The Law Societies
JOINT BRUSSELS OFFICE

# Brussels Agenda

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*The Law Societies' monthly publication with the latest EU news*





## Editorial

This month's edition of the Brussels Agenda focuses on technology. We will take a closer look at the issues surrounding law and its relation to technology. The world now relies on technology to access markets it could not do so before, from different countries to different businesses.

This month also sees the end of roaming charges in the EU from 15 June 2017, demonstrating just how dependent we are on technology helping us to access data networks wherever we are in the EU. In 2016, the EU identified the Digital Single Market strategy as a means to create new opportunities for all within the EU regarding jobs, health data, the economy etc. also indicating a focus on technology.

Our viewpoint article focuses on virtual competition and is written by Professor Ariel Ezrachi. He also came to the UK Law Societies' Joint Brussels Office Event of which there is a report.

As to other contributions, we also have an article written by Diane Mievis on 'Trade in a digital world,' and Caroline Calomme, the founder of Brussels Legal Hackers is explaining why more advanced technological tools in legal practice are no longer a suggestion, but the reality.

An update on the tax law legislative train and the Audiovisual Media Services Directive our own articles include a short article on what blockchains and smart contracts are, and another article explaining geoblocking and what the EU is doing to minimise it.

The ePrivacy Regulation has gained much attention and an update on this has been included.

Furthermore, we have reported on the UK Law Societies' Joint Brussels Office event with the Law Society of Ireland on re-qualification to the Irish Bar.

In addition to the usual information on upcoming decisions, in the case law corner we have summaries on the Gibraltar case on the freedom to provide services and the Pirate Bay CJEU decisions.

Finally, we have a call for any blogs, twitter accounts or interactive sources of law that our readers use, so we can compile a reading list for our readers for the summer.

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Ariel Ezrachi

## Virtual Competition

E-commerce has brought us all closer to the promised land of competition – where ample choice, better quality and lower prices reside. Our online environment is seemingly delivering constant waves of innovation and competitive pressure. It has led to reduced barriers to entry, increased market access, increased market transparency and lower search costs.

Alongside these positive developments - somewhat behind the scenes - a range of strategies have emerged, which may undermine these developments – limiting transparency, price competition, choice and access to markets. Indeed, following the wave of innovation and competitiveness introduced by e-commerce, increasingly powerful anti-competitive undercurrents have come into play.

At times, anti-competitive strategies may be unilateral, and include behavioral discrimination or exclusionary practices. At other times, novel contractual frameworks may limit competition, such as online marketplace bans and wide parity clauses. Also noteworthy are instances in which advanced algorithms may be used to facilitate coordinated action and establish algorithm-driven collusion.

These developments raise challenging policy and enforcement questions. Should they call for antitrust intervention or should we put our trust in the market's ability to correct itself? To what extent can exiting competition and disruptive innovation safeguard consumer welfare from new algorithm-driven business strategies?

Consider, for example, the challenges presented by the shift to dynamic pricing. As industries are shifting to automated dynamic, differential pricing where sophisticated computer algorithms rapidly calculate and update prices, an interdependence may emerge. The algorithm's ability to detect and quickly react to price changes in a highly transparent market, may (somewhat counterintuitively) chill competition and result in price increases. This phenomenon which may emerge under certain market conditions is known as tacit collusion. In itself it is not illegal. But, should it be condemned when companies use algorithms to change the market dynamics and artificially create parallelism?

Another interesting strategy which raises enforcement challenges is that of price discrimination. Increasingly, online operators are harvesting our personal data and can adjust pricing accordingly. Online platforms are able to create a mirage of competition – a seemingly competitive environment – which in fact has been altered to maximize profitability, by identifying the user's willingness to pay and charge at that level. The user's postcode, computer brand, search history and other data points, all play a role in personalizing the shopping environment, and the price displayed. As a result, the seller is able to engage in discriminatory practices and charge higher prices, while retaining the façade of competition. The customer, being unaware of the information gathered and the method used to calculate the price, is often unaware of it being targeted by these strategies.

These strategies, and others, form an increasing part of our modern online environment. Stealth, and asymmetry of information, are two striking characteristics of our online dystopia. Also noteworthy is the increased concentration online - as the key information and search junctions are captured by a select number of players who benefit from network effects. The majority of us trust a few search interfaces and service providers. As we increasingly depend on these providers to shape our online interface their gatekeeper's power increases. Worryingly, we may lack the ability to detect whether the marketplace has been distorted and through which means.

While many are concerned about the shift in power from consumers to the platforms, key questions remain: Is the shift in power transient or here to stay? Is competition law the adequate tool to address our concerns? And if it is, how effective might it be in addressing these strategies.

These questions are at the top of the agenda of most competition agencies. Enforcers in the EU and elsewhere grapple with the various theories of harm and the role competition law should play in these evolving markets. Possible remedies may include ex-ante and ex-post measures and may go beyond the narrow scope of competition law. They could, for example, focus on consumer empowerment, privacy and data mobility. The risk of over intervention is clear – it may chill innovation and investment. At the same time, the risk of under enforcement is also notable and significant, and may result in clear consumer harm.

We should all hope, that our enforcers and elected representatives will rise to the challenge and develop an inclusive data-driven economy which safeguards both innovation and consumer welfare and which benefits society as a whole.

Read more about these themes:

A Ezrachi & M Stucke Virtual Competition–The Promise and Perils of the Algorithm Driven Economy (Harvard University Press)

A Ezrachi & M Stucke 'Two Artificial Neural Networks Meet in an Online Hub and Change the Future (Of Competition, Market Dynamics and Society)' University of Oxford Legal Studies Research Paper Series, available on SSRN.

## Biography

**Ariel Ezrachi** is the Slaughter and May Professor of Competition Law at the University of Oxford and the Founder and Director of the University of Oxford Centre for Competition Law and Policy. He routinely advises competition authorities, law firms, and multi-national firms on competition issues, and develops training and capacity building programmes in competition law and policy for the private and public sectors. He is the co-editor-in-chief of the Journal of Antitrust Enforcement (OUP) and the author, co-author and editor of numerous books, including Virtual Competition – The Promise and Perils of the Algorithm-Driven Economy (2016, Harvard) and EU Competition Law, An Analytical Guide to the Leading Cases (5th ed, 2016, Hart)



Diane Mievis

## Trade in a digital world: data need to fly

The Internet has profoundly changed trade and global value chains and enabled start-ups and small businesses to access any market around the world. While countries are updating their national rules to keep up with the fast changes brought by technology, they have been struggling to address these issues in trade deals. We cannot do trade agreements as we did in the past. The rules must be designed globally.

The European Union (EU) has understood this very well and committed, in its 'Trade for all' strategy (October 2015), to leverage the principles of the European Digital Single Market at international level. Eighteen months later, the Commission delivered on its engagement and published its brand new horizontal digital trade chapter in the framework of the EU-Mexico free trade agreement (FTA).

One element is still missing, temporarily replaced by a placeholder: a provision on data flows. This is quite unfortunate as data flows are of course at the core of digital trade. Without them, there's simply no trade in a digital world.

Discussions between EU Member States - based on a concept note coming from the European Commission for

the EU-Japan FTA - are still ongoing in an effort to get the provisions right. Though the concept note was never made public, DIGITALEUROPE had access to its content and decided to strongly oppose it. While we are fully committed to the right of privacy of consumers and encourage European efforts on data protection, the concept note failed to find the right balance between business interests and general exceptions. In the current proposal, the principle of the free flow of data (resulting from the principle of the free flow of services formalised in the WTO General Agreement on Trade in Services in 1995) would become the exception, while the exception would be transformed into a principle.

By inserting a full carve-out without any conditions, we are offering our trade partners an open mandate to introduce protectionist measures and online censorship by abusing the privacy exception. Europe would be left with no legal remedy. With half of the world still needing to adopt privacy rules, the European Commission should promote similar transfer mechanisms to the rules allowing for international data transfers in the new European General Data Protection Regulation.

We have recently seen 15 EU Member States encouraging Vice-President Timmermans, who heads the Commission Project team working on the concept note, 'to urgently present a concrete and ambitious text proposal for an EU position on data flows'. Bringing back part of the conditions of the GATS Article 14 bis could do the trick.

If we fail to do so, it also means that on day 1 of BREXIT, just as planes won't be able to fly from London, data will not be able to flow to Brussels if the UK fails to have an adequate regime recognised by the EU and to offer transfer mechanisms.

There is an economic rationale to ensure data can be transferred: 2014 data showed that excluding intra-EU trade, EU Member States exported 506.6 billion EUR and imported 372 billion EUR in digitally-enabled services, resulting in a surplus of approximatively 134 billion EUR for these services. Digitally-enabled services trade represented 56% of all services exports to non-EU countries and 52% of all services imports from non-EU countries.

The European Parliament (EP) is now working on a own-initiative report on digital trade where the Rapporteur MEP Marietje Schaake will also cover what the provisions on data flows should be. This will be the position of the EP for any trade agreement to be approved in the future.

The Commission Project team is expected to come up with a revised proposal soon as the political deal with Japan on the FTA is imminent.

With the Trans Pacific Partnership still in limbo, and the United States busy renegotiating NAFTA, the EU – which is still the leader in exports of digitally deliverable services – has a fantastic opportunity to pave the way for the global rulebook on the digital economy. If we don't do it, who will?

## Biography

**Diane Mievis** became DIGITALEUROPE new Senior Policy Manager for Global Economic Affairs in May 2014. She's notably in charge of the work of the Digital Trade Policy Group – including the promotion of ICT related interests in free trade agreements, the advocacy against market access barriers and forced localisation measures, customs related issues and export control. Diane ensures coherency of DIGITALEUROPE work on the international scene. She's also in charge of the relations with other global trade associations.




TECHNOLOGY

Caroline Calomme

## Modern lawyers will not only grasp the impact of current regulations on disruptive technology, they will also customize those innovations to the legal industry

An **artificial intelligence judge**, **legal robots**, **big data for law** – the legal profession is not immune to the wave of tech buzz words. From doomsday scenarios to comforting articles insisting that robots will not

replace lawyers anytime soon, legal tech is most certainly trending. So much so that entire **legal tech guides** are drafted to assist legal departments in choosing the right product. Of course, the transformation of legal services is not a brand new phenomenon. The Stanford Law Review had already published an article on '**Some Speculation about Artificial Intelligence and Legal Reasoning**' in 1970 and **Professor Richard Susskind** who became well-known in 2008 thanks to his book 'The End of Lawyers? Rethinking the Nature of Legal Services' had been exploring the future of the legal industry for over 30 years.

Today introducing more advanced technological tools in legal practice is no longer a suggestion, but the reality. In times of economic hardship, clients expect quality and efficiency from a sector where they are billed by the hour and the highest level of expertise no longer seems sufficient to distinguish a law firm from its competitors. Even in more conservative jurisdictions which have not explicitly liberalised legal services, successful lawyers need to understand what technology has to offer and how to integrate it to serve their clients. Fortunately, legal practice consists to a certain extent of repetitive tasks which can be automated or at least streamlined. For example, e-discovery software supports practitioners in common law jurisdictions by identifying and reviewing the vast amount of documents to be produced in discovery proceedings. Nonetheless, so-called legal tech goes beyond facilitating tiresome tasks previously delegated to junior lawyers.

Indeed, legal practice management software helps your firm to track the time spent on each file, relevant documents, clients' bills, etc. Contract management software has become another popular tool. Integrating existing drafts, it allows users to create contracts and review them without having to copy paste from templates. Often built around a decision tree, the relevant pieces of texts are inserted following a series of questions. It is also possible to track the life cycle of the contract and set alerts for key dates. This document automation tool has been adapted to other fields where standardised forms and documents are regularly used, including intellectual property, family law and company law. To be sure, those services are not limited to law firms and SMEs now also turn to legal tech start-ups offering a cheap and simple way to incorporate their business, file patents, obtain personalised contracts and more.

Legal data analytics remains perhaps the most promising innovation in the long term. It refers to the process of analysing legal data to extract meaningful information using the methodology data scientists already apply in other fields: How are those cases related? How does this judge tend to rule? What are the chances of success of this case in several jurisdictions? Previously the realm of legal publishers, this technique involves processing a very large amount of legal data, sometimes called 'big law', revealing patterns which would otherwise go unnoticed. Natural language processing and visualisation tools complement this new approach allowing both practicing lawyers and academics to conduct better quality research in a shorter amount of time (see e.g. **ROSS**).

Beyond more competitive prices, clients are intrigued by new services such as chat bots or messaging applications always available to address their legal needs and matchmaking tools connecting lawyers to potential clients. Companies are also looking for software implementing complex legal advice, as shown by the variety of **privacy technology products** available on the market since the adoption of the GDPR. While the technology is generally developed externally by software companies, start-ups or legal publishers, some law firms have decided to build their legal tech infrastructure in-house. Naturally, these advances can also improve access to justice for individuals who could not afford legal services or chose not to consult a lawyer, as demonstrated by **Crowd Justice**, **ClaimIT** or **Do Not Pay**.

Curious? On 27 April, **Legal Hackers** organised the first of a series of demo nights in Brussels for developers and start-ups such as **Lawbox** to showcase their tools. Here are some of the other ways to learn more about those intriguing developments: **Legal Geek's Startup map**, Brussels School of Competition course on **Law, Cognitive Technologies & Artificial Intelligence**, Daniel Martin Katz and Michael J. Bommarito's new **online Legal Analytics course**, **LegalTech.be**.

## Biography

**Caroline Calomme** is the founder of Brussels Legal Hackers, the local chapter of an international community of professionals who explore and develop creative solutions to pressing issues at intersection of law and technology through monthly meetups.

She obtained her bachelor degree at the European Law School in Maastricht and the degree of Magister Juris with distinction from the University of Oxford. Previously, she worked as a Blue Book trainee for the European Data Protection Supervisor and as a private law lecturer at Maastricht University. In the Netherlands, she also co-founded the Technolawgeek community.


## Tax Law Legislative Train Updates

Speaking at the recent *Tax Day*, hosted by Accountancy Europe, EU Commissioner Pierre Moscovici remarked that he could remember a time when they worked for seven years and failed to manage a tax directive; now it took only seven months to agree on one. The catalyst behind this change of pace, has of course been the series of leaks and whistleblowing that have brought scrutiny on the tax regimes of dozens of countries and many companies, from Apple to Panama. With this, a wave of momentum has emerged, as a first step, to understand the extent of the perceived unfair dealings – indeed, at the same time as the Commissioner was delivering his remarks, Jean-Claude Juncker was facing a hearing of the PANA committee, concerning Luxembourg's cooperation on tax matters during Juncker's time as Prime Minister. As a second step, public appetite to see tax applied fairly has grown: several MEPs who participated in *Tax Day* mentioned the need to see a level playing field in the field of tax, with much vitriol being directed against both tax havens and sweet-heart deals. Nor should this be seen as a limited issue; as Jeppe Kofod, a Danish MEP who sits on the PANA committee pointed out, the first batch of off-shore leaks covered 120.000 accounts, while the documents released as part of the 'Swiss leaks' pointed towards facilitation of terrorism funding and illegal political contributions.

In a broad sense, the EU has been successful at translating this public discontent into legislative action. The pipeline of new or amending directives which address taxation is very full, with some historical initiatives – such as the Common Corporate Tax Base – which may now have been given renewed impetus. Furthermore, an overarching strategy has emerged, centred on transparency, avoiding opportunities to avoid taxation by cross border capital transfers and generally adopting a more robust approach to aggressive corporate tax avoidance

While tax competition between member states may remain a legitimate strategy – in answer to a recent question from Nessa Childers MEP, Commissioner Moscovici reiterated that *"the rate at which corporate profits are taxed is a sovereign decision for Member States" – the* EU is reducing the opportunities to 'hide' corporate income via the use of tax havens, and also to avoid taxation by artificial – ie, non-business driven – steps. As one financial report, recently quoted in the *Financial Times* said; *"Wealth managers* ***will lose $13bn of annual revenue*** *as a result of the outflows linked to the tax crackdown, which will make it harder for the wealthy to use offshore accounts to avoid paying tax"*
The following initiatives, in various stages of the legislative process represent the most important ongoing work in this area.

**1. Common (Consolidated) Corporate Tax Base (CCCTB)**

An idea dating back at least to 1982, the two legislative proposals dealing with a Common Corporate Tax Base, and a Common Consolidated Corporate Tax Base are the most recent attempt to legislate a pan-European tax system. Part of the March 2015 Transparency Package, two of the key deliverables announced in the June 2015 'Action Plan on Corporate Taxation' the Common (Consolidated) Tax Base would provide a single set of rules for calculation of the corporate tax base across the EU, with the intent of meeting the goal of "*fairer and more efficient taxation*" and "*to effectively tackle corporate tax avoidance*". The two pieces of legislation aim to do this by;

1. Re-establishing the link between taxation and where economic activity takes place.
2. Ensuring that Member States can correctly value corporate activity in their jurisdiction.
3. Creating a competitive and growth-friendly corporate tax environment for the EU, resulting in a more resilient corporate sector, in line with the recommendations in the European Semester.
4. Protecting the Single Market and securing a strong EU approach to external corporate tax issues, including measures to implement OECD BEPS, to deal with non-cooperative tax jurisdictions and to increase tax transparency.

A proposed Directive was released on 25th October 2016, and is available **here**. On 23rd May, Ministers held an orientation debate, and were broadly supportive of the aims, albeit in some cases with serious doubts regarding the flexibility each member state would be allowed. In addition, two key aspects of the current proposal are causing difficulty for the proposal in Parliament. The first concerns the threshold at which the new regime would apply. The current proposal takes €750million of annual revenue as the mandatory threshold; certain civil society actors, however, such as the European Trade Union Confederation have argued that the threshold should be **lowered to €40million**.

A second point of concern centres on the blacklisting of foreign tax havens. An aim of the CCCTB proposals are to maintain an EU list of non-cooperating states, rather than relying on multiple national lists. A methodology for the scoreboard to be used to assess potential tax havens is **available**, but discussions are ongoing as to whether this would affect, for example, UK overseas territories or potentially even the USA, given the . A measure of the controversy the methodology is posing in the Parliament can be seen in a question tabled on 31st May by 14 S&D MEPs, expressing concern that regimes with a 0% corporate tax regimes are not *per se* being included in the list, as well as urging the Council to greater transparency.

The proposals currently sit with the ECON committee, with a report expected in July 2017; a Plenary vote is expected in early 2018. A more extensive briefing sheet, including links to the relevant impact assessments can be found **here**.

**2. Country by Country Reporting**

(Disclosure of income tax information by certain undertakings and branches)
Addressing estimates that the EU loses 50-70 billion each year due to tax avoidance on corporate tax this initiative – amending Accounting Directive 2013/34 – is part of a broader strategy for a Fair and Efficient Corporate Tax System in the EU. On the principle that public scrutiny can help to ensure that profits are effectively taxed where they are generated, this proposed directive requires that Multi-National Enterprises (MNEs) disclose publicly in a specific report the income tax they pay together with other relevant tax-related information on a country by country basis.

The current proposal would require MNEs, whether headquartered in the EU or outside, with turnover of more than €750m will need to comply with these additional transparency requirements. This threshold is being challenged, with socialist MEPs arguing that the threshold should be lowered to €40million.

The type of information to be disclosed includes income tax paid and accrued as well as the necessary contextual information.

A more detailed briefing can be found **here**; the proposed directive is jointly under the responsibility of JURI and ECON. A vote is scheduled in committee on 12th June.

**3. Hybrid Mismatches with third countries**

Aiming to avoid instances of 'double non-taxation' across the EU, the proposed directive has its genesis in the 2016 directive on rules against tax-avoidance practices (Council Directive (EU) 2016/1164). That instrument included provisions addressing mismatches within the EU – such as where *"income received by a parent company is not considered as taxable income in the country of the parent company while the related expense from the subsidiary is deductible in the country of the subsidiary"*. The new directive extends those provisions to cover instances where at least one of the parties is a corporate taxpayer in a Member State, and others are tax residents in non-EU countries.

The proposed **Directive** was agreed in Council on 21st February 2017, decided by Parliament on 27th April, and was adopted by Council on 30th May.

**Conclusion**

Few would fail to welcome the vigour by which the Institutions are responding to revelations of leaks, but concerns do remain; on the one hand, as mentioned above, there is pressure from the left to expand the range of companies affected by the new initiatives. On the other, there is concern from professional bodies that the new rules targeting tax-havens risk conflating legitimate off-shore holdings and tax avoidance, and thus lumping privacy together with secrecy.

A further point of disagreement is the role of intermediaries; a recent **study** by the Parliament highlighted that "*Law firms, accountants, trust companies and banks are the most prevalent types of intermediaries"* administering off-shore structures. Thus there is concern that new measures to combat tax avoidance may inadvertently throw the baby of legal privilege away along with the bathwater of tax avoidance. This week, new proposals were issued by the Commission addressing potentially aggressive tax planning arrangements; it will be interesting to examine further the impact of these proposals on the legal profession.

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## The Audiovisual Media Services Directive: A clash of interests?

On April 25th, the CULT (Culture and Education) committee adopted a report on the regulation of audio-visual media services (AVMS), which will form the basis of the trilogue between the Parliament, Commission and Council. However, both the content and the manner in which the report was adopted have come under

criticism, with a group of MEPs attempting – unsuccessfully – to block the adoption of the report by using the "Rule 69C" procedure.

Firstly, the interests of the two rapporteurs came under scrutiny; as ***Politico*** noted, Petra Kammerevert and Sabine Verheyen (representing S&D and EPP, respectively), have both declared monthly payments from *Westdeutscher Rundfunk Köln*, a German public broadcaster producing radio and television programmes. Given that the Commission report aims to bring 'newer' forms of media streaming on the same regulatory footing as television broadcasting, it is clear why this may be seen as a cause for concern, or as *Politico* quoted a Dutch MEP, **Marietje Schaake**, as saying; *"I'm interested to know how my colleagues will avoid double hats."*

Secondly, the scope of the report is very broad; although the report has been described as "Netflix legislation", the extension of the rules to any platform which uses video content as an "essential" part of the service lead one diplomat, quoted in the *FT* to comment that the legislation would ***"police any moving picture on any screen".***For companies previously used to self-regulation of content – such as Facebook and You-Tube, the rules will mean a legal obligation to *"come up with measures to ferret out videos that contain* ***hate speech****, incitement to terrorism or simply harm the "moral development" of children." (FT).* Of course, this move can hardly have come as a surprise, with Facebook in particular having been accused of allowing extremists to propagate views, of facilitating the spread of fake news, and of not doing enough to prevent, for example, the live streaming of murders and suicides.

A third point of difficulty of the report is that it fell afoul of civil society in several aspects; CPME, the *Comité Permanent des Médecins Européens*, criticised the committee decision to remove the Commission proposals to limiting ***"marketing on foods high in fat, sugar and salt…to minors"***, while the Netflix director of Public Policy criticised the new requirement that 30% of content would need to be European, describing the rate as ***"fantastically high"***and suggesting that it would lead to consumers in one market effectively subsidising content in another. For what it's worth, the Commission's report into the application of the current AVMS directive in 2012, found that although the provisions on protections of minors were *"****rarely breached***", advertising techniques targeting minors were "**used frequently**".

Finally, the method by which the report was adopted led to sharp criticism from MEPs not from the S&D or EPP groups. Despite opposition, primarily from Liberal MEP, the combined majority of the EPP and S&D groups was enough to see off a challenge brought, as mentioned above, under Rule 69C. Following a petition by 76MEPs, the rule forces a plenary vote on a matter already adopted by committee. In this case, a sufficient number of MEPs were found to trigger a vote, but not to overturn the committee's decision, and thus the report will form the basis of the Parliament's position in trilogies. The passing of the report in plenary – albeit with 266 MEPs voting 'No' has led to accusations of a pact between the two largest groups, and indeed the appointment of two rapporteurs is in itself a highly unusual process.

The implications for lobbyists are unclear. That there has been a general view that tighter legislation preventing the broadcasting on social media of hate crimes, extremism etc is not in doubt – indeed a recent *Economist* leader opined that "*one idea has gained momentum in both Europe and America—that internet firms are doing the jihadists' work for them*". However, the quota for European content (and a requirement to advertise European works prominently) will cause discontent. How could the directive been better shaped, from the perspective of the tech lobby? Tech industry groups criticised the measure as vague and unworkable in parts. More attention will undoubtedly be paid to the committee structures- perhaps more vociferous objections to perceived conflicts of interest? Juncker, and others before him, have long called for a more political Europe, but it will be interesting to see if that desire could withstand US style deadlock via objection.

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## Irish Law Society - Re-qualification to the Irish Bar.

On 9 May, Stuart Gilhooly, president of the Law Society of Ireland and Ken Murphy, director-general, were hosted by the Law Societies' Joint Brussels Office for an information evening on registering as an Irish solicitor.

The president and director-general gave an informative and interactive talk to an audience of mostly UK lawyers based with international firms in Brussels, advising the audience of the 'no exam' principle, whereby a solicitor who has qualified in England and Wales or Northern Ireland can have their qualification recognised in Ireland without having to sit additional examinations, and vice versa. The principle applies to those who have first qualified into other jurisdictions, but who have three years post-qualified experience (PQE) in England and Wales or Northern Ireland.

Mr Gilhooly and Mr Murphy were keen to stress that the information provided was strictly on a courtesy basis, and was not an inducement for UK solicitors to transfer to Dublin. Many solicitors have already done so,

however (approximately 1100 solicitors have registered in Ireland since Brexit, and slightly more than 200 have taken out practicing certificates) which speaks to the intensity of interest in the subject.

As was to be expected given the audience and location, the questions from the floor covered some of the finer details of EU Employment law and recognition of professional qualifications. Attendees were particularly interested in routes for those qualified in Scots law, who are not covered by the reciprocal Ireland - England and Wales/Northern Ireland recognition regime.

The panel explained the reciprocal nature of the arrangement allowing a smoother means of transition for Irish solicitors wishing to work in the UK and UK solicitors in Ireland, and posited that if changes were introduced by the England and Wales/Northern Ireland authorities to qualification requirements, this could lead to a revision of the conditions for UK solicitors wishing to register at the Irish Bar. The speakers concluded, 'what lawyers crave above all is certainty and the current world does not allow that.'

Further information, including details on the prerequisites to obtain a Certificate of Admission, is available via the Law Society of Ireland's **website**.

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## The Law Societies Joint Brussels Office Event Report on Competition in Virtual Reality and the Rising Power of the Super-Platform

The Digital Single Market has increased access for consumers to buy goods online. Although there are benefits from the digital economy, the rise of super-platforms pose many challenges, in particular when data and algorithms are used together. This starts to change the dynamics of competition in order to maximise efficiency for companies. The Commission's **Preliminary Report** on the E-commerce Sector Inquiry also reported use of automatic price adjustments and the OECD has also published a report on **Algorithms and Collusion**. This could lead to anticompetitive behavior as it makes it easier for firms to achieve and sustain collusion without any formal agreement or human interaction. This form of market share poses new challenges as these arrangements do not go through the legal instruments we currently have.

**Key issues addressed and findings**

- **Anti-competitive collusion**: This is where a company uses algorithms to automatically set prices. An example of anti-competitive collusion on algorithms is the fuel market in Rotterdam. The Rotterdam area was found to have used technology which took data from a number of companies where it built a database, the algorithm was taught behaviors and then connected to as many data points in order for it to make real time decisions. Computers adjust to the changing market, thus making it easier for companies to ask the algorithm what it wants i.e. more market share, increase prices etc. Thus, how much intent is needed for collusion to be established for Article 101 TFEU to apply? This is difficult to establish due to the natural development of the market, posing a challenging question on whether it is possible to charge a company that profits from our data.
- **Personal pricing**: This is where a company will use algorithms to analyse a consumer's personal data to quote that individual with different prices. This is becoming more dominant. When a consumer goes online to buy a good, they may believe they are paying the best market value however, they can be paying the highest price that they are willing to pay. This can be based on factors such as a consumer's postcode or if the consumer is using a MacBook or iPhone. There is also dynamic pricing, where an algorithm assumes a consumer can afford more through the way they arrived to a website. In theory this is passive collusion as there is no interaction or anything to satisfy Article 101 TFEU, yet the price still changes. This can lead to distortion in the market and secret deals, which engage in discriminatory pricing.
- **Ethical issues**: Consumers believe they have ample choice online through many competitors. However, the reality is that websites decide what prices to show you, decide the features that are shown and are far from the competitive nature we think it to be. This system works because of asymmetric information and consumers are unaware of how they are being manipulated. Some argue this is a consumer protection problem and not a competition law problem. Companies are using price discrimination in order to extract the most value. Social gaps can increase as wealthier consumers are likelier to have access to countermeasures than poorer consumers, which brings up the notion of EU competition also being about fairness. However, companies need an e-commerce market platform if they are to access other markets across Member States. Smaller businesses may have detrimental effects, for example, where they do not realise what makes them higher or lower in search platforms. Thus, there is possible harm to smaller businesses and there are no mechanisms for redress.
- **Future and legal problems**: Algorithms, collusion and personal pricing will likely effect more and more markets, which will change the market terms as trends are continuously evolving. Thus, there is an issue for the future, if artificial intelligence is used to determine prices, it will be harder to lower

prices in the market as the outcome cannot be easily reverse engineered. There is an issue of liability, if an algorithm creates a problem, is the person who created the algorithm liable?

**Conclusion**
Ultimately, the winners in this scenario are the big platforms who are taking advantage in this area. However, some believe that the consumer is the new super power and that the consumer has the ability to direct the market in which way they want, based on their choices. It may be possible to stretch Article 101 TFEU to legislate on this area, however this debate is to appreciate that there is a radical change in competition and as a society we benefit by regulating it. The EU Commission aims to release a proposal by the end of this year on the interventions that should occur. However, care is needed on any future legislation to ensure that it does not disable any innovation and still balances the issues related to consumers.

**The Joint Brussels Office welcomed Professor Ariel Ezrachi, Slaughter and May Professor of Competition Law at the University of Oxford, and Werner Stengg, Head of Unit for E-Commerce and Platforms at DG Connect, on 10 May 2017.**

**This article was featured in the City Update June Newsletter.**



## Progress on the proposed ePrivacy Regulation in the Parliament

On 9 June, the Civil Liberties Committee (**LIBE**) of the European Parliament published its **draft report** on the proposed ePrivacy Regulation (**ePR**). The proposal, published on 10 January as part of the Data Economy Package, aims to regulate electronic communications in the EU following the adoption of the General Data Protection Regulation (**GDPR**).

The ePR is a crucial piece of legislation as it deals with the protection of personal data and privacy in the online world and covers such issues as, among others, end-to-end encryption, cookies, tracking, confidentiality of communications or access to data by government agencies.

From the point of view of the legal profession, the most important parts of the ePR are Recital 26 and Article 11. Both deal with lawful interception of communications and provide for conditions for such interception carried out by relevant member state authorities and in accordance with the EU law. Recital 26 in particular clarifies the extent of application of the EU law to national measures, following the CJEU judgment in Tele2/Watson (**C-203/15 and C-698/15**). The legal profession has long been concerned with the possibility of interception of lawyer-client communications which normally enjoys full confidentiality and are covered by the Legal Professional Privilege (**LPP**).

In its **draft opinion**, the Legal Affairs committee (**JURI**) criticised the Commission's proposal pointing out lack of clarity as to the boundaries between the proposed instrument and the GDPR. This echoes the concerns raised by the UK Parliament's European Scrutiny Committee which pointed out that the '*the respective scopes of the new GDPR and the proposed Regulation are not entirely clear to us and, by extension, may not be clear to duty-holders and data subjects.*' In the same line, the European Data Protection Supervisor (**EDPS**) in its **opinion** stressed that attributing different levels of protection to different categories of communications data is likely to result in gaps in the future framework.

It pointed out that in its current wording the ePR duplicates the structures set up by the GDPR and seems to create its 'lex specialis' which it should not do. The report also recommends that the ePR focus on confidentiality of communications and refrain from focusing on consent since it is no longer the right criterion. Interestingly, the latter point has also been raised by the Council of the EU in the Maltese Presidency **note** stressing that the grounds for processing of data are broader under the GDPR and hence should not be too restricted under the proposed ePR.

The draft report will be presented at the LIBE meeting on 21 June. The MEPs will then be invited to submit amendments until the beginning of July.



## Blockchains and smart contracts

On 12th June 2017, blockchain had successfully been used to buy and sell mutual funds in test conditions. Blockchain start-ups and jobs have **continued to increase**. This year has seen BNP Paribas Securities Services team up with Axa Investment Managers on a blockchain project. Blockchain projects are popping up in Switzerland, USA and even the UAE. It is thought by many that blockchain will **change the way**

**business is conducted** by changing the way finance, data and transactions are validated and tracked.

**What is blockchain?**

A blockchain (or also known as distributed ledger) is a database. It is a database of any information that is recorded, i.e. the transfer of bitcoins and the tracking of transfers of physical assets such as diamonds. Blockchains store data into blocks, whilst chaining "**them together to form a cohesive, unbroken record of that information**." This database can be described as a register in a sense, made of "**digitally recorded and encrypted … data in the form of blocks, which when connected via the distributed network of computers storing the blocks, form the blockchain**."

Blockchains consist of a peer-to-peer network. Each node (each computer in the network) on this network can have a copy of the whole ledger. As the data is distributed across a network of computers, ledgers operate by consensus and a single ledger cannot be in sole control. This is one of the reasons blockchain has gained attention, as this is very different from a bank and blockchains make real-time data records of transactions meaning the data cannot be changed, deleted and they are highly hack resistant.

However, blockchain has many uses, some exist and some do not as of yet. The possibilities of blockchain technology include bonded transactions, multiparty signatures, third party arbitration, recording property ownership, verifying the origins and authenticity of diamonds, secure voting in elections etc.

**What is a smart contract?**

Here, a contract can be enforced through a computer code that executes the terms and conditions of a contract between parties. The more complex the code is, the 'smarter' the contract is as this enables the contract to execute itself without anything to compel a party to act to enforce the contract. This results in autonomous parties such as Internet of Things devices entering into smart contracts without the need for human interference, creating computerised agents. As smart contracts run on a blockchain, they run exactly as programmed without any possibility of fraud or third party interference. However, this also shows just how inflexible a smart contract can be, requiring a change in the code to change a provision in the contract. This may change as time goes on due to technology constantly developing.

Coders are able to formulate the smart contracts in the framework that they want, imposing limits on the contract. This could lead to parties paying coders to get tailor the smart contracts to their particular needs, resulting in a market which is driven by customers. Coders could be assisted by lawyers in the future to draft contracts.

**Security**

The code behind the blockchain was released under an open source licence meaning that users can see if the coding has security flaws or contains backdoors, thus knowing that it should not be used. This creates transparency in the blockchain that is being used. The ledger is checked for consistency. Privacy is also not affected as pseudonyms are used. However, if a particular blockchain asks for a user's identity, then this information will be viewable by all who use the particular application, meaning the ledger would not be compliant with EU data privacy rules. This creates a challenge in identifying who the data controller or the data processor would be.

**Legal issues**

Smart contracts are still subject to the law of contract as smart contacts can be traced back to a human. As there are many hypothetical scenarios to deal with, the answers cannot be fully determined and legislators can only start to provide working frameworks when blockchains are more widely used. However, there is a question as to which jurisdictional laws would apply to a blockchain when servers and ledgers could be scattered all over the world. Some argue whether smart contracts can be considered contracts at all as they are every different to contracts on paper. Questions on how to terminate a smart contract arise, as they are self-executing. Can an offer and acceptance be applied to a smart contract in a blockchain? These matters could be solved by incorporating certain terms and conditions into the smart contracts. The anonymity granted to those in the blockchain could give rise to questions surrounding money laundering. Then, there is also the issue of recourse.

**Conclusion**

If there is anything we have learned from the journey of bitcoin, it is that technology will continue to develop. Blockchain and smart contracts will also continue to revolutionise and transform. The blockchain and smart contract as we know now, may well be very different to the ones that will be used in everyday transactions in the future. We encourage everyone to keep up to date with evolving technologies that can have an effect on the legal world.

## What is new with geoblocking?

Geoblocking consists of geolocation technology, using a user's IP address to identify where they live and where the request is coming from. When a website blocks you from accessing the website based on your location (blocking access across borders) this is what geoblocking consists of. Other forms of geoblocking include differing prices or conditions based on the customer's location (across borders); refusal to deliver goods across borders and; not being able to download or purchase goods from abroad.

The EU believes this is restricting the free flow of goods and services within and across Member States. This not only goes against the EU's Digital Single Market agenda, but also the EU's internal market policy.

A form of geoblocking that you may have come across would be in the form of BBC iPlayer. The media service from the BBC will not work in another country due to geoblocking. However, Netflix has a different form of geoblocking, where you will have access to different content in different countries, essentially you will only be able to access the library in the country which you are located in. As such, geoblocking can be used to enforce national copyright laws.

However, geoblocking can be used to prevent citizens of one country which has imposed a super injunction on the publication of certain information from being able to access news reports in another country where the super injunction would not apply, to avoid contempt of court liability.

On 8 June 2017, the EU Council adopted new rules on **cross-border portability of online content services in the internal market** thus, allowing consumers to access online content services they have paid for within one Member State across the EU. In terms of Netflix, you would be able to access the library from the Member State where you have subscribed and paid for the content, not the Member State in which you are travelling. This will improve competitiveness and encourage innovation across the online services platforms, attracting more consumers in the long term. Free to air services (such as the BBC and certain other public broadcasters) will have the option of benefitting from the regulation provided that they verify the country of residence of their subscribers, according to EU data protection rules. To avoid any potential abuses, service providers will verify the subscribers' member state of residence through adequate measures that do not go beyond what is necessary in order to achieve the purpose of verifying their residence are allowed. Examples given by the **European Parliament** include: contracts for internet or telephone connection, customer payment details and IP addresses.

The **EU's geoblocking regulations** will come into power in early 2018, meaning for example, citizens of one Member State will be able to access the same content on Netflix in another Member State.




## Joint position on the proposal for a mandatory EU Transparency Register

The Law Society of England and Wales and the Law Society Scotland adopted their position on the Commission's proposal for a mandatory lobbying register from September 2016.

The Law Societies welcomed the move towards a mandatory system and the proposal to include the Council in the scope of the new register. They added that at the same time, any new regulation must be proportionate to its objectives in order to achieve the intended results.

They also supported the idea of including 'interactions' in the scope of the register thus focusing on direct lobbying. Such a definition provides greater legal certainty for registrants and makes it easier to decide whether someone is or is not a lobbyist. They insisted on clear exemption for legal work which is the core activity of most law firms and it should not be impacted by the transparency rules.

Finally, the Societies underlined the EU decision-making process should be as transparent as possible to allow for its proper scrutiny and to ensure that the Union's institutions are accountable. They added that lobbying is a vital part of the democratic process, as it helps inform politicians and decision-makers of key concerns and the potential impact of proposed policies and legislation as well as options that may not have been considered.


## The Law Society of England and Wales participates in the Consejo General de la Abogacía Española (CGAE) conference

From 1-2 June, the Law Society of England and Wales participated in the "VII Jornadas de Juntas de Gobierno", a conference organised by the Spanish National Bar, Consejo General de la Abogacía Española, every four years. The event gathers lawyers active within the 83 Local Bars and the 10 Regional Councils in Spain, that in total represent more than 256,000 lawyers

This year's conference took place in Granada with the theme 'Good practices in the legal profession. Present and future of Local Bar Associations'. Law Society President Robert Bourns participated in the session on 'The future of the legal profession. Challenges and new work niches. Artificial intelligence', and spoke on the opportunities the use of artificial intelligence and technology offer in particular for small firms. **Read more**.



## Legal aid lawyers reminded they can refuse work that's uneconomical

Legal aid solicitors specialising in criminal law are being reminded by The Law Society of England and Wales that they are able to exercise discretion when accepting cases if the work threatens the viability of their firm. James Parry, chair of the Law Society criminal law committee, said: "The aim of this practice note is to remind solicitors handling criminal law cases that only duty work is obligatory, and all other work may be refused on the grounds that it is uneconomical."

Remuneration rates for criminal legal aid work have not been increased since 1998, thus viability of firms are under threat.

James Parry added: "The reduction in funding for criminal legal aid work has created a situation where many solicitors are increasingly required to undertake work that is unremunerated or carried out at a loss. This presents a serious tension between continuing to undertake legally aided work and obligations to provide a proper standard of service to their clients or to conduct business in a financially sustainable manner. As a result, firms must carefully consider each instruction, in particular as to whether to accept or refuse such instructions will be contrary to their professional obligations.

"Many solicitors' practices undertaking this vital work in communities around the country are struggling to survive. Persistent cuts to rates can create a situation for providers where work cannot be carried out to the requisite professional standards without undermining the financial stability of providers.

"We recognised that solicitors need help in identifying circumstances which may warrant a refusal to undertake legal aid work and in doing so to ensure compliance with the Solicitors Regulation Authority's Code of Conduct. This new practice note sets out the situation as it exists under the contract." **View the practice note**.



## New electronic bill of costs

The new electronic bill of costs is set to be implemented from 1 October, after it went before the Civil Procedure Rule Committee earlier this year. The bill will apply to costs incurred after its start date, leading to the transition away from paper bills. Members and civil litigators, should be aware of this upcoming change, as it will present a significant change of practice in terms of recording time. The Law Society of England and Wales will keep members updated on this matter once it has been confirmed in the latest Civil Procedure Rule Committee minutes.

## Graham Matthews takes up reins as Law Society president

Graham Matthews has taken up the role of President of the Law Society of Scotland on Friday 26 May.

Alison Atack, a partner at Lindsays in Glasgow is the Law Society's new Vice President.

Mr Matthews, a partner at law firm Peterkins, has represented the city of Aberdeen and Aberdeenshire solicitors on the Law Society's Council for over 10 years and has served on a number of committees including the Client Protection (formerly Guarantee Fund), Professional Practice, Remuneration and Regulation Committees.

Alison Atack, who represents solicitors in Glasgow and Strathkelvin on the Society's Council, has also been a member of the Regulatory Committee and is convener of the Client Protection Sub-Committee.

Outgoing President Eilidh Wiseman, said: "I'm very pleased to congratulate both Graham and Alison on taking up their roles as President and Vice President today.

"It has been a tremendous privilege to represent Scottish solicitors during the past year and I know Graham and Alison will do a superb job while they are in office. Both have been long-standing members of the Council – with over 30 years between them - and will bring their combined knowledge, enthusiasm and commitment to their new roles as President and Vice President, particularly during a time of enormous change for the profession and public alike. They each have a deep understanding of key issues affecting the profession and the Society, not least the rapidly changing legal market and the need for more modern, flexible governance, the issues around access to justice and legal aid, and of course the outcomes of negotiations following the vote to leave the EU."

Law Society of Scotland President, Graham Matthews, said: "It is a huge honour to be President of the Law Society of Scotland and serve our membership, whether they are working on the high street, in-house, or in city firms across Scotland and further afield. The profession has changed enormously since I started out in practice, but solicitors' willingness and ability to adapt to a changing environment remains constant. There will certainly be challenges ahead as we work through a number of important issues. We will play a full part in the current legal services review and continue to press for new legislation which will allow the legal sector to develop, help us to become more agile as a regulator and make sure there are robust protections for members of the public using solicitors' services. Ensuring access to justice will also be a priority. I feel very strongly that everyone, regardless of background or financial situation, should be able to access the legal advice and support when and where they need it. For that to happen legal aid solicitors need to be fairly remunerated for the important work that they do.

"Eilidh has done a tremendous job during her year in office, showing determination, grace and good humour in approaching even the most demanding of issues. I'd like to thank her for all of her work as Alison and I take up the reins."

Alison Atack, Vice President of the Law Society of Scotland, said: "I am looking forward to working alongside Graham as vice president during the next 12 months and getting to know the wider profession and understanding some of the particular pressures they face. As the Society's new office bearers we will continue the drive towards being a world-class organisation, providing the support and services solicitors are looking for to ensure their businesses can thrive and that they can continue to meet the needs of their clients."



## Adrian Ward honoured and vote for PC freeze at AGM

The solicitor credited with pioneering much of Scotland's modern law on incapacity and mental disabilities has been awarded honorary life membership of the Law Society of Scotland.

Adrian Ward MBE received the award at the Law Society's annual general meeting in Edinburgh on Thursday, 25 May.

Presenting the accolade, Eilidh Wiseman, the former president of the Law Society of Scotland, said: "Adrian has had a remarkable career, earning him the respect and admiration of his colleagues and peers. During his 50-plus years as a solicitor he has pioneered much of our modern law on incapacity and mental health and disability, including helping to steer the first major piece of legislation, the Adults with Incapacity (Scotland) Act 2000, through the Scottish Parliament, benefitting thousands of people across Scotland.

"He has been hugely influential, carrying out extremely valuable work on human rights in eastern European countries following the break-up of the Soviet Union and playing a prominent role in promoting powers of attorney, or their equivalents, at home and abroad.

"For this and so much more I am delighted to award him with honorary life membership of the Law Society of Scotland."

Solicitors at the Law Society's AGM voted to freeze the annual practising certificate fee for the eighth consecutive year.

Eilidh Wiseman said: "We are aware of the costs involved in practising as a solicitor and the Society's Council put forward the proposal to maintain the current practising certificate fee at this year's AGM. Just as solicitors need to adapt to a changing economic environment, we too need to continue our drive to increase efficiency, to innovate and be enterprising in our approach to make sure we can add value, without imposing any unnecessary additional costs on our members.

"While we're encouraged to see growth within the legal sector and a gradual rise in the number of number of practising solicitors, economic uncertainties remain. We recognise that there are firms, particularly those who carry out legal aid work, and other organisations facing budgetary constraints and these, coupled with rising costs elsewhere including the mandatory SLCC levy increase of 12.5%, place further pressure on hard working solicitors.

"Our strategy is to boost the Society's revenue through new and improved services, partnerships or suitable investment so that we are less reliant on membership fees."

Delegates at the AGM also voted to change the rules on qualifying as a solicitor advocate and were in favour of a change to the Society's constitution which will increase the number of co-opted members on its Council from six to eight to allow representation from different interest groups within the profession, including Scottish solicitors working overseas.

Solicitors aiming to qualify as a solicitor advocate will now be required to undertake an introductory course before applying to become a solicitor advocate, with applications scrutinised to ascertain whether the solicitor has sufficient experience prior to the training course. The new rules will also introduce a requirement for solicitor advocates to undertake a minimum of 10 hours of advocacy-related CPD each year.

**Adrian Ward has been a member of the Law Society of Scotland since 1967. He is a consultant to TC Young, and also works as a consultant to Council of Europe, after a distinguished career in practice. He has convened the Law Society of Scotland's Mental Health and Disability Sub-Committee for almost 30 years and won the Scotsman Lifetime Achievement Award at the 2014 Scottish Legal Awards. He was awarded an MBE for his work with people who have learning disabilities in Scotland and has received national awards for legal journalism, legal charitable work and legal scholarship.**

**The practising certificate fee, which is compulsory for all practising solicitors, is set by the Law Society Council and voted on by members each year at the Society's annual general meeting. There are currently 11,500 practising Scottish solicitors.**

**Information about the Law Society's Council and the 2017 AGM papers are available to read on the website.**


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## Urgent investment needed to secure long term future of legal aid

The Law Society of Scotland has called for more investment, decreased bureaucracy and improved use of technology to guarantee the long-term sustainability of legal aid. Decades of under-investment have led to a decline in access to justice for people across Scotland.

The Law Society has set out a series of recommendations in its **comprehensive submission**.

The proposals include:

- Increased funding and a rise in legal aid rates
- An urgent review of funding for police station work
- A restructure of criminal legal aid funding and a streamlined payment system
- Simplification of civil legal aid and adoption of a single grant system
- Simplification of children's legal aid to help applicants

- Increased scope of legal aid work carried out by trainee solicitors
- Research into the preventive benefits of legal aid

President, Graham Matthews, said: "The current system is under immense pressure and there is a growing gap between those who need legal advice and those who can deliver it.

"Legal aid is the basis of social justice and provides equality before the law, ensuring that everyone is able to resolve disputes and legal issues regardless of their social background or financial situation. It gives people the ability to protect their rights, often at the most challenging times in their lives, whether they have been unfairly dismissed from work, unlawfully evicted from their home, resolving custody of their children or defending themselves against a criminal charge.

"We know that early resolution of legal problems can prevent much bigger issues further down the line, before they get more difficult and more expensive to resolve. Unfortunately, under the current system solicitors are finding it increasingly difficult to afford to take on legal aid clients, particularly in civil cases, and run a viable business – with those who do take on legal aid clients effectively unpaid for some of the work they carry out. The result is that it's becoming increasing difficult for people to access the legal support and advice that they need, especially in rural communities."

The Society also believes that savings brought about by increased efficiency in the legal aid system and better use of technology, should be reinvested into the legal aid system to help ensure its long term sustainability.

Ian Moir, co-convener of the Law Society of Scotland's legal aid committee, said: "We fully understand the current restrictions on public spending. However the decades-long lack of investment in legal aid alongside the complexity and high level of bureaucracy involved, mean it has become increasingly difficult to maintain a sustainable, high quality legal assistance system.

"Less is spent on legal aid now than two decades ago, with the 2016-17 budget set at £127 million compared to £132 million in 1994-95, while costs of running a business have risen. In addition some of the criminal legal aid rates paid to solicitors haven't increased in 25 years, with certain civil rates unchanged for 17 years. This is simply not sustainable and we see an increasing gap between those who can afford legal assistance to resolve a problem and those who can't, something we believe should be unacceptable in Scotland today."

Co-convener Mark Thorley added: "We have set out a positive case for change in our submission. Our recommendations would help to streamline the system and make the most of what technology can offer to generate savings which can then be re-invested to ensure the long term future for legal aid. These changes will allow solicitors to run viable businesses offering a range of legal services and help those most in need."

To read the full **legal aid review submission** see the Law Society of Scotland website.

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## First Minister and leading legal figures back LGBT+ workplace equality campaign

A campaign to promote LGBT+ equality in the workplace is being launched by the Law Society of Scotland and The Glass Network today, Thursday, 18 May.

Leading public and legal figures, including First Minister Nicola Sturgeon and Scottish Law Commissioner Hector MacQueen, will set out key principles of law and facts about LGBT+ equality in the workplace, with each asking 'These are our principles – what are yours?' in a series of videos to be screened at the launch event in DLA Piper's Edinburgh offices.

Drew McCusker, trainee solicitor at Jackson Boyd Lawyers and founder of The Glass Network, an organisation for LGBT+ legal professionals in Scotland, said the #TheseAreOurPrinciples campaign is more than just a statement about equality, but demonstrated the accomplishments of the Scottish legal profession and its future development.

He said: "The high profile vocal and visible support demonstrated in this campaign comes from all corners of the Scottish legal profession. Whether someone's workplace is in-house or international, public or private, high street or city centre, #TheseAreOurPrinciples is a campaign which encourages everyone regardless of sexual orientation or gender to support diversity in the workplace.

"LGBT+ equality has been increasing in Scotland for decades, from de-criminalisation to marriage. However, equality is not achieved by law alone. It's important that there is an open and frank discussion of what more we can do.

"That is why The Glass Network and the Law Society of Scotland are asking 'What are your principles? ' Sharing this message online is more than a sentiment – it is a visible signal of a law firm or solicitor's commitment to raising the standards which benefit everyone in the profession regardless of their gender identity or sexual orientation."

Eilidh Wiseman, the former President of the Law Society of Scotland, said: "The Law Society has worked hard to promote equality and diversity in the legal profession, carrying out extensive research, developing an equality and diversity strategy, staging events and introducing equality standards and guides for solicitors. But more still needs to be done.

"Over a quarter of lesbian, gay, bisexual and transgender people in the UK choose not to disclose their sexuality or gender identity at work. By visibly supporting and encouraging LGBT+ staff, firms increase job satisfaction, leading to a more productive and skilled workforce."

A discussion event will follow the screening of the first videos at the DLA Piper office in Rutland Square, Edinburgh.

A trailer for the campaign is **available on Youtube**



## Belfast Hosts International Law Conference

More than 400 lawyers visited Belfast at the end of May 2017 to participate in the International Bar Association's '***Bar Leaders Conference and Mid-Year meetings'***

The conference was attended by the leaders of the majority of the world's Law Societies & Bar Associations and prominent international lawyers.

The International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies, and is hosting its 12th Annual Bar Leaders' Conference in Belfast as a result of extensive lobbying by the Law Society of Northern Ireland, the Bar of Northern Ireland and Invest NI.

All three organisations took a proactive joint approach to raise the profile of the services and support that the legal profession in Northern Ireland can offer businesses, legal firms and the international legal market generally.

In what is highly regarded as one of the most prestigious events in the international legal calendar representatives from Invest NI will showcase the region's legal technology and innovation expertise during the event, while representatives from the Law Society of Northern Ireland and the Bar of Northern Ireland will contribute as speakers in a number of sessions.

Those attending will discuss a number of timely issues including the opportunities and challenges of Brexit and those of artificial intelligence and use of 'robot lawyers'.

Commenting the President of the Law Society of Northern Ireland, Ian Huddleston said:

***"It is my very great honour to welcome the delegates of the International Bar Association (IBA) Bar Leaders' Conference and Mid-Year Meetings 2017 to Belfast. The Law Society's support for the IBA Bar Leaders' Conference and Mid-Year Meetings is a reflection of our ongoing commitment to international engagement and to establishing global links. We are therefore delighted to welcome so many of our international colleagues to Belfast at an important point in the timeline of global business, politics and law".***

## Law Society welcomes IBA Human Rights Institute

The Law Society of Northern Ireland were delighted to welcome Council Members of the International Bar Association's Human Rights Institute (IBAHRI) to Law Society House for their meeting.

The International Bar Association's Human Rights Institute (IBAHRI) works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

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## Conference Examines Needs of Children in Justice System

Putting the needs of children at the centre of the Justice system was one of the key themes discussed at a conference organised and hosted by the Law Society of Northern Ireland.

Over 110 solicitors attended the Children Order Conference which took place at the Crowne Hotel, Belfast.

The conference has become an annual event in the legal calendar and it continues to provide an opportunity for legal practitioners who specialise in family and criminal law to come together to discuss issues and developments in relation to children and the justice system.

Those attending had an opportunity to hear from key note addresses including:

**The Right Honourable Lord Justice Gillen** who provided attendees with an update in respect of the family law aspects of his Civil Justice Review;

**The Honourable Mr Justice O'Hara** who spoke on current issues within the family courts in Northern Ireland.

**His Honour Judge Nicholas Crichton** (retired) on the benefits of Family Drug and Alcohol Courts.

**Mike Shaw** who spoke on the role of a psychiatrist in Children Order cases and attendees also heard from John Sheldon, Patricia Devine, Karen Woodall, Clare Burke, Suzanne Rice, and Laura Lee Jenkins.

Commenting on the conference, Fiona Donnelly, Chair of the Children Order Panel said:

***"It is important that we provide a platform in which to share knowledge, best practice and to hear from the experts in the field of Children's law. I am delighted that yet again the Children Order Conference has been a resounding success and I wish to thank our key note speakers and attendees".***

## The Law Societies' Joint Brussels Office Summer Reception 2017

The Law Societies' Joint Brussels Office hosted their Summer Reception on 20 June. We were honoured to have Claude Moraes MEP welcome attendees of over 100 legal minds with an opening speech on being a solicitor and a politician. He also spoke about the challenges on opening services. We were also privileged by the presence of the presidents and CEOs of the UK Law Societies. In particular, Robert Bourns, Graham Matthews and Ian Huddleston addressed the crowd full of some of the greatest legal minds. We would also like to thank our guests. We look forward to seeing you at our next events.




**ONGOING CONSULTATIONS**

***Energy***
**Consultation on the list of proposed projects of common interest in energy infrastructure**
27.03.2017 – 26.06.2017

***Access and connectivity***
**Public consultation on the Review of the Significant Market Power (SMP) Guidelines**
27.03.2017 – 26.06.2017

***Energy***
**Consultation on the list of proposed projects of common interest in energy infrastructure – Additional projects in oil and smart grids**
03.04.2017 – 26.06.2017

*Employment and social affairs*
**Open Public Consultation for the Evaluation of the EU Agencies: EUROFOUND, CEDEFOP, ETF, EU-OSHA**
05.04.2017 – 05.07.2017

*Financial markets, Banking and financial services*
**Public consultation on the conflict of laws rules for third party effects of transactions in securities and claims**
07.04.2017 – 30.06.2017

*Customs Taxation*
**Open public consultation on general arrangements for excise duty – harmonisation and simplification**
11.04.2017 – 04.07.2017

*Taxation*
**Public consultation on the structures of excise duties applied to alcohol and alcoholic beverages**
18.04.2017 – 11.07.2017

*Single market, Environment, Consumers*
**Public consultation on the detergents Regulation in the context of its ex-post evaluation**
02.05.2017 – 25.07.2017

*Transport*
**Public consultation on the evaluation of the Intelligent Transport Systems (ITS) Directive**
05.05.2017 – 28.07.2017

*Business and industry*
**Interim evaluation of the programme for the competitiveness of enterprises and small and medium-sized enterprises (COSME) (2014-2020)**
10.05.2017 – 31.08.2017

*Digital economy and society, Employment and social affairs, Business and industry, Banking and financial services, Justice and fundamental rights*
**EU Company Law upgraded: Rules on digital solutions and efficient cross-border operations**
10.05.2017 – 06.08.2017

*Digital economy*
**Public consultation on the evaluation and revision of the .eu top-level domain regulations**
12.05.2017 – 04.08.2017

*Education and training, Youth, Role of sport in society, Culture and media*
**Public consultation on the "Recommendation on Promoting social inclusion and shared values through formal and non-formal learning"**
19.05.2017 – 11.08.2017

*Justice and fundamental rights*
**Public consultation – Call for evidence on the operation of collective redress arrangements in the Member States of the European Union**
22.05.2017 – 15.08.2017

*Digital economy*
**Public consultation on the database directive: application and impact**
24.05.2017 – 30.08.2017

*Institutional affairs*
**Public consultation on the European citizens' initiative**
24.05.2017 – 16.08.2017

*Food safety*
**Stakeholder consultation for the evaluation of the EU legislation on blood, tissues and cells**
29.05.2017 – 31.08.2017

*Climate action, Digital economy and society, energy, Transport, European neighbourhood policy, Regional policy*
**Evaluation – Regulation TEN-E**
30.05.2017 – 04.09.2017

## COMING INTO FORCE THIS MONTH

*Fiscal*
**COUNCIL DECISION (EU) 2017/985 of 8 August 2016 giving notice to Portugal to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit**

*Free movement*
**REGULATION (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming marketsText with EEA relevance.**

*Foreign Policy*
**COMMISSION IMPLEMENTING REGULATION (EU) 2017/970 of 8 June 2017 amending Council Regulation (EC) No 329/2007 concerning restrictive measures against the Democratic People's Republic of Korea**

## CASE LAW CORNER

**Decided cases**

***Freedom to provide services***

**Case C-591/15** – R (On the application of The Gibraltar Betting and Gaming Association) v The Commissioners for Her Majesty's Revenue and Customs

The Gibraltar Betting and Gaming Association ("**GBCA**") is a trade association whose members are primarily Gibraltar-based gambling operators who provide remote gaming services to customers in the UK and elsewhere.

In 2014, the UK adopted a new tax regime for certain gambling duties. The new regime, based on the 'place of consumption' principle, requires gambling service providers to pay a gaming duty in respect of all remote games of chance played with them by UK consumers. Under the previous taxation regime, based on the 'place of supply' principle, only service providers established in the UK were charged gaming duties on their gross profits from their supply of gaming services to customers worldwide.

The GBCA challenged the new regime before the High Court of England and Wales on the basis that the regime is contrary to the principle of the freedom to provide services under Article 56 TFEU. The question referred is whether the UK and Gibraltar are to be treated as if they were part of a single Member State or whether, as a matter of EU law, Gibraltar has the constitutional status of a separate territory to the UK, so that provision of services between the two is to be treated as intra-EU trade.

The Court held that there is no factor that could justify the conclusion that relations between Gibraltar and the UK may be regarded, for the purposes of Article 56 TFEU, as akin to those existing between two Member States.

Whilst the Court confirmed that Gibraltar does not form part of the UK, it held that that fact us not decisive in determining whether two territories must, for the purposes of the applicability of the provisions on the four freedoms, be treated a single Member State.

The Court concluded that the provisions of services by operators established in Gibraltar to persons established in the UK constitutes a situation confined in all respects within a single Member State.

**Case C-48/16** – ERGO Poist'ovna v Alžbeta Barlíková

Article 11(1) of Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that it covers not only cases of complete non-execution of the contract concluded between the principal and the third party, but also cases of partial non-execution of that contract, such as non-compliance with

the volume of transactions or the duration envisaged by that contract.

Article 11(2) and (3) of Directive 86/653 must be interpreted as meaning that the clause of a contract for commercial agency pursuant to which the agent is required to refund, on a pro-rata basis, a part of his commission in the event of partial non-execution of the contract concluded between the principal and the third party does not constitute a 'derogation to the detriment of the commercial agent', for the purposes of that Article 11(3), if the part of the commission subject to the refund obligation is proportionate to the extent to which that contract has not been executed and on condition that that non-execution is not due to a reason for which the principal is to blame.

Article 11(1) of Directive 86/653 must be interpreted as meaning that the concept of 'a reason for which the principal is to blame' does not relate only to the legal reasons which led directly to the termination of the contract concluded between the principal and the third party, but covers all the legal and factual circumstances for which the principal is to blame, which are the cause of the non-execution of that contract.

**Case C-99/16** – Lahorgue

The reference for a preliminary ruling was made in interlocutory proceedings issued by Mr Jean-Philippe Lahorgue against the Lyon Bar Association, the National Bar Council, the Council of European Bars and Law Societies, and the Luxembourg Bar Association, seeking an order requiring the Lyon Bar Association to issue to Mr Lahorgue, as a provider of cross-border services, the router for accessing the Private Virtual Network for Lawyers.
The refusal, on the part of the competent authorities of a Member State, to issue a router for access to the private virtual network for lawyers to a lawyer duly registered at a Bar of another Member State, for the sole reason that that lawyer is not registered at a Bar of the first Member State, in which he wishes to practise his profession as a free provider of services, in situations where the obligation to work in conjunction with another lawyer is not imposed by law, constitutes a restriction on the freedom to provide services under Article 4 of Directive 77/249 to facilitate the effective exercise by lawyers of freedom to provide services, read in the light of Article 56 TFEU and the third paragraph of Article 57 TFEU. It is for the national court to determine whether such a refusal, in the light of the context in which it is put forward, genuinely serves the objectives of consumer protection and the proper administration of justice which might justify it and whether the resulting restrictions do not appear to be disproportionate in regard to those objectives.

***Principles of Community law***

**Case C-217/16** – European Commission v Dimos Zagoriou (Opinion of the Advocate General)

It is for national law, subject to the principles of equivalence and effectiveness, to determine which courts have jurisdiction to hear actions opposing the enforcement of acts of the European Commission which impose a pecuniary obligation on persons other than Member States, pursuant to Article 299 TFEU. In determining whether there is any breach of the principle of equivalence, the national court must, first, ascertain whether the proceedings concerned are similar as regards their purpose, cause of action and essential characteristics, and second, examine whether the procedural rules for the actions based on EU law are less favourable than those for the actions based exclusively on national law.

In case of enforcement of an act, adopted pursuant to Regulations No 2052/88, No 4253/88 and No 4256/88 and Article 299 TFEU, and imposing a pecuniary obligation on an undertaking owned by a local authority, which undertaking has subsequently been dissolved, Article 299 TFEU and the aforementioned EU regulations do not require that local authority to discharge the pecuniary obligation imposed on the undertaking. It is for national law to determine the persons against whom enforcement can be sought, subject to the principles of equivalence and effectiveness.

***Freedom of movement of persons***

**Case C-420/15** – U

This request for a preliminary ruling concerns the interpretation of Articles 18, 20, 45, 49 and 56 TFEU.

The request was made in the course of criminal proceedings brought against Mr U, an Italian national and an official of the European Commission, for driving in Belgium a motor vehicle registered in Italy.

The court held that Article 45 TFEU must be interpreted as precluding legislation of a Member

State, such as that at issue in the case in the main proceedings, in accordance with which a worker residing there is required to register in that Member State a motor vehicle which he owns, but which is already registered in another Member State and is intended essentially for use in that latter State.

Belgian Court rules refusal to accept EU Civil Servant ID cards as proof of residence is discriminatory

The plaintiff came to Belgium as a foreigner with privileged status and received a special identity card valid from 2009 to 2019. She subsequently made a request for permanent residence and received an E+ Card valid from 2016 to 2021.

The plaintiff has two children who have Belgian nationality, and she is working as a parliamentary assistant at the European Parliament. The plaintiff is now requesting Belgian nationality which has been refused as the public prosecutor considers that she has only been legally resident in Belgium since 2016, thereby not meeting the requirement of five years uninterrupted legal residence.

The public prosecutor recognised that in the Law of 14/01/2013, the special identity card is not mentioned as an accepted method of proof of the length of residence. Additionally, the "note circulaire" dated 08/03/2013 identifies that this list is restrictive.

The Court found as follows:

- A "note circulaire" is only guidance for civil servants and does not bind the courts;
- From the wording of the Law of 14/01/2013, it is not clear that the list should be restrictive;
- Art 3 of the Law of 14/01/13 says "the residence documents that have to be taken into account", but does not exclude at all the possibility that other documents may be taken into account; and
- Granting a restrictive nature to the list would contradict Article 7 of the Code on Belgian Nationality since this Article does not demand a deed of residence, but only an authorisation to reside in the country or to take up residence in accordance with the law on foreigners or the law on regularisation.

Accordingly, the Court held that the special identity card had to be accepted as proof of the plaintiff's residence for the previous five years at the date the request for nationality was made. Any other decision would be discriminatory since the plaintiff, as an EU civil servant, cannot receive the requested residence document precisely because she is an EU civil servant.

***Intellectual property***

**Case C-610/15** – Stichting Brein v Ziggo BV

The Dutch Supreme Court referred the following question to the Court:

Is there a communication to the public within the meaning of Article 3(1) of the Copyright Directive by the operator of a website, if no protected works are available on that website, but a system exists by means of which metadata on protected works is indexed and categorised for users, so that the users can trace and upload and download the protected works?

The Court held that the concept of 'communication to the public', within the meaning of Article 3(1) of the Copyright Directive, must be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

**Upcoming decisions and Advocate General opinions in May**
**Consumer Rights**
**Case C-133/16 –** Christian Ferenschild v JPC Motor SA

1. Reference for a preliminary ruling by the Cour d'appel de Mons [Belgium], seeking to clarify whether Article 5(1) of Directive 1999/44, which provides that the limitation period, under which a claim arising from lack of conformity of the goods with the contract, may not expire within a period of two years from the time of delivery, also applies to consumer trade in second-hand goods.
2. If it is found that the directive does cover the trade in second hand goods, to what extent does the protection therein cover a consumer who so purchases second-hand

goods?

**Insolvency and Company Law**
**Case C-126/16 – Smallsteps BV**

1. Request for a preliminary ruling from the Rechtbank MiddenNederland [Netherlands], concerning the aim of Directive 2001/23, protecting rights of employees in the event of a takeover, but which does contain exceptions in the event of insolvency (Articles 5 and 9), to answer the following questions;
2. Where an insolvency proceedure is expressly designed aimed at securing the survival of (parts of) the undertaking, according to Dutch law, is it in conformity with the Directive?
3. Is Directive 2001/23 applicable in a case where the "prospective insolvency administrator" appointed by the Rechtbank acquaints himself, prior to commencement of the insolvency procedure, with the situation of the debtor and investigates the possibilities for a restructuring of the activities of the undertaking by a third party, and also prepares for acts which must be carried out shortly after the insolvency in order to enable the restructuring to take place by means of an asset transaction through which the undertaking of the debtor, or part thereof, will be transferred at the date of the insolvency or shortly thereafter, and those activities, in their totality or in part, are continued (virtually) without interruption?
4. Does it make any difference in this regard whether the continuation of the undertaking is the primary objective of the pre-pack, or whether the (prospective) insolvency administrator's primary objective with the pre-pack and the sale of the assets in the form of a "going concern" immediately after the insolvency is to maximise the proceeds for all of the creditors, or that, in the context of the pre-pack, consensus on the transfer of assets (continuation of the undertaking) is achieved before the insolvency and its implementation is formalised and/or effected after the insolvency? And how should the matter be viewed if it is sought to secure both the continuation of the undertaking and the maximisation of proceeds?
5. Is the date of the transfer of the undertaking for purposes of the applicability of Directive 2001/23 and of Article 7:662 et seq. of the BW arising from it, in the context of a pre-pack preceding the insolvency of the undertaking, determined by the actual consensus on the transfer of the undertaking achieved prior to the insolvency, or is that date determined by the point in time at which responsibility as employer for carrying on the business of the unit in question shifts from the transferor to the transferee?'

**Freedom to provide Services**
**Case C-49/16 - Unibet International Limited v Nemzeti Adó- és Vámhivatal Központi Hivatal**
Request for a preliminary ruling from the Fovárosi Közigazgatási és Munkaügyi Bíróság [Hungary], concerning Article 56 TFEU. Is the fact that Unibet was preventing from offering games of chance in Hungary, despite having licenses to do in other EU states a violation of the Freedom to Provide Services?

## Call for suggestions

We are calling our readers to write to us, to provide any blogs, twitter accounts or any interactive and online sources of law or law related things that would be a fun and valuable source of information to people. We are looking forward to compiling a list to suggest for summer time reading to our readership. Please email: **brusselstrainee@lawsociety.org.uk**

## Notice for upcoming events

SAVE THE DATE: 13 July 2017 at European Parliament, Discussion on Acquired Rights. Panellists include: David Green, The Law Society of England and Wales and Professor Andrea Biondi, King's College London.

## About us

The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: **brussels@lawsociety.org.uk**

## Subscriptions/Documents/Updates

For those wishing to subscribe for free to the Brussels Agenda electronically and/or obtain documents referred to in the articles, please contact **Antonella Verde**. The Brussels Office also produces regular EU updates covering: Civil Justice; Family Law; Criminal Justice; Employment Law; Environmental Law; Company Law and Financial Services; Tax Law; Intellectual Property; and Consumer Law as well as updates on the case-law of the European Court of Justice. To receive any of these, contact **Antonella Verde** stating which update(s) you would like.

## Editorial Team


**Helena Raulus**
Head of the Brussels Office Ad Interim
**helena.raulus@lawsociety.org.uk**
**Anna Drozd**
EU Policy Advisor (Professional Practice)
**anna.drozd@lawsociety.org.uk**
**Rita Giannini**
EU Policy Advisor (Justice)
**rita.giannini@lawsociety.org.uk**
**Stuart Brown**
Trainee Solicitor
**stuart.brown@lawsociety.org.uk**
**Arfah Chaudry**
Intern
**arfah.chaudry@lawsociety.org.uk**
**Peter Boyle**
Intern
**peter.boyle@lawsociety.org.uk**

**Joint Brussels Office**
85 Avenue des Nerviens - B-1040 Brussels
Tel.: (+32-2-) 743 85 85 - Fax: (+32-2-) 743 85 86 - **brussels@lawsociety.org.uk**