



Law Society  
of Scotland

# The White Paper on the Future Relationship between the United Kingdom and the European Union

## Response by the Law Society of Scotland

October 2018



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## 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 respond to the Inquiry by the UK Government White Paper on the Future Relationship between the United Kingdom and the European Union. The Brexit Policy Working Party has the following comments to put forward for consideration.

## General Comments

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We note the publication of the White Paper on the Future Relationship between the UK and the EU which represents the UK Government's current proposals for the Future Relationship. The White Paper ranges across a very wide scope of activity which touches on legal, economic, social and practical matters. We hope that whatever Future Agreement is reached between the UK and the EU it should respect the rule of law, uphold the interests of justice, promote the human rights of UK and EU citizens and provide clarity and certainty about the respective obligations of both negotiating parties and be legally binding. Our response makes a number of recommendations to the UK Government which we hope will lead to further consultation with stakeholders and improve the clarity, certainty and practicality of the proposals.

### Chapter 1 – Economic partnership

#### 1.2 Goods

##### Our Comments

##### Common rulebooks

The White Paper proposes a free trade area for goods. Mutual recognition or harmonisation of product standards is essential to facilitate the free circulation of goods across border and we welcome the recognition of this. However, the White Paper refers to “an upfront choice to commit by treaty to ongoing harmonisation with EU rules on goods, covering *only those necessary to provide for frictionless trade at the border.*” It is not clear what rules would be considered “necessary” to facilitate frictionless trade or how this would be determined and adjudicated upon. If rules are not consistent for any and all products which are or may be traded across the border, problems will arise.

It is not clear how it is anticipated that UK participation in EU agencies would operate in practice. Further detail is needed as to how the rulebook would be drawn up and agreed in practice.

Lastly, it is also unclear how the common rulebook will function as regards third country free trade agreements.

### **Recommendation 1**

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.

### **Facilitated customs arrangement**

The ability to determine its own customs policy is a key component of the UK's ability to negotiate meaningful trade deals with international partners. However, any trading arrangement agreed with the EU must also comply with the WTO rules. The WTO makes provision for exceptions to its general rules where these are specifically agreed on a bilateral or multilateral basis. One of the most important principles is the "most favoured nation" rule which dictates that an advantage offered to one WTO member must be offered to all. Specific agreement between countries entering a customs union is one of these exceptions.

### **Recommendation 2**

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.

### **Elimination of rules of origin**

It is not clear how the elimination of requirements for rules of origin (ROO) for goods traded between the UK and the EU could be achieved. The existing ROO ensure that an appropriate tariff can be applied, having regard to the origin, not only of finished products but also the varying origins of component parts. Removing ROO requirements for goods passing between the UK and the EU could allow parties to circumvent tariffs on either side, negating the ROOs as the proposed system appears to be open to exploitation. Circumvention would only be avoided if the UK maintained the same tariff rules as the EU.

In terms of enforcement it is difficult to envisage how goods entering the UK will be tracked especially if loads on which tariffs are levied are split up and resold several times, perhaps to numerous different parties. It is not clear how the EU authorities would be able to verify that the correct rules had been complied with at the point of entry. If an appeal were to be launched against the decision made by a customs authority, it is not clear how this would be handled if the goods had been processed at, for example, Portsmouth and customs duties imposed on the basis of a particular customs classification, but the ultimate destination was Rotterdam and a dispute emerged over the correct classification and therefore the appropriate tariff. This lack of clarity and the potential complexities caused in such situations could mitigate against channeling goods through the UK as it would be simpler to send them directly to the EU.

### **Recommendation 3**

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

#### **Intellectual Property**

EU rules covering geographic indicators (GIs) safeguard the authenticity of regional and traditional products and benefit producers who manufacture such products by protecting those products through the use of a designation of origin, geographic indicator or guarantee of traditional speciality. Preserving the integrity of products and manufacturing processes gives consumers a guarantee of quality and knowledge that they are supporting the preservation of cultural heritage. The rules protect:

- (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 (GIS): having a quality, reputation or other characteristic that is 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.

If, following negotiations, the existing rules for third countries were to be applied to the UK, Scottish and other UK producers could receive lesser rights. At present, 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 to EU producers. Third country producers should be able to use a registered name of a TSG, provided that the product concerned complies with the requirements of the relevant specification and the producer is covered by a system of controls.

It will be important to take steps in 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.

1.2.39 states that the UK will set up a framework for protecting GIs which will offer continuous protection for UK GIs. However, the wording suggests that those with EU registered GIs would need to submit an application to be registered as a GI in the UK, after the UK framework is set up. This is a concern as it would generate costs for businesses and protections could lapse if the registration was not completed quickly: it would be more efficient and effective for EU registered GIs to be automatically registered in the UK.

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.

#### **Recommendation 4**

The Government should ensure that the new UK law on GIs and the new national register are in place and populated with all pre-Withdrawal registrations in the EU before the end of the transition or implementation period.

#### **Consumer rights**

However the future relationship between the UK and the EU develops, it is important that there should be effective provision to ensure that consumers' rights are recognised and protected. In particular, consumers should have affordable access to remedies to allow them to translate their rights into effective redress when required. This approach would be applicable irrespective of whether goods were tangible or digital or acquired face to face or at a distance and whether the UK consumer acquired the goods or services in the EU or acquired EU goods from the UK.

#### **Recommendation 5**

The Future Relationship Agreement should include comprehensive Consumer Protection provisions.

### **1.3 Services and investment**

#### **Our Comments**

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. The existing regime could form the basis for negotiation in the Future Relationship.

## **Cross Border Supply of Legal Services**

The existing 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.

There are three key pieces of legislation that affect the legal profession:

*Lawyers' Services Directive of 1977 (77/249) implemented by the European Communities (Services of Lawyers) Order 1978.*

This Directive 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. Migrant 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.

*The Lawyers' Establishment Directive of 1998 (98/5) implemented by the European Community's (Lawyer's Practice) (Scotland) Regulations 2000.*

This Directive entitles lawyers who are qualified in and a citizen of a Member State to practice on a permanent basis under their home title in another EU/EEA member state, or Switzerland. 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 practice 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 Directive (2005/36) implemented by the European Communities (Recognition of Professional Qualifications) Regulations 2016.

Re-qualification as a full member of the host State legal profession is governed by this Directive. Article 10 of the 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:

- (a) complete an adaptation period (a period of supervised practice) not exceeding three years; or
- (b) 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).

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 is implemented by the provision of Services Regulations 2009.

### **Recommendation 6**

The Future Relationship Agreement should ensure that UK and EU citizens can have access to the lawyers of their choice so they can obtain advice about the enforcement of those rights which are recognised in the Agreement.

### **Services and substantive law**

The line between goods and services is increasingly blurred. Tangible goods will often incorporate services, for example computers with integrated software or equipment provided subject to ongoing maintenance obligations. This is perhaps of particular relevance in a digital context. There is therefore a question as to whether seeking to perpetuate this distinction is appropriate in the Future Relationship Agreement which should, so far as possible, be future-proofed.

We also note that in some cases, the ability to provide services is inextricably linked to mechanisms within EU law.

Cases of cross-border insolvency offer a good example of this. In terms of orderly administration of insolvency where a company is operating in the UK and one or more remaining EU countries, it is essential that the practical effect of the EU Insolvency Regulation (2015/848) is preserved. The regulation provides for the mutual recognition of insolvency/bankruptcy proceedings throughout the EU. Such proceedings are either 'main' (affecting all assets of a debtor) or 'secondary' (affecting only those assets situated in a particular jurisdiction and relative liabilities). Main proceedings may be opened in that jurisdiction where the debtor has its centre of main interests ('COMI' as defined in the Regulation). If the location of a debtor's COMI is in dispute a local court's decision may be referred to the CJEU.

These rules mean that the cost and confusion caused by creditors ‘forum shopping’ to find the jurisdiction which they feel best serves their interests is controlled and it is clear which jurisdiction has overall control. If the UK leaves the EU without retaining or replicating this system (including appropriate forum for final determination) the mischief the Regulation is designed to address will reappear. Among other consequences, decisions of the UK courts in matters of insolvency/bankruptcy would not be recognised in other member states, and insolvency practitioners (including the Accountant in Bankruptcy) may be required to appear in an EU court to justify their actions.

### **Recommendation 7**

The Future Relationship Agreement should preserve the practical effects of the EU Insolvency Regulation (2015/848).

### **Payment infrastructure**

The free movement of capital and financial services are closely linked. A practical issue arises in the context of payment systems infrastructure relating to use UK bank and credit cards outside the UK. This has the potential to affect not only the financial services industry, but every person travelling abroad or buying goods or services online.

### **Recommendation 8**

The Government should provide details as to how UK bank and credit cards will work in the EU following withdrawal.

## **1.4 Framework for mobility**

### **Our Comments**

1.4.73 states that “*the UK and the EU have already reached an agreement on citizens’ rights which provides EU citizens living in the UK and UK nationals living in the EU before the end of the implementation period with certainty about their rights going forward.*”

However, the certainty does not extend to all EU citizens living in the UK. Significant levels of uncertainty for those EU citizens with some level of criminal convictions remains – even for those with historic convictions at the lower end of the offending scale.

Many EU citizens currently living in the UK are uncertain about the arrangements for their dependent relatives after the end of the transition or implementation period in December 2020.

The rules that currently apply to dependent relatives of non-EU nationals living in the UK have a high threshold and reassurance that those rules will not be applied in their current format to dependent relatives of EU citizens post-transition would allay anxiety among EU citizens currently in the UK.

1.4.74 -75 – It is important to recognise that whilst the UK “*will want to continue to attract the brightest and the best, from outside the EU and elsewhere*”, any future immigration system will also require to facilitate the flow of low skilled and unskilled labour which certain sectors need to operate. That requirement might be specific to certain sectors or certain geographic areas and therefore it will be important that this is considered in ensuring that the “*UK will design a system that works for all parts of the UK.*”

1.4.76 – Controlling immigration is in itself not problematic, though the objective of reducing net migration needs to be looked at within the context of much broader economic policy.

1.4.76 d – it is not clear what is meant by ensuring smooth passage for “*legitimate travel*”.

1.4.80 - 87– There is a risk that permitting non-visa holding EU citizens to visit the UK for business reasons to only undertake paid work in narrow circumstances (as with the current business visitor visa policy) could make the UK an unattractive destination. This approach may undermine the intention at 1.4.87 to ensure that tourists and business visitors should not routinely have to face questions about the purpose of their visit.

Given the complexities inherent within the current visitor rules for non EEA nationals, there risks a degree of complexity which will inevitably lead to EU nationals being refused entry to the UK on the basis that they intend to work or train whilst in the UK as visitors.

1.4.86 – if there is to be a UK-EU youth mobility scheme, then modelling such on the Tier 5 (Youth Mobility Scheme) seems sensible. The Tier 5 scheme is recognised as broadly working well. The scheme does not restrict work in any way and is open to those aged 18-30 years old. It does not however permit dependents and that issue should be examined in respect of any UK-EU scheme. It would also be made clear that any such scheme would apply to all EEA Member States, as stated in 1.4.78 that “*the principle of non-discrimination between existing member States should apply to all of the provisions agreed as part of the framework for mobility.*”

1.4.89 – a scheme that permits EU citizens to retire to the UK would be welcome. We note that UK immigration rules no longer have a ‘retired persons of independent means’ category and it is not currently possible for non EEA nationals to retire to the UK, unless they meet the requirements of the tier 1 (Investor) visa rules which require available funds of £2million for investment.

### **Recommendation 9**

The Government should provide clarity about the immigration status of EU citizens with historic convictions at the lower end of the offending scale and about the arrangements for the dependent relatives of EU citizens after the end of the transition or implementation period. The future immigration system should facilitate the flow of low skilled and unskilled labour to certain sectors or geographic areas 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.

## 1.5 Digital

### Our Comments

Many regulations concerning outsourcing to digital or technology suppliers come from the EU. There is, for instance, growing activity from the European Banking Authority on adequacy of controls when outsourcing to cloud suppliers, or in relation to prudential risks arising from the use of fintech suppliers. The FCA has demonstrated similar interest, but already there are divergent approaches, which complicate negotiations and understanding of acceptable risk parameters. Regulatory alignment for digital services would be helpful for entering into licensing arrangements between providers and suppliers in the UK and EU but it is not clear how this might be achieved.

There is also a growing appreciation of opportunities stemming from digital, in traditional sectors, including professional and financial services. UK banks and other providers of financial services are increasingly active alongside separate fintech companies, working to provide new services to consumers. There is also a growing discussion around legaltech, not only to enhance services for consumers and business clients but also to make legal firms more efficient. There is scope for many of these organisations to be much more active in the digital sector, as both a customer and a supplier.

### Recommendation 10

The Government should provide more detail as to how a collaborative approach to regulation of digital markets might be achieved in order to realise the benefits of new technologies

## 1.6 Open and fair competition

### Our Comments

We support the commitment to open and fair competition and would welcome continuing cooperation in this area. The White Paper rightly recognises the importance of state aid, competition, environmental, climate change, social and employment and consumer protections in this regard.

### **State aid**

The proposals at 1.6.1.111 include committing “to a common rulebook on state aid, enforced by the CMA”. State aid laws are supranational. They exist at EU and EEA level to counter respectively “...any aid granted by a Member State or through State resources ... in so far as it affects trade between Member States,” (Article 107 TFEU) and “...any aid granted by EC Member States, EFTA States or through State resources...in so far as it affects trade between Contracting Parties” (Article 61 of the EEA Agreement).

The proportionate reconciliation of these provisions is a supranational task, presently entrusted to the CJEU and (with the application of homogenisation) the EFTA court.

A UK/EU common rulebook would need to embody not just common economic perceptions but also shared social and environmental values, and enforcement policy. Clarity is to be needed on how maintenance of such a common high standards could be ensured.

Under EU law there are other, further values that need to be reconciled with the pure economics of state aid for example the application of state aid economic principles must be tempered by due regard to the values embodied in the extensive relevant case law.

### **Recommendation 11**

The Government should provide clarity on how maintenance of a state aid common rulebook with the necessary high standards could be ensured.

### **Competition law**

We take the view that EU competition law will continue to affect all UK business offering goods or services within the Internal Market after exit from the EU. The present UK domestic regime runs in parallel to the EU one and costs for compliance with EU and national regimes are minimised because the regimes are similar. If the UK were to adopt a dramatically different approach to competition law, this could create compliance issues for UK companies wishing to trade with or within the EU as they would need to comply with two regimes with the potential for conflicting duties under each.

1.6.2.116 recognises that “It will be important to ensure that competition decisions are compatible” and refers to the need to “work with the EU to build on established cooperative arrangements, such as those found in existing FTAs, to manage parallel merger and antitrust investigations. This should include provisions on sharing confidential information and working together on live cases and ensuring that the UK and the EU continue to take a robust approach in enforcing competition rules.”

Sharing confidential information outside of the remit of Competition Regulation 1/2003, the European Competition Network (ECN) and the current ECN+ proposal, will need to be carefully engineered to ensure that both procedural efficiencies are achieved and the mechanism used will give the required legal protections to all the parties under the investigation. This is not an easy exercise and the only model that is currently in force, the EU/Switzerland Agreement has potential loopholes ensuring that the parties have sufficient protections. For example, there is no mechanism for a procedural challenge/ appeal before the information on live cases is exchanged and the fall-back to national regimes is far from clear.

### **Recommendation 12**

The Government should provide further detail as to how the CMA would continue to work with DG Competition in handling competition cases and, in particular, how merger controls which triggered both UK and EU thresholds might be dealt with.

## 1.7 Socio-economic cooperation

### Our Comments

1.7.127-128 deals with areas where the UK and EU economies are closely linked including transport (air, sea, road and rail), energy, nuclear power, civil judicial cooperation, intellectual property, and audit and accountancy.

#### 1.7.6 Civil Nuclear

1.7.6.144 states that The UK proposes that a “new relationship should be based on a comprehensive nuclear collaboration agreement between Euratom and the UK”... This should ensure “continuity of contractual arrangements for the supply of nuclear material, either by allowing for existing nuclear supply contracts with the UK to remain valid after the UK’s exit, or by providing for their seamless re-approval prior to the UK’s exit” and “continue UK cooperation and information-sharing with the European Observatory on the Supply of Medical Radioisotopes”.

We welcome this approach because we have consistently raised the need for certainty about the need for frictionless access to radioisotopes for Nuclear medicine which are used for the diagnosis and treatment of cancer and other diseases. There is a serious concern that the early diagnosis and treatment of cancer will be adversely affected by leaving the Euratom and that a failure to maintain the supply of radioisotopes could potentially infringe the human rights of patients. We urge the Government to provide more detail on the exact procedures that will apply to the movement of these products under the Nuclear Collaboration Agreement and to act compatibility with its obligations under the Human Rights Act 1998 when negotiating this Agreement. The medical professions have expressed particular concerns that customs controls could necessitate a new approach to importation given that any delays could render the isotopes useless.

### Recommendation 13

We encourage the Government to bear in mind its human rights obligations towards patients and potential patients when negotiating the Nuclear Collaboration Agreement.

#### 1.7.7 Civil judicial cooperation

1.7.7.145-148 set out the Government’s approach to Civil judicial cooperation. We welcome the recognition that “civil judicial cooperation is mutually beneficial to both the UK and the EU” and that the Government is “keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters”.

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 member states.

We welcome 1.7.7.148 which emphasises that the 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”.

### **Recommendation 14**

We recommend that the Government consult broadly with the courts, the legal profession and civic society an regarding its negotiating position in regard to civil judicial cooperation and that close dialogue with the devolved legislatures, administrations and judiciaries is maintained.

#### **1.7.8 Intellectual property**

1.7.8.149-152 recognise intellectual property but focus on patents and do not recognise other forms of protection such as trademarks, plant variety rights or supplementary patent certificates.

Unless agreed otherwise, UK businesses will lose the ability to protect brands in the UK and the rest of the EU though a single registration as part of the EU Trade Mark (EUTM) system. Often, this is businesses’ preferred method of trade mark protection as it is quick and cost-effective. The need to register a trade mark under two systems would lead to an increase of costs in terms of legal and application fees and is also likely to result in a slower processing time.

There is also uncertainty as to how existing EUTM marks will be dealt with following Withdrawal. There are many options currently being considered. For example existing applications might be divided to become EUTM and UK registrations to maintain the status quo for right holders. In that event, each trade mark would likely retain their respective filing and registration dates.

However, automatically importing EU marks onto the UK register may create conflicts with existing UK marks.

The lack of relative grounds examination has led to a number of parallel rights existing. Although the current rules on relative grounds would give a solution to such conflicts there will be potential cost and uncertainty for businesses. It could also create a bloated UK register in which it would be difficult to know whether the imported marks are being used. This will make it difficult to know whether a later trade mark can be used in the UK. Whatever the outcome of discussions and negotiations this issue should be dealt with explicitly to ensure legal certainty.

A further problem may arise when the UK ceases to be a Member State with regard to the need to show use of EUTMs in the territory for which they are registered if they are at present used only in the UK. Moreover, after withdrawal, brand owners in the UK will not be able to rely on passing off rights to prevent an EUTM registration.

Similarly, there will be uncertainty where licensees of trade marks have been granted a licence for use in the EU. This is likely to lead to renegotiation of licensing contracts between parties, resulting in legal costs to agree the new position and possible change of licence fee.

There is further uncertainty as to how disputes over existing EUTMs would be determined post-Brexit and as regards how pending applications would be progressed.

From the perspective of the legal sector, UK lawyers may lose their rights of audience in EUTM disputes at the EUIPO. This may adversely affect businesses which will have fewer choices in the agents they can instruct in the EU27 to deal with brand protection and management in the Internal Market. Less competition in the choice of agent may result in higher costs which will be passed on to the consumer.

### **Community Plant Variety Rights**

It is likely that these would be dealt with in a similar way to CTM rights and the issues of rights of representation and duplication of cost would also apply in this case. We also note that Plant Varieties are devolved under the Scotland Act.

### **Supplementary Protection Certificates**

Supplementary protection certificates (SPCs) are a specific patent term extension which apply to medical and plant products. They were created as a way of recognising the more onerous regulatory requirements to which pharmaceuticals, veterinary medicines and agrichemical are subject which often prolongs the time required to bring a product to the market.

The current rules on SPCs are contained in Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products and Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products meaning that the UK will need to enact domestic legislation before withdrawal if the protection is to be preserved. This should be reasonably easy to achieve but as in other areas of law, a separate UK system and divergence from the EU could create additional costs for companies operating in both markets.

### **Recommendation 15**

The Government should include other forms of intellectual property in their negotiation strategy including EU Trade Marks, Community Plant Variety Rights and Supplementary Protection Certificates. There needs to be clarity about dispute resolution mechanisms in connection with intellectual property disputes in the Future Relationship

## 1.8 Independent trade policy

### Our Comments

The UK's independent trade policy is of relevance to EU negotiations to the extent of interplay between the two policies. One question which requires to be addressed is how future UK trade defence measures would be applied in the absence of border checks on imports from the EU? This makes it difficult to envisage how the UK could apply different trade defence measures to those of the EU.

As referred to above, it is also not clear how the common rulebook would function as regards third country free trade agreements.

### Recommendation 16

The Government should clarify how future UK trade defence measures would be applied in the absence of border checks on imports from the EU.

## Chapter 2 – Security partnership 51

### 2.1.1

Scotland, as the rest of the UK and the EU face common threats and challenges to their security as demonstrated with attacks such as Bilal Abdullah in 2017 at Glasgow Airport and in London.

The issue of security and the shape of the partnership is of equal interest and importance to Scotland in ensuring the safety of people living in Scotland. To ensure security provision, there need to be systems in place to share information and co-operate in matters regarding foreign policy, defence, development, law enforcement and criminal justice as highlighted in 2.1.2. Clarification over 'development' in this context would be helpful.

With reference to criminal justice, the UK is a multi-jurisdictional state. Scotland has distinct criminal and civil laws, court structure, legal profession, prosecution service and police force - all of which fall in the devolved competences and are within the legislative competence of the Scottish Parliament. Security is reserved to the UK Parliament, under the Scotland Act 1998, Schedule 5, section B.8.

These matters are directly relevant and require to be considered in relation to those security issues that affect the safety and interests of EU and UK citizens referred to in 2.2.8. The fight against crime and terrorism referred at 2.2.8(a) is also directly relevant to criminal law.

We welcome the White Paper's acknowledgment of the devolved role outlined in Chapter 4 which echos *Security, law enforcement and criminal justice: A Future Partnership Paper* that:

*'The Government will work with the Devolved Administrations....as negotiations progress on the UK's partnership with the EU. Close working will be especially important where justice and policing are devolved. The UK Government will continue to work closely with these governments on the detail of these proposals as they affect their interests'* (paragraph 40).

We appreciate that those aspects of the UK's future security relationship which relate to international relations, lie outside the Scottish Parliament's competence but the UK Government should ensure that the devolved administrations and legislatures are involved when issues which are in the devolved area are to be discussed in connection with the new Security Agreement.

2.1.5 The five key principles of how the UK vision for that future security relationship is to work include:

- Protect shared operational capabilities to keep people safe
- Respect the sovereignty of the UK and the autonomy of EU decision making
- Have an institutional framework that delivers a practical and flexible partnership
- Be dynamic and keep pace with growing global challenges and evolving threats
- Be underpinned by appropriate safeguards

We support these principles but in relation to each, the Scottish position should be taken into account. Scotland is a contributor to security policy issues in various ways:

- Scottish Government and the Scottish Law Officers joining UK delegates at the EU Justice Ministers and EU Prosecutor's meetings
- Scottish Parliament and Government being implementing international obligations including those currently existing under EU law
- Scottish Parliament and Government scrutinising and implementing EU legislation where it affects devolved competence

We responded to the UK Government: *Security, law enforcement and criminal justice: A Future Partnership Paper* in December 2017. That response detailed Scottish institutions involved in security partnership matters:

- Scottish Government where the responsibility mainly falls within the remit of the Scottish Government Justice department
- Scottish Courts and Tribunal Service which are responsible for the administration of the distinct Scottish court system. That also includes the role of the judiciary under the Judicial Office for Scotland who provide support to the Lord Justice General with responsibility for the training and conduct of judges as well as the disposal of court business.
- In whatever form any UK-EU security partnership may be agreed, this will require to consider how decisions are to be made in the event of dispute. We note the reference to the independence of decision making in paragraph 5 (b). Chapter 4 refers to institutional arrangements and we refer to our comments there.

- Crown Office and Procurator Fiscal Service (COPFS) is the Scottish prosecution service. The Lord Advocate has a unique position as its head where he is responsible, among his other roles, for the prosecution system as well as acting as the principal legal adviser to the Scottish Government. His decision to prosecute in the public interest where the locus of the crime is Scotland is taken independently of the Scottish Government. Crimes with security aspects such as those outlined in 2.2.8(a), (d) and (e) are prosecuted under indictment in the Lord Advocate's name. All reports as to crimes to be prosecuted in Scotland (which will include those with cross border implications whether UK, EU or international) fall to be considered by COPFS in accordance with Scottish criminal and evidential rules.
- Police Scotland is involved in dealing with organised crimes and counter terrorism dedicated in keeping people safe. Areas of its work directly align with the need for co-operation with the EU on security matters
- Scottish Prison Service, funded by the Scottish Government, deals with those persons remanded or sentenced by the courts to custody and rehabilitation. This includes the administration, safety standards of care and organisation of Scottish prisons.

All these institutions will have roles in the proposed future security partnership and need to be taken into account when negotiating the future relationship.

Scottish devolved responsibilities in criminal justice need to be considered in relation to 2.1.6(b) and (d) and 2.1.7. We endorse the need to protect shared law enforcement and criminal justice cooperation capabilities regarding the sharing of data and information, investigation of serious criminality and terrorism and cooperation in agencies such as Europol and Eurojust.

After exit the protection of the UK and EU citizens needs to be maintained as a priority. That involves working with the relevant EU law enforcement agencies, networks and systems on an equivalent basis as at present without diminishing the quality and quantity of cooperation. The relationship with the EU will change as the UK becomes a third country. Scotland needs to play its part and continue to contribute its current level of involvement and responsibility.

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.

### **Recommendation 17**

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.

## 2.2 Shared security context

### Our Comments

There is a shared threat from terrorism and organised crime affecting the whole UK and the EU. Organised crime is increasing in complexity and scale and has been recently described as the UK's '*biggest national security* (our emphasis) *threat*'. Economic cooperation is required to tackle money laundering that respects no borders.

The UK has strengthened its ability to handle terrorist incidents in the UK by legislating for a UK wide jurisdiction under the Counter-Terrorism Act 2008.

The UK must continue to co-operate with the relevant EU law enforcement agencies, networks and systems on a similar basis to the way in which they currently do to combat the shared security context. Scotland should play its part and fulfil its current level of commitment and responsibility in that respect. Cognisance of the Scottish specific interests and dimension requires to be integral to the UK's position in the negotiations for the future relationship.

Paragraph 2.2.8(f) regarding diseases, natural hazards and deliberate threats. These issues fall generally within the scope of health which again is a devolved matter. The ability of the UK to counter such threats may well be hindered if the UK loses its access to the EU Early Warning and Response System (([EWRS](#)) unless an effective replacement is put in place. The EWRS tool is restricted to the European Centre for Disease Prevention and Control (ECDC) with the EU and the Directorate General Health and Food Safety facilitating the sharing of data and evidence. As noted,

*“Infectious diseases do not respect borders and we need to tackle them together. It should be blindingly obvious to all concerned that that it is in all our interests to maintain these vital links.”*

The UK's proximity to continental Europe and cross-border travel mean infectious diseases can easily come from EU 27 countries and vice-versa. The UK must maintain co-operation in public health [with the European Medicines Agency](#).

### Recommendation 18

The Government should continue to co-operate with the relevant EU law enforcement agencies, networks and systems on a similar basis to the way in which they currently do to combat the shared security context. Cognisance of the Scottish specific interests and dimension requires to be integral to the UK's position in the negotiations for the Future Relationship.

## 2.2.3 Law enforcement and criminal justice cooperation

### Our Comments

There is currently a range of legal, practical and technical capabilities to address the challenges to security. We must maintain the level of cooperation and partnership existing at present to combat the issues identified in 2.2.8. Agreement on these matters is of the utmost importance.

We stress the importance of maintaining the present capacity to prevent criminals avoiding detection and justice by using international borders. The UK including Scotland participates in a number of EU agencies that support and enhance police and judicial cooperation. The Future Relationship must ensure that there is the maximum possible co-operation on security issues affecting the UK and the EU. We echo what George Wilson, EU Law and Policy Specialist said to the Home Affairs Sub-Committee:

*‘That co-operation would be based, as it currently is, on respect for the rule of law and fundamental human rights. It would include important safeguards that benefit not only ourselves but EU nationals, when we look at the security and justice tools. In the proposed treaty, if it is agreed, we would like to see fundamental rights prioritised alongside, rightly, the aim of keeping our country and Europe safe from serious organised crime and terrorism.*

2.2.19 recognises the need for robust governance arrangements and a dispute resolution mechanism. However, there needs to be a clear understanding of how the rule of law, access to justice and protection of Human Rights for both the EU and UK citizens will apply in the Future Relationship. The UK will not then be a member of the EU. There needs to be as constructive a focus as possible (which is addressed partly in Chapter 4) on how best to achieve the common aims of security between the EU and UK and the governance and dispute mechanism that is to be agreed.

Much depends on how the UK seek to participate in any other international agreements such as Framework Participation Agreements negotiated between the social partners at European level which are contractually binding on the signatory parties. These may deal with the development of military capabilities where the EU has indicated that the UK will be welcome to participate in these projects. (This is referred to as external security in the Framework for the UK-EU Security Partnership). We have noted the reference in 2.3.17 to the EU and other third countries legal frameworks.

Whatever mechanism is proposed, it needs to be agreed and operational to avoid uncertainty as to how security partnership arrangements are to be achieved. Indeed there may well be more than one treaty given the number of issues outlined in 2.3.13. These issues may also impact the content of any UK-EU Security treaty. It is in the interests of both the EU and the UK to ensure that systems continue to operate bilaterally in fields such as data-sharing.

We have already referred to the need for dispute resolution methods to be clear given the possibility of disputes not only between the UK and the EU but also from those individuals and organisations affected across Europe.

Whether arrangements are finally reached, the '*closest possible cooperation*' should include relevant Scottish interests to take account of the distinctive features of the Scottish legal system.

### **Recommendation 19**

The Government must ensure that the Future Relationship Agreement should provide the maximum possible co-operation on security issues affecting the UK and the EU. Consultation on the terms of the negotiation and the Future Relationship Agreement should include relevant Scottish interests and take account of the distinctive features of the Scottish legal system.

#### **2.3.1 Data exchange**

The UK must continue to participate in EU data exchange mechanisms. We support the need for an agreement regarding the sharing of data as outlined in 2.3.1.24 to include Information about airline passengers, alerts to the police and border forces, exchange of criminal records information, DNA, fingerprint and vehicle registration data.

#### **2.3.2 Practical cooperation**

2.3.2.40 recognises the need for new arrangements regarding practical cooperation between the UK and the EU to respect Scotland and Northern Ireland's distinct legal systems and the role of the Lord Advocate in Scotland as the head of the prosecution service. We welcome this paragraph and consider that this approach applies to the whole of Chapter 2 and is not restricted to matters of practical cooperation.

Whatever agreement is reached in the future, we recognise that data exchange tools and practical cooperation on extradition, between judicial, police and customs authorities and by cross-border criminal investigation and prosecution teams are essential to the successful achievement of law enforcement objectives under the Future Security Partnership.

2.3.2.42-46 deal with the need for cooperation in relation to extradition of wanted individuals and the role of the European Arrest Warrant (EAW).

2.3.2.46 recognises that when the UK is a third country there will be challenges to the "full operation of the EAW".

We agree that the EAW should be the basis for a future extradition arrangement and recognise that this will present constitutional issues for some EU Member States. It would be useful to know how the UK intends to allay the concerns of Member States in this context. Extradition outside the EAW (or EAW-like rules) is likely to take much longer and cost more and will require systems and staff to handle extradition requests in the future. Accordingly adequate resourcing of CPS and COPFS will require to be in place for implementation of the Future Security Partnership.

2.3.2.47-51 deal with cooperation between judicial police and customs authorities and cross-border criminal investigation and prosecution teams.

Efficient and secure evidence exchange mechanisms in relation to cross-border criminal investigations based on equivalent mechanisms to the European Investigation Order and on the Joint Investigations Team are clearly needed to ensure safety and security under the Future Security Partnership. We recognise that there need to be bilateral arrangements between Member States and the UK. The UK's contribution in terms of information and expertise is a key asset in the detection and prosecution of crime. We believe that this has greatly enhanced co-operation between prosecutorial and judicial authorities and should continue into the Future Security Partnership.

### **Recommendation 20**

We emphasise the need for certainty at exit day relating to criminal justice issues particularly data exchange tools and practical cooperation on extradition, between judicial, police and customs authorities and by cross-border criminal investigation and prosecution teams. The Government should set out its plans for the resourcing of CPS and COPFS which will require to be in place for implementation of the Future Security Partnership.

#### **2.3.3 Agencies**

2.3.3.52-60 identify a number of EU agencies that provide a forum for exchanging expertise, sharing resources, coordinating investigations and developing new methods for cooperation. Police Scotland and COPFS have roles in relation to EU institutions:

Police Scotland's International Assistance Unit deals with 'organised crime and terrorism [that does] not respect borders and it is vital that...police force can work with counterparts in Europe and across the world to keep Scotland safe...this collaboration is currently working well.'

We support continued cooperation between UK police forces and organisations such as Eurojust, Europol, Cepol (European Police College), European Agency for Fundamental Rights (FRA) and the European Network and Information Security Agency (ENISA). Access to these organisations will need to include data-sharing that enables the identification of a suspect's location and facilitation of the operation of the EAW system.

COPFS also has an international role as recognised by the Lord Advocate, James Wolffe QC:

'successful investigations and prosecutions undertaken by law enforcement in Scotland demonstrate the enormous benefit derived from the excellent international cooperation we have established...we are fully committed to building on the strong links we have with countries elsewhere in Europe and around the world'.

2.3.3.54 we note that where the UK participates the UK respect the remit of the CJEU.

2.3.3.55-57 refer to serious and organised crime and terrorism and to work with Europol. In 2017 Scotland handled 950 inquiries so continuing cooperation and memberships is necessary.

2.3.3. 58-60 refer to investigations and prosecutions of serious criminal cases. We endorse the need for continued cooperation and membership of Eurojust.

### **Recommendation 21**

We recommend that the Government should propose for the Future Security Partnership that UK police and prosecution authorities can continue to cooperate with EU agencies that provide a forum for exchanging expertise, sharing resources, coordinating investigations and developing new methods for cooperation.

## **2.4 Foreign Policy, Defence and Development**

### **Our Comments**

We endorse the continued role of the UK as a member of NATO and the UN Security Council and support the concept of a specific security agreement with the EU. Specifically we support paragraph 2.4.64 which states: The partnership should be based on common values of peace, democracy, human rights and the rule of law, and the protection of shared interests. Basing the security partnership on the rule of law and human rights is key to upholding our values.

2.4.2. 71 – 74 We agree with the approach taken in the Sanctions and Anti-Money Laundering Act 2018.

### 2.5.3 Counter-terrorism and countering violent extremism

Issues of counterterrorism are reserved to the United Kingdom Parliament under the Scotland Act 1998 schedule 5.

The UK's ability to handle terrorist incidents has been strengthened by a Memorandum of Understanding of Handling of Terrorist cases between the Attorney General and the Lord Advocate. Where jurisdiction is shared by the prosecuting authorities within the UK such incidents arising in both jurisdictions can be prosecuted at one location, rather than both England and Scotland. Where cross- border terrorism cases arise, there are substantial benefits to the public interest for such cases involving co-conspirators to be tried together in one country. There is a UK-wide jurisdiction in relation to terrorist offences under the Counter-Terrorism Act 2008. Other offences connected to terrorism and such circumstances may also share jurisdiction.

### **Recommendation 22**

The existing cooperation between the distinct prosecuting authorities in the UK jurisdictions should be borne in mind in negotiating the Future Security Relationship.

## **2.5 Wider security issues**

### **Our Comments**

This paragraph includes a collection of work streams which include justice and health considerations. Exactly how these considerations differ from the rest of the topics covered by the chapter is unclear. More details are required as to the scope of such workstreams and whether such work streams have commenced. By that means, the ongoing work and cooperation can be planned and factored when considering the full remit of the security partnership.

There may be other areas of work which are relevant when considering wider security implications. An example is the Victims' Rights Directive that ensures that victims of crime and their family members have the right to information, support and protection. It sets out procedural rights for victims in criminal proceedings and requires that EU Member States provide appropriate training on victims' needs to professionals who are likely to encounter victims.

### **Recommendation 23**

We recommend that the Government provide more details about the scope of the workstreams referred to in 2.5. Clarification about how the Future Security Relationship will support the rights of victims of crime would be welcome.

## **Chapter 3 – Cross-cutting and other cooperation**

### **3.2 Data Protection**

#### **Our Comments**

The key concern here relates to adequacy or other recognition of the UK data protection regime by the EU. 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 as part of the Future Relationship Agreement. However, if this is not achieved within the timescale of the negotiations an adequacy designation could provide a helpful interim solution.

### **Recommendation 24**

The Government should provide information regarding the point at which the UK intends to see an adequacy designation and the anticipated timescales. Is the Government intending to have a designation in place as part of the Future Relationship Agreement?

### **3.3 Classified Information**

#### **Our Comments**

Data-sharing is anticipated to increase with greater use of technology and virtual networks in the future. There will be an ongoing need to access relevant data from the EU. This is a key area where EU law intersects with devolved matters.

We believe that with the rest of the UK, Scotland needs to be able to work with eu-LISA — the European Agency for the operational management of large-scale IT systems in freedom, security and justice. eu-LISA has the responsibility for managing new EU information systems and empowering the agency to make EU information systems for security, border and migration management fully interoperable by 2020. The use of such a sophisticated, flexible and integrated system helps address the challenges of irregular migration, cross border crime and terrorism which will continue to present problems and threats to the UK's security and also raises issues about how the data is managed.

The Future Security Relationship will need to deal with data sharing and include comprehensive and robust data protection arrangements. The need for participation in eu-LISA has been recognised by the Government as '[it] believe[s] it is in the national interest to continue participating ....as this will maximise our influence over how it operates IT systems that we take part in and for which it is responsible'.

Co-operation however is not just one way. The Schengen Information System II (SIS II) demonstrates how the UK contributes to the sharing of real-time data for the purposes of law enforcement which includes wanted criminals, missing persons and suspected terrorists.

### **Recommendation 25**

We stress the need for certainty and clarity as to the data-sharing provisions and the data protection arrangements in the Future Security Relationship.

## **3.4 Cooperative Accords**

### **Our Comment**

3.4.2.36 We agree that the UK should seek participation in the successor to Erasmus+.

## **3.5 Fishing Opportunities**

### **Our Comments**

In 2016, landings by Scottish vessels contributed around 65% of the quantity of all landings by UK vessels. Fishing opportunities is consequently a particularly important issue for Scotland. We welcome the recognition that the Government will work closely with the devolved administrations in pursuing the proposed agreement. It is of crucial importance that Scotland's fishing interests are protected along with those of the other UK jurisdictions, particularly in recognising that positive changes to the UK fisheries position will impact the European fishing fleet and/or impact on trade negotiations, including tariffs.

Following the UK's exit from the EU, regulation of fishing in Scotland should fall within the ambit of the Marine (Scotland) Act 2010. In line with the marine planning envisaged by this Act, we consider that it is important that fishing is not looked at in isolation but that an integrated view is taken. In particular, leaving the Common Fisheries Policy opens up the opportunity for fisheries to be looked at in detail alongside matters such as conservation, fossil fuel and renewable energy developments, aquaculture, and

navigation. This will help to ensure that the system of marine planning envisaged under the Act is comprehensive, rather than having components of use of the sea treated separately.

The creation of an agreement which sets out a clear legal framework for the management of fisheries between the UK and the EU is a priority for the negotiations. This would assist in producing certainty and consistency for businesses operating in the sector and for consumers, which may in turn assist in ensuring sustainability of the sector. Such an agreement would ensure clarity as to the rights and obligations of the respective parties to the agreement.

### **Recommendation 26**

We recommend that an agreement which sets out a clear legal framework for the management of fisheries between the UK and the EU is a priority for the negotiations.

## **Chapter 4 – Institutional arrangements**

### **4.2 A Practical and Flexible Partnership**

#### **Our Comments**

We agree with the objectives for the relationship between the UK and the EU as set out in the summary at 4.1.2. However we also expect that the institutional arrangements should insure 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.

We note that 4.1.3 suggests that the CJEU makes laws for the UK. We do not agree with this interpretation of the TFEU Article 267 on the role of the CJEU. The TFEU states:-

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union” There is a significant difference between “making” law and “interpreting” law and this should not be confused particularly when EU is clear on the point.

In relation to 4.2.4 we note that the “UK’s proposal would take the form of an association agreement between the UK and EU”.

There is no precise definition of association agreements in EU law however Article 217 TFEU provides that:-

“The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”.

There are currently 14 association agreements in some of these are twined with stabilisation agreements and one is an interim association agreement. The most significant association agreement currently being negotiated is the Mercosur Agreement.

Article 218 of the TFEU sets out the procedures for the negotiation and conclusion of such association agreements. Does the Government expect that the EU will follow the Article 218 procedure in connection with the Association Agreement and the separate agreements which the Government details in 4.2?

In connection with the framework for the different forms of dialogue which is provided in 4.2.6 we note the similarities between the structure of the future partnership and the existing treaty arrangements with the European Union. We note the arrangements as set out in Figure 1 which create structural arrangements for the future partnership which are in many respects similar to the existing EU structure.

### **4.3 New Forms of Dialogue**

In 4.3.11 there are a number of structural arrangements mentioned for the dialogue between the UK and the EU to take place within including exchanges between the UK Parliament and the EU Parliament. However there appears to be no mechanism for the devolved legislatures to be able to express views to the European Parliament. The Government should explain how it envisages there to be a role for the devolved legislatures and administrations in this context.

#### **4.3.1 Setting Direction through a Governing Body**

4.3.12 gives some detail about a proposed new governing body which would be a political body and would give leaders and minister's a forum where they could set direction of the future relationship, discuss if, how and when changes to the relationship were necessary and provide transparency and accountability. These arrangements seem to be quite complex and reproduce aspects of the existing EU political structure, resembling the EU Council. The provision of transparency and accountability is clearly an important objective. How does the Government intend to achieve this within the proposed structure?

In 4.3.15 we assume that the memorandum of understanding and supplementary agreements between the United Kingdom and the devolved administrations will be revised significantly in order to achieve the objective that the UK Government will represent the interests of all parts of the UK in the Governing Body. Does the Government intend to consult broadly on the rewrite of the Memorandum of Understanding and supplementary agreements? What mechanisms does the Government propose to take the opinion of the devolved legislatures and administrations?

#### **4.3.2 Technical Discussion through the Joint Committee**

We note the intended remit of the Joint Committee details are needed about the method of appointment of members of the UK representation on the Joint Committee. How will they be chosen? How representative will they be of the jurisdictions in the UK? The mechanism for appointment of members, remit, powers and accountability of the Joint Committee should be set out in the implementing legislation.

#### **4.3.3 Parliament Discussion**

We agree that the relationship between the UK Parliament and the European Parliament are for them to determine but it is worthwhile noting there is existing treaty provision.

TFEU Protocol (No 1) on the role of National Parliaments in the European Union deals with the role of National Parliaments in the creation of EU Law. The established routes for contact between the EU and National Parliaments have been criticised as being unsatisfactory but learning from that experience should enable the UK to put forward suggestions for a better functioning dialogue in the UK EU relationship treaty.

#### **4.3.4 Consultation over Legislative Proposals**

We agree with the terms of paragraph 22 although we expect that not only Government should be consulted over the proposals for the common rulebook and any potential changes to that rulebook but also other stakeholder including civic society bodies, academia and the professional bodies and institutions.

#### **4.4 Administrative Provisions**

##### **Our Comments**

We agree with the terms of paragraphs 23 to 26.

##### **4.4.1 Application of Legislative and Regulatory Commitments**

##### **Our Comments**

We agree that there should be a clear process to manage the regulatory and legislative changes that result from the Future Relationship. 4.4.28 seems to suggest that both the EU and UK could use the Joint Committee to notify legislative proposals which have been not only proposed but also “adopted”. This approach seems to be modelled on EEA decision making procedures. We assume that the use of the word adopted means that the proposal has been passed and is in force. This is a problematic proposal as positions will already have been taken on the issue by either the UK or the EU and increases the prospect of rejection by either party with potentially significant consequences for the Future Relationship agreement.

The complexity of the dialogue set out in 4.4.1.20–30 is a consequence of having to deal with “adopted legislation”.

We recommend that “adopted” legislation should not feature in paragraph 4.4.1. The schematic however does function properly for proposed legislation and to that extent we endorse it. However would notification of proposed UK legislative changes to the Joint Committee mean that the EU Institutions be able to comment upon them - would Parliament and the devolved legislatures be able to comment on proposed changes originating from the EU? what if the changes resulted from UK court decisions or interpretations or decisions of the CJEU? How would this process be managed?

#### 4.4.2 Ensuring Consistent Interpretation

We note 4.4.2.33 which appears to set out the current position for courts to take into account the relevant case law of the Courts of the other party as provided for in section 6 of the European Union (Withdrawal) Act 2018. Section 6 provides:

##### Interpretation of Retained EU Law

6 (1)A court or tribunal—

(a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and

(b) cannot refer any matter to the European Court on or after exit day.

(2) Subject to this and subsections [\(3\)](#) to [\(6\)](#), a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal”.

This raises a number of issues:-

(a) Does 4.4.2.33 apply to Tribunals?

(b) How does 4.4.2.33 relate to section 6 of the European Union (Withdrawal) Act 2018?

(c) How does the power of the Joint Committee “to preserve consistent interpretation of the agreement” fit with adherence to the duty to respect judicial independence?

(d) Will the proposals in 4.4.2.35 require section 6(2) of the European Union (Withdrawal) Act 2018 to be amended to place the UK Courts under a duty to pay regard to CJEU case law where there is a common rulebook?

(e) What if there is no relevant case law? The paper seems to suggest that there will always be relevant case law on issues which the common rulebook will cover. That will not always be true or remain true.

## 4.5 Resolving Disputes

### Our Comments

4.5.1.42 When there are cases before the CJEU dealing with legal issues which are part of the common rulebook questions but which do not arise from the UK, should the UK have a right to intervene and should UK lawyers have a right of audience in such cases?

Disputes may arise in relation to goods and be litigated before the courts of Member States. The matter may then be referred to the CJEU. The paper should recognise that the joint committee procedures may be operating in parallel to the normal judicial procedures in the Member States.

The dispute provisions appear to be based on standard FTA mechanisms avoiding the jurisdiction of the CJEU except on questions of EC law. Would the EFTA court, modified appropriately be a better model

## 4.6 Accountability at Home

### Our Comments

The creation of common frameworks signals a move away from a binary division of power towards more extensive joint working between UK and devolved governments. This therefore increases the importance of ensuring that intergovernmental bodies are transparent and accountable.

New Structures could include “new JMC-type committees in areas where common frameworks are created” and subcommittee structures. Proposals for statutory arrangements for common frameworks were debated during the passage of the European Union (Withdrawal) Act which included arrangements for determining what powers will be devolved or reserved in the event of the Governments being unable to agree where the powers should lie. It would be useful for the Governments to revisit those amendments as a way to inform discussions on the frameworks.

Not only is there a need for more systematic intergovernmental dialogue but also for increased inter-Parliamentary contact. Parliamentary scrutiny (in all the legislatures in the UK) of the activities of the JMC and any Frameworks which are created in whatever form they take will be essential if the actions of all the Governments throughout the UK are to be fully accountable.

We agree with recommendation 25 of the UK Parliament’s Public Administration and Constitutional Affairs Committee report. “25.The absence of formal and effective inter-governmental relations mechanisms has been the missing part of the devolution settlement ever since devolution was established in 1998. The process of the UK leaving the EU has provided the opportunity for the Government to re-think and redesign inter-governmental relations in order to put them on a better footing. Once the UK has left the EU, and UK Common Frameworks are established, the present lack of intergovernmental institutions for the underpinning of trusting relationships and consent will no longer be sustainable. *We recommend that the Government take the opportunity provided by Brexit to seek to develop, in conjunction with the devolved*

*Administrations, a new system of inter-governmental machinery and ensure it is given a statutory footing. Doing this will make clear that inter-governmental relations are as important a part of the devolution settlement as the powers held by the devolved institutions. (Paragraph132)”.*

We look forward to the publication of the Review of Inter-governmental relations.

### **Recommendations 27**

We have set out a number of questions concerning issues raised in sections 4.2-4.6. We recommend that the Government provide answers to these questions before the negotiation of the Future Relationship Agreement gets underway.

### **Conclusion and next steps**

#### **Our Comments**

We hope that a Withdrawal Agreement can be agreed in time to minimise disruption to the economic, social and legal structures in the UK and EU on exit day. We will comment on the European Union (Withdrawal Agreement) bill during its passage through Parliament and expect to comment on the Future Relationship Agreement in due course.

We encourage the Government to be as open and transparent as possible during this process and to consult widely on proposals for the text of the Agreement not only with the devolved legislatures and administrations but also with civic society.

## **ANNEX**

### **Recommendations**

#### **Recommendation 1**

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 Third countries.

#### **Recommendation 2**

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.

#### **Recommendation 3**

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

#### **Recommendation 4**

The Government should ensure that the new UK law on GIs and the new national register are in place and populated with all pre-Withdrawal registrations in the EU before the end of the transition or implementation period.

#### **Recommendation 5**

The Future Relationship Agreement should include comprehensive Consumer Protection provisions.

#### **Recommendation 6**

The Future Relationship Agreement should ensure that UK and EU citizens can have access to the lawyers of their choice so they can obtain advice about the enforcement of those rights which are recognised in the Agreement.

#### **Recommendation 7**

The Future Relationship Agreement should preserve the practical effects of the EU Insolvency Regulation (2015/848).

#### **Recommendation 8**

The Government should provide details as to how UK bank and credit cards will work in the EU following withdrawal.

### **Recommendation 9**

The Government should provide clarity about the immigration status of EU citizens with historic convictions at the lower end of the offending scale and about the arrangements for the dependent relatives of EU citizens after the end of the transition or implementation period. The future immigration system should facilitate the flow of low skilled and unskilled labour to certain sectors or geographic areas and be designed to make the UK an attractive destination for visitors, skilled workers and those who want to do business.

### **Recommendation 10**

The Government should provide more detail as to how a collaborative approach to regulation of digital markets might be achieved in order to realise the benefits of new technologies

### **Recommendation 11**

The Government should provide clarity on how maintenance of a state aid common rulebook with the necessary high standards could be ensured.

### **Recommendation 12**

The Government should provide further detail as to how the CMA would continue to work with DG Competition in handling competition cases and, in particular, how merger controls which triggered both UK and EU thresholds might be dealt with.

### **Recommendation 13**

We encourage the Government to bear in mind it's human rights obligations towards patients and potential patients when negotiating the Nuclear Collaboration Agreement.

### **Recommendation 14**

We recommend that the Government consult broadly with the courts, the legal profession and civic society on its negotiating position in regard to civil judicial cooperation and that close dialogue with the devolved legislatures, administrations and judiciaries is maintained.

### **Recommendation 15**

The Government should include other forms of intellectual property in their negotiation strategy including EU Trade Marks, Community Plant Variety Rights and Supplementary Protection Certificates. There needs to be clarity about dispute resolution mechanisms in connection with intellectual property disputes in the Future Relationship

### **Recommendation 16**

The Government should clarify how future UK trade defence measures would be applied in the absence of border checks on imports from the EU.

### **Recommendation 17**

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.

### **Recommendation 18**

The Government should continue to co-operate with the relevant EU law enforcement agencies, networks and systems on a similar basis to the way in which they currently do to combat the shared security context. Cognisance of the Scottish specific interests and dimension requires to be integral to the UK's position in the negotiations for the future relationship.

### **Recommendation 19**

The Government must ensure that the The Future Relationship Agreement should provide the maximum possible co-operation on security issues affecting the UK and the EU. Consultation on the terms of the negotiation and the Future Relationship Agreement should include relevant Scottish interests and take account of the distinctive features of the Scottish legal system.

### **Recommendation 20**

We emphasise the need for certainty at exit day relating to criminal justice issues particularly data exchange tools and practical cooperation on extradition, between judicial, police and customs authorities and by cross-border criminal investigation and prosecution teams. The Government should set out its plans for the resourcing of CPS and COPFS which will require to be in place for implementation of the Future Security Partnership.

### **Recommendation 21**

We recommend that the Government should include in the Future Security Partnership that UK police and prosecution authorities can continue to cooperate with EU agencies that provide a forum for exchanging expertise, sharing resources, coordinating investigations and developing new methods for cooperation.

### **Recommendation 22**

The existing cooperation between the distinct prosecuting authorities in the UK jurisdictions ought to be borne in mind in negotiating the Future Security Relationship.

### **Recommendation 23**

We recommend that the Government provide more details about the scope of the workstreams referred to in 2.5. Clarification about how the Future Security Relationship will support the rights of victims of crime would be welcome.

#### **Recommendation 24**

The Government should provide information regarding the point at which the UK intends to see an adequacy designation and the anticipated timescales. Is the Government intending to have a designation in place as part of the Future Relationship Agreement?

#### **Recommendation 25**

We stress the need for certainty and clarity as to the data-sharing provisions and the data protection arrangements in the Future Security Relationship.

#### **Recommendation 26**

We recommend that an agreement which sets out a clear legal framework for the management of fisheries between the UK and the EU is a priority for the negotiations.

#### **Recommendation 27**

We have set out a number of questions concerning issues raised in sections 4.2-4.6. We recommend that the Government provide answers to these questions before the negotiation of the Future Relationship Agreement gets underway.



**For further information, please contact:**

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