



Law Society  
of Scotland

# House of Lords EU Committee Post – Brexit UK-EU Relations Inquiry

## The Law Society of Scotland's Response

May 2018



## Introduction

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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 Brexit Policy Working Party welcomes the opportunity to consider and respond to the House of Lords EU Committee inquiry: Post-Brexit UK-EU Relations Inquiry. The Sub-committee has the following comments to put forward for consideration.

## General Comments

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Consideration of Post-Brexit UK-EU Relations must be seen in the context of what is known about the positions and aspirations of the negotiating parties at the moment. This is however necessarily fluid and could change according to negotiation imperatives, the political situation in the UK and that in the EU.

The main sources of the position are set out in a variety of documents including the EU Guidelines dated 23 March 2018 and the Prime Minister's Mansion House Speech on 2 March 2018.

The European Council Guidelines reiterated that any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field (para 7) and that the framework for the future relationship will be elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement. (para 8)

And the Prime Minister's speech where she said:

"we want good access to each other's markets, it has to be on fair terms...We both want good access to each other's markets; we want competition between us to be fair and open; and we want reliable, transparent means of verifying we are meeting our commitments and resolving disputes.

But what is clear is that for us both to meet our objectives we need to look beyond the precedents, and find a new balance".

The Prime Minister went on to set out the fundamentals of the anticipated trading relationship:

1. Binding commitments to ensure fair and open competition.

2. Independent arbitration to resolve disputes fairly and promptly.
3. Inter-regulatory cooperation to enable UK regulators to work with EU counterparts which would apply to “everything from getting new drugs to patients quickly to maintaining financial stability”.
4. Data protection arrangements which would go beyond an adequacy arrangement and include an ongoing role for the UK’s Information Commissioner’s Office. This will ensure UK businesses are effectively represented under the EU’s new ‘one stop shop’ mechanism for resolving data protection disputes.
5. Maintenance of links between people in the UK and the EU.

### **What areas should be covered in the framework for future relations, to be agreed in October 2018?**

In earlier documents on the UK’s priorities for the negotiations with the EU we identified high level issues to be agreed which included ensuring stability in the law, maintaining freedom, security and justice, maintaining recognition and enforcement of citizens’ rights, promoting continued professional recognition and continued Scottish lawyers’ rights of audience in the EU, and protecting legal professional privilege for the clients of Scottish Lawyers working in the EU or advising on EU Law.

The Draft Withdrawal Agreement has covered the initial phase of withdrawal including many important issues but even that Draft Agreement is not yet finalised. Less than 11 months until exit day several issues remain to be agreed and the mantra that “Nothing is agreed until everything is agreed” remains one of the basic negotiation ground rules.

Therefore we urge the UK and EU negotiating teams to conclude the Withdrawal Agreement with the utmost urgency. This is key to ensuring the objective which the EU and UK have to agree on a future framework for relations before the end of October 2018. The October agreement will provide only a broad outline of the future relationship but will need to scope all the areas of future UK-EU cooperation across the full range of EU Policy competences. The Agreement should include the areas of freedom, justice and security, criminal and civil judicial cooperation and economic cooperation. It should also point the way to the final shape of the future EU-UK relationship.

### **How much detail will it be possible to include this framework?**

This is a difficult question to answer as this is a unique set of circumstances. Clearly a framework is not expected to fully detail every aspect but it should set out the principles of agreement and broad subject areas to be covered in the Future Relationship. It should be possible to identify the main themes.

We suggest that the principles of the agreement should include:

1. Maintaining the rule of law and the interests of justice
2. Upholding the Human Rights of the citizens of the UK and the EU as required under the European Charter of Fundamental Rights and other rights instruments

3. Reaching an agreement which fulfils the intention of the UK to withdraw from the EU and which is fair to both the UK and the EU.

We suggest that the broad subject areas should include:

1. Goods including agriculture, food and mutual recognition of product standards
2. Fisheries
3. Services including financial, legal and accountancy services
4. Civil Judicial Cooperation
5. Citizens Rights
6. Dispute resolution (see our further comments below)
7. Health

### **How compatible are the visions for a future relationship set out by the UK Government, European Council and European Parliament?**

They are compatible in some areas but not in others. Much of the future relationship centres around trade.

As noted in our response<sup>1</sup> to the Government's consultation on Future UK trade policy absence of a customs agreement or a comprehensive free trade agreement which includes mechanisms for mutual recognition of standards may cause significant delays in customs and regulatory procedures when compared with the current arrangements, therefore adding costs for both importers and exporters. There would also be cost implications for importers and exporters of both goods and services providers in terms of understanding new regulatory requirements and customs processes and the potential impact on supply chains. There may also be implications to be considered in other areas such as the exhaustion of intellectual property rights or employment issues. Trade in services should be firmly embedded in the UK's approach to trade. This requires a particular focus on removing non-tariff barriers to entry into, or maintaining a position within, overseas markets. These can 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.

### **Trade in legal services**

We believe free trade agreements (FTAs) ought to include commitments on trade in legal services.

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<sup>1</sup> [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)

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. 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 in addition to international law. This ability should extend to advising on representing clients with respect to international arbitration.

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.<sup>3</sup> 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 advice and other legal services. The Joint EU/UK Statement of 8 December 2017 and the draft Withdrawal Agreement both underscore the importance of Citizens' Rights. We agree with that position and believe that it is crucial for these rights to be real and effective, that is why EU citizens and UK citizens resident in either the UK or the EU must have access to qualified lawyers who can help these citizens enforce their rights. Rights without the means of enforcement are nugatory. In this connection the future relationship must contain provisions about civil judicial co-operation in civil and commercial matters. The draft Withdrawal Agreement makes provision for this in Articles 62-65 and the Prime Minister specifically mentioned this in her speech. Furthermore if there is no separate agreement regarding Police and judicial co-operation in criminal matters these too should be included in the future relationship.

The Institute for Government has analysed the UK and EU positions on the future trading relationship.

Their paper *How do the UK and EU opening position on the future trading relationship compare?* noted that in relation to:

1. Goods: "Neither side wants the introduction of tariffs or quotas".
2. Fish: "...fisheries is one of the most controversial areas of the negotiations"
3. Services: "The EU's position implicitly rejects the Prime Minister's proposal of mutual recognition and the Chancellor's regulatory dialogue idea"
4. Customs: "The UK has proposed two options for a future customs arrangement but has not made clear which it prefers and that it is not clear whether the EU would be willing to grant the unprecedented levels of customs cooperation in its "highly streamlined" option which harness technology to speed up a more traditional model for customs interactions.

We note that the customs framework provided for in the Taxation (Cross-Border Trade) Bill would be compatible with this model although the UK and EU would still need to deal with issues such as the system of rules of origin. The second option mooted was a customs partnership: this would be an unprecedented level of customs cooperation, but there was insufficient detail in the Future partnership paper<sup>2</sup> to allow for further analysis.

More extensive commentary on the Future partnership paper can be found here: [https://www.lawscot.org.uk/media/359385/lss-response-to-hmt\\_customs-bill\\_january-2018-ms-footnote.pdf](https://www.lawscot.org.uk/media/359385/lss-response-to-hmt_customs-bill_january-2018-ms-footnote.pdf). We note that the EU has indicated that a highly streamlined option is not agreeable.

5. Regulatory cooperation: “the UK and EU appear to agree that there needs to be binding commitments to prevent unfair competition.” We also note that regulatory co-operation goes beyond unfair competition and is necessary for continued access to each market.
6. Agencies: “The EU stresses the importance of its “decision making autonomy” which means that the UK will not be part of the political institutions such as the European Council, Commission and Parliament.” This means, in the Institute’s view that the door may still be open for the UK to be in the room with the EU Agencies without voting rights.
7. Dispute Resolution: “While the UK is proposing a standard arbitration mechanism found in other free trade agreements, it also wants a much deeper relationship. For the EU, the deeper the relationship the less acceptable this type of mechanism would be. The two sides are aligned if the deal is more limited in their ambitions. But if the UK wants a deep deal it may need to propose a different type of mechanism: See our further comments below.
8. Data: The “EU guidelines imply that the EU will grant the UK adequacy if it maintains current standards – this suggests that the UK’s ambition of something that goes further is not acceptable. The guidelines do not mention any role for the ICO.”
  1. Businesses operating across borders, including law firms themselves, increasingly rely on international data flows. We therefore support the objective of seeking digital trade packages to support those data flows.
  2. At the same time we 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.

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<sup>2</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/637748/Future\\_customs\\_arrangements\\_-\\_a\\_future\\_partnership\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf)

With the introduction of the General Data Protection Regulation<sup>3</sup> as supplemented and amended by the Data Protection Bill<sup>4</sup>, the UK should start from a position of relative regulatory alignment.

9. Migration: “There is scope for negotiations on what a preferential EU migration regime could look like after Brexit.”
10. Transport: “The UK and EU are agreed on the outcome. The EU is more prescriptive in how they might be achieved, and the importance of level playing field provisions will be an important area of negotiation.”
11. Science research, education and culture: “The UK and EU both seem to want the same outcome in these areas. The UK is prepared to pay for continued involvement, which will be a key demand from the EU.” We note however the current controversy over participation in the European Space Agency and Galileo.
12. Energy: “It is not clear whether the EU guidelines, in not mentioning the single energy market, rule out the UK’s continued participation. The issue of the single electricity market on the island of Ireland will need to be addressed in talks related to Ireland and North-South co-operation.”

## Dispute Resolution

After the transition/implementation period as currently proposed ends on 31 December 2020 the CJEU will have no jurisdiction, subject to the terms of the draft Withdrawal Agreement dated 19 March 2018 Article 82 that:

The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom referred to it before the end of the transition period.

And under Article 87:

1. Where, before the end of the transition period, a lawyer authorised to practice before the courts of the United Kingdom represented or assisted a party before the Court of Justice of the European Union in proceedings brought before it or in requests for preliminary rulings referred to it before the end of the transition period, this lawyer may continue to represent or assist that party in those proceedings or requests.

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<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2016.119.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG)

<sup>4</sup> <https://services.parliament.uk/bills/2017-19/dataprotection.html>

2. Lawyers authorised to practice before the courts of the United Kingdom may represent or assist a party before the Court of Justice of the European Union in the cases referred to in Article 83.

Article 83 deals with new cases before the CJEU but UK judges will no longer sit in the CJEU. The Withdrawal Agreement makes it clear that UK will no longer have the ability to vote on the content of EU law or have the automatic right to intervene in proceedings before the Court (subject to Article 86).

The UK and the EU will need to construct a new method of dispute resolution that will apply to the UK/EU in the Future Relationship. The shape of this mechanism should be outlined in the framework. There are several options available that the UK and EU can consider as a basis for a new dispute settlement system:

The UK's position as stated in *Enforcement and dispute resolution: a future partnership paper* (para 22) is that where rights are expressed in the Withdrawal Agreement or future relationship agreement they will be enforced by the UK courts and ultimately by the UK Supreme Court and in Scottish criminal law cases by the High Court of Justiciary sitting as a court of Appeal. It would be helpful to have clarification from the government on how this position is affected by the December Agreement.

Both parties agree that an enforcement mechanism is needed on the application of the terms of the new UK-EU agreement. Furthermore, ensuring certainty on how any disagreements are resolved is of paramount importance to citizens and businesses.

The Government's White Paper entitled *The United Kingdom's exit from and new partnership with the European Union* acknowledged the need for a dispute resolution mechanism to ensure a "fair and equitable implementation" of the UK's future relationship with Europe.

The paper sets out a number of options for the mechanism based on the existing frameworks available.

These included:

- a. The CETA Joint Committee established under the EU-Canada Comprehensive Economic and Trade Agreement (CETA). This Committee supervises the implementation and application of the agreement. If necessary, the parties can refer disputes to an ad hoc arbitration panel. The EU's free trade agreement with South Korea also provides for an arbitration system.
- b. The North American Free Trade Agreement (NAFTA), main settlement procedure provides that the governments' concerned aim to resolve any potential disputes amicably, but if that is not possible, panel procedures.
- c. Mercosur, where disputes are in the first instance resolved politically, but if a political solution is not forthcoming the dispute can be submitted to an ad hoc arbitration tribunal. Decisions of the tribunal may be appealed on a point of law to a Permanent Review Tribunal.

- d. The New Zealand-Korea Free Trade Agreement, where the first approach is cooperation and consultation to reach a mutually satisfactory outcome. The agreement sets out a process for the establishment of an arbitration panel. The parties must comply with its findings and rulings, otherwise compensation may be payable or the benefits of the FTA may be suspended.
- e. The World Trade Organisation (WTO) has a Dispute Settlement Body (made up of all the members of the WTO) which decides on disputes between members relating to WTO agreements. Recommendations are made by a dispute settlement panel or by an Appellate Body which can uphold, modify or reverse the decisions reached by the panel.
- f. EU-Switzerland bilateral agreements or treaties which govern the EU-Switzerland economic and trade relationship. Each agreement deals with different elements of EU law such as free movement of persons where substantive EU law applies. On the other hand the free trade agreement does not apply EU law as such.

Each agreement establishes a joint committee which regulates and applies the agreement. Apart from some cases, there is usually no recourse to a court or tribunal. The White Paper also contains an annex (Annex A) which contains further illustrations of how other international agreements approach interpretation and dispute resolution. The White Paper sets out the Government's intention with regard to the future relationship with the EU. The paper states:

*"... the UK will seek to agree a new approach to interpretation and dispute resolution with the EU This is essential to reassure businesses and individuals that the terms of any agreement can be relied upon, that both parties will have a common understanding of what the agreement means and that disputes can be resolved fairly and efficiently".*

Of course it is up to the UK and the EU to agree the form of dispute resolution they prefer. The paper makes clear that the parties need not be bound by precedent but sets out certain parameters for the agreement. These include that i. any arrangements must be ones that respect UK sovereignty, ii. protect the role of UK courts and iii. maximise legal certainty, including for businesses, consumers, workers and other citizens. We believe these parameters should include promotion of the rule of law and the interests of justice. Other options which the paper does not discuss include:

- (a) the setting up of a separate permanent court comprised of both UK and EU Judges. We acknowledge that this may be a constitutionally difficult solution not least for the EU which considers the CJEU to be the ultimate arbiter of EU law (Opinion 1/91 where such a solution was rejected on autonomy grounds).
- (b) The creation of a mechanism for an ad hoc court comprised of both UK and EU Judges.

Both of these options are worthy of consideration among the other options which the parties will have to choose from.

We agree with the following points which have been raised by the Law Society of England and Wales that there are key principles for any future dispute resolution settlement which should be that:

- The same dispute settlement system should apply across all strands of the final UK-EU Agreement.
- The mechanism put in place should continue to grant access to individuals to enforce their rights. This can be modelled on the CJEU or EFTA Court preliminary ruling system, under which national courts could refer cases to a new tribunal. Alternatively, an appellate system could be pursued, such as the one under the CETA agreement for settling financial disputes. It is worth recognising that ETA court rulings are not binding on the referring national court.
- The system chosen should not discourage individuals or businesses from taking cases to the tribunal for reasons related to the expense or waiting times involved.
- There should be an article in the agreement, implemented into UK law, to create convergence between the decisions made by the UK-EU dispute settlement mechanism, the UK courts and the CJEU judgments. This clause could be modelled on Protocol 2 of the Lugano Convention, under which national courts are to take due account of each other's judgments.
- There should be a mechanism for dialogue between the UK and the EU that can take effect in cases where there is a danger of substantive divergence – either due to case law or legislative developments. In our view this could be the Joint Committee as provided for in articles 157 – 159 of the draft Withdrawal Agreement.



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