



Law Society
of Scotland

Response by the Law Society of Scotland

Outline of the Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom

November 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.

Our Brexit Policy Working Party welcomes the opportunity to consider and comment these initial views regarding the significant matters contained in the outline of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom which, at a minimum, should be taken into account in the course of the negotiations. We expect that there will be further consultations on the Future Relationship Agreement as its provisions are developed by the parties.

General Comments

PART I: INITIAL PROVISIONS

BASIS FOR COOPERATION

Shared values including the respect for human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation, are essential prerequisites for the future relationship. Reaffirmation of the United Kingdom's commitment to the European Convention on Human Rights (ECHR), and the Union's and its Member States' to the Charter of Fundamental Rights of the Union. Support for effective multilateralism.

Our Comment

We agree with the terms of the basis for cooperation. However the UK Government should confirm whether or not it is also reaffirming it's commitment to the Human Rights Act 1998 as well as to the ECHR.

Commitment to a high level of personal data protection. Commencement of the Commission's assessments of the United Kingdom's standards on the basis of the Union's adequacy framework, endeavouring to adopt decisions by the end of 2020. In the same timeframe, the United Kingdom will take steps to ensure comparable facilitation of personal data flows to the Union. Appropriate co-operation between regulators.

Our Comment

We agree with this commitment to a high level of personal data protection and the timetable for the Commission's assessments of the UK's standards. Whilst we are content with the commitment we have previously raised concerns regarding adequacy - https://www.lawscot.org.uk/media/359224/law-society-of-scotland-briefing_data-protection-and-eu-withdrawal_oct-2017.pdf.

Terms for the United Kingdom's participation in Union programmes, subject to the conditions set out in the corresponding Union instruments, such as in science and innovation, culture and education, development, defence capabilities, civil protection and space.

Our Comment

We assume that the Union programmes will also include those relating to civil and criminal judicial cooperation including the Regulation on the movement of civil status documents under Regulation (EU) 2016/1191.

Dialogue and exchanges in areas of shared interest, with the view to identifying opportunities to cooperate, share best practice and act together.

PART II: ECONOMIC PARTNERSHIP

GOODS

- Comprehensive arrangements creating a free trade area combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition as described below.
- Zero tariffs, no fees, charges or quantitative restrictions across all goods sectors, with ambitious customs arrangements that build on the single customs territory provided for in the Withdrawal Agreement, respecting the Parties' legal orders.
- Extent of the United Kingdom's commitments on customs and regulatory cooperation, including with regard to alignment of rules, to be taken into account in the application of checks and controls at the border.

In this context, recalling the Union's and the United Kingdom's intention to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing.

Our Comment

We have the following recommendations to make in relation to Goods:

The Government should provide more detail on the terms of the common rulebook, what is necessary for frictionless trade, how UK Agencies would participate in EU Agencies and how the common rulebook would apply to other trade agreements.

The Government should clarify how an arrangement which is not a customs union but functions “as if in a combined customs territory” would be treated by the WTO and what traders would need to do under the Facilitated Customs Arrangement and how excisable goods should be dealt with.

The Government should explain more fully the rules which will apply to prevent circumvention of the proposed tariff system.

SERVICES AND INVESTMENT

Ambitious, comprehensive and balanced arrangements on trade in services and investment, delivering a level of liberalisation in trade in services well beyond the Parties' WTO commitments, and in line with Article V of the General Agreement on Trade in Services, with substantial sectoral coverage, covering all modes of supply and providing for the absence of substantially all discrimination in the covered sectors, with exceptions and limitations as appropriate.

Provisions on market access and national treatment under host state rules, ensuring that the Parties' services providers and investors are treated in a non-discriminatory manner, including with regard to establishment. While preserving regulatory autonomy, provisions to promote regulatory approaches that are transparent, efficient, compatible to the extent possible, and which promote avoidance of unnecessary regulatory requirements.

Appropriate arrangements on professional qualifications.

Provisions to enable free movement of capital and payments related to transactions liberalised under the economic partnership, subject to relevant exceptions.

Our Comment

Further detail as to the anticipated nature of “deep commitments” is needed, along with an outline of how services and investment would operate in practice.

Legal Services

It is in our view highly important that any reciprocal rights provided for in the Future Relationship are implemented in the EU27 specifically. The Future Relationship must be founded on the key values of respect for the rule of law, access to justice and furtherance of Human Rights.

Creation of rights in the Future Relationship without providing a system of remedies undermines these values.

We believe that the focus on citizens' rights was the correct approach to take in connection with the Withdrawal Agreement and should be one of the foundations of the Future Relationship. However

providing citizens with rights without providing them with the capability to obtain legal advice may render these rights useless.

That is why we believe that it is crucially important that citizens across the UK and the EU have access to their lawyers so they can obtain advice about the enforcement of those rights which are recognised in the Future Relationship. We urge both the EU and the UK to maintain mutual provision between the EU and the UK on legal qualifications, as near as possible to the current frameworks for the benefit of both EU and UK citizens. Accordingly in our view the existing regime could form the basis for negotiation in the Future Relationship.

FINANCIAL SERVICES

Commitments to preserving financial stability, market integrity, investor protection and fair competition, while respecting the Parties' regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest. This is without prejudice to the Parties' ability to adopt or maintain any measure where necessary for prudential reasons.

Commencement of equivalence assessments by both Parties as soon as possible after the United Kingdom's withdrawal from the Union, endeavouring to conclude these assessments before the end of June 2020.

Close and structured cooperation on regulatory and supervisory matters, grounded in the economic partnership and based on the principles of regulatory autonomy, transparency and stability, recognising this is in the Parties' mutual interest.

DIGITAL

Provisions to facilitate electronic commerce and cross-border data flows, address unjustified barriers to trade by electronic means, and ensure an open, secure and trustworthy online environment, with a bilateral dialogue and joint work in multilateral and multi-stakeholder forums, while not affecting the Parties' data protection rules.

Our Comment

The Government and the EU should provide more detail as to how a collaborative approach to regulation of digital markets might be achieved in order to protect consumers while driving innovation and promoting collaboration to realise the benefits of new technologies.

INTELLECTUAL PROPERTY / PUBLIC PROCUREMENT

- Protection and enforcement of intellectual property rights beyond multilateral treaties to stimulate innovation, creativity and economic activity.

Mutual opportunities in the Parties' respective public procurement markets beyond their commitments under the WTO Government Procurement Agreement, without prejudice to their domestic rules to protect their essential security interests, and standards on transparency and procedures.

Our Comment

We agree with these proposals.

MOBILITY

- Arrangements on temporary entry and stay of natural persons for business purposes in defined areas.

Other aspects of mobility, based on non-discrimination between the Union's Member States and reciprocity, including visa-free travel for short-term visits.

Our Comment

The Government and the EU should provide detail about how the future immigration system will facilitate the flow of labour, both skilled and low or unskilled, to certain sectors or geographic areas. This should include the youth mobility scheme and retirement for EU nationals and be designed to make the UK an attractive destination for visitors, skilled workers and those who want to do business.

It would be useful to maintain ease of access to higher education between EU Member States and the UK.

TRANSPORT

- Comprehensive Air Transport Agreement, covering market access and investment, aviation safety and security, air traffic management and provisions to ensure open and fair competition.
- Comparable market access for freight and passenger road transport operators, underpinned by relevant existing international obligations to ensure open and fair competition, with consideration of complementary arrangements to address travel by private motorists.
- Acknowledgement of the intention of the United Kingdom and relevant Member States, in line with Union law, to make bilateral arrangements for cross-border rail services.
- Connectivity in the maritime transport sector, underpinned by the applicable international legal framework, with appropriate arrangements for cooperation on maritime safety and security.

Our Comment

We welcome these proposals.

ENERGY

- Framework to facilitate technical cooperation between electricity and gas networks operators and organisations in the planning and use of energy infrastructure connecting the Parties' systems, and mechanisms to ensure security of supply and efficient trade over interconnectors over different

timeframes. Consideration of cooperation on carbon pricing by linking a United Kingdom national greenhouse gas emissions trading system with the Union's Emissions Trading System.

Wide-ranging Nuclear Cooperation Agreement between the European Atomic Energy Community (EURATOM) and the United Kingdom, underpinned by commitments to existing high standards of nuclear safety. Timely reassessment of authorisations and EURATOM Supply Agency approvals of contracts for the supply of nuclear material. Cooperation through the exchange of information on the supply of medical radioisotopes.

Our Comment

Bearing in mind the Basis for Cooperation we encourage the Government and the EU to keep in view their collective human rights obligations towards patients and potential patients when negotiating the Nuclear Cooperation Agreement.

FISHING OPPORTUNITIES

- Cooperation bilaterally and internationally to ensure fishing at sustainable levels, promote resource conservation, and foster a clean, healthy and productive marine environment, noting that the United Kingdom will be an independent coastal state. While preserving regulatory
- autonomy, cooperation on the development of measures for the conservation, rational management and regulation of fisheries, in a non-discriminatory manner. Close working with other coastal states and in international fora, including to manage shared stocks.
- Within the context of the overall economic partnership, establishment of a new fisheries agreement on, inter alia, access to waters and quota shares, to be in place in time to be used for determining fishing opportunities for the first year after the transition period.

Our Comment

There is a need for full engagement with the devolved administrations in the negotiation of any such access and quota agreement. The new fisheries agreement should set out a clear legal framework for the management of fisheries between the UK and the EU. This will help to ensure certainty and consistency for businesses and consumers. The agreement is to address "inter alia, access to waters and quota shares". It would be helpful to set out what other matters the agreement will cover so as to avoid confusion and/or changes in scope in the future.

GLOBAL COOPERATION

- Cooperation, including in international fora, such as in the areas of climate change, sustainable development, cross-border pollution, trade protectionism and financial stability.

Reaffirmation of the Parties' commitments to international agreements to tackle climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement.

Our Comment

We agree with the approach being taken.

LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION

Competition must be open and fair. Provisions to ensure this should cover state aid, competition, social and employment standards, environmental standards, climate change and relevant tax matters, building on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship.

Our Comment

The Government and the EU should provide clarity on the terms of a common rulebook for state aid. In terms of competition law, provision should be made for cooperation between the European Commission and national regulators of the EU Member States on the one hand and the CMA and other UK sector regulators on the other in handling competition cases. In particular it will be important to consider how merger applications which triggered both UK and EU thresholds might be dealt with.

PART III: SECURITY PARTNERSHIP LAW ENFORCEMENT AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

- Comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters, with the view to delivering strong operational capabilities for the purposes of the prevention, investigation, detection and prosecution of criminal offences, taking into account the shared and evolving threats the Parties face, the mutual benefits to the safety and security of their citizens, and the fact that the United Kingdom will be a non-Schengen third country that does not provide for the free movement of persons.
- Scale and scope of future arrangements reflecting the commitments the United Kingdom is willing to make that respect the integrity of the Union's legal order, such as with regard to alignment of rules and the mechanisms for disputes and enforcement including the role of the Court of Justice of the European Union, underpinned by long-standing commitments to the fundamental rights of individuals, including continued adherence to the ECHR and its system of enforcement, and adequate protection of personal data, which are both essential prerequisites for enabling the cooperation envisaged by the Parties, and to the ne bis in idem principle and procedural rights.
- Noting these commitments, reciprocal arrangements for timely, effective and efficient exchanges of Passenger Name Record (PNR) data and results of processing of such data stored in respective national PNR processing systems, and of DNA, fingerprints and vehicle registration data (Prüm).
- In addition, swift and effective arrangements enabling the United Kingdom and Member States to extradite suspected and convicted persons efficiently and expeditiously, with the possibility to waive the requirement of double criminality, and to determine the applicability of these arrangements to own nationals and for political offences.

- Consideration of further arrangements appropriate to the United Kingdom's future status for data exchange and practical cooperation between law enforcement authorities, and between judicial authorities in criminal matters, such as exchange of information on wanted or missing persons and of criminal records, with the view to delivering capabilities that, in so far as is technically and legally possible, and considered necessary and in both Parties' interests, approximate those enabled by relevant Union mechanisms.
- Terms for the United Kingdom's cooperation via Europol and Eurojust.

Support of international efforts to prevent and fight against money laundering and terrorist financing, particularly through compliance with Financial Action Task Force standards and associated cooperation, with the Parties going beyond those standards with regard to beneficial ownership transparency and ending the anonymity associated with the use of virtual currencies

Our Comment

We believe that the Security Partnership should have as a priority the protection of the UK and EU citizens. There should be no reduction in the mechanisms being available to the UK when considering future co-operation in combatting crime and security in order to maintain stability and safety that would prejudice or adversely affect the safety of the UK people.

That involves deep cooperation between the UK and EU law enforcement agencies, networks and systems on an equivalent basis as at present without diminishing the quality and quantity of cooperation. Priorities which need to be achieved to create a new Security Partnership include, cooperation through EU agencies, maintenance of the European Arrest Warrant (EAW), European Investigation Orders (EIO) or creation of equivalent mechanisms and co-operation on matters relating to proceeds of crime.

Building a new security partnership with the EU is of utmost importance. It is essential that the UK negotiators recognise the role of the devolved legislatures and administrations including the distinct Scottish criminal legal framework when agreeing the terms of the new partnership.

Civil Justice Cooperation

It is of considerable concern that the Political Declaration does not contain provisions relating to Civil Judicial Cooperation. Civil justice cooperation is key to maintaining the rule of law, promoting the interests of justice, upholding human rights and ensuring that commercial and personal matters can be properly dealt with in courts across the UK and the EU. It is essential that both the UK and EU negotiators ensure that there are adequate provisions in the Future Relationship Agreement.

The White Paper emphasised that the UK Government will “work closely with the devolved administrations to ensure that the future arrangements for cooperation with the EU take into account the separate and distinct legal systems in Scotland and Northern Ireland”. Confirmation that such close working has taken place would be welcome.

FOREIGN POLICY, SECURITY AND DEFENCE

- Close, flexible and scalable cooperation on external action at the bilateral and international level, ensuring that the UK can combine efforts with the Union to the greatest effect, including in times of crisis or when serious incidents occur, respecting the autonomy of both Parties.
- Structured consultation and regular thematic dialogues at various levels, and invitations for the United Kingdom to participate in informal sessions of the Union's Council meetings where appropriate.
- Cooperation in third countries, including on consular provision and protection, and in international organisations and fora, notably in the United Nations. Possibility to support each other's positions where relevant, including through agreed statements, demarches and shared positions.
- Consultation on sanctions, with intensified exchange of information where foreign policy objectives are aligned, with the possibility of adopting mutually reinforcing sanctions.

Participation by the United Kingdom on a case-by-case basis in Common Security and Defence Policy missions and operations through a Framework Participation Agreement, with intensified interaction at relevant planning stages, proportionate to the level of the United Kingdom's contribution.

Collaboration by the United Kingdom in relevant current and future projects of the European Defence Agency through an Administrative Arrangement, participation of United Kingdom entities in European Defence Fund supported projects, and collaboration by the United Kingdom in Permanent Structured Cooperation projects where invited on an exceptional basis, under the conditions in Union law.

- Timely exchange of intelligence between the United Kingdom and relevant Union bodies.
- Consideration of appropriate arrangements on space cooperation, including satellite navigation, where in the Parties' mutual interest.

THEMATIC COOPERATION

- Promotion of security and stability in cyberspace through increased international cooperation and the exchange of information on a timely basis, including the United Kingdom's participation in relevant cyber security activities of the Union, and a cyber dialogue.
- Cooperation on counter-terrorism, countering violent extremism and emerging threats through dialogue, sharing best practices, operational cooperation and reciprocal voluntary information exchange.
- Cooperation to tackle illegal migration through operational cooperation, dialogue, cooperation in third countries and in international fora.
- Cooperation in the field of civil protection in respect of natural or manmade disasters, enabled by the United Kingdom's participation in the Union's Civil Protection Mechanism as a Participating State.

- Cooperation in matters of health security in line with existing Union arrangements with third countries, and in international fora.

CLASSIFIED AND SENSITIVE NON-CLASSIFIED INFORMATION

- Security of Information Agreement, with guarantees on the handling and protection of classified information, alongside any necessary provisions on sensitive non-classified information

Our Comment

We have no comment.

PART IV: INSTITUTIONAL ARRANGEMENTS

STRUCTURE

- Future relationship based on an overarching institutional framework, with the possibility for specific governance arrangements in individual areas. Possibility to review the relationship.

GOVERNANCE

- Mechanisms for dialogue at summit, ministerial, technical and parliamentary levels.

Robust, efficient and effective arrangements for the setting of strategic direction, for the management, supervision, implementation and development over time of the future relationship, for the resolution of disputes and enforcement, and safeguard provisions, in full respect of the Parties' own legal orders, and based on the arrangements for dispute settlement and enforcement provided for in the Withdrawal Agreement.

Our Comment

We expect following on the Basis for Cooperation that the institutional arrangements should ensure that the relationship between the UK and the EU is based upon the rule of law and the interests of justice and that the human rights of citizens in both the UK and the EU are expressly protected.

The White Paper mentioned a number of structural arrangements within which dialogue between the UK and the EU could take place. This included exchanges between the UK Parliament and the EU Parliament. However, there appears to be no mechanism for the devolved legislatures to communicate views or concerns to the European Parliament within the political declaration.

The UK Government should explain the role it envisages for the devolved legislatures and administrations in this context. However there appears to be no mechanism for the devolved legislatures to be able to express views to the European Parliament. The UK Government should explain how it envisages there to be a role for the devolved legislatures and administrations in this context.

PART V: FORWARD PROCESS

- Following the conclusion of the Withdrawal Agreement between the Parties but prior to the United Kingdom's withdrawal from the Union, the Parties will engage in preparatory organisational work with the aim of enabling rapid commencement of negotiations.
- In accordance with Article 184 of the Withdrawal Agreement, commencement of the formal process of negotiations as soon as possible after the entry into force of the Withdrawal Agreement, using best endeavours to ensure the necessary steps are taken so that the future relationship can take effect by the end of 2020, noting the Parties' commitment in the Withdrawal Agreement to develop the necessary legal agreements in good faith and expeditiously.

Intention to develop, at the beginning of these negotiations, a clear programme to deliver this ambitious timetable, incorporating regular review points for negotiators at which they will report publicly on their progress. The Union and the United Kingdom will convene a high level conference at least every six months to take stock of progress.

Our Comment

The Process should detail the accountability of both the UK and EU to the UK and European Parliaments and the need for regular updates on the negotiations to be made public. The high level conference should meet at more regular intervals than those proposed - say at four monthly intervals.



For further information, please contact:

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