



Law Society
of Scotland

Proposal

UK Government

Negotiation Priorities on leaving the EU:

Proposals by the Law Society of Scotland

November 2016



Introduction

The Law Society of Scotland is a professional body for over 11,000 Scottish Solicitors.

With our overarching objectives 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, promote the provision of excellent legal services and ensure that public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in 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.

General Comments

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. The UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and it has as much potential to affect people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have a breadth, depth and far reaching effect for the immediate future and for several years to come.

Both prior and subsequent to the Referendum the Society conducted polls of its members and has developed the important messages from our dual statutory function to act in both public and membership interests. The following issues arise from that analysis and membership survey:-

Public interest issues

- Ensuring stability in the law.
- Maintaining freedom, security and justice.
- Maintaining recognition and enforcement of citizens' rights including the rights of parties with pending cases before the Court of Justice of the EU.
- Promoting immigration, residence, citizenship and employment rights of EU Nationals resident in the UK.

- Taking account of the interest of the devolved administrations and Scots Law in the exit negotiations.

Membership Issues

- Promoting continued professional recognition and continued rights of audience in the EU.
- Protecting legal professional privilege for the clients of Scottish Lawyers working in the EU or advising on EU Law.

The Society's Proposals for the UK Government's Negotiation Priorities on Leaving the EU

We have now had the chance to review the political landscape in which the next steps will unfold. The Prime Minister has indicated that she will notify the European Council of the decision to withdraw the UK from the EU in March 2017. Accordingly the Society has prepared this proposal to inform the UK Government about the legal issues we consider to be most pressing for the negotiation process.

Public Interest Issues

Ensuring stability in the law

The UK Government's policy objective should be to retain existing EU law at point of exit and then repeal or amend in the post exit period when there is more time for consultation and proper scrutiny by the UK Parliament and the Scottish Parliament, the Welsh and Northern Ireland Assemblies.

We support the UK Government's decision to maintain consistency and stability in the law.

The need to maintain stability in the law, repeal legislation and prepare new legislation to fill in gaps arising from leaving the EU will comprise a significant part of domestic legislation which is passed at or following withdrawal for some years to come.

We take the view that the bill which will repeal the European Communities Act 1972 should contain a clause which preserves and continues existing EU Law whether derived from direct or indirect effect provisions. Laws with direct effect (Treaties and Regulations) will cease to apply once the withdrawal agreement is in place, the UK is no longer a member of the EU and the European Communities Act 1972 has been repealed. However it would be inappropriate to include in any new law the wholesale repeal of direct effect provisions without making some alternative arrangements. These arrangements would ensure clarity and stability in the law and prevent legal uncertainty. Similarly EU law with indirect effect (Directives) has already been transposed into domestic legislation through either primary or secondary legislation by the UK Parliament or the Scottish Parliament. That law will continue to be part of the UK and Scots Law until and unless it is specifically repealed. Many statutory instruments deriving from EU Directives have been enacted under Section 2 of the 1972 Act and so would be repealed once the Act is repealed unless explicitly retained.

International Trade Law creates the basis for UK import and export activity which has a direct impact on economic and commercial growth and development. This affects everyone and therefore it is important that new trade agreements are constructed in line with existing standards of trade law and put in place without undue delay to minimise disruption to the economy.

In order to reassure and create stability for businesses, consumers and citizens, it is vitally important that effective transitional arrangements are in place to ensure that disruption to existing commercial and personal legal arrangements are minimised.

Maintaining Freedom, Security and Justice

We propose that the UK should seek as part of the Withdrawal Agreement to maintain the existing EU Freedom, Security and Justice Legislation, including the European Arrest Warrant, access to EU databases, information exchange systems, agencies and cross-border co-operation framework.

The Lisbon Treaty created the Area of Freedom, Security and Justice (AFSJ), which covers policy areas that range from the management of the EU's external borders to judicial cooperation in civil

and criminal matters and police cooperation. It also includes asylum and immigration policies and the fight against crime (terrorism, organised crime, cybercrime, sexual exploitation of children, trafficking in human beings, illegal drugs, etc.).

The UK retained an opt-in facility granted to the UK and Ireland under the Amsterdam Treaty in 1997 and has opted into (or in the case of Schengen-related measures has not opted out of) a number measures, including the EU arrest warrant.

EU measures have been developed to deal with cross-border situations, for example where it is suspected that a criminal organisation is operating in several EU countries, or that a suspected criminal is hiding in a different EU country. In such cases, cooperation is necessary. EU law and policy in this area is intended to strengthen dialogue and facilitate action between the criminal justice authorities of EU countries.

a. Access to agencies

As an EU Member State the UK enjoys access to all of the agencies such as Eurojust, the European Police Office (EUROPOL), the European Police College (CEPOL), the European Union Agency for Fundamental Rights (FRA) and the European Network and Information Security Agency (ENISA). These agencies participate in the EU wide investigation of crime and subsequent prosecution by way of data sharing measures, identifying whereabouts of a suspect and the obtaining of a European Arrest Warrant.

The UK Government should as part of the withdrawal agreement negotiations give priority to maintaining access to all agencies. It would also be desirable for the UK to retain the ability to influence the policies and operational activities of those organisations but after withdrawal from the EU this would be a challenge.

b. Europol

We agree with the decision of the UK Government to opt in to the new Union Agency for Law Enforcement Co-operation Regulation EU 2016/794 by January 2017 in order to continue access to Europol. Membership of Europol will continue until such time as the Regulation was repealed,

although there is provision for the Commission to review and evaluate the working practices of the agency every 5 years. We propose that the UK Government should seek to secure the UK's continued membership of the Europol network.

c. Schengen Information System (SIS)

The SIS facilitates the real-time sharing of information and alerts between the relevant authorities in participating countries, it is in operation in all EU Member States and Associated Countries that are part of the Schengen Area. Special conditions exist for EU Member States that are not part of the Schengen Area, of which the UK is one. The SIS enables the UK to exchange information with Schengen countries for the purposes of cooperating on law enforcement.

This provides UK police forces with the following specific alerts for persons wanted for arrest for extradition; missing persons; witnesses or absconders or subjects of criminal judgments. Access to the SIS has resulted in access to all information on live European Arrest Warrants, and information in respect of previous convictions of individuals who have offended within the EU and out with the UK.

The UK Government should follow other non-EU countries and continue access to the SIS, particularly if an EAW style framework for extradition to and from EU Member States is agreed as part of the Withdrawal Agreement or the post leaving UK/EU relationship.

d. The European Arrest Warrant (EAW)

The EAW is applied throughout the EU and has replaced extradition procedures within the EU's territorial jurisdiction. Judicial procedures have been designed to surrender people for the purposes of criminal prosecution or executing a custodial sentence.

Following a withdrawal from the EU unless the EAW is retained the process for the extradition of individuals will be more expensive, complex and time consuming and will require a new treaty or treaties to underpin any alternative arrangements.

Scotland has been making use of the EAW. The Crown Office and Procurator Fiscal Service in Scotland recently published figures relating to the use of the EAW showing that between 2011

and May 2016 there had been 48 extraditions to Scotland pursuant to EAWs, and 49 EAWs issued by Scotland during the same period.

The options for re-establishing some form of mutual recognition in criminal matters with countries in the EU following a UK exit, include reversion to the European Convention on Extradition 1957 (“ECE 1957”). Such an approach is likely to result in increased burden for all agencies of the criminal justice system. Bilateral Extradition arrangements will require new treaties with EU member states which may be lengthy and present difficulties.

In 2012, the UK Government made a positive decision to opt into the EAW framework. The time then Home Secretary Teresa May MP outlined some of the reasons in support of the decision to opt-into the framework, for example it being a streamlined process making it easier to bring serious criminals back to the UK to face trial or serve sentences.

Those reasons for opting into the EAW are still sound and the UK Government should take an approach which avoids disengagement from the EAW. There should be no change to the law which would prejudice the safety and security of the individual.

e. The European Investigation Order (EIO)

The UK Government should prioritise the implementation of the Directive regarding the EIO. The UK Government opted-in to this measure and transposition into domestic law must take place by 1st May 2017. The Directive allows member states to carry out investigative measures at the request of another member state on the basis of mutual recognition. These investigative measures include interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications.

We believe the UK Government should implement the EIO Directive.

f. Criminal procedure

The EU published a 'roadmap' on procedural rights in 2009 to ensure that the basic rights of suspects and accused persons. A number of measures followed with proposals to further strengthen procedural safeguards for citizens in criminal proceedings. Of those measures, the UK opted into and transposed the Directives on the Right to Interpretation and Translation in Criminal Proceedings and the Right to information in Criminal Proceedings.

We believe that the rationale for opting into these Criminal Procedure Directives remains, and the Government should avoid any proposal which results in a reversal or erosion of the opt-in and, which diminishes the right of the individual.

Maintaining Recognition and enforcement of citizens' rights including the rights of parties with pending cases before the Court of Justice of the EU.

Maintaining the structure of the Brussels Regulations, the EU Enforcement and Order of Payment, the Maintenance Regulation and Rome I & II on Applicable law are essential to litigants in both the UK and the EU. They assist in the resolution of disputes and are valuable to litigants in their personal and commercial capacities. Other Civil Rights including European Trademark Unitary Patents and Design Rights and pending applications should be included in the Withdrawal Agreement.

Article 81 of the TFEU states that the EU shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases... Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

The treaty arrangements are backed up by a number of civil justice instruments into which the UK has opted. These include the Brussels I Regulation on the mutual recognition and enforcement of civil and commercial judgements across member states, which sets out the Rules governing cross-border jurisdiction disputes. The principal rule is that court where a defender is domiciled has jurisdiction. Other EU instruments with significant domestic impact include the EU Enforcement Order 2004 and Order of Payment 2006, and Rome I and II on applicable law.

The EU has also made law in a number of areas concerning civil judicial cooperation in cross-border family cases. The law includes the Brussels II (a) Regulation on the jurisdiction of matrimonial proceedings, principally divorce. This regulation also allows for the mutual recognition and enforceability of judgements concerning parental responsibility and supplements the Hague Convention and provides a mechanism for the return of abducted children. The Maintenance Regulation provides rules for assessing jurisdiction in maintenance disputes and for identifying the law which will be applied as well as for the recognition and enforcement of maintenance decisions from other EU member states' Courts.

When the UK leaves the EU this body of law will cease to apply in the UK as Article 81 and the regulations and directives flowing from it will not operate outside the EU. Prior to the TFEU and the EU regulations arrangements were made for cross border litigation by way of bilateral treaties and other conventions. When the UK exits unless there is provision in the Withdrawal Agreement this solution will need to be adopted. This will take time, incur cost and delay and will leave citizens with civil or family law issues in limbo unless there is provision in the Withdrawal Agreement.

In family cases, there are some practical problems with the implementation of Brussels II (a) but family practitioners generally agree that the regulation makes the law in this area clearer.

In terms of Intellectual Property the creation of the European Union Intellectual Property Office and EU Trademarks and registered Community Design are important processes for UK business and the Withdrawal Agreement must contain provision preserving them and adequate transitional provisions.

Creating arrangements to secure the rights of parties with pending cases before the Court of Justice of the European Union (CJEU)

We believe the UK Government should adopt the option for dealing with pending cases at the CJEU which will cause least disruption to litigants.

The UK's exit will have an impact on litigants before the Court of Justice of the EU (CJEU) on the CJEU itself and on the relationship between the CJEU and the domestic courts in the constitutive jurisdictions of the UK.

The CJEU has the following functions:

- interpreting EU law (preliminary rulings)
- enforcing EU law (infringement proceedings)
- annulling EU legal acts (actions for annulment)
- ensuring the EU takes action (actions for failure to act)
- sanctioning EU institutions (actions for damages)

The impact will affect litigants and their lawyers. Steps must be taken to uphold the rule of law and the proper administration of justice.

Although the numbers are not known, it is probable that there are currently cases pending in the domestic courts which may involve a reference to the CJEU in the next few years. There are also cases which have already been referred and are waiting for a decision. Furthermore, once the UK has left the EU, there will still be a need for a determination on applicable EU law in relation to some cases but the UK will no longer have recourse to the CJEU.

It is critically important that current and pending cases are identified quickly, and that these (plus any new cases) are dealt with using adequate transitional arrangements, rather than left to go through the CJEU system and risk not having been heard before the UK leaves the EU.

There are two options for dealing with such cases:-

Option One would permit the CJEU to hear cases pending at the point of withdrawal and promote compliance with decisions in those cases.

Option Two would provide that the UK Supreme Court would establish an EU Chamber consisting of both UK judges and EU judges with expertise in EU law to deal with cases which are repatriated to the UK following the finalisation of the Withdrawal Agreement.

Promoting Immigration, residence, citizenship and employment rights of EU Nationals in the UK

We believe clarity is needed as a matter of urgency about the residence, housing and work rights of such individuals and their families and how these can be regularised with the minimum of bureaucracy.

The Free Movement Directive (2004/38) deals with the ways in which EU citizens and their families exercise the right of free movement, the right of residence and the restrictions on those rights on the grounds of public policy, public security or public health. The UK is currently bound by treaty to the principle of free movement.

Although the UK is bound by the Treaty obligations to respect the free movement of persons it has opted out of most EU Law on immigration, the best example of which is the Schengen Accords which create the common European area and framework for visas and border control.

UK immigration law is reserved to the UK Parliament under the Scotland Act 1998 and although the UK is bound by treaty to the principle of free movement it has retained control over some aspects of border and visa policy.

The UK Government has stated that an objective of withdrawal from the EU's control of immigration law and policy, borders and visas. There is a debate about the accrued rights of EU citizens and their families. It is desirable that there is early certainty about the status and rights of citizens of other Member States and their families resident in the UK who do not fulfil the current criteria for permanent residence or who move to the UK before the exit Withdrawal Agreement is finalised. It is likely that citizens of EU states living within the UK who do not qualify for permanent residence under the current rules would have to regularise their immigration, residence and visa status.

An EU citizen can apply for a permanent residence card after 5 years residence in the UK. This document proves the right to live in the UK permanently. Eligibility arises if the applicant has lived with an EEA family member for 5 years and the EEA family member is a qualified person throughout 5 years or has a permanent right of residence. The UK Government has stated that when the UK leaves the EU they fully expect that the legal status of EU nationals living in the UK and that of UK nationals in EU member states will be properly protected. The UK Government has also stated that EU nationals who have lived continuously and lawfully in the UK for at least 5 years automatically have a permanent right to reside. This means that they have a right to live in the UK permanently in accordance with EU law. There is no requirement to register for documentation to confirm this status. Furthermore a person can apply for a permanent residence card after that person has lived in the UK for 5 years. The card will prove that person's right to live in the UK permanently.

Similarly, UK citizens living in other member states would have to comply with the immigration, residence and visa requirements imposed by those member states.

Taking account of the interest of the devolved administrations and Scots Law in the exit negotiations

While the UK voted to leave the EU by 52% to 48%, in Scotland the vote in favour of Remain was 62% to 38%. In a speech to the Scottish Parliament following the referendum, the First Minister said that it was the responsibility of the UK government to restore stability and confidence and to set out its plan for the way forward. She underlined the need to involve the Scottish Government in that work at every step of the way.

On 15 July, the Prime Minister visited Scotland to meet with the First Minister. She committed to ensuring that Scotland is fully engaged in UK government discussions on its future relationship with the EU. She also said that she would not trigger Article 50 until she believes that a UK approach and objectives for negotiations have been properly established.

On 22 July, the First Minister attended a meeting of the British-Irish Council in Wales for an "extraordinary summit" of the group. Welsh First Minister Carwyn Jones, who convened the Cardiff summit, said afterwards that the devolved governments should need to give permission before the formal process of Brexit begins (a proposition with which Ms Sturgeon broadly agreed).

In a speech to business leaders, charities and public sector organisations for think tank IPPR1 Scotland on 25 July, Ms Sturgeon listed the five key interests she will seek to protect during the coming months' negotiations.

- Democratic interests - "the need to make sure Scotland's voice is heard and our wishes respected."
- Economic interests - "safeguarding free movement of labour, access to a single market of 500 million people and the funding that our farmers and universities depend on".
- Social protection - "ensuring the continued protection of workers' and wider human rights".
- Solidarity - "the ability of independent nations to come together for the common good of all our citizens, to tackle crime and terrorism and deal with global challenges like climate change".
- Having influence - "making sure that we don't just have to abide by the rules of the single market but also have a say in shaping them."

The UK ought to take into account the views of all devolved administrations. For Scotland, there are particular issues about our legal system, constitutional arrangements such as legislative competency and how EU laws are dealt with once they are repatriated. Scotland may need increased devolved powers. This affects justice and home affairs, environment law, farming and research. Withdrawal from the EU should also not precipitate changes to human rights law (whilst acknowledging that the EU Charter of Fundamental Rights will no longer apply.)

As Bernard Jenkin MP, the Chairman of Public Administration and Constitutional Affairs Committee stated in his note to the Cabinet Office on "Leaving the EU and the Machinery of Government", this is a "Whole of Government project".

The Whole-of-Government concept is important to recognise in terms of the negotiations with the EU because of the breadth, depth and scope of EU Law as it applies throughout the UK. In this context "Whole

of Government” should be interpreted as “Whole of Governance” to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government. This would require a revision of the October 2013 Memorandum of Understanding and Supplementary Agreements between the Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee. This revision would take into account of the extraordinary circumstances which apply because of the UK’s exit from the EU and establish structures to help achieve the best outcome for the UK and its constituent nations. In particular Supplementary Agreement B which contains the “Concordat on Coordination of European Union Policy issues” with Sections B1 relating to Scotland, B2 to Wales, B3 to Northern Ireland and B4 providing a common annex needs revision. Relevant considerations are also contained in the Concordat on International Relations, Section D of the Memorandum of Understanding and its relevant Sections for Scotland, Wales and Northern Ireland and common annex. Revision of the Memorandum and the annex will enhance the UK response by full engagement with the devolved administrations. A common approach will ensure that the “Whole-of-Government” concept is respected. It is crucially important that communications between UK Ministers and the devolved administrations are as transparent as possible. Whitehall departments must be fully appraised of the considerations which are of importance to the devolved administrations and fully cooperative with the devolved administrations, the Scottish Parliament and the Welsh and Northern Ireland Assemblies.

The Communiqué from the Joint Ministerial Committee on 24 October 2016 which notes the agreement to form a new Joint Ministerial Committee on EU Negotiations is a step forward but cooperation between the UK Government and the Devolved Administrations must be embedded in Government departments to ensure the success of the negotiations.

Promoting continued professional recognition and continued rights of audience in the EU

We believe that the UK Government should negotiate the continuity of the EU law concerning the transnational practice of law and legal professional privilege in the Withdrawal Agreement. We have drafted an article for the Withdrawal Agreement which can be found at the Appendix.

Free movement of lawyers

The 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)
- Lawyers' Establishment Directive of 1998 (98/5)
- Recognition of Professional Qualifications Directive (2005/36)4

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.

The Lawyers' Services Directive (temporary provision)

The Lawyers' Services Directive 1977 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. Migrating 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.

Permanent establishment under home title

The Establishment Directive 1998 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 practicing – 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

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 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:

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

It is also worth bearing in mind that a number of our future lawyers take advantage of programmes to broaden their horizons during their studies, which rely on reciprocal arrangements with other EU universities. The ERASMUS programme, the best-known EU student exchange programme established in 1987, has a number of participants from Scottish law schools.

Legal professional privilege

The CJEU decided the case of *AKZO NOBEL Ltd and AKCROS Chemicals Ltd v The European Commission (C-550/07)* in September 2010. The judgement concerned the application of legal professional privileged communications between a client and in-house Counsel. The Court also decided to exclude all lawyers qualified outside the EU from the application of legal professional

privilege. The case proceeded on the precedent of the ECJ in *AM&S Europe v the Commission* [1982] ECR 1575 paras 25-26 which also excluded non-EU lawyers from the application of legal professional privilege. The Court acknowledged that legal professional privilege applies to communications between a client and his independent lawyer but limited the definition of lawyer to “a lawyer entitled to practice his profession in one of the member states, regardless of the member state in which that client lives... but not beyond”. The apparent basis of the exclusion of third countries from the benefit of legal professional privilege within the EU is the difficulty of the “Court being able to ensure that the third country in question has a sufficiently established Rule of Law tradition which would enable lawyers to exercise the profession in the independent manner required and they to perform their role as collaborators in the administration of justice”. *Opinion of Advocate General Kokott, 29 April 2010 paras 60-61*. Legal professional privilege and Confidentiality of Communications is a key aspect of the Rule of Law in the UK and is acknowledged by the Courts and Parliament as central to the administration of justice. Recently legislation such as the Investigatory Powers Bill and the Policing and Crime Bill specifically acknowledge the requirement to protect legal professional privilege and confidentiality. The doctrine is upheld under human rights law in *Campbell v UK (1992) 15 EHRR 137*. The loss of legal professional privilege and confidentiality will have a negative impact on the rights of clients and on the ability of lawyers in the UK to provide a full service to their clients when acting in EU legal issues or on matters which relate to EU Law or business in the EU. The UK legal systems clearly meet the test which Advocate General Kokott identified in respect of the Rule of Law and the independence of the lawyers in those systems and should therefore have legal professional privilege accorded to the lawyer/client relationship when EU Law is an issue.

This should be a priority for the UK Government in the negotiations in order to ensure that UK Lawyers can function fully when acting for British EU clients and third country who wish their legal services and advice.

Appendix

UK-EU WITHDRAWAL AGREEMENT DRAFT ARTICLE ON LEGAL SERVICES

1. The parties recognise that trans-European and transnational legal services that cover the laws of multiple jurisdictions play an essential role in facilitating trade and investment and in promoting economic growth and business confidence.
2. The parties shall regulate or seek to regulate UK and EU lawyers and transnational legal practices, subject to such amendment as may be necessary to reflect this Agreement, in such a manner as existing EU Law currently provides. Accordingly the parties agree that the following Directives continue to apply in the UK, notwithstanding that the UK is no longer a member State of the EU:-
 - (i) The Lawyers Services Directive of 1977 (77/249)
 - (ii) The Lawyers Establishment Directive of 1998 (98/5); and
 - (iii) Recognition of Professional Qualifications Directive (2005/36) in respect of lawyers' qualifications.
3. The parties also agree that:-
 - (a) foreign lawyers may practice foreign law on the basis of their right to practice that law in their home jurisdiction;
 - (b) foreign lawyers may prepare for and appear at commercial arbitration, conciliation and mediation proceedings;
 - (c) lawyers qualified in a UK jurisdiction may prepare for and appear in the Court of Justice of the European Union;
 - (d) provision of legal services through web based or telecommunications communications technology is permitted;
 - (e) foreign lawyers and domestic (host country) lawyers may work together in the delivery of full integrated transnational legal services; and

- (f) “foreign lawyer” means in relation to the UK, a lawyer qualified in an EU member state and in relation to the EU, a lawyer qualified in the UK, as referred to in Article 1 of the Lawyers Establishment Directive of 1998 (98/5) and the term “Foreign Law”, shall be construed accordingly.

For further information, please contact:

Michael Clancy
Director Law Reform
Law Society of Scotland
DD: 0131 476 8163
michaelclancy@lawscot.org.uk