



Law Society
of Scotland

Briefing on the UK/EU Withdrawal Agreement and the Political Declaration

November 2018





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Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

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

This briefing is designed to identify:-

1. The procedural setting for the Withdrawal Agreement and Political Declaration and consequently for the debate culminating in a “meaningful vote” under the European Union (Withdrawal) Act 2018.
2. An analysis of the Withdrawal Agreement seen from the perspective of the Law Society of Scotland.
3. An analysis of the Political Declaration seen from the perspective of the Law Society of Scotland.

The Society has taken a keen interest in the UK's withdrawal from the EU and has tried to provide impartial commentary on legislation, parliamentary inquiries, and papers produced by the EU Commission and the Scottish Parliament and Scottish Government. Throughout the process we have identified priorities such as clarity in the law, clarity on the rights of EU citizens in the UK and UK citizens in the EU the role of Scottish Parliament and Scottish Ministers and acknowledgement of the distinctive aspects of the Scottish Legal system and legal professions.

We hope that you will find this briefing helpful in the up and coming debates on the Withdrawal Agreement and Political Declaration.

General Comments

1. The Withdrawal Agreement (WA) and the Political Declaration (PD) in EU and UK Process.

The WA and the PD require to satisfy firstly the provisions of article 50 TEU (Article 50) and secondly Section 13 of the European Union (Withdrawal) Act 2018 (the Act).

1. The relevant provisions of Article 50 (paragraphs 2 and 3) state:

“2. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

2. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

Section 13(1)(a) states:

“(1)The withdrawal agreement may be ratified only if—

(a) a Minister of the Crown has laid before each House of Parliament—

(i) a statement that political agreement has been reached,

(ii) a copy of the negotiated withdrawal agreement, and

(iii) a copy of the framework for the future relationship,”

Our Comment

Our view is that the WA and the PD formally satisfy the terms of both Article 50 and the Act and that the process of ratification under Article 50 and section 13 may proceed. We note that the WA is also subject to the process under Constitutional Reform and Governance Act 2010.

2. The Withdrawal Agreement (WA) - structure and analysis

The WA comprises six parts I. Part One common provisions, II. Part Two citizens' rights, III Part Three separation provisions which regulates many areas of law, (such as goods placed on the market before the end of the transition period, ongoing customs procedures, ongoing VAT and excise duty matters), IV Part Four transition, V. Part Five financial provisions and VI Part Six institutional and final provisions.

A number of WA provisions involve the CJEU: Part One which defines the scope and characteristics of Union law which will apply in the United Kingdom after withdrawal; Title X of Part Three, on 'Union judicial and administrative procedures'; Part Four, on the transition period; and Part Six, covering the interpretation and application of Union law within the framework of the Agreement, decision-making procedures and dispute settlement.

Part One Common Provisions of the Withdrawal Agreement

(a) Effects of Union law in the United Kingdom after withdrawal

The WA sets out the rights for EU27 citizens resident in the UK and for UK nationals resident in the EU27 Member States which apply from 30 March 2019 (WA article 185) until the end of the transition or implementation period on 31 December 2020 (WA article 126). Article 2 provides a wide definition of the notion of 'Union law' for the purposes of the Agreement, including the 'general principles of the Union's law' and the 'acts adopted by the institutions, bodies, offices or agencies of the Union', including decisions of the Court and international agreements and relevant acts of the Member States within the EU legal order.

Article 4(1) of the WA provides that the WA and those provisions of Union law made applicable by the WA 'shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. Furthermore Article 4 (2) states 'legal and natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law'. The United Kingdom is to ensure compliance with these obligations through primary legislation - presumably through the prospective EU (Withdrawal Agreement) bill.

Article 4(1) does not, however, expressly require the disapplication of provisions of United Kingdom law which are inconsistent or incompatible with Part Two of the WA as did the equivalent provision of the text of 19 March 2018.

Article 5 states the principle of 'full mutual respect and good faith', similar to the duty of sincere cooperation laid down in Article 4(3) TEU.

Article 6(1) provides that other than in respect of the provisions governing the transition period and the financial settlement, or as otherwise provided, Union law will be understood as it was applicable on 31 December 2020, the last day of the transition period.

(b) Treatment of the United Kingdom as a 'Member State'

For the purposes of the WA 'all references to Member States and competent authorities of the Member States in provisions of Union law made applicable by this Agreement shall be read as including the United Kingdom and its competent authorities' (Article 7(1)).

Subject to the following exceptions:

‘the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions’ (Article 7(1)(a)); ‘the participation in the decision-making and governance’ of institutional bodies other than the institutions (Article 7(1)(b)); attendance in the meetings neo-comitology committees, Commission expert groups, and so on (Article 7(1)(c)).

Part Two Citizens Rights.

Part Three The Separation Issues.

Part Four Transition Period

(a) Duration of the transition period

Under Article 126, the transition period runs from the WA’s entry into force on 30 March 2019 until 31 December 2020, which is the cut-off date for determining whether individuals can benefit from the provisions of Part Two of the WA.

Under Article 132 the Joint Committee may, before 1 July 2020 ‘adopt a single decision extending the transition period’ by a period of one or several years.

Our Comment

Any such decision would clearly impact on the application of the WA, and could give rise to legal uncertainty. How would the parties mitigate this uncertainty? Under article 127 during the transition period, EU law has to continue in the UK but EEA states also need to continue to treat the UK as if it were still a member state. Paragraph 6 appears to achieve that end and it purports to do so in respect of directly applicable EU law as well as EU law that needed implementation by the member states. Has the UK Government received assurances from the EU that the withdrawal agreement can achieve this result?

(b) Application and effects of Union law during the transitional period, ‘Union law shall be applicable to and in the United Kingdom’, subject to a number of specified exclusions (Article 127(1)). Such Union law ‘shall produce in respect of and in the UK the same legal effects as those which it produces within the EU and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union’ (Article 127(3)).

Unless otherwise provided, ‘any reference to Member States in the Union law applicable pursuant to [Article 127(1)], including as implemented and applied by Member States, shall be understood as including the United Kingdom’. Article 128(1) provides that Article 7 concerning the exclusion of United Kingdom members from ‘participation in the decision-making and the attendance in the meetings of the institutions’, applies during the transition period.

External Action

The UK has obligations concerning the EU's external action. During the transition or implementation period the UK is bound by 'the obligations stemming from the international agreements concluded by the Union, or by the Member States acting on its behalf, or by the Union and its Member States acting jointly' (Article 129(1)). For its part, the EU 'will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements' and, if need be, inform other parties of any extension of the transition period (footnotes to Article 129(1) and 132(1)).

Our Comment

The Government and the EU should explain the legal effectiveness of the footnotes to articles 129 (1) and 132 (2)

In accordance with the principle of sincere cooperation laid down in Article 129(3), when acting in its own right the UK 'shall refrain ... from any action or initiative which is likely to be prejudicial to the Union's interests',

Our Comment

The UK can negotiate and conclude international trade treaties during the transition period, provided they do not come into effect before 1 January 2021, though under Article 2(1) TFEU, the Union could already authorise the United Kingdom to conclude such treaties while it is still a Member State.

Article 129 is unclear and could create misunderstandings between the parties. While the UK may enter into agreements in the areas of the EU's exclusive competence, such agreements may not enter into force or apply during the transition period unless the Union so authorises.

3. The Political Declaration (PD) -- Structure and analysis

The PD sets out the framework for the future relationship between the EU and the UK has been agreed by the negotiators and agreed in principle at political level. It sets out the scope and terms of the future UK-EU relationship which guide the negotiators to the future relationship by 31 December 2020 covering an economic partnership, a security partnership and other agreements on areas of shared interest.

PART I: INITIAL PROVISIONS

I. BASIS FOR COOPERATION

A. Core values and rights

"6. The Parties agree that the future relationship should be underpinned by shared values such as the respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation. The Parties agree that these values are an essential prerequisite for

the cooperation envisaged in this framework. The Parties also reaffirm their commitment to promoting effective multilateralism.

7. The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.”

Our Comment

We agree with the terms of the basis for cooperation as expressed in paragraphs 6 and 7 of the Declaration. However the Government should confirm whether or not it is also reaffirming its commitment to the Human Rights Act 1998 as well as to the ECHR.

Will the Government confirm that the UK's equality and human rights legal framework will be preserved and that there will be no regression from the principles and standards which are already established in Union legislation and jurisprudence? Will the Government aim to ensure that we remain aligned with the EU in this area of law, that there is no dilution in rights or stagnation in an area of law which protects the most vulnerable in society? The Government should ensure that during the negotiations for the Future Relationship the UK's other international obligations such as those in the UN Convention on the Rights of Persons with Disabilities ([A/RES/61/106](#)) are complied with.

B. Data protection

Our Comment

We agree with the Parties commitment to a high level of personal data protection and the timetable for the Commission's assessments of the UK's standards as expressed in paragraphs 8 -10 of the Declaration. Whilst we are content with the commitment we have previously raised concerns regarding adequacy. The ability to freely exchange data with other countries is vital to the continued health of the information economy. We would therefore urge the Government to begin discussions as soon as possible with the EU to secure an early adequacy designation for the UK.

II. AREAS OF SHARED INTEREST

Our Comment

We agree with these proposals.

PART II: ECONOMIC PARTNERSHIP

I. OBJECTIVES AND PRINCIPLES

Our Comment

We note that “the Parties agree to develop an ambitious, wide-ranging and balanced economic partnership” and expect that the shared values will inform the negotiations. However we also believe that the economic partnership should reflect the interests of justice and the UN guidelines on Business and Human Rights.

II. GOODS

Our Comment

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

The Parties need to provide more detail on the terms of the comprehensive arrangements that will create a free trade area, how UK Agencies would cooperate with EU Agencies and what rules the UK would consider aligning under paragraph 25. The Government should clarify how an arrangement which is not a customs union but which “ builds on and improves the single customs territory” would be treated by the WTO and what traders would need to do under this arrangement and how excisable goods should be dealt with. The Government should explain more fully the rules which will apply to prevent circumvention of the proposed tariff system.

III. SERVICES AND INVESTMENT

Our Comment

We need further detail about of the arrangements which cover professional and business services under paragraph 30 and we expect these arrangements to cover legal services. The current arrangements regarding legal services are successful, effective and flexible due to the fact that service providers can provide advice across borders and set up businesses to provide services to their clients. It is important that any reciprocal rights provided for in the Future Relationship are implemented in both the UK and the EU specifically. The Future Relationship must be founded on the key values of respect for the rule of law and furtherance of Human Rights as stated in the shared values. Creation of rights in the Future Relationship without providing a system of remedies or the capability to access advice about those remedies undermines these values.

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. That is why we believe that it is crucially important that citizens across the UK and the EU have access to their lawyers so they can obtain advice about the enforcement of those rights which are recognised in the Future Relationship.

We urge both the EU and the UK to maintain mutual recognition between the EU and the UK on legal qualifications, as near as possible to the current frameworks for the benefit of both EU and UK citizens. In our view the existing regime could form the basis for negotiation in the Future Relationship. The Parties should provide further detail on how paragraphs 31, 32, 35 and 36 will apply to legal services.

We welcome paragraph 39 which addresses equivalence in regulatory cooperation, including in relation to equivalence decisions. The wording suggests that the potential issue of withdrawal of equivalence without sufficient notice has been recognised and that prior notification of changes to regulations that might result in a loss or reassessment of equivalence can therefore be expected. The negotiators ought to consider that there should be a further stipulation that equivalence should not be withdrawn or suspended without cause (which might be implied by ‘transparency’, ‘appropriate consultation’ and ‘stability’ and core values in paragraph 6).

V. DIGITAL

Our Comment

Considering the terms of paragraph 40 the Parties should provide more detail as to how a collaborative approach to regulation of digital markets might be achieved in order to protect consumers while driving innovation and promoting collaboration to realise the benefits of new technologies.

VI. CAPITAL MOVEMENTS AND PAYMENTS

Our Comment

The Parties should provide more information about the proposed exceptions.

VII. INTELLECTUAL PROPERTY

Our Comment

We agree with these proposals.

VIII. PUBLIC PROCUREMENT

IX. MOBILITY

Our Comment

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

Civil Justice Cooperation

Paragraphs 57, 58 and 59 are welcome to the extent that the Parties “confirm their commitment to the effective application of the existing international family law instruments to which they are parties”. It is however of considerable concern that the Political Declaration does not contain full provisions relating to Civil Judicial Cooperation. For example the family law provisions do not appear to include protective orders and there is no provision for civil judicial cooperation to support business or consumers. Will the Government confirm which International family law instruments are covered by paragraph 57?

Civil justice cooperation is key to maintaining the rule of law, promoting the interests of justice, upholding human rights and ensuring that commercial and personal matters can be properly dealt with in courts across the UK and the EU. It is essential that both the UK and EU negotiators ensure that there are adequate provisions in the Future Relationship Agreement and we encourage the negotiating team to pursue this objective. The White Paper emphasised that the UK Government will “work closely with the devolved administrations to ensure that the future arrangements for cooperation with the EU take into account the separate and distinct legal systems in Scotland and Northern Ireland”. Confirmation that such close working has taken place would be welcome.

X. TRANSPORT

Our Comment

We agree with these proposals.

XI. ENERGY

Our Comment

Bearing in mind the shared values we encourage the Parties to keep in view their collective human rights obligations towards patients and potential patients with regard to diagnostic and therapeutic radioisotopes when negotiating the Nuclear Cooperation Agreement.

XII. FISHING OPPORTUNITIES

Our Comment

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

XIII. GLOBAL COOPERATION

Our Comment

We agree with the approach being taken.

XIV. LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION

Our Comment

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

PART III: SECURITY PARTNERSHIP

I. OBJECTIVES AND PRINCIPLES

II. LAW ENFORCEMENT AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

Our Comment

We believe that the Security Partnership should have as a priority the protection of the UK and EU citizens. Organised crime is increasing in complexity and scale and has been recently described as the UK's 'biggest national security threat'. There should be no reduction in the mechanisms being available to the UK when considering future co-operation in combatting crime and security in order to maintain stability and safety that would prejudice or adversely affect the safety of the UK people. That involves deep cooperation between the UK and EU law enforcement agencies, networks and systems on an equivalent basis as at present without diminishing the quality and quantity of effective cooperation. Priorities which need to be achieved to create a new Security Partnership include, cooperation and exchange of information and intelligence through EU agencies, maintenance of the European Arrest Warrant (EAW), European Investigation Orders (EIO) or creation of equivalent mechanisms and co-operation on matters relating to proceeds of crime. Building a new and close 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.

We agree with the proposed agreement to prevent and fight against money laundering and terrorist financing through compliance with FATF standards.

III. FOREIGN POLICY, SECURITY AND DEFENCE

IV. THEMATIC COOPERATION

Our Comment

We agree with the proposals to cooperate in paragraphs 110-117 but otherwise have no comment to make.

PART V. CLASSIFIED AND SENSITIVE NON-CLASSIFIED INFORMATION

Our Comment

We have no comment to make.

PART IV: INSTITUTIONAL AND OTHER HORIZONTAL ARRANGEMENTS

I. STRUCTURE

II. GOVERNANCE

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

The White Paper on the Future Relationship between the United Kingdom and the European Union (Cm 9593) mentioned a number of structural arrangements within which dialogue between the Parties could take place. This included exchanges between the UK Parliament and the EU Parliament. However, there appears to be no mechanism for the devolved legislatures to communicate views or concerns to the European Parliament. We note the role (under paragraph 134) for the CJEU as the sole arbiter of Union law on a reference from the independent arbitration panel.

Our Comment

We note that paragraph 122 states the overarching “framework could take the form of an Association Agreement”. 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 16 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 negotiation will follow the Article 218 procedure in connection with the Association Agreement?

Strategic direction and dialogue

In paragraphs 125-131 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.

The relationships 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.

However there appears to be no mechanism for the devolved legislatures to be able to express views. How does the Government envisage there to be a role for the devolved legislatures and administrations in this context?

The governance arrangements are necessarily complex and reproduce aspects of the existing EU political structure. The provision of transparency and accountability is clearly an important objective. How does the Government intend to achieve this within the proposed structure?

Will the memorandum of understanding and supplementary agreements between the United Kingdom and the devolved administrations be revised in order to ensure that the UK Government will take into account the views of the devolved institutions? 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?

We note the intended remit of the Joint Committee includes dispute resolution. 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 UK members of the Joint Committee should be set out in the implementing legislation.

Interpretation

Our Comment

We note paragraph 131 which seeks to ensure consistent interpretation.



With reference to paragraph 134 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?

III. EXCEPTIONS AND SAFEGUARDS

PART V: FORWARD PROCESS

I. BEFORE WITHDRAWAL

II. AFTER WITHDRAWAL

III. REVIEW POINT

Our Comment

We have no comment to make.



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