



Law Society
of Scotland

Law Society of Scotland

European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 March 2018 TF50 (2018) 33 – Commission to EU 27)

29 March 2018



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.

We have had an opportunity to consider the 19 March 2018 TF50 (2018) 33 – Commission to EU 27: European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (draft Agreement). The following are our observations

Part 1 Common Provisions

Article 2 Definitions

- Article 2(a) (i) refers to 'Union law' meaning, amongst other categories 'the general principles of Union law'

It would be helpful if this were to be defined.

- Article 2(c)

This defines 'Union citizen' as meaning 'any person holding the nationality of a Member State'. We note that the definition in the draft Withdrawal Agreement agrees with that in the TFEU Article 20 but is inconsistent with the definition in Directive 2004/38/EC Article 2.1 which defines 'Union citizen' as 'any person having the nationality of a Member State'. There should be a reference to the TFEU in the Withdrawal Agreement.

Article 4 Methods and principles relating to the effect, the implementation and the application of this Agreement

- Article 4.5

This reflects the terms of the European Union (Withdrawal) Bill currently being scrutinised in the UK Parliament. The Bill might be amended and therefore there should be flexibility over the terms of this Article.

Part Two Citizens' Rights Title I General Provisions

Article 8 Definitions Article 9 Personal scope

The definitions in article 8 (c) and article 9 () and (2) contain the word 'thereafter'. This is archaic and should be deleted.

- Article 9.3
- *Article 10 Continuity of residence*

Reference to Article 14(2) regarding periods of absence should be a direct reference to Directive 2004/38/EC. Linking to Article 14(2) does not add any additional information and only creates an additional step in reaching the required detail.

Title II Rights and Obligations

Chapter 1 Rights related to residence, residence documents

Article 13 Right of exit and of entry

- Article 16(1)

This Article states that people will have the right to enter the host State as set out in the first paragraph of Article 5(1) of Directive 2004/38/EC. That states that "Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport." It may be desirable to note the conditions on which restrictions on granting entry could be made. Is this adequately covered by 'provisions on travel documents applicable to national border controls'?

Article 16 Status and changes

The examples of the change of status provided in this article are not helpful. They are clearly not meant to be exclusive. Accordingly, rather than the partial list of status changes it would be better to have either a full list or no examples at all.

Article 17 Issuance of residence documents

- Article 17(1)(d)

Further information or guidance on what would constitute 'reasonable grounds' may be helpful.

- Article 17(1)(k)

Article 17(1) (k) (ii) (economically inactive persons) and Article 17(1)(k)(iii) (students) both refer to sufficient resources not to become a burden on the social assistance system of the host State. However, 17(1)(k)(ii)

refers to evidence, whereas 17(1)(k)(iii) refers to 'a declaration or equivalent' that cannot require reference to any specific amount of resource. It is not clear why different approaches are taken.

- Article 17(1)(l)

The drafting of this Article is very confusing. It refers to provisions in Directive 2004/38/EC, but also lists those provisions, with slightly altered wording. Article 17(1)(l)(iv) refers to a document issued in accordance with Article 3(2) of Directive 2004/38/EC, but that Article does not relate to the issuance of any document.

- Article 17(1)(m)

It is unclear why there is need to reference Directive 2004/38/EC if the relevant list of supporting documents is included in this Article.

Chapter 3 Professional qualifications

Article 25 recognised professional qualifications

We agree with the retention of the recognition arrangements under Directive 98/5/EC.

Article 27 Administrative cooperation on recognition of professional qualifications

The reference to the example of cooperation between the UK and Member States should be expanded to include issues beyond the disciplinary sphere.

Title III Coordination of social security systems

Article 28 Persons covered

Why is article 28.2 a derogation rather than simply a definition?

Title IV Other provisions

Article 33 Publicity

Is the duty of publicity imposed by article 33 unlimited in terms of time? Should it not be subject to a defined time frame?

Part Three Separation Provisions

Title I Goods Placed On the Market

Article 37 Continued circulation of goods placed on the market

- Article 37(1) (a) seems impossible to police but would also make it impossible to effectively police circulation of goods manufactured at a later date

Article 38 Proof of placing on the market

This article refers to the burden of proof being on an economic operator to demonstrate 'on the basis of any relevant document that the good was placed on the union or UK market'

There is no definition of what a 'relevant document' might be. Consideration should be given to providing a definition for the guidance of traders.

Title II Ongoing Customs Procedures

Article 43 Union status of goods

- Article 43(1) and (3) - delete 'and ended thereafter'.

Title II Ongoing Value Added Tax and Excise Duty Matters

Article 47 Value added tax (VAT)

Article 48 Excise goods

- Articles 47 and 48 – delete 'and ended thereafter'.

Title IV Intellectual Property

Article 50 Continued protection in the United Kingdom of registered or granted rights

50(2) – We note that geographical indications can be cancelled under the current law if they become generic i.e. the products sold under that name cease to meet the technical requirements specified or indeed if they lose their connection to a specific place. One would assume that the UK GI law, whatever form that takes, will have a similar provision.

Furthermore, as a general rule the principle of territoriality applies to GI's like other IP rights. Therefore, while "Champagne" is a GI in the EU, in other countries it can be used to describe a style of sparkling wine. Therefore post withdrawal, if a GI became generic in either the UK or the EU and lost its protected status, it would not automatically follow that it would lose its status in the other market if it continued to be seen as a term referring to a product produced in a particular place with certain characteristics and qualities deriving from its place of production.

50(4) - The terms of the transition of trade mark rights are, as many suspected, following the Montenegro model. This is the most practical solution in the circumstances but we would make the following comments:

When an applicant files a UK trade mark, it has to declare a genuine intention to use it. No such obligation exists in EUTM filings. It is interesting that the Withdrawal Bill does not provide that such a declaration is required in the creation of the new UKTM right which is created from an EUTM registration.

Article 50(5)(b) provides that EUTMs which are divided into a UK national TM shall not be challenged for lack of genuine use in the UK before the end of the transition period. Does this mean however that the genuine use period is 'reset' such that the newly created divided UK TM cannot be challenged for a period of 5 years? If so, this is likely to cause a cluttered trade mark register for the 5 year period after the transition period. There will be many marks on the UK register which have been registered automatically but where the owner does not use them, yet it will not be possible to invalidate the mark.

When an EUTM has opposition/cancellation proceedings ongoing at the end of the transition period, will there also require to be corresponding opposition proceedings before the UKIPO? Article 55(1) provides an ad hoc right of priority for 6 months after the transition but pending opposition proceedings could easily extend beyond that time frame.

As a follow on from the above, what is intended to happen to EUTMs which are opposed/subject to cancellation based on UK passing off rights or an earlier UKTM?

Title V Ongoing Police and Judicial Cooperation in Criminal Matters

We note that there is no definitions section under this Title. There are in relation to others and it would be helpful to have one here.

Article 58 Ongoing judicial cooperation proceedings in criminal matters

- Article 58(1)(b)

Article 58(1) (b) refers to the 'central authority' (line 2).

Reference is made repeatedly throughout this section of the draft Agreement to central authority. Presumably it intends to rely for definition to the relevant Framework Decision(s) but the Framework Decision(s) do not generally contain any specific definition.¹

There is no standard definition in the draft Agreement as to what the 'central authority.' means. Article 2 Definitions of the draft Agreement could include a definition for purposes of clarity.

- In Article 58(1) (b), consideration could be given to the insertion of 'recognition and' between the words 'for' and 'execution.'(line 3).

Council Framework 2003/577/JHA refers to recognition as well as execution.

Should the word 'or' be inserted between the words 'authority' and 'by' in line 2?

- Article 58(1) (c) refers to the 'central authority' (line 2) See above.
- Article 58(1) (e) refers to judgments.

These are judgments in 'criminal matters imposing custodial sentences'. While there is reference to the Council Framework Decision 2008/909/JHA which makes it clear, there could be confusion as it is not any judgment.

- In Article 58(1) (f), the words 'convictions in the course of' could be inserted between the words 'of' and 'new.' (line 1)

Without the insertion of these words, there is a lack of clarity as to what is the reference to new criminal proceedings means. Though there is a reference to Article 3 of that Framework Decision, it still seems that it should be clear within the document itself as to reference to convictions.

The word 'initiated' appears in line 2. Is 'initiated' within the context of convictions actually correct?

- Article 58 (1) (g) refers to 'central authority' (line 2). See above

Footnote 43 should be amended by the deletion of the words 'of information extracted from' to accurately refer to the name of the Council Framework Decision 2009/315/JHA.

Should the reference to 'conviction' in line 2 refer to 'criminal records'?

Should reference be included to the Council Framework Decision 2009/316 JHA which establishes the European Criminal Records Information System (ECHRIS) (set up in terms of Article 11 of the Framework Decision 2009/315/JHA referred to in sub-paragraph (g)).

¹ For instance, Council Framework Decision 2006/783 refers to Article 4 Transmission of decisions and recourse to the central authority. Paragraph 7: The United Kingdom and Ireland, respectively, may state in a declaration that the decision together with the certificate must be sent via its central authority or authorities specified by it in the declaration. These Member States may at any time by a further declaration limit the scope of such a declaration for the purpose of giving greater effect to paragraph 3. They shall do so when the provisions on mutual assistance of the Schengen Implementation Convention are put into effect for them. Any declaration shall be deposited with the General Secretariat of the Council and notified to the Commission. Central authority can be defined as those responsible for administration transmission reception of confiscation orders.

- Article 58(1) (h) refers to 'central authority' (line 2). See above.

This also refers to the monitoring and surrenders on breach of supervision orders. Should this provision be extended?

Why has the terminology changed to 'forwards' (line 4) when the previous sub-clauses refer to 'transmit'?
See Article 58(1) (d).

- Article 58(1) (i) refers to 'central authority' (line 2). See above.

This refers to European Protection Orders. Should European Protection Measures also be included?

The reference again uses 'forwards' rather than 'transmits'.

- Article 58(1) (j) refers to 'central authority' (lines 2/3). See above.

The reference should be to 'State' rather than 'authority' where it occurs between the word 'executing' and 'or' in line 3.

The word 'executing' should be inserted between the words 'an' and 'authority' in line 3.

It refers to 'forwards' in line 4. Should this be 'transmit'?

'a' should read 'an' in line 4 where it occurs between 'execute' and 'European'?

- Article 59 Ongoing law enforcement cooperation proceedings, police cooperation and exchange of information

The terminology of this section could be expressed more clearly. It refers to 'shall apply as follows' in the start of the Article then again to 'shall apply in respect of' under subparagraph (b).

- Article 59 (a)(i)

There is reference within Article 39 of the Schengen Implementing Convention to 'central bodies' not 'central body' in line 2.

The word 'the' appears to have been omitted between 'by' and 'competent' and again between 'by' and 'requested' in line 2.

In line 3, it is suggested that it refers to 'authority' rather than 'authorities' in line 4.

There is a reference again to 'forward' rather than 'transmit' in line 5.

- Article 59 (a) (ii)

The words 'an authority designated by a' should refer to 'officers of one of the' in line 3.

The reference to 'Party' should read 'Parties' in line 3.

- Article 59 (b) (v)

It is unclear where the reference to 'or entrusting observation to the officers of the Member State in whose territory observation is carried out' originates from. (lines 1/2)

Should the reference to ‘an authority designated by requested Member State’ merely refer to the requested authority?

- Article 59 (c)

The word ‘requested’ where it appears in line 2 should refer to ‘requesting’.

- Article 59 (e)

The reference in lines 2/3 to ‘where there was a hit before the end of the transition period on an alert issued in the Schengen Information System’ would be better expressed by reference to the relevant section of Council Decision 2007/533/JHA or clarified.

- Article 59 (f)

This should include the words ‘of a member State’ after the word ‘Office’ in line 2.

- Article 59 (g)

The word ‘received’ at the end of line 3 seems unnecessary.

- Article 60(1) Confirmation of receipt or arrest

Should the reference to Article 59 (b) (ix) be included under line 3 since this refers to joint special investigation teams which are neither a judicial decision nor specifically a request? This may be correct were Article 59(b) (ix) to refer to a request to set up a joint special investigation teams.

The reference to ‘requested’ in line 5 should be to ‘requesting’.

- Article 61 Other applicable Union acts

Directive 2012/13/EU² of the European Parliament and of the Council is wider in its application than reference to the European Arrest Warrant. It also refers to criminal proceedings which include right to

- *Article 88 Ongoing administrative procedures and Article 89 New administrative procedures*

Articles 88 and 89 would appear to give EU power over all administrative procedures which have already commenced or where facts occurred before the end of the transition period, As noted above, it is not entirely clear whether would be broad enough to cover all competition investigations/cases being dealt with by the Commission. In particular, would the provisions be broad enough to ensure that a Commission decision on a competition case can be applied in a claim for damages raised in the UK?

- Article 91 Binding force and enforceability of decisions

Article 91 specifically addresses decisions made before transition period, which may be appealed to the EU courts. We would suggest amending 91(1) to read “Decisions adopted by institutions, bodies, offices

² This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights under subject matter.

and agencies of the Union before the end of the transition period, and decisions resulting from the procedures referred to in Article 88 and 89...” as articles 88 and 89 do not actually refer to decisions.

Title VI Ongoing Judicial Cooperation in Civil and Commercial Matters

Article 63 Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities

- Article 63(1) – are there any problems with this in respect of a contract concluded during membership where after withdrawal, the purchaser wants to sue in a situation which falls under Art 7 of Brussels 1?³

Title VII Data and Information Processed or obtained before the end of the Transition Period, or on the basis of this agreement

Article 66 Definitions

Would the combination of Article 66(d) and the general continued application of EU law cover the situation where Directive 2002/58 is replaced/amended by the ePrivacy Directive before the end of the transition period?

Article 67 Protection of personal data

I think 67(b) needs to be amended. It refers to ‘data subjects outside the UK’ but presumably what it means is ‘data subjects in the EU’. There may be confusion with sub-paragraph (b). If it is meant to refer to specific provisions for sharing of information between authorities, it might be clearer to list them. It does not seem to provide for data flows and GDPR has theoretical application in any case.

Title X Union Judicial and Administrative Procedures

A couple of questions arise in this context in the area of competition law where the European Commission is the relevant regulator in an EU context but actions for damages which may be determined by a Commission finding that a company has contravened EU competition law are brought in national courts.

The most fundamental question is whether the scope of “administrative procedures” extends to competition procedures. This should be clarified and if not, separate provisions dealing with competition procedures will be required.

³ (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>)

- *Article 88 Ongoing administrative procedures and Article 89 New administrative procedures*

Articles 88 and 89 would appear to give EU power over all administrative procedures which have already commenced or where facts occurred before the end of the transition period, As noted above, it is not entirely clear whether would be broad enough to cover all competition investigations/cases being dealt with by the Commission. In particular, would the provisions be broad enough to ensure that a Commission decision on a competition case can be applied in a claim for damages raised in the UK?

- *Article 91 Binding force and enforceability of decisions*

Article 91 specifically addresses decisions made before transition period, which may be appealed to the EU courts. We would suggest amending 91(1) to read “Decisions adopted by institutions, bodies, offices and agencies of the Union before the end of the transition period, and decisions resulting from the procedures referred to in Article 88 and 89...” as articles 88 and 89 do not actually refer to decisions.



For further information, please contact:

Michael Clancy
Director Law Reform
Law Society of Scotland
DD: 0131
michaelclancye@lawscot.org.uk