



Law Society
of Scotland

Memorandum of comments

UK EU Trade and Cooperation Agreement and the European Union (Future Relationship) Bill

29 December 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 committees welcome the opportunity to consider and respond to the UK EU Trade and Cooperation Agreement and the European Union (Future Relationship) Bill. The Society has the following comments to put forward for consideration.

- [Comments on UK EU Trade and Cooperation Agreement](#)
- [Comments on EU \(Future Relationship\) Bill](#)

UK EU Trade and Cooperation Agreement

PART ONE: COMMON AND INSTITUTIONAL PROVISIONS

Title I: General provisions

Our comments

We would like to acknowledge both the UK and the EU negotiation teams for their work on developing, agreeing and completing the Trade and Cooperation Agreement (TCA) and the supplementary agreements particularly on Nuclear Cooperation which is of crucial importance to those requiring diagnostic or therapeutic radiotherapy. The terms of such a broad-ranging treaty as the TCA will not satisfy everyone but the effort has been considerable and should be respected. Article COMPROV.1 states this is a “basis for a broad relationship between” the UK and the EU and covers many aspects of the relationship between the UK and the EU. The treaty comprises six parts covering: common and institutional provisions; trade, transport, social security coordination and fisheries; law enforcement and judicial cooperation in criminal matters; thematic cooperation in health and cyber security; participation in EU programmes and financial provisions; and dispute settlement. The agreement is 1255 pages long. Many of the provisions are of direct and considerable importance to citizens and businesses in the UK and the EU.

Accordingly, noting that the TCA is, under Article FINPROV.11, provisionally agreed until 28 February 2021 we question why it is absolutely necessary for the UK Government to require Parliamentary consideration of the TCA and the implementation bill to be concluded by 31 December 2020. Such a timetable means that scrutiny of the TCA and the legislation is being sacrificed for speed.

We take the view that the full period of provisional agreement should be used by the UK Parliament to debate and scrutinise the treaty and the implementing legislation. We accept that the Government’s answer to this suggestion is likely to be that they have to meet that timescale in light of existing statutory provision and the need for some statutory provisions to be in force on 1st January. We take the view that a suitable legislative framework could have been constructed or amended to allow for such a change in the light of the TCA’s provisions.

The EU (news release 24 December 2020¹) has stated that, “*The negotiations could only be finalised at a very late stage before the expiry of the transition period. Such late timing should not jeopardise the European Parliament’s right of democratic scrutiny, in accordance with the Treaties. In light of these exceptional circumstances, the Commission proposes to apply the Agreement on a provisional basis, for a limited period of time until 28 February 2021.*”

The EU will use the provisional agreement period to scrutinise the TCA and relevant legislation and obtain the consent of member states (on the basis of unanimity) as well as that of the European Parliament and

¹ https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2531

the Council. The UK Parliament and the devolved legislatures should be afforded the same opportunity and time to properly scrutinise the TCA and the Bill.

In relation to Article FINPROV.8 we note that termination of the TCA can take place by “written notification through diplomatic channels”. This seems to be a relatively insubstantial mechanism for terminating the TCA. Furthermore, we note there are no provisions for any transitional arrangements in the event of such a circumstance arising.

We welcome the terms of Article SSC.67: Protection of individual rights which requires the UK and the EU to ensure the Protocol on Social Security Coordination will have the force of law and that it can be litigated on in the courts or tribunals. It is however regrettable that there is no broad provision for civil judicial cooperation in the TCA. We hope that the UK’s accession to the Lugano Convention will follow soon because the lack of a relatively easy way to recognise and enforce civil and commercial judgements will bring considerable disadvantage to citizens and business in the UK and Europe who wish access to justice to enforce obligations and vindicate rights.

Title II: Principles of interpretation and definitions

Our comments

We have no comments to make.

Title III: Institutional framework

Our comments

We note (Article INST.1 and Annex INST (procedure of the Council and the Committees)) which provide for the establishment of the Partnership Council, which will comprise representatives of the EU and of the UK and will be co-chaired by a member of the European Commission and a UK Government minister. The remit of the Council is the attainment of the objectives of the TCA and any supplementing agreement. The Council will also supervise and facilitate the implementation and application of the TCA and any supplementing agreement and along with Committees can make decisions binding on the UK and the EU and all bodies set up under the TCA.

The Council is only one of a number of structural arrangements (eg the Trade Partnership Committee and various specialised committees and working Groups) mentioned in Title III, which create a dialogue between the UK and the EU.

We welcome provision (Article INST.5) for the UK and EU Parliaments to be able to establish a Parliamentary Partnership Assembly consisting of members of both Parliaments “as a forum to exchange views on the partnership”. 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 the devolved legislatures and administrations will have a role in this process.

We welcome Article INST.6: Participation of civil society and the provisions for Domestic Advisory Groups (Article INST.7), and in particular the Civil Society Forum (Article INST.8) which reflects a suggestion we made in connection with the structural architecture of the Withdrawal Agreement in 2018.

We also welcome Annex INST. rules 10 and 13 which make provision for the transparency of Council and Committee meetings.

PART TWO: TRADE, TRANSPORT, FISHERIES AND OTHER ARRANGEMENTS

HEADING ONE: TRADE

Title I: Trade in goods

Title II: Services and investment

Our comments

The provisions on trade in services and investment could be stronger but there are a number of helpful aspects, including a specific section on legal services not usually found in a trade agreement.

We note that Chapter 1 General provisions, Article SERVIN.1.4 provides for a review of commitments and reservations in services included in Annexes SERVIN1-4.

Chapter 2: Investment liberalisation

This chapter makes provision for establishment (Mode 3 provision of services under the GATS) and includes provisions on market access, national treatment, most favoured nation (MFN) treatment, senior management and board of directors, and on performance requirements. Article SERVIN.2.7 restricts the scope of application of the provisions under Chapter 2, which do not apply to non-conforming measures and exceptions listed in Annexes SERVIN-1 and 2. The impact of these provisions will therefore need to be considered on a country-by-country basis as per the annexes.

Chapter 3: Cross-border trade in services

The chapter on cross-border provision of services includes provisions regarding market access, local presence, national treatment and MFN treatment. We welcome Article SERVIN.3.2, which bars the restriction on or requirements for 'specific types of legal entity or joint venture' as it ensures that eg LLPs (common in the legal services sector) would be able to provide services. Article SERVIN.3.3 prohibits requirements to establish or maintain an enterprise in order to provide services. Similarly, service providers cannot be required to be resident in the territory of the other party. However, we note that under Article

SERVIN.3.6 the provisions do not apply to non-conforming measures listed in Annexes SERVIN-1 and 2 so again these will need to be considered on a country-by-country basis.

Chapter 4: Entry and temporary stay of natural persons for business purposes

Under movement of natural persons, the agreement provides for several categories of personnel that are not included under GATS obligations, namely independent professionals, short-term business visitors and graduate trainees. This is welcome from the perspective of facilitating services and investment and also in the context of graduate trainees, contributing to personal development opportunities.

Chapter 5: regulatory framework

Section 5: Financial services

There is limited provision for financial services in the TCA. We understand that a decision on equivalency is expected next month, although the timescale has not been confirmed. The EU has indicated that it will provisionally apply the TCA until 28 February 2021 to allow the necessary ratification process to be completed: it is not clear whether this will have implications for the timing of the grant of equivalency (assuming it is forthcoming).

While this would allow access through third country status and passporting, the arrangements, in the absence of agreeing a more favourable arrangement in the coming months, would be subject to a 30-day notice of withdrawal of equivalency and accordingly creates a level of uncertainty and therefore risk to UK financial services providers. There is no consultation provision which would allow for some forewarning of removal of equivalency akin to that in the EU-Japan EPA. Financial services firms will therefore be forced to either maintain EU authorised businesses and gear up operations to the required level (and that on a per member state basis) or withdraw their services from the EU. This is likely to result in a dilution of UK operations (and UK fiscal contribution) and extra cost to firms of multiple authorisations and compliance. This is a long-term issue as any divergence on financial services regulation may trigger the withdrawal of equivalency.

There is a recognition that the position in respect of financial services is 'underdeveloped' in the TCA. The UK and EU aim for a Memorandum of Understanding to be agreed by March 2021 establishing a framework for regulatory co-operation on financial services. This may facilitate some divergence or may suggest a more aligned position. Key areas being considered by the EU and in which EU requires clarification are, we understand, how the UK supervisory discretion will be applied to EU firms and how the UK's temporary requirement affects EU firms.

Section 7: Legal services

The agreement contains positive arrangements regarding home title rights, but these are subject to reservations. These provisions only appear to address the right to advise, not privilege, and only in relation to advising on UK law, not EU law. So, while UK lawyers could advise eg an Austrian client on UK merger control (unless Austrian law prohibits this), they would be unable to advise an Austrian client on EU merger control, and the advice would not be privileged.

Furthermore, under Article SERVIN.5.48, “*Legal services*” do not include “*legal representation before administrative agencies, the courts and other duly constituted official tribunals of a Party...*” (eg the European Commission in cartel cases or before the CJEU).

We also note that it is not clear how Sections 2 and 7 of Chapter 5 interact, but one might assume Section 7 prevails as being the more specific.

On MRPQ, Article 5.13 under Section 2 appears to create a mechanism for future recognition rather than a continuation of current recognition arrangements - ie a step backwards which may be reversed later - rather than giving direct rights. It does contain a provision allowing specific bilateral agreements with member states – but presumably only where the member states are competent to conclude those agreements.

While we welcome the fact that the agreement goes further than other EU trade agreements, it nevertheless reduces opportunities to export legal services and limits the ways in which the legal professions in the UK can serve their clients and provide advice to citizens and businesses. The TCA in this respect will put the professions at a competitive disadvantage as regards their EU counterparts.

We also consider that it would have been helpful to include some recognition of the provisions of the Northern Ireland Protocol relevant to this area.

Annex SERVIN-6 Guidelines for Arrangements on the Recognition of Professional Qualifications, (see also Article SERVIN.5.13) are to be “taken into account” in the development of joint recommendations by professional bodies or authorities in the UK or EU (“joint recommendations”). These are expressed to be non-binding and non-exhaustive and to “set out the typical content of arrangements”. They “should be taken into account by the Partnership Council when deciding whether to develop and adopt arrangements.” This is a helpful provision for future development of arrangements on the recognition of professional qualifications.

Title III: Digital trade

Our comments

Transitional arrangements

The Title on digital trade should be read in conjunction with Article FINPROV.10A: Interim provision for transmission of personal data to the United Kingdom: “*For the duration of the specified period, transmission of personal data from the Union to the United Kingdom shall not be considered as transfer to a third country under Union law.*” This bridging provision means that there will be no disruption to flows of personal data at the end of 2020. The specified period is four months from 1 January 2021, extendable for another two months, or the period until the date the Commission adopts its adequacy decisions in relation to the UK under Article 36(3) of Directive (EU) 2016/680 (Directive for the prevention, investigation,

detection or prosecution of criminal offences) and under Article 45(3) of Regulation (EU) 2016/679 (GDPR), whichever is earlier.

We note that this remains valid providing the UK does not amend its data protection regime or exercise the designated powers without the agreement of the Union within the Partnership Council, during this period.

Title III provisions

Article DIGIT.3 states that the parties have the right “to achieve legitimate policy objectives” including “privacy and data protection”. Article DIGIT.7 also highlights the right of protection of personal data and the right to privacy and acknowledges the role that high standards in this area play in contributing to trust in the digital economy, thereby encouraging trade.

Beyond this the parties are by Article DIGIT.6.1. “committed to ensuring cross-border data flows to facilitate trade in the digital economy” and accordingly will not introduce data localisation provisions. There is a review provision under which the parties will review these provisions within three years of the TCA entering into force.

We note that a separate Declarations document includes a statement that the EU will review the “adequacy” of the UK’s data protection laws as against the EU’s General Data Protection Regulation (GDPR) and the Law Enforcement Directive. The document states that the European Commission will “work closely to that end with the other bodies and institutions involved in the relevant decision-making procedure.” The UK has already declared the GDPR to be “adequate” for the purposes of UK data protection law.

Digital contracts

Article DIGIT.10 includes provisions on the conclusion of contracts by electronic means. The parties must ensure that domestic law “neither creates obstacles for the use of electronic contracts nor results in contracts being deprived of legal effect and validity solely on the ground that the contract has been made by electronic means.” However, this is subject to certain exceptions such as legal representation services, services of notaries public, contracts that require witnessing in person, contracts that establish or transfer rights in real estate and contracts requiring by law the involvement of courts, public authorities or professions exercising public authority and contracts governed by family law or by the law of succession.

Title IV: Capital movements, payments, transfers and temporary safeguard measures

Our comments

We have no comment to make.

Title V: Intellectual property

Our comments

We note that Title V generally codifies existing EU and UK law regarding well-recognised intellectual property rights: trademarks, patents, copyright, unregistered designs, registered designs, plant variety rights. We note that the UK and the EU will in future be separate for the purposes of assessing exhaustion of rights.

Geographic Indications and Protected Designations of Origin

We have commented elsewhere² on the importance of Geographic Indications and Protected Designations of Origin to Scottish producers and rural communities and those in other parts of the UK as well as for consumer protections purposes. The lack of coverage in the agreement is therefore a potential concern. We note that the UK and EU have agreed a review clause, which states that “*the Parties may jointly use reasonable endeavours to agree rules for the protection and effective domestic enforcement of their geographical indications*” and could therefore facilitate such agreement in the future.

Title VI: Public procurement

Our comments

The provisions relative to procurement are very detailed and there is particular reserve relative to services of a social nature. Generally, there is a partial shift in terminology from EU to WTO Agreement on Government Procurement (GPA) requirements but procurement of the following remains covered:

- Hotel and restaurant services (CPC 641);
- Food serving services (CPC 642);
- Beverage serving services (CPC 643);
- Telecommunication related services (CPC 754);
- Real estate services on a fee or contract basis (CPC 8220);
- Other business services (CPC 87901, 87903, 87905-87907).

Under Article PPROC.2.1 the provisions of the GPA that are specified in Section A of Annex PPROC-1, “including the Annexes of each Party to Appendix I to the GPA” are incorporated into this Title. This perpetuates the application to the UK’s devolved governments of the procurement value thresholds which are applicable to central government entities. This is the result of the inclusion of the devolved governments in GPA Appendix I. Such classification appears to have happened because governmental powers relative to England (conceptually equivalent to those of the devolved governments of the UK nations) are, in there being no English Government, exercised for England by United Kingdom (central government) authorities. This contrasts with the absence from GPA Appendix 1 of corresponding infra-state entities such as the *comunidades autónomas* of Spain or the German *Länder*.

² https://www.lawscot.org.uk/media/360726/lss-response_tra_scotland-and-brexit-trade-and-foreign-investment-inquiry_july-18.pdf

Title VII: Small and medium-sized enterprises

Our comments

We have no comment to make.

Title VIII: Energy

Our comments

We have no comment to make.

Title IX: Transparency

Our comments

We have no comment to make.

Title X: Good regulatory practices and regulatory cooperation

Our comments

We have no comment to make.

Title XI: Level playing field for open and fair competition and sustainable development

Our comments

Chapter three: Subsidy control

The subsidy or state aid provisions substantially codify existing EU state aid legal concepts and doctrines.

The word “subsidy” is defined in line with existing EU case law on “aid” - ie more broadly than that for the WTO Anti Subsidy and Countervailing Measures Agreement - to cover not only grants but other favours. Subsidies are to be transparent and published.

We note that *“Each Party shall establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime. That independent authority or body shall have the necessary guarantees of independence in exercising its operational functions and shall act impartially.”* In addition, “interested parties” are to have a right to complain and seek judicial review. The provisions also require

each party to maintain adequate remedies enabling interested persons to object to allegedly unlawful aid and to seek dispute resolution. Mechanisms exist but there is no obligation to abide by their outcome. Ultimately, each party reserves the right, if no solution can be agreed, to treat what it would see as social or environmental dumping as a violation of the Agreement and implement countermeasures.

On state aid provisions the fact that the full EU state aid regime applies in Northern Ireland (without being addressed in this agreement) means there remains the prospect of two subsidy control regimes operating in the UK – the regime under the TCA and the reachback or spillover into Great Britain of the state aid provisions under the Northern Ireland Protocol. The Government should explain how it intends to manage these arrangements.

Chapter six: Labour and social standards and Chapter seven: Environment and climate

Protecting standards

The level playing field provisions bind the parties to non-regression obligations with regards to labour and social standards and with regards to environmental and climate change protections. This includes non-regression as a result of inadequate enforcement, an important provision as it recognises that legislating for protections will not produce the desired result unless effective enforcement makes them meaningful.

Title XII: Exceptions

Our comments

We have no comment to make.

HEADING TWO: AVIATION

Title I: Air transport

Title II: Aviation safety

Our comments

We have no comment to make.

HEADING THREE: ROAD TRANSPORT

Title I: Transport of goods by road

Title II: Transport of passengers by road

Our comments

We have no comment to make.

HEADING FOUR: SOCIAL SECURITY COORDINATION AND VISAS FOR SHORT-TERM VISITS

Title I: Social security coordination

Title II: Visas for short-term visits

Our comments

We have no comment to make.

HEADING FIVE: FISHERIES

Our comments

We have no comment to make.

HEADING SIX: OTHER PROVISIONS

Our comments

We have no comment to make.

PART THREE: LAW ENFORCEMENT AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

Title I: General provisions

Our comments

Article LAW.GEN.1: Objective

LAW.GEN 1. 2, specifies that Part Three does not apply to situations arising between the member states, or between member states and Union institutions, bodies, offices and agencies, nor does it apply to the activities of authorities with responsibilities for safeguarding national security when acting in that field. This appears to be a significant derogation. There should be the closest continued cooperation maintained

between the UK and EU to deal with the issues such as national security, terrorism and organised crime which are continuing threats to Scotland, the wider UK and the EU. Organised crime comes in many guises. The UK and the EU need to deal effectively with activities such as financial and cyber-crime, human and drug trafficking and smuggling of firearms which may have implications for national security.

Article LAW.GEN.4: Protection of personal data

We note that “Special categories of personal data” is defined in Article LAW.GEN 2 which is in line with GDPR Article 9 on special category data. Both parties commit to ensuring personal data processing is “subject to effective safeguards in the Parties’ respective data protection regimes”. Reciprocal arrangements require notification of breaches to be reported to the Specialised Committee on Law Enforcement and Judicial Cooperation of the supervisory authorities which is responsible for oversight.

Article LAW.GEN.5: Scope of cooperation where a member state no longer participates in analogous measures under Union law

These provisions seem relatively clear except for paragraph 6 where the EU shall inform the UK when a member state ceases to participate in, or enjoy rights under, provisions of EU law relating to law enforcement and judicial cooperation in criminal matters. We note that there is no timeframe applied to this process. This process also engages the Specialised Committee on Law Enforcement and Judicial Cooperation.

Title II: Exchanges of DNA, fingerprints and vehicle registration data

Our comments

Title II involves data sharing under the Prüm Decision which includes rules for operational police cooperation such as joint patrols and introduced procedures for fast and efficient data exchange in specific areas.

EU member states grant each other access to their automated DNA analysis files, fingerprint identification systems and vehicle registration data which means that DNA profiles or fingerprints found in one EU member state can be compared automatically with profiles held in other EU states. Car registration data (including licence plates and chassis numbers) are exchanged through national platforms that are linked to the online application “EUCARIS”.

We cannot determine if Title II provisions are as comprehensive as those currently enjoyed by the UK. However, we draw attention to a number of particular provisions set out below.

Article LAW.PRUM.16: Accreditation of forensic service providers carrying out laboratory activities

Under paragraph 3, the competent law enforcement authorities of the UK shall not carry out searches and automated comparison under Articles LAW.PRUM 8, 9 and 12 before the UK has implemented and applied the reciprocal access measures referred to in paragraph 1.

Article LAW.PRUM.18: Ex ante evaluation

Under paragraph 1 the UK has to fulfil the conditions set out in Article LAW.PRUM.17 (Implementing measures) and ANNEX LAW-1 through an evaluation visit and a pilot run. Once the evaluation report is done, the EU will determine the date from which personal data may be supplied by member states to the UK.

Pending the outcome of that evaluation, from the date of the entry into force of the TCA, member states may supply to the United Kingdom personal data until the date or dates determined by the EU under paragraph 2 but only for nine months after the TCA comes into force.

The Specialised Committee on Law Enforcement and Judicial Cooperation may extend this period by nine months.

Article LAW.PRUM.19: Suspension and disapplication

This relates to changes to the Union and member states' arrangements. There is no obligation to advise the UK, although there may need to be amendments to the TCA.

Title III: Transfer and processing of passenger name record data

Our comments

Article LAW.PNR.19: Definitions

Under this article "serious crime" means any offence punishable by a custodial sentence or detention order for a maximum period of at least three years under the domestic law of the United Kingdom. We note the formulation "domestic law of the United Kingdom and point out that criminal law in the UK is part of the law of each of the three jurisdictions England and Wales, Scotland and Northern Ireland

Article LAW.PNR.22: Police and judicial cooperation

We note the reciprocal arrangements in place for sharing of the passenger name records in specific cases where necessary to prevent, detect, investigate, or prosecute terrorism or serious crime.

Article LAW.PNR.25: Data security and integrity

These contain the requirements only on the UK regarding breach of data. We assume that the EU will remain bound by the existing EU law.

Article LAW.PNR.27: Automated processing of PNR data

Paragraphs 10-15 include time periods to allow the UK to make technical adjustments to enable compliance with this Title within a period of 3 years.

Title IV: Cooperation on operational information

Our comments

We agree with Title IV which provides for assistance through the provision of relevant information for the purposes of: (a) the prevention, investigation, detection or prosecution of criminal offences; (b) the

execution of criminal penalties; (c) safeguarding against, and the prevention of, threats to public safety; and (d) the prevention and combating of money laundering and the financing of terrorism.

Title V: Cooperation with Europol

Our comments

Title V establishes cooperative relations between Europol and the competent authorities in the UK to support and strengthen action by member states and the UK, and mutual cooperation in preventing and combating serious crime, terrorism and forms of crime which affect a common interest covered by an EU policy, as referred to in Article LAW.EUROPOL.48 (Forms of crime).

In Article LAW.EUROPOL.47: Definitions, “competent authority” means, for the EU, Europol and for the UK, a domestic law enforcement authority responsible under domestic law for preventing and combating criminal offences. This will need to take account of the three legal systems in the UK.

In Article LAW.EUROPOL.50: National contact point and liaison officers we welcome paragraph 4, which confirms that the practice of seconding officers will continue.

Article LAW.EUROPOL.59: Working and administrative arrangements is very positive and an improvement on previous arrangements.

Title VI: Cooperation with Eurojust

Our comments

In Article LAW.EUROJUST.62: Definitions “competent authority” means, for the EU, Eurojust and, for the UK, a domestic authority with responsibilities under domestic law relating to the investigation and prosecution of criminal offences. How will arrangements take account of the role of the Lord Advocate and the Crown Office and Procurator Fiscal Service (COPFS)?

Article LAW.EUROJUST.66: Liaison Prosecutor

To facilitate the cooperation established under this Title, the United Kingdom shall second a Liaison Prosecutor to Eurojust. This is of relevance to the role of the Lord Advocate and COPFS – though matters of terrorism and security are reserved, a number of other serious crimes as set out in ANNEX LAW such as counterfeiting and product piracy, computer crime and corruption are not. How will arrangements take account of the role of the Lord Advocate and the COPFS?

Article LAW.EUROJUST.67: Liaison Magistrate

For the purpose of facilitating judicial cooperation with the UK in cases in which Eurojust provides assistance, Eurojust may post a Liaison Magistrate to the UK, in accordance with Article 53 of the Eurojust Regulation.

Title VII: Surrender

Our comments

We agree with the Article LAW.SURR.76: Objective, which is to ensure that the extradition system between the Member States and the UK is based on a “mechanism of surrender pursuant to an arrest warrant in accordance with the terms of this Title”.

We also agree with Article LAW.SURR.77: Principle of proportionality, which is based on necessity and proportionality and includes factors such as the rights of the requested person and the interests of the victims, the seriousness of the offence and the likely penalty.

Under Article LAW.SURR.79: Scope, an arrest warrant may be issued for acts punishable by the law of the issuing state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed...for sentences...of at least four months —this seems quite a low threshold but is acceptable for arrest warrants to be issued.

Under paragraph 3, “a state shall not refuse to execute an arrest warrant issued in relation to the following behaviour where such behaviour is punishable by deprivation of liberty...of a maximum period of at least 12 months” where the person requested is suspected of common purpose in the commission of significant crimes including terrorism, trafficking in drugs and psychotropic substances, or murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking or rape, even where that person does not take part in the actual execution of the offence or offences concerned.

Paragraphs 4 and 5 provide the process and detail the crimes to which the principle of double criminality may not be applied. How will arrangements take account of the role of the Lord Advocate and the COPFS?

Article LAW.SURR.83: Nationality exception

The UK and the EU may notify the Specialised Committee on Law Enforcement and Judicial Cooperation that a state’s own nationals will not be surrendered or that the surrender will be authorised only under certain specified conditions. The notification shall be based on the fundamental principles or practice of the legal order of the UK or the state on behalf of which a notification was made.

Paragraph 3 provides for the state to consider “instituting proceedings against its own national which are commensurate with the subject matter of the arrest warrant, having taken into account the views of the issuing state”. This seems a reasonable compromise where a member state has constitutional prohibitions on extradition of its citizens.

Article LAW.SURR.109: Relation to other legal instruments

This Article provides that the TCA will apply instead of the European Convention on Extradition (1957) or the European Convention on the Suppression of Terrorism.

Article LAW.SURR.112: Application to existing European arrest warrants

We agree with the need for application of the TCA to outstanding European arrest warrants issued before the end of the transition period where the person has not been arrested.

Title VIII: Mutual assistance

Our comments

We agree with the objectives of the Articles in Title VIII.

Title IX: Exchange of criminal record information

Our comments

We agree that the exchange of criminal record information is important.

Title X: Anti-money laundering and counter terrorist financing

Our comments

We agree with Title X and the need to cooperate in preventing the use of financial systems to launder the proceeds of criminal activity, including drug trafficking and corruption, and to combat terrorist financing.

Title XI: Freezing and confiscation

Our comments

Cooperation between the UK and the member states will be important for the purposes of investigations and proceedings aimed at the freezing of property and if appropriate confiscation thereof within the framework of proceedings in criminal matters

Title XII: Other provisions

Our comments

We have no comment to make.

Title XIII: Dispute settlement

Our comments

We agree with the objective to establish a mechanism for avoiding and settling disputes with a view to reaching a mutually agreed solution, where possible.

PART FOUR: THEMATIC COOPERATION

We have no comment to make on this Part.

PART FIVE: PARTICIPATION IN UNION PROGRAMMES, SOUND FINANCIAL MANAGEMENT AND FINANCIAL PROVISIONS

We have no comment to make on this Part.

PART SIX: DISPUTE SETTLEMENT AND HORIZONTAL PROVISIONS

Title I: Dispute settlement

Our comments

Title I (Articles INST.9-34D) focuses on dispute settlement by establishing a mechanism for avoiding and settling disputes regarding interpretation and application of the TCA and supplementing agreements.

Article INST.10.1 sets out the scope of Part 6 including a number of exceptions such as Part Three (Law enforcement and judicial cooperation in criminal matters), situations governed by other provisions of the TCA; the separate Agreement on procedures for exchanging and protecting classified information and the Protocol on Social Security Coordination. These exceptions for the dispute resolution procedure are quite extensive but for example Part Three contains its own dispute settlement process in Title XIII. It might have been better if the dispute settlement provisions were consolidated within the TCA.

The process of dispute settlement by consultation under Article INST.13 provides that if one of the Parties considers that the other Party has breached the TCA they shall “endeavour to resolve the matter by entering into consultations in good faith, with the aim of reaching a mutually agreed solution”. This seems a reasonable approach and consistent with other Agreements.

If consultations are not agreed or do not take place, then under Article INST.14 (Arbitration procedure) the complaining Party may request the establishment of an arbitration composed of three arbitrators with expertise in law and international trade. There is a requirement that arbitrators shall be persons whose “independence is beyond doubt, who possess the qualifications required for appointment to high judicial office in their respective countries or who are jurisconsults of recognised competence”. We agree that these qualifications and expertise are appropriate for arbitrators under the TCA. The word “jurisconsult” is not frequently used in the UK but the other qualifications are well understood.

Article INST.17: deals with functions of the arbitration tribunal which include making an objective assessment of the matter before it and shall set out, in its decisions and rulings, the findings of facts and law and the rationale behind any findings that it makes. There are provisions which cover terms of reference (Article INST.18), urgent proceedings (Article INST.19) and the ruling of the tribunal (Article INST.20). These provisions are quite different from the arbitration provisions in the Withdrawal Agreement.

Article INST.29 confirms that the decisions of the tribunal shall be binding on the EU and the UK but will not create any rights or obligations for natural or legal persons. Paragraph 4A. underlines for “greater certainty” that the courts of each Party shall have no jurisdiction in the resolution of disputes between the Parties. This fulfils the UK Government’s objective of excluding the jurisdiction of the CJEU. In the Withdrawal Agreement there is a reference procedure to the CJEU for an opinion on matters of EU law but that is not provided for in this article.

We agree with the provision that each Party “shall make the rulings and decisions of the arbitration tribunal publicly available, subject to the protection of confidential information” (ANNEX-INST-X (Rules of procedure)) unfortunately this Annex is not published and we can offer no detailed comments.

Title II: BASIS FOR COOPERATION

Our comments

Article COMPROV.4: Democracy, rule of law and human rights contains important provisions as follows:

“1. The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties.

2. The Parties shall promote such shared values and principles in international forums. The Parties shall cooperate in promoting those values and principles, including with or in third countries.”

We commend the UK and the EU for this explicit commitment to democracy, the rule of law and respect for human rights. In particular we agree with the reference to the Universal Declaration and “the international human rights treaties to which they are parties”. We interpret this reference to include, in the UK’s case, the European Convention on Human Rights.

Draft European Union (Future Relationship) Bill

We have the following comments to make on the draft European Union (Future Relationship) Bill.

Due to the short time available we have not been able to comment in depth on some of the clauses and the schedules. Nevertheless, we hope that the undernoted comments will be of assistance to those who will be participating in parliamentary debates on 30 December 2020.

PART ONE: SECURITY

Criminal records

Our comments

Clauses 1 (Duty to notify member states of convictions) and schedule 1, 2 (Retention of information received from member states), 3 (Transfers to third countries of personal data notified under section 2), 4 (Requests for information from member states), 5 (Requests for information made by member states) and 6 (Interpretation of the criminal records provisions) will implement TCA, Title IX on the Exchange of Criminal Record Information between the UK and the EU.

Passenger and vehicle registration data

Our comments

Clauses 7 (Passenger name record data) and schedule 2 will implement TCA, Title III on the Transfer and processing of passenger name record data. Clause 8 (Disclosure of vehicle registration data) will implement TCA, Title II.

Evidence

Our comments

Clause 9 (Mutual assistance in criminal matters) and Schedule 3 will implement TCA, Title VIII on Mutual Assistance. Clause 10 (Accreditation of forensic service providers) amends the Accreditation of Forensic Service Providers Regulations 2018 to bring it into conformity with the TCA Title II.

Extradition

Our comments

Clauses 11 (Member States to remain category 1 territories), 12 (Dual criminality) and 13 (Category 1 territory not applying Trade and Cooperation Agreement to old cases) deal with aspects of the implementation of TCA, Title VII on Surrender.

PART TWO: TRADE AND OTHER MATTERS

Information about non-food product safety

- 14 Disclosure of non-food product safety information from Europe within UK*
- 15 Disclosure of non-food product safety information to Commission*
- 16 Offence relating to disclosure under section 14(4)(b)*
- 17 General provisions about disclosure of non-food product safety information*
- 18 Interpretation of sections 14 to 17*

Use of relevant international standards

- 19 Use of relevant international standards*

Customs and tax

- 20 Disclosure of information and co-operation with other customs services*
- 21 Powers to make regulations about movement of goods*
- 22 Administrative co-operation on VAT and mutual assistance on tax debts*

Transport

- 23 Licences for access to the international road haulage market*
- 24 International road haulage*
- 25 Disclosure of data relating to drivers 'cards for tachographs*

Social security

- 26 Social security co-ordination*

Privileges and immunities

- 27 The EU and Euratom and related organisations and bodies*

Energy

- 28 Nuclear Cooperation Agreement*

Our comments

We have no comment on clauses 14-28

PART THREE: GENERAL IMPLEMENTATION

General implementation of agreements

- 29 General implementation of agreements*

Our comments

We consider that clause 29 will implement the TCA and the Security of Classified Information Agreement. There is no reference in clause 29 to the Nuclear Cooperation Agreement. The Government should explain why this is the case.

30 Interpretation of agreements

Our comments

Clause 30 requires courts or tribunals to have regard to Article COMPROV13 (public international law).

Powers

31 Implementation power

Our comments

Clause 31 provides relevant national authorities (a Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities) with the power to make regulations as considered appropriate to implement the TCA, the Nuclear Cooperation Agreement the Security of Classified Information Agreement or any relevant agreement. Regulations under clause 31 can make any provision that could be made by an act of parliament including modifying the European Union (Future Relationship) Bill.

These are very broad regulation making powers and the relevant national authorities should be required in the bill to consult with relevant stakeholders before making regulations under clause 31.

Our comments in relation to the regulation making power under Clause 31 apply equally to Clauses 32 (Powers relating to the start of agreements) and 33 (Powers relating to the functioning of agreements).

Financial provision

Our comments

We have no comments on clauses 34 (Funding of PEACE PLUS programme) and clause 35 (General financial provision).

Parliamentary scrutiny

36 Requirements in Part 2 of CRAGA

Our comments

In terms of clause 36, approval under the Constitutional Reform and Governance Act 2011 (CRAGA) will not apply to the TCA, the Nuclear Cooperation Agreement or the Scrutiny of Classified Information Agreement. This restricts the proper processes of scrutiny even further in relation to the ratification process.

PART FOUR: SUPPLEMENTARY AND FINAL PROVISION

Supplementary

37 Interpretation

38 Regulations

39 Consequential and transitional provision etc.

Final

40 Extent, commencement and short title

Our comments

We have no comments on Part Four.



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