



Law Society  
of Scotland

# Written Evidence

## Scotland's Place in Europe

January 2017



## 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.

We welcome the opportunity to consider and respond to the Scottish Governments paper: Scotland's Place in Europe, and have the following comments to put forward for consideration.

## General Comments

The UK's exit from the EU has many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and has as much potential to affect many 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 depth, breadth and far reaching effect for the immediate future and for several years to come. We welcome the Scottish Government's paper, which provides an important contribution to the debate on Scotland's future relationship with Europe.

While the specific proposals in the Scottish Government's paper will require careful consideration, and we provide some comments below on the different sections of that paper, we would stress that as part of whatever framework is negotiated between the UK and the EU there are a number of legal issues that will be important to address in order to protect the rights and interests of everyone in the UK. These issues include ensuring stability in the law, maintaining freedom, security and justice, maintaining recognition and enforcement of citizens' rights, and promoting the rights of EU nationals resident in the UK. We have discussed these issues in full in our paper to the UK Government on Negotiation Priorities on Leaving the EU.<sup>1</sup>

<sup>1</sup> Negotiation Priorities on leaving the EU: Proposals by the Law Society of Scotland (November 2016)  
<http://www.lawscot.org.uk/media/983776/proposal-uk-government-negotiation-priorities-on-leaving-the-eu-final-021216-.pdf>

## Protecting Scotland's Interests

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### The Single Market

Following the Prime Minister's speech on 17 January 2017, setting out the UK Government's 12 priorities for the negotiations with the EU, it has been confirmed that the UK Government will not seek to remain in the Single Market after leaving the EU.

The Prime Minister has stated that she intends to pursue a free trade agreement with the EU allowing the maximum possible freedom to trade and operate between EU member states and the UK. This would involve accessing the Single Market without being a member, and preserving elements of the current arrangements where it is deemed appropriate.

The feasibility of a new free trade agreement with the EU is a matter for political negotiation. The current operation of the Single Market has significant implications on the trade of goods and services in a very wide range of industries, including the legal sector.

We believe that the Scottish Government should advocate for, and the UK Government should negotiate the continuity of the EU law concerning the transnational practice of law and legal professional privilege for Scottish solicitors after the UK leaves the EU. Without the continuation of arrangements allowing for free movement of lawyers, Scottish solicitors will face significant challenges in providing legal services within the EU. Each EU member state will have its own requirements for third country lawyers to meet before being permitted to operate within their jurisdiction, with different rules relating to the provision of legal advice on home country or international law, advising on EU law or on the law of the host state, admission to the local legal profession, and the establishment of a law firm. Common requirements include examinations, residence in the host state, EU nationality, and reciprocal arrangements.

### Differentiated Solutions for Scotland

The Scottish Government's paper proposes the potential for Scotland to have a differentiated relationship with the EU compared to the rest of the UK, negotiated as part of the overall withdrawal agreement between the EU and the UK.

The Scottish Government's preference is for Scotland to remain within the EEA and the Single Market, even if the rest of the UK does not. The paper sets out examples of other situations where regions or sub-states have different relationships with the EU to the Member State. However, a key factor in the examples given is precisely that – the regions are a part of a Member State of the EU.

The obvious mechanism currently available for States to be part of the Single Market and the EEA without being members of the EU is membership of EFTA. Membership of EFTA is currently only available to

countries that qualify as States in international law. As Scotland does not presently hold that status, it is difficult to see how membership of EFTA would be achieved. However, we also recognise that many of the issues around a differentiated arrangement for Scotland are essentially political matters which will be subject to negotiation between Scotland and the UK, as well as the UK and the EU.

## **Further Devolution and the Constitutional Consequences of Brexit**

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We agree with the Scottish Government that the issue of devolved areas sitting within EU competence creates issues which require to be dealt with properly at the point the UK leaves the EU and that there are a number of options for taking forward the devolution of the areas of agriculture, food and drink, fisheries aquaculture and the marine environment, environmental protection, civil law, criminal law enforcement, health, and higher education and research.

Some of these may be dealt with in the context of the withdrawal agreement between the UK and the EU such as civil law and criminal law enforcement, but others will be effectively repatriated at the point of leaving the EU. The Prime Minister stressed that “no decisions currently taken by the devolved administrations will be removed from them”, but that devolution of repatriated powers would need to be managed in such a way as to ensure no new barriers within the UK are created. How best to deal with the onward devolution of these issues in a fashion which provides for stability and proper transfer of functions to the devolved administrations of the UK is one for consideration and consultation.



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