bn to the economy on an annual basis;
- There are almost 1,200 Scottish firms; and
- More than 24,000 people are employed within the Scottish legal profession.[3]

We also emphasise the importance of facilitating a coordinated and holistic approach to trade promotion, both within and across economic sectors to maximise opportunities, for example the suite of professional business and advisory services, including legal services, which support investment. This comprehensive approach should also highlight broader benefits of doing business in Scotland, incorporating the availability of talent and cultural factors, such as quality of life.

As set out in our response to the consultation on the UK's future trade policy,[4] we believe that a whole of governance approach should be taken when considering trade negotiations. In the context of devolved competences this is particularly relevant where international agreements would bind domestic legislatures to effect changes to domestic law. We also noted that there was a distinct lack of clarity in the Trade Bill as to how the devolved administrations might be involved in trade negotiations. Further discussion of how the devolved administrations might play a role in trade negotiations following EU withdrawal is set out below.[5]

Lastly, we note the recent publication of the White Paper, *The future relationship between the United Kingdom and the European Union.*[6] We are considering this paper and will comment on it in due course.

[2] See further our response to the House of Lords EU Justice Sub-Committee *Brexit: Enforcement and Dispute Resolution Inquiry* available here: https://www.lawscot.org.uk/media/359503/120117-consultation-response-brexit-enforcement-dispute-reolution_.pdf

[3] The number of practising Scottish solicitors is over 11,000.

[4] https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf

[5] See also our response to the International Trade Committee's inquiry into UK Trade Policy Transparency and Scrutiny available here: https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf

[6] https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union

Response to questions

1. What are Scotland's priorities for future trade relations with the EU? How could these be best met in a future UK-EU trade deal?

On one view Scottish priorities for future trade relations would focus on existing offensive interests – ie those export sectors in which Scotland is particularly strong.[7] This includes sectors such as professional services (including legal and accountancy services); scientific and technical activities; financial services; food and drink; and coke, refined petroleum and chemical products.[8] At the same time, focusing solely on existing top performers could prove short-sighted and in our view the deal should be as broad as possible, seeking to preserve current benefits as well as allowing for growth in new sectors. It should also be noted that facilitating imports can provide benefits for consumers in terms of competition and greater consumer choice.

One important consideration in terms of any trade deal is seeking to ensure that the approach to trade policy is consistent with other areas of domestic law. The importance of the education sector and trade in education services is a good example of the necessity of approaching trade in the round. While universities are keen to, and indeed encouraged to, attract foreign students, their ability to do so can be constrained by rules in the immigrations system, which frustrate this objective. Foreign students should be enabled to study here. A system which integrates trading priorities with other areas of law, such as immigration rules, is therefore needed.

Trade must not be viewed in a vacuum. The EU framework for civil justice, providing mechanisms for dispute resolution and facilitating access to redress for businesses and individuals has been fundamental to supporting the internal market. Any trade deal should seek, so far as possible, to maintain cooperation in civil justice, which not only gives Scottish consumers and Scottish businesses greater confidence in entering into international transactions but also provides our trading partners with confidence about the reciprocal enforceability of obligations and vindication of rights.

Trade in services and non-tariff barriers

Trade in services should be firmly embedded in the UK's approach to trade as an area of particular strength for both Scotland and the UK as a whole. This requires a particular focus on ensuring that non-tariff barriers to entry into, or maintaining a position within, the EU market are not resurrected. These can

[7] "…countries have offensive interests (i.e. the improved market access that they aim to achieve in the markets of their trading partners) and defensive interests (i.e. the protective barriers in their own markets that the affected industries demand be preserved)" – see https://www.wto.org/english/res_e/booksp_e/historywto_09_e.pdf

[8] See http://www.gov.scot/Topics/Statistics/Browse/Economy/Exports/ESSPublication/ESSExcel We anticipate that others in those industries will provide sector-specific commentary so we focus here on legal services and other ways in which a strong legal framework can support trade relationships.

include for example: foreign ownership caps; joint venture obligations; restrictions on types of commercial presence; nationality or residency requirements; or complex regulation. Other non-tariff barriers are even less visible and can be created by practical rather than legal considerations, for example application processing times. There also needs to be an effective enforcement mechanism to challenge the compatibility of a particular non-tariff barrier in terms of the trade agreement and level of market access intended.

The importance of legal services

We believe any future UK-EU deal should seek to retain the advantages of the current EU framework which has been highly successful in creating the market for legal services. The legal services sector facilitates trade across all other sectors as well as being an important contributor to the UK economy in its own right. This includes contract negotiations for the provision of goods or services and also extends to advice on matters such as intellectual property protection.

Businesses of all types are increasingly international in focus and global in reach and lawyers must be able to provide their services accordingly, whether this is through expansion of their own offices or partnering with firms in other jurisdictions on an ongoing or case-by-case basis. Furthermore, trade agreements create legal rights and obligations and it is therefore imperative that individuals and business have access to legal advice to allow them to exercise those rights and meet the requirements of their obligations.

In practical terms, this must be supported by efficient business visa systems which allow lawyers to enter a country for the purposes of meeting their clients face-to-face.[9] This refers back to the concept of non-tariff barriers referred to above: if a lawyer has to wait a long time for a business visa to be authorised this could act as practical barrier to provision of legal services. Additionally EU clients may sometimes wish to travel to the UK to instruct or receive legal services and EU lawyers may need to come here, requiring an efficient business visa system for visitors to the UK.

The EU internal market for legal services is well developed with a high level of harmonisation ensuring smooth functioning of the market in legal services across national borders. The framework governing lawyers and legal services provision is set out in dedicated legislation:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)

These Directives implement two of the fundamental freedoms – freedom of services and freedom of establishment - allowing a very high level of access to other Member State markets, while recognizing the jurisdiction-specific nature of legal advice to ensure appropriate protection for recipients of those services.

[9] Such temporary provision of services is also known as "fly-in-fly-out" and forms part of the commitments under Mode 4 of the GATS and other trade agreements under the heading 'Movement of natural persons'

Lawyers qualified in the EEA States (Norway, Iceland and Liechtenstein) and in Switzerland also participate in the EU lawyers' regime.

A more detailed overview of the EU regime for legal services can be found in the Annex.

Lawyers also play a key role in resolving disputes when problems arise. We support the ability of lawyers to provide advice on the law of any jurisdiction where they are authorised to practice, including on EU law,[10] in addition to international law. This ability should extend to advising on representing clients with respect to, international law, international arbitration and arbitration before the proposed EU Investment Court.

Protecting rights and resolving disputes

The rule of law and the functioning of the justice system are of particular concern to lawyers and their clients; rights must be enforceable if they are to deliver full value to the rights-holder. Within the EU, there is an almost complete legal framework for choice of law, jurisdiction and recognition and enforcement of judgments in civil and commercial matters. This framework aims to facilitate the recognition and enforcement of judgments reached by Member States' courts, to achieve free movement of judgments, and rules for jurisdiction and choice of law, and to provide common rules of evidence and service of documents. All of these are important in cross-border matters, and will continue to be relevant after the UK has left the EU.[11]

We also note the EU commitment to establishing minimum common rules relating to availability of legal aid to improve access to justice in cross-border disputes,[12] which further enhances the ability of individuals to access justice in an internal market context.

At present the UK is an attractive jurisdiction for dispute resolution as a result of its reputation for reliable, efficient courts and relatively generous and flexible rules on the discovery of evidence among other factors. This brings clear benefits for the UK legal services' industry, which in turn contributes to the economy as a whole. Instrumental to this degree of success in an EU context is the possibility for claimants to rely on the well-established rules provided by the Brussels I and Brussels II *bis* and the Rome I and Rome II

[10] UK qualified lawyers who have been practising EU law will not lose their knowledge or ability simply as a result of UK withdrawal from the EU. Furthermore, the process of disentanglement of the UK from the EU will be long and not without disputes or issues to clarify which will call for legal advice on both sides of the channel and on both types of law. This will be especially important to those who cannot afford to pay for two lawyers.

[11] See further our response to *Providing a Cross-Border Civil Cooperation Framework: A Future Partnership Paper* available here: https://www.lawscot.org.uk/media/359749/190218-consultation-response-providing-cross-border-civil-judicial-coooperation-framework.pdf

[12] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0008

Regulations in respect to both the establishment of jurisdiction and the mutual recognition and enforcement of judgments within the EU.

If UK judgments are not automatically enforced in the remaining EU countries, this will be of detriment to clients in the UK and across the EU27. We therefore recommend that the UK Government seeks to maintain arrangements to ensure certainty of jurisdiction and continued mutual recognition and enforcement of judgments with the remaining EU Member States, and indeed to pursue continued participation in the Lugano Convention to continue cooperation with the non-EU signatories.

As set out in our Negotiation Priorities memorandum we therefore consider that maintaining the structure of the Brussels I and II bis Regulations, the EU Enforcement and Order of Payment, the Maintenance Regulation and Rome I & II on Applicable law are essential to litigants in both the UK and the EU. They assist in the resolution of disputes and are valuable to litigants in their personal and commercial capacities. Involvement of the European Court of Justice, if necessary, should not be seen to be a barrier to this arrangement.

Creation of functioning markets and open competition

In addition to the specific legislation which applies to the legal services industry outlined above, there are other aspects which, in a general sense, enhance the ability of lawyers to serve their clients in relation to trade between the UK and EU countries and advantage those citizens and businesses in their own right.

These include provisions relating to harmonisation of product standards and other aspects of consumer protection, competition law and procurement rules that regulate the functioning of and fair access to business opportunities within the Internal Market and EU-wide protections in terms of intellectual property

More recent EU trade deals have included provisions relating to state aid and competition law. There may be aspects of both state aid and competition of particular relevance in a Scottish context and we have stressed elsewhere the importance of ensuring that the particularities of Scottish or more localised markets and the communities to which they correspond, are observed.

Intellectual property rights

Intellectual property law offers important protections for producers, artists and businesses. In this response we focus on intellectual property protections for regional and traditional products but we further details of the impact of UK withdrawal from the EU in the context of wider intellectual property law protections can be found in our briefing paper on this topic.[13]

Regional and traditional products

The EU has created a set of rules which safeguard the authenticity of regional and traditional products. These benefit producers in particular regions, or who manufacture products with a traditional character,[14] by offering specific protection to those products through the right to use a particular designation of origin, geographic indicator or guarantee of traditional speciality. This protection ensures that the reputation and quality of the product is maintained as producers are not subject to pressures from competitors who can cut corners to produce a cheaper version of the product or damage its reputation. It can therefore offer a way of preserving traditional industries, often made up of smaller/family-run businesses and sustaining employment vital to regional economies. By preserving the integrity of products and manufacturing processes, the measures offer consumers a guarantee of quality and the knowledge that they are supporting the preservation of cultural heritage, which can also promote investment and encourage tourism.

a) Protected Designations of Origin (PDO): produced, processed *and* prepared in a specific geographical area, using the recognised know-how of local producers and ingredients from the region concerned
b) Protected Geographic Indications (PGI): quality or reputation is linked to the place or region where it is produced, processed or prepared, although the ingredients used need not necessarily come from that geographical area
c) Geographical Indications of Origin for Spirit Drinks (GI's): having a given quality, reputation or other characteristic that is essentially attributable to geographic origin.
d) Traditional Speciality Guaranteed (TSG): having a traditional character, either in the composition or means of production, without a specific link to a particular geographical area

Specific examples from regions of Scotland include: Orkney Lamb PDO, Native Shetland Wool PDO, Ayrshire New Potatoes PGI (applied for), Orkney Scottish Island Cheddar PGI, and Stornoway Black Pudding PGI and the Spirit Drink GI Scotch Whisky. All the above and about 70 other producer

[13] https://www.lawscot.org.uk/media/360382/lss-briefing_uk-withdrawal_ip_may-2018.pdf

[14] This note does not extend to wines, nor to the proposed "product of island farming" designation.

registrations from across the UK exist or have been applied for in the EU register, which contains about 1,300 plus registrations in total.

The strength of the protection lies in the absolute reservation for producers in a particular area. It extends beyond direct usage to cover evocation.[15] The rights are usually enforced through civil actions.

The current EU rules are contained in Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. Spirit Drink GI's are covered by Regulation (EU) No. 110/2008.

Effect of UK withdrawal from the EU on intellectual property protections

Following withdrawal from the EU, the UK will need to create its own system for this type of protection.

The World Trade Organisation (WTO) rules, as set out in the TRIPS agreement[16] do not offer an alternative system for intellectual property in and of themselves: they merely require that countries provide a means of protection. However, all signatories to the TRIPS agreement, are bound to create some kind of geographical indication protection.[17]

Some countries offer similar mechanisms for ensuring intellectual property protection, for example collective trademarks available in China. Examples of other protection options are as follows:

- Collective marks: to get a collective mark you generally have to have an applicant who represents all of the people that intend to use the mark. This is difficult. For example where an organisation represents a high proportion of, but not all, producers it would not be entitled to such a mark in most other jurisdictions.

- Certification marks: For the certification mark, the applicant is generally expected to carry out checks to ensure that all of the goods comply with the rules in relation to the use of the mark. This can be quite challenging for smaller producers' associations. Under a GI it is easier to delegate the checks to a third party – in the UK this is done by HMRC.

- Passing off: Passing off is a right that can only be enforced through a court and necessitates separate proceedings each time there is an infringement. The producer must prove the goodwill

[15] See for example the recent decision of the Court of Justice of the European Union regarding Scotch Whisky: *Scotch Whisky Association* v *Michael Klotz C-44/17* ("Glen Buchenbach")

[16] The Agreement on Trade-Related Aspects of International Property Rights

[17] See Articles 22 and 23 of TRIPS

attaching to the good and the loss caused by the infringer's misrepresentation on each occasion. It is therefore an expensive and time-consuming option.

As can be seen, these options can be comparatively expensive, time-consuming and uncertain. The EU system offers the highest level of protection for these types of products and therefore serves the needs of Scotland's traditional products and industries well.

In other jurisdictions, such protections are less popular – an issue which can cause particular friction when negotiating trade deals. This tends to relate to the protection of names which although protected in Europe have become generic in those territories i.e. they describe a style of product regardless of where it has been produced. Having said that, we are not aware of any Scottish GI's which fall into that category.

It is important to note that the ability to register a product for protection in other jurisdictions is often contingent upon parallel protection in the home country. The absence of GI protection in the UK, may also lead to existing overseas registrations of UK GI's being declared invalid.

Trade with the EU and ongoing protection for producers

If, following negotiations, the existing rules for third countries were to be applied to the UK, Scottish producers could receive lesser rights in the EU. EU legislation states that third country producers "should be able to use a registered name of a traditional speciality guaranteed, provided that the product concerned complies with the requirements of the relevant specification and the producer is covered by a system of controls."[18] At present, producers from third countries are able to register EU PDOs and PGIs but only in the framework of the WTO or under multilateral/bilateral agreements and even then, only if their own national laws offer the same kinds of protections and make them available to EU producers. The post-Brexit status of UK GI's are already registered in the EU is currently uncertain due to the lack of a stated UK position on domestic protection.

It will be important to take steps in EU negotiations to ensure that such a reduction in rights is avoided as it would have a negative impact on Scottish and other UK businesses. To obtain equivalent protection for its producers to that which they currently enjoy, the UK would need to enact national legislation and create a UK register reproducing all the features of the EU system. Ideally, agreement on reciprocity in this regard would be reached as part of the wider negotiations with the EU but if this were not achieved it would be necessary to negotiate a stand-alone agreement on reciprocity at the earliest opportunity. This could tie in with the White Paper's proposals regarding a common rule book on trade in goods including agrifood.[19] To

[18] See https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1477484063384&uri=CELEX:32012R1151 at recital 30

[19] See Chapter 1.2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf

avoid any hiatus the new national law and national register would need to be in place (and populated with all pre-Brexit registrations in the EU register) prior to withdrawal.

Data flows

International trade increasingly relies on international data flows. We therefore support the objective of seeking digital trade packages to support those data flows.

In relation to personal data, the UK should be closely aligned with the EU at the point of withdrawal. One option that has been spoken about in terms of ensuring continued flows of personal data is recognition by way of an adequacy decision. There are a number of problems with relying on an adequacy decision as the basis of transfer of data to companies or other business forms in the UK. It would be preferable to have a specific agreement in place to cover exchange of personal data between the UK and EU following withdrawal. However, if this is not achieved within the timescale of the withdrawal negotiations an adequacy designation could provide a helpful interim solution. More information is needed from the government regarding the point at which the UK intends to see an adequacy designation and the anticipated timescales to ensure business continuity for Scottish businesses which rely on flows of personal data between the UK and the EU.[20]

2. What opportunities will there be, following the UK's withdrawal from the EU, for increasing Scottish exports to non-EU nations? How can these opportunities be maximised?

The opportunity to increase Scottish exports to non-EU nations will depend on the ability of the UK to secure legitimate rollover of existing trade agreements and to secure new trade agreements. It also depends on the scope for Scottish industries to be access and attract relevant talent and skill sets and build their international reputation. Scotland enjoys a favourable international reputation and has relative advantages in terms of distinctive and popular culture, landscape and history. It should be allowed to capitalise on this, in turn, providing benefits to the wider UK.

The breadth and depth of these new arrangements will be particularly important and, as noted in our response to question one above, deals are likely to provide greater export opportunities in the short term where they match with Scotland's offensive interests. Trade agreements should also facilitate growth in new areas, and be future-proofed to take account of new goods, services and integrated products which may be developed in the future.

[20] https://www.lawscot.org.uk/media/359224/law-society-of-scotland-briefing_data-protection-and-eu-withdrawal_oct-2017.pdf

In terms of Scottish legal services, arbitration and other forms of international dispute resolution are seen as a potential growth area. Again, trade agreements should recognise that the Scottish legal industry, as with Scots law, offers many of the same advantages more frequently advertised in relation to England and Wales, while also retaining its own characteristics.

The recent launch of Scottish Legal International, a profession-led initiative with the support of Scottish Development International and the Law Society of Scotland offers a collective mechanism to encourage greater awareness and expansion of the sector by marketing Scottish legal services as an essential component of successful international trade and investment.

Data flows

In context of trade beyond the EU, we once more emphasise the importance of ensuring that such agreements not only facilitate flows of data between the UK and other countries but also contain safeguards to ensure that any data stored, processed, or used in those countries is effectively protected. The domestic legislation of the UK's trading partners must therefore guarantee the same level of protection as UK data protection rules but rules alone are insufficient without effective enforcement.

The UK should therefore seek to engage with international partners on these issues and to support the work of the ICO in relation to the duties set out in Article 50 of the General Data Protection Regulation[21] and as envisaged under Clause 120 of the Data Protection Bill.[22]

3. How well do the UK Government's trade priorities address those areas which are most important to Scotland?

It is not entirely clear at present what the UK Government's trade priorities are. The Department for International Trade's stated objectives according to its webpage are:

- Support and encourage UK businesses to drive sustainable international growth.
- Ensure the UK remains a leading destination for international investment and maintains its number one position for international investment stock in Europe.
- Open markets, building a trade framework with new and existing partners which is free and fair.
- Use trade and investment to underpin the government's agenda for a Global Britain and its ambitions for prosperity, stability and security worldwide.[23]

[21] http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

[22] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/18153.pdf

However, these are too general to allow for a critical analysis on their own merits, nor to establish how they address any specific Scottish issues.

We note that a number of areas 'coming back from Brussels' coincide with areas of law where competence has been devolved to the Scottish Parliament (inshore fisheries, agriculture, environment, etc) and these areas are all likely to be affected by any future trade agreement. This could lead to discrepancies between policy goals set at the Scottish level (e.g. animal welfare; food additives for cattle feed etc), which might be undermined by these international agreements.

Furthermore, trade policy is about much more than bilateral trade negotiations. Flowing from a structured stakeholder engagement mechanism should be government/industry collaboration on market access issues, which could be modelled to some extent on the EU Market Access Strategy. This brings together the Commission, industry, Member States and EU Delegations and Member State Embassies 'on the ground' to agree priorities and then deploy the market access toolkit to tackle commercially significant barriers in markets around the world. This will range from classic diplomacy to using mechanisms at global level (notably the WTO system but also, for example, OECD) and, ultimately, WTO dispute settlement. Business sectors are part of the team throughout the process.

4. What influence should the devolved administrations have over future UK trade policy, and how should this be provided for?

The devolved legislatures and administrations have not played a formal role in negotiating international trade treaties. However, since the EU first took over responsibility for trade negotiations, there have been constitutional developments within the UK with the creation of the devolved legislatures and administrations- including the Scottish Parliament - and subsequent further devolution of powers to them. Determining the UK's position across a raft of sectors encompassing products and services, which may be provided from anywhere in the UK, demands a holistic approach.

As we have stated elsewhere, we believe it is important to ensure a "whole-of-government" approach in terms of the negotiations with the EU. The concept is also of particular relevance to other international agreements - including trade agreements - which may or will have an impact on domestic law. In this context "whole of government" should be interpreted as "whole of governance" to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government. [24]

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[23] https://www.gov.uk/government/publications/department-for-international-trade-single-departmental-plan/department-for-international-trade-single-departmental-plan-may-2018

[24] This would require a revision of the October 2013 Memorandum of Understanding and Supplementary Agreements between the Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee. This revision would take

UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international trade agreements and consider how these might best be modernised to take account of changes in the UK's political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with trade negotiations in recent years.

In order to create a comprehensive and inclusive trade policy, conduct negotiations and implement trade agreements, it would helpful were the UK government to engage with the devolved administrations and legislatures. In our recent response[25] to the International Trade Committee's *UK Trade Policy Transparency and Scrutiny inquiry,* we set out a range of options for involvement of the devolved administrations as follows:

- requiring the consent of the devolved administrations to any UK negotiated trade position;
- *normally* requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
- having a procedural structure for the devolved administrations' involvement similar to that in the European Union Withdrawal Bill for "common frameworks" (ie formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process); and,
- as a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc and allowing them to have a scrutiny and comment role(as noted above).
- With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention, a memorandum of understanding etc. For instance, where terms such as "normally" are being used to describe what would be expected in the relationship between parties, such provision should probably best not be stated in statute, due to the lack of precision.[26]

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into account of the extraordinary circumstances which apply because of the UK's exit from the EU and establish structures to help achieve the best outcome for the UK and its constituent nations. In particular Supplementary Agreement B which contains the "Concordat on Coordination of European Union Policy issues" with Sections B1 relating to Scotland, B2 to Wales, B3 to Northern Ireland and B4 providing a common annex needs revision. Relevant considerations are also contained in the Concordat on International Relations, Section D of the Memorandum of Understanding and its relevant Sections for Scotland, Wales and Northern Ireland and common annex. Revision of the Memorandum and the annex will enhance the UK response by full engagement with the devolved administrations. A common approach will ensure that the "Whole-of-Government" concept is respected. It is crucially important that communications between UK Ministers and the devolved administrations are as transparent as possible. Whitehall departments must be fully appraised of the considerations which are of importance to the devolved administrations and fully cooperative with the devolved administrations, the Scottish Parliament and the Welsh and Northern Ireland Assemblies.

[25] Our response is available here: https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf

[26] Section 2 of the Scotland Act 2016 should at best be seen as an exception peculiar to its context.

Where the subject of negotiations relates to devolved matters, it should be expected that the UK Government would seek the involvement of devolved administrations in negotiations. Consideration should be given to whether the UK Government should be required to seek more than just the involvement of the devolved administrations in such negotiations but also seek their consent to the position of the UK Government during such negotiations where they relate to devolved matters. This will be important where trade agreements impact upon on devolved matters and implementing legislation may be carried out by the devolved administrations or engage the legislative consent convention.

Accordingly, rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate trade-related confidence-building and good-faith collaboration across devolved and Westminster administrations eg to tie in with the "common frameworks" to be agreed as a result of repatriation of EU powers. Such structures may provide, for example, for devolved participation in the design of trade mandates and in the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to trade agreement implementation and minimising risks to UK-wide implementation of trade agreements.

Lastly, insofar as trade negotiations relate to devolved areas, one option would be to make UK ratification of any agreements (or relevant sections thereof) provisional on devolved administration consent (which may in turn require devolved legislative consent). This is similar to the approach taken at EU level in relation to ratification of mixed agreements.[27]

These issues are explored in further detail in our Transparency and Scrutiny Inquiry response.[28]

5. How do the UK and Scottish governments promote Scottish exports, the Scottish "brand", and foreign investment in Scotland, how well do they coordinate their activities, and how could this be improved?

Scottish goods and services should be recognised as part of the wider UK offering, currently promoted under the GREAT banner.[29] At the same time, in many instances this will be complementary to the work that goes on in Scotland, for example through the Scottish Government's own economic development arm, Scottish Development International. The branding of products and/or services emanating from Scotland to recognise their distinct character may be beneficial in particular contexts. The importance of cultural

[27] I.e free trade agreements where the competence is shared between EU and Member State levee g because they contain investment provisions. Such mixed agreements need to be ratified by each EU Member State individually

[28] https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf

[29] For example, the Law Society of Scotland is directly involved in the Ministry of Justice's "Legal Services are Great" campaign.

factors, including the quality of life, arts scene, local produce, history and landscape should not be ignored; these additional factors add to the appeal of living and working in Scotland

Legal services

We are concerned that promotion of legal services on the international stage often focuses exclusively or predominantly on English common law, the English courts and English law firms. However, Scotland has a strong market for professional services, including legal services. Furthermore, legal services support and facilitate trade and investment in other sectors. The recent launch of Scottish Legal International, a profession-led initiative with the support of Scottish Development International and the Law Society of Scotland offers a collective mechanism to encourage greater awareness and expansion of the sector by marketing Scottish legal services as an essential component of successful international trade and investment.

Ensuring coordination by facilitating sector-specific discussions encompassing relevant stakeholders would be helpful. For example discussion of legal services should ensure that the reputation of the Scottish courts as impartial and independent, the offerings of the Scottish Arbitration Centre and the strengths of Scots law are harnessed alongside promotion of the high quality legal services offered by the Scottish legal profession.

Future work on the Scottish brand should emphasise the advantages of doing business in Scotland, drawing on the wider support network in terms of availability of high quality legal advice, an effective commercial court, and the strength of the rule of law alongside other important professional business services.

A holistic approach to trade and investment promotion

At the same time it would be helpful to facilitate a coordinated approach between broader groupings and economic sectors. Legal services providers are not only a strength in their own right but also, along with accountants and consultancy firms, form part of a suite of high quality professional services offering. Hand in hand with financial services, these present an attractive and comprehensive support infrastructure for existing businesses and new investors. In addition, Scotland's reputation for research and innovation, closely connected with world-class universities provide an ongoing pipeline of talent and opportunities to invest in forward-thinking projects.

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Annex - Specific priorities for legal services in the context of EU Withdrawal

As set out in our Negotiation Priorities memorandum,[30] we believe that the UK Government should negotiate the continuity of the EU law concerning the transnational practice of law and legal professional privilege in the Withdrawal Agreement. We have drafted an article for the Withdrawal Agreement which can be found in the Appendix.

Free movement of lawyers

The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another member state have been in force for a number of years. *The level of internal market access for legal services is supported by free movement of persons.* There are three key pieces of legislation that affect the legal profession:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)
- Recognition of Professional Qualifications Directive (2005/36)4

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession.

The Lawyers' Services Directive (temporary provision)

The Lawyers' Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another member state - a 'migrant' lawyer - must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practices before the judicial authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

[30] https://www.lawscot.org.uk/media/9945/negotiation-priorites-for-leaving-the-eu-for-the-uk-government.pdf

Permanent establishment under home title

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a member state to practise on a permanent basis under their home title in another member state. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the member state in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practise on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.

Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

Recognition of professional qualifications

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one member state and is in good standing with his or her home bar.

The member state where the lawyer is seeking to re-qualify may require the lawyer to either:

- complete an adaptation period (a period of supervised practice) not exceeding three years, or
- take an aptitude test to assess the ability of the applicant to practice as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host member state and it must take account of the fact that the applicant is a qualified professional in the member state of origin).

It is also worth bearing in mind that a number of our future lawyers take advantage of programmes to broaden their horizons during their studies, which rely on reciprocal arrangements with other EU universities. The ERASMUS programme, the best-known EU student exchange programme established in 1987, has a number of participants from Scottish law schools.[31]

[31] For further information on the impact of studying law in Scotland post Brexit see: https://sulne.files.wordpress.com/2017/11/studying-eu-law-during-and-after-brexit-1st-edition.pdf

Legal professional privilege (LPP)

At present any business based that obtains legal advice from a UK or other EU/EEA qualified lawyer is protected by legal professional privilege. The ability of UK qualified lawyers to provide advice on the basis that the privileged nature of those communications will be respected is also of key importance to the legal sector as a major contributor to the UK economy.

LPP is conceptually a right of the client and is central to the rule of law and administration of justice. Its scope may vary slightly between jurisdictions but in general terms LPP protects confidential communications between companies or individuals and their legal advisers made for the purposes of, or legal advice in contemplation of, litigation. It is not possible to force such communications to be disclosed in legal proceedings or to regulators or other third parties.

The right to rely on legal professional privilege throughout the Internal Market,[32] has been recognised in CJEU case law. It important, both as end in its own right due to the important protection it provides to clients in dispute and to ensure that Scottish (and other UK) lawyers are on a par with those who are members of the local bar or law society in the EU/EEA and Switzerland.

Securing LPP for communications between EU clients and UK qualified lawyers should be included within the legal services negotiating priorities of the UK Government in the in order to ensure that UK qualified lawyers can function fully when acting for EU or third country clients who engage them.

[32] See especially Case 155/79 *AM&S Europe Limited* v *Commission* and the AG's opinion in T-125/03R and T-253/03R *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* which states that the privileged nature of communications from lawyers outside the EU/EEA cannot be recognized.