The Scottish Parliament's European & External Relations Committee Inquiry Into Scotland's Relationship with the EU

The Law Society of Scotland's response

September 2016

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee ('the Sub-Committee'). The Sub-Committee is comprised of senior and specialist lawyers (both in-house and private practice).

Introductory comments

The UK's exit from the EU is the most significant constitutional development to affect the UK since 1945. Other changes including accession to the European Economic Community in 1972, the development of devolution to Scotland, Northern Ireland and Wales in the 1990's, the adoption of the Human Rights Act in 1998 and the creation of the Supreme Court in 2005 were important constitutional changes most of which have affected the lives of many millions of people living across the UK. However 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 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. Specifically in connection with legal matters changes will require to be carefully thought through. 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". We have analysed what we perceive to be the most significant public interest issues arising from the UK's exit from the EU and also the most significant issues confronting Scotland's solicitors. These are detailed later in this paper.

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 administrators 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.

Scotland's Future Relationship with the EU

It is impossible to identify which relationship would be "best" for Scotland as each option has political, legal, social and economic advantages and disadvantages. Scotland could participate in one of a number of options for a future relationship with the EU.

The options for a future relationship between Scotland and the EU include:-

1. Remain within the UK and participate in a WTO Membership relationship

This scenario will take place if the UK withdraws without simultaneously concluding negotiations with the EU on the new relationship.

The UK is a member of the WTO but its membership will need to be refreshed and in certain respects negotiated and ascertained. This will most likely involve the re-submission of a revised UK schedule of commitments. However, the UK's exit from the EU may also have an impact on some of the EU schedules of commitments under the WTO framework which may also have to be renegotiated (as they were defined when the UK was a member of the EU and accordingly third countries would have access to its market).

2. Remain within the UK which joins the EFTA and EEA agreements

European Free Trade Association (EFTA)

The European Free Trade Association is an inter-governmental organisation set up by the 1960 Stockholm Convention for the promotion of free trade and economic integration for the benefit of its four member states which are Liechtenstein, Norway, Iceland and Switzerland. The association works under the EFTA Convention, EFTA's Free Trade and Partnership Agreements and the European Economic Area (EEA) Agreement

The Association was designed to provide liberalisation of trade in goods amongst its member states as a response to the establishment of the European Economic Community (EEC). The UK was one of the founding members of EFTA but left the Association in 1973 in order to join the European Community. Re-joining EFTA would be subject to the agreement of the member states.

The key to understanding EFTA is that it is a free trade area rather than customs union. Member States set their own tariffs and can make free trade agreements with other countries independently of the Association. EFTA currently has 27 free trade agreements covering 38 countries.

The EFTA states have their own arrangements with the EU. Three EFTA States (Norway, Liechtenstein and Iceland) have the European Economic Area Agreement (EEA) with EU. Joining the EEA would in addition require the agreement from EFTA/EEA states and the 27 EU member states. Switzerland has a separate framework of bilateral agreements with EU.

European Economic Area (EEA)

The agreement on the European Economic Area which came into effect on 1 January 1994 creates a single market between the EU and the three EEA/EFTA states. The EEA agreement provides in Article 1 that the aim of the agreement is to "promote a continuous and balanced strengthening of trade and economic relations between the contracting parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European economic area".

Article 1, paragraph 2 states "In order to attain the objectives set out in paragraph 1 the association shall entail, in accordance with the provisions of this Agreement:

(a) the free movement of goods;
(b) the free movement of persons;
(c) the free movement of services;
(d) the free movement of capital;
(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; and
(f) closer co-operation in other fields, such as research and development, the environment, education and social policy".

The Agreement also covers consumer protection, small and medium sized enterprises, tourism, audio-visuals and civil protection.

The agreement does not cover nor require participation in the EU policies such as the Common Agriculture and Fisheries Policies, the Customs Union, the Common Trade Policy, Common Foreign and Security Policy, Justice and Home Affairs, or Monetary Union.

If on leaving the EU the UK remained a member of the EEA it would still be subject to most EU regulations but would not have direct influence or representation in any of the EU institutions. There would only be indirect influence such as the right to be consulted on EU proposals affecting the UK. *This is EFTA* 2015 edition states that the "EEA/EFTA states do not have the right to participate in the political decision making within the EU institutions. The EEA agreement does however provide the EEA/EFTA state experts with the opportunity to contribute to the shaping of EU legislation at the preparatory stage by participating in the European Commission's Expert Groups and Comitology Committees." These expert groups advise and assist the Commission with the drafting of new laws which the EU Council administers and the European Parliament subsequently adopts. The publication goes on to say that whenever "the European Union adopts or amends an Act related to the single market the contracting parties assess its EEA relevance with a view to amending the applicable Annex to the EEA agreement in order to align it as closely as possible with EU legislation. This permits harmonised law in the EEA, i.e. both within the EU and in the EEA/EFTA states. Both sides to the EEA agreement can request consultation on matters of concern and negotiate adaptations to the EU Act in question."

If EFTA and EEA accession would be possible further analysis is needed whether there are areas not covered by the EEA agreement where the UK would like to continue participating. An example of this is the common trademark system.

3. Remain within the UK and participate in a Free Trade Agreement or an Association Agreement with the EU.

   In this scenario the UK will negotiate a separate free trade agreement or association agreement with the EU, either simultaneously when negotiating the terms of the exit, or if more time is needed for these negotiations than exit allows, there would need to be a transitional arrangements in place after the exit negotiations are concluded.

Issues which might feature in such negotiations include application of the internal market rules rather than trade rules where the UK wants to have a deeper access to the internal market which includes free movement of goods and services.

This agreement would need to be signed and ratified by the UK and all other EU member states according to their constitutional requirements.

4. Remain within the UK and participate in a bespoke relationship with the EU

   Such an agreement arising out of the withdrawal agreement between the UK and the EU would be subject to political discussion and could include access to the internal market, perhaps include some participation in the institutional structures - or lesser access in other areas. It might be possible to use the EU internal market rules, the EEA agreement or EU overseas territories models (such as Greenland) to evaluate the options available.

   The agreement would need to be signed and ratified by the UK and all other EU member states according to their constitutional requirements.

5. Following an independence referendum seek to be admitted as a member state of the EU. The 2016 Scottish National Party Manifesto stated that "the Scottish Parliament should have the right to hold another referendum…if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will." The First Minister, Nicola Sturgeon MSP has subsequently stated that a second independence referendum is "highly likely" following the vote and in the programme for Government announcement on 6 September 2016 stated "62% of those who voted in Scotland, voted to remain in the EU. That's why I am determined to pursue all options to protect our place in Europe…However, to ensure that all options are open … this Programme for Government makes clear that we will consult on a draft Referendum Bill, so that it is ready for immediate introduction if we conclude that independence is the best or only way to protect Scotland's interests." The appointment of Mike Russell MSP as Minister for UK negotiations un Scotland's place in Europe and the creation of a new Sub-Committee of Ministers are also indicative of the Scottish

Government's commitment to examine all the options for Scotland's relationship with Europe. In the event of a successful independence referendum all the other options which are referred to in relation to the UK at pages 1 to 5 would apply to Scotland including participating in WTO membership relationship, seeking to join EFTA and the EEA agreements, or participating in a free trade/association agreement with the EU or participating in a bespoke relationship with the EU.

Each of these options has advantages and disadvantages and political and legal ramifications.

The Withdrawal Process

The withdrawal process is sketched out in Article 50 Treaty of European Union (TEU)

Article 50 (TEU) provides that:-

1. *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

2. *A Member State which decides to withdraw shall notify the European Council of its intention. 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.*

3. *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.*

4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*

   A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.

5. *If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.*

Article 50 suggests a negotiated withdrawal, but the decision to leave does not need the agreement of other Member States. Withdrawal can occur two years after the UK notifies the European Council that it is going to leave, even if there is no withdrawal agreement.

Following there will be negotiations between the EU and the UK with a view to an agreement setting out the withdrawal arrangements. The negotiation period under Article 50 could be lengthy because of the legal, political, financial and commercial issues to be agreed. The withdrawal agreement needs to take account of "framework" for the future relationship with the UK. Article 218(3) TFEU applies to the negotiations and the European Commission has made a recommendation to the Council of the European Union (formerly the Council of Ministers), to authorise the negotiations and appoint the EU negotiator. The negotiator is Michael Barnier, a former EU Commissioner.

The negotiation period under Article 50(2) is to finalise the arrangements for a Member State's withdrawal. Article 50(4) makes clear that the UK cannot participate in discussions about the withdrawal agreement in the European Council.

The Council of the EU, with the European Parliament's consent then concludes the agreement, acting by a Qualified Majority Vote.

The withdrawal agreement rescinds the UK's treaty obligations. They are also dissolved two years after notification of withdrawal to the European Council if the 2 year period is not extended and if there is no agreement.

The EU-UK withdrawal agreement

A withdrawal agreement would contain:-

(a) terms concerning withdrawal covering the areas of law and policy; and
(b) transitional provisions allowing EU law and obligations to continue to apply until the process was finalised.
(c) provisions taking account of the "framework" for the future relationship between the UK and the EU.

Withdrawal from the existing law and policy issues will require great care in order to minimise disruption. Transitional arrangements for alternative regimes will have to be dealt with in relation to legal aspects, projects and other functions funded by the EU. Recognition of rights of establishment, legal rights and obligations under EU law will also be affected. Other issues will include the termination date for participation in EU institutions and bodies and provisions for the employment of EU staff members who are UK citizens.

The withdrawal agreement would follow two stages. The first would be the withdrawal negotiations; the second ratification of the withdrawal agreement by interested parties.

The International change process

This process on an international level is likely to need at least 4 treaties:-

1. the withdrawal agreement as discussed above;
2. the continuing EU member states will have to finalise a treaty amending the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) in order to repeal all references to the UK.
3. if the UK wanted to move from the EU to the European Free Trade Area (EFTA) there would be a treaty of accession; which would need to be approved by the four EFTA states and the departing/joining country; and

4. If the UK wanted to join the European Economic Area (EEA) in addition to EFTA membership, that would necessitate a separate treaty for accession to the EEA. This treaty would need the approval of the EU, its member states, the EFTA/EEA countries and the UK.
5. If other arrangements were to be made they would require further negotiations and agreements.

Article 50(2) TEU requires arrangements for "withdrawal, taking account of the framework for its future relationship with the Union". Therefore that framework would need to be prepared alongside the withdrawal agreement.

The domestic process for dealing with a withdrawal from the EU

The Society is not in a positon to comment on the political implications for the devolution settlement of withdrawal from the EU however there will be legal implications some of which have already been referred to in this paper.

They include the repeal of the European Communities Act 1972 (abrogating EU authority) and a number of other Statutes including treaty legislation. That legislation would also need to include provisions to maintain legal certainty and stability and to deal with issues such as EU laws and treaty provisions having direct effect, trade arrangements with third countries and to deal with the implications for devolution of the repatriation of law making authority from the EU.

It is likely that amendment of the Scotland Act 1998 will be necessary following withdrawal. This depends on the approach taken in the withdrawal agreement and in any implementing legislation. The Act constrains the competence of the Scottish Parliament (Section 29 (2) (d)) and the Scottish Government (Section 57 (2)) so that they must not act in a manner incompatible with EU law.

The Scotland Act 1998 Section 126 (9) provides that –

(a) All those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties and

(b) All those remedies and procedures provided for by or under the EU Treaties,

are referred to as EU Law".

The reference to "EU law" occurs throughout the Scotland Act at various points including Sections 29, 57, 106 and Schedule 5 paragraph 7.

Section 106 also makes provision for Her Majesty or a Minister of Crown to make subordinate legislation transferring a function to Scottish Ministers. In connection with EU law matter this section provides that where subordinate legislation is to be used to split such an obligation under EU law so that that part of the ministerial function of observing and implementing it can be transferred to Scottish Ministers the order cannot be made unless Scottish Ministers have been consulted. Furthermore the Secretary of State's powers of intervention under Section 58 can be used to ensure that the Scottish Ministers share of such an obligation is met.

Paragraph 7 of Schedule 5 provides that international relations (including those with the European Union and its institutions) are reserved matters but there is an exception from the reservation for observing and implementing international obligations, obligations under the ECHR and obligations under EU law. This has effect where the obligations of a Minister of the Crown are transferred to Scottish Ministers. Scottish Ministers have an obligation to implement those obligations so far as they relate to devolved matters. Furthermore a member of the Scottish Government would be acting ultra vires if they made any subordinate legislation or did any other act which is incompatible with any of the EU provision.

Dependent upon the transitional arrangements there will need to be a mechanism for referring a matter to a Court which can adjudicate cases which would be referred to the Court of Justice of the European Union where these are necessary and emerge from litigation in Scotland or at the UK Supreme Court. Subject to the transitional arrangements,

mechanisms will need to be devised to take account of the removal of the Court of Justice of the European Union's jurisdiction.

The laws of both the EU and the UK are likely to change and evolve in a number of ways over a period of time:-

- EU law will change and be amended at EU level but the original legislation in the UK, in so far as it is not amended by the UK Parliament or the Devolved Administrations, would not be automatically amended;
- the courts, tribunals and other decision making bodies of the UK, and ultimately solicitors and their clients, would respect the judgements of the Court of Justice of the EU as persuasive only rather than binding. Case law in the UK and the EU is likely to diverge over time;
- the legislatures in the UK would review and amend laws that had transposed EU directives.

The situation regarding EU regulations defined by Article 288 TFEU would be very complex. They have general application, are binding in their entirety and directly applicable in all Member States. 'Directly applicable' means that, distinct from EU directives, the UK would not have transposed these EU regulations (or indeed Treaty provisions) into its national law. Departure from the European Union would therefore mean that 2029 regulations could cease to apply, creating enormous legal uncertainty for people, institutions and businesses. Provisions would be needed to bring certainty to this situation.

EU membership has had significant importance for Scotland, its people and its law.

The application of the Four Freedoms under the treaty and the significant breadth of EU law mean that EU law affects most people and businesses in Scotland. EU law covers 20 areas of policy and law:-

I. General, financial and institutional matters
II. Customs Union and free movement of goods

III. Agriculture
IV. Fisheries
V. Freedom of movement for workers and social policy
VI. Right of establishment and freedom to provide services
VII. Transport policy
VIII. Competition policy
IX. Taxation
X. Economic and monetary policy and free movement of capital
XI. External relations
XII. Energy
XIII. Industrial policy and internal market
XIV. Regional policy and co-ordination of structural instruments
XV. Environment, consumers and health protection
XVI. Science, information, education and culture
XVII. Law relating to undertakings
XVIII. Common Foreign and Security Policy
XIX. Area of freedom, security and justice
    (a) General
    (b) Free movement of persons
    (c) Judicial co-operation in civil matters
    (d) Police and judicial co-operation in criminal and customs matters
    (e) Programmes
    (f) External relations

XX. People's Europe

In total, omitting decisions there are around 3099 items of legislation from the EU including over 2029 Regulations and 1070 Directives. Most EU legislation, excepting that subject to the UK's opt outs, has been implemented in the UK either directly, by the UK Parliament, or through the devolved arrangements. The UK has opt-outs of various natures in 4 policy areas:-

- The full opt-out from Economic and Monetary Union;

- The semi-flexible opt-out from the Schengen agreement on the abolition of border controls between Member States, where the UK can opt in to participating to Schengen measures subject to the unanimous agreement of the other participating Member States;
- The flexible opt-out from the Area of Freedom, Security and Justice where the UK can choose to opt in to any measures of its choice.
- The special interpretation attached to the reference to the Charter of Fundamental Rights in the UK.

The legal impact of EU law has the following effects:-

(a) the primacy of EU law
(b) the impact on the Scottish Parliament and Scottish Government; and
(c) the impact on clients and the general public

(a) <u>The primacy of EU law</u>

The European Communities Act 1972 ensures that EU law has primacy over UK law. It has been applied in the UK in relation to subordinate legislation in the decision in *R v Secretary of State for Transport ex parte Factortame Ltd [1992] 1AC603*. Accordingly, solicitors must be aware of the EU law in order to assess whether law made in any jurisdiction in the UK is validly made. Under the principle of direct effect, some EU laws create rights and obligations without the need for transposition. EU law covers a large range of legal topics with impact (or potential impact) on a significant number of EU citizens. The decisions of the Court of Justice of the EU are binding on UK Courts.

As noted, EU law applies in many areas of the law which fulfils the comments made. As Denning MR who said *in Bulmer v Bollinger [1974] 2 All ER 1226* "But when we come to matters with a European element the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward part of our law. It is equal in force to any statute".

Accordingly EU law is a compulsory subject for those wishing to qualify as a Scottish solicitor.

(b) The impact on the Scottish Parliament and the Scottish Government

The Scotland Act 1998 embeds EU law into the fabric of devolution. Section 29 of the Scotland Act provides that legislation passed by the Scottish Parliament "is not law" if it "(d) is incompatible with…EU law". Compliance with EU law is therefore a basic condition of the validity of law passed by the Scottish Parliament.

Furthermore, Executive competence concerning EU law is also determined by Section 57, Scotland Act 1998 which states in subsection (2) "A member of the Scottish Government has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with EU law".

(c) The impact on clients and the general public

Solicitors routinely advise their clients, whether they are individuals or businesses, on the impact of EU law and policies. Solicitors do so so that clients are kept informed of their rights and obligations under EU law, are able to enjoy the opportunities afforded to them by EU law and policies, and be defended or seek redress when matters go wrong. Areas of law affected by EU law include Civil Justice, Company law, Competition law, Consumer law, Criminal law, Employment law, Environment law, Equality law, Family law, Financial services, Human rights law (through the Charter of Fundamental Rights), Immigration law, Intellectual Property law, Mental Health and Disability law.

Although the majority of the EU policy output is of a legislative and regulatory nature, it is important not to forget the extent of distributive and redistributive policies by the EU and their impact on Scottish clients: the Common Agricultural Policy; the European Structural and Investment Funds (including the European Regional Development Fund and the European Social Fund); and the Research and Innovation Framework Programme (Horizon 2020);

EU law also impacts on Scottish clients in many aspects of their daily lives and business.

EU law has relevance for the individual as: an employee (e.g. working time directive, minimum standards in annual leave); a parent (minimum standards in parental leave); a man/woman (equal opportunities); a consumer (food standards; minimum standards in consumer rights; impact of EU competition policy); a business traveller or a tourist (air passenger rights); a patient (EU approval of medicines and medical devices), a person wishing to live in a safe and healthy environment (air and water quality controls), and also as to his or her right to study, work and retire in another EU Member State.

EU law has relevance for businesses as: employers (working time directive, posted workers directive); inventors (European unitary patent); producers (food standards; environmental standards); procurers of services (public procurement); as exporters (common commercial policy); holders of data (data protection directive and the forthcoming regulation); members of an industry impacted by EU level regulation (Agriculture and Fisheries; Banking and Financial Services; Chemical products; Energy; Healthcare; Telecoms and Technology), SMEs or large corporations (late payments directive; competition policy), and also as to their right to sell and provide cross-border goods and services and/or establish business in another EU Member State.

Of particular interest to clients of solicitors when things go wrong, as they sometimes do, EU law has a number of provisions to help seek redress and access to justice on a cross-border basis: in criminal law matters (e.g. the European Arrest Warrant; the European Investigation Order), family law (jurisdiction, recognition and enforcement of court decisions on divorce, child custody and child maintenance – the Brussels IIa Regulation), consumer law and civil justice (European Small Claims procedure; European Order for Payment).

To ensure mutual trust in the area of freedom, security and justice, the EU has established minimum standards in criminal procedural rights which ultimately

impacts on how Scottish clients experience the justice system in Scotland and in other Member States: the right to information in criminal proceedings; and the right to interpretation and translation, to name but two directives in to which the UK has opted.

(d) Impact on the legal profession

There are also aspects of EU law which have particular relevance to the legal system and professions, including the Directive on the mutual recognition of diplomas, the Lawyers' Establishment Directive and the Lawyers' Cross-border Provision of Services Directive. The risk to legal professional privilege in respect of EU law issues when advice is given when advice is given by a non EU lawyer is significant. Arrangements must be made to preserve legal professional privilege for the clients of Scottish Lawyers acting in EU law matters in the EU on their behalf.

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 the domestic legislation which is passed at or following withdrawal. Bearing in mind the public interest in maintaining consistent application of the law, the useful aspects of the freedom, security and justice legal framework, appropriate recognition and enforcement of citizens' rights, CJEU pending cases, immigration, residence, citizenship and employment status and the impact of the UK's exit on the devolved administrations it is clear that a wholesale repeal of the law which has emanated from the EU over the years would be problematic, difficult to implement, and unduly disruptive.

We propose that domestic legislation is passed to ensure a "soft landing" in terms of legal change. In principle 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. This has been through primary or secondary legislation either at UK level or through 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.

Considering such a large body of law in lead up to the UK's withdrawal from the EU would be a difficult task. The 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.

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 business, consumers and citizens we believe it is vitally important that effective transitional arrangements are in place to ensure that all necessary provisions continue to apply unless and until they are specifically repealed and that alternative domestic provisions are put in place. It is likely that much of what the UK decides to retain will depend on the outcome of the withdrawal agreement and a new relationship between the UK and the EU.

Similar considerations apply to the area of freedom security and justice which covers policy areas arrange from the management of the EU's external borders to judicial co-operation in civil and criminal matters and police co-operation this includes asylum and immigration policies and the fight against crime, terrorism, trafficking, cyber-crime, organised crime and sexual exploitation of children. The UK retained an opt in facility 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 of measures including the EU arrest warrant. We would advocate

that careful consideration should be given to maintaining such aspects of the area of freedom, security and justice either on a transitional basis or as part of the withdrawal agreement or as part of the future relationship with the EU. Furthermore, in terms of recognition enforcement of citizen's rights, Article 81 of the TFEU states that the EU shall develop judicial co-operation in civil matters having cross border implications based on the principle of mutual recognition of judgements and of decisions and extra-judicial cases. These 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 mutual recognition and enforcement of civil and commercial judgements across member states which sets out the rules governing cross border jurisdiction disputes. Other EU instruments with significant domestic impact include the EU enforcement order 2004 and order of payment 2006 and the Rome I and II regulations on applicable law.

The EU has also made law in a number of areas concerning civil judicial co-operation in cross border family cases. The law includes the Brussels I and II (a) Regulations on the jurisdiction of matrimonial proceedings principally divorce. There are also provisions concerning the return of abducted children and maintenance.

In the event of a UK exit from the EU this body of law will cease to apply as will the provisions of Article 81. The regulations and directives flowing from it will not operate outwith the EU. Prior to the TFEU and the EU regulations arrangements were made for cross border litigation by way of a number of bilateral Treaties and other conventions. Unless there is some other form of agreement between the UK and EU it is likely that solution would be adopted again. If the UK joins the EEA/EFTA, the Lugano Convention which governs the relationship between the EU and the EA/EFTA states would apply. The Lugano Convention effectively applies the Brussels I Regulation and other Regulations in these states in the event of the UK leaving the EU and remaining as a WTO the EU Civil Justice and Co-operation arrangements would cease to apply in the UK and the UK would need to negotiate bilateral or multilateral treaties with other countries.

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. EEA membership would result in the UK ratifying the Lugano Convention which reflects the Brussels II (a) Regulation.

The scale is immense, the timeframe short, the energy and commitment challenging to maintain. The implications for the Scottish Government and the Scottish Parliament are significant. Participation in the UK's exit from the EU is such a wide ranging exercise that it is likely to become the dominant theme throughout this and into future parliamentary sessions. The far reaching and deep range of EU law and policy, the need for adequate scrutiny of the negotiations between the UK and the EU, the contribution to the negotiations, and the consideration of consequential changes following the withdrawal agreement and the internal arrangement to be finalised are so significant that they may occupy the Government and the Parliament to such an extent that regular policy and legislative work will not attract the resources or time necessary for effective proposal, scrutiny and legislation.

The Society is not in a position to assess the impact on Scotland's economy of the termination of the EU funding packages.

The position of EU citizens in Scotland

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. The Schengen system has come under significant pressure in the recent past due to the Middle East migrant crisis.

EU Law concerning rights of EU citizens to move and reside freely within member states encourages movement across internal borders. 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.

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.

If the UK joins EEA/EFTA the UK would be subject to the agreement which provides for the free movement of person within the EEA/EFTA/EU area. The EEA/EFTA Treaty would allow some opportunity to the UK to restrict immigration on the terms and conditions set out in the Treaty.

If the UK adopts a WTO position the right of freedom of movement under the EU Treaty would not apply and the UK would control its own 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 is completed. It is likely that citizens of EU states living within the UK would have to regularise their immigration, residence and visa status. Clarity is needed about the residence, housing and work rights to such individuals and their families.

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

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.

In respect of acquired rights, Article 50 (3) of the TEU provides that the Treaties will cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification of the intention to leave unless the European Council in agreement with the UK unanimously decides to extend this period. The EU Treaties make no specific mention of acquired rights nor are there any provisions which seek to protect acquired rights, notwithstanding the fact that EU law and the Treaties give individuals rights (Case – 26/62 Van Gend en Loos).

Some commentators have claimed that the Vienna Convention on the law of the Treaty is supportive of the idea that acquired rights do attach to EU citizens in the UK following the UK leaving the EU, however, the Vienna Convention provides that the termination of a Treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the Treaty prior to its termination". The misinterpretation which has arisen concerns the use of the word "parties" these are the "states parties" which are signatories to the Vienna Convention rather than those states' citizens. Therefore the Vienna Convention does not provide a basis for stating the EU citizens have acquired rights in relation to the UK nor that UK citizens have acquired rights in other Member States of in the EU.

For further information and alternative formats, please contact:

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