



**THE LAW SOCIETY  
of SCOTLAND**  
[www.lawscot.org.uk](http://www.lawscot.org.uk)

# Written Evidence

## **Justice Committee Inquiry: The implications of Brexit for the Justice System**

**The Law Society of Scotland's response  
November 2016**

## Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors.

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

We have a statutory duty to work in the public interest,<sup>1</sup> a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to respond to the Justice Committee's inquiry on the implications of Brexit for the justice system. This response has been prepared with the assistance of the Joint Brussels Office of the UK Law Societies.

## General Comments

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. Other changes including accession to the European Economic Community in 1972, the development of devolution to Scotland, Northern Ireland and Wales in the 1990's, the adoption of the Human Rights Act in 1998 and the creation of the Supreme Court in 2005 were important constitutional changes most of which have affected the lives of many millions of people living across the UK. However the UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and has as much potential to affect many people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have depth, breadth and far reaching effect for the immediate future and for several years to come.

The European Communities Act 1972 gave effect in the UK to the EEC (now EU) treaties. This altered the sources of the laws of the constituent parts of the UK by ensuring that the law of the then European Communities and all subsequent law from the EU made under the treaties is directly

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<sup>1</sup> Solicitors (Scotland) Act section 1

enforceable in the Member States. This means that the EU legal principles of direct applicability and direct effect are incorporated into law applying throughout the UK. The House of Lords has held in the case of *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 AC 603 that EU law must be applied in the UK and that the European Communities Act 1972 is a 'constitutional' act which cannot be impliedly repealed. The Act also required the Courts in the UK to take judicial notice of EU law according to the decisions of and principles formulated by the Court of Justice of the EU (the CJEU). Courts in the UK need not refer matters to the CJEU where previous decisions have considered the point of law in question. The CJEU's decisions are authoritative and following *Srl CILFIT v Ministry of Health* [1982] ECR 3415 a court is obliged to treat a previous case of the CJEU as a precedent even if that relates to another jurisdiction in the EU.

When the UK leaves the EU the Treaties will cease to apply. With the repeal of the European Communities Act 1972 both the supremacy of EU law and the role of the CJEU in the UK's legal systems will, subject to the terms of the Repeal Bill, the Withdrawal Agreement and the post leaving relationship, cease to have effect.

We support the UK Governments' decision to maintain consistency and stability in the Law. The need to maintain stability in the law, repeal legislation and prepare new legislation to fill in gaps arising from leaving the EU will comprise a significant part of the domestic legislation which is passed at or following withdrawal for some years to come. The UK Government's policy objective should be to retain existing EU law at point of exit and then repeal or amend in the post exit period when there is more time for consultation and proper scrutiny by the UK Parliament and the Scottish Parliament, and the Welsh and Northern Ireland Assemblies. In these circumstances, future decisions of the CJEU would be persuasive in UK courts in cases where the application of legacy EU law is in question.

Another relevant instrument to consider in the context of the impact on the justice system of leaving the EU is the EU Charter of Fundamental Rights (the Charter). The Charter sets out the civil, political, economic and social rights of European citizens and other persons resident in the EU. These rights are derived from the ECHR and other international treaties.

The Charter will most likely cease to apply, subject to any other negotiated outcome, when the Withdrawal Agreement comes into effect and the UK is no longer a member of the EU. That would result in a loss of EU specific rights which Dr Tobias Lock in his paper 'The Human Rights

implications of the European Referendum<sup>2</sup> details such as the right to be forgotten, guarantee of human dignity, physical and mental integrity, the prohibition on trafficking, the right to conscientious objection, a broader right to marry, a right to asylum, a broader fair trial guarantee, and the social principles contained in the Charter. It would also remove the influence of the Charter on the future development of UK human rights law, in particular in situations where legacy EU law is being considered.

Specifically in connection with legal matters, changes will require to be carefully thought through. As Bernard Jenkin MP, the Chairman of Public Administration and Constitutional Affairs Committee stated in his note to the Cabinet Office on “Leaving the EU and the Machinery of Government”, this is a “Whole of Government project”.

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

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<sup>2</sup> *The Human Rights Implications of the European Union referendum*, Dr Tobias Lock, University of Edinburgh, prepared for the Scottish Human Rights Commission (May 2016)

## Criminal Justice

The area of freedom, security and justice covers policy areas from the management of the EU's external borders to judicial co-operation in civil and criminal matters and police co-operation this includes asylum and immigration policies and the fight against crime, terrorism, trafficking, cyber-crime, organised crime and sexual exploitation of children. The UK retained an opt in facility under the Amsterdam Treaty in 1997 and has opted into (or in the case of Schengen-related measures has not opted out of) a number of measures including the European Arrest Warrant (EAW). We would advocate that careful consideration should be given to maintaining such aspects of the area of freedom, security and justice either on a transitional basis or as part of the withdrawal agreement or as part of the future relationship with the EU. The primary objective of judicial security and police cooperation is the safety of the citizen, as a guiding principle there should be no change to the law which would prejudice the safety and security of the individual.

### *Options for change*

European Union (EU) measures have been developed to deal with cross-border situations, for example where it is suspected that a criminal organisation is operating in several EU countries, or that a suspected criminal is hiding in a different EU country. In such cases, cooperation is necessary. EU law and policy in this area is intended to strengthen dialogue and facilitate action between the criminal justice authorities of EU countries. We have set out below a number of examples illustrating the need to maintain access to EU databases, information exchange systems, agencies and framework for cross-border co-operation framework: -

#### *a. Access to agencies*

As an EU Member State the UK enjoys access to all of the agencies such as Eurojust, the European Police Office (EUROPOL), the European Police College (CEPOL), the European Union Agency for Fundamental Rights (FRA) European Network and Information security agency (ENISA). The roles played by these agencies should not be underestimated. The agencies participate in the EU wide investigation of crime and subsequent prosecution by way of data sharing measures, identifying whereabouts of a suspect and the obtaining of a European Arrest Warrant.

The UK Government should as part of the withdrawal agreement negotiations consider giving priority to maintaining access to all agencies, in addition whilst it would be desirable for the UK to retain the ability to influence the policies and operational activities of those organisations this could be a challenge following withdrawal from the EU.

The ability to share information quickly and co-ordinate operations with other law enforcement agencies through Europol is key to detecting, disrupting and detaining criminals across borders.

*b. Europol*

The UK Government should consider giving priority to deciding whether or not to opt in to the new European policing co-operation framework<sup>3</sup> in order to continue access to Europol. The new Regulation<sup>4</sup> repeals the existing Council decisions which set out the framework for establishment and membership of Europol. Membership of Europol would continue until such time as the Regulation were repealed, although there is provision for the Commission to review and evaluate the working practices of the agency every 5 years<sup>5</sup>. The UK Government must indicate by January 2017 if it is to opt-into the new Regulation. Failure to do so would mean the UK will no longer be a member Europol from 1 May 2017. This will have implications for the ability of police to share information.

*c. Schengen Information System (SIS)*

The SIS facilitates the real-time sharing of information and alerts between the relevant authorities in participating countries, it is in operation in all EU Member States<sup>6</sup> and Associated Countries<sup>7</sup> that are part of the Schengen Area. Special conditions exist for EU Member States<sup>8</sup> that are not part of the Schengen Area, of which the UK is one. On the 13th April 2015 the UK gained access<sup>9</sup> to the Schengen Information System and operates it in the context of law enforcement cooperation, which allows the UK to exchange information with Schengen countries for the purposes of cooperating on law enforcement.

The SIS has been implemented by virtue of a Regulation<sup>10</sup> and a Council Decision<sup>11</sup>. Each state using the SIS is responsible for setting up, operating and maintaining its national system and its

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<sup>3</sup> [Regulation \(EU\) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation \(Europol\) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA](#)

<sup>4</sup> [Regulation \(EU\) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation \(Europol\) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA](#)

<sup>5</sup> Article 68.

<sup>6</sup> EU Member States that are part of the Schengen Area are most EU Member States, except for Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom.

<sup>7</sup> Switzerland, Norway, Liechtenstein and Iceland

<sup>8</sup> Bulgaria, Croatia, Cyprus, Ireland, Romania and United Kingdom.

<sup>9</sup> <https://www.gov.uk/government/news/uk-joins-international-security-alert-system>

<sup>10</sup> [Regulation \(EC\) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System \(SIS II\) and Regulation \(EC\) No 1986/2006 of the European Parliament and of the Council of 20 December 2006](#)

national Supplementary Information Request at the National Entry (SIRENE) Bureau, which in the UK is the National Crime Agency. We understand that the UK police forces have linked the Police National Computer (PNC) to the SIS. The European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA), is responsible for the operational management of the central system and the communication infrastructure. The European Commission is responsible for the general oversight and evaluation of the system and for implementing measures such as the governing entering and searching data.

The UK has full access to SIS for criminal justice and law enforcement. For example, the following specific alerts are available: alerts for persons wanted for arrest for extradition; alerts for missing persons; alerts for witnesses or for absconders or subjects of criminal judgments. Access to the SIS has resulted in access to all information on live European Arrest Warrants, and information in respect of previous convictions of individuals who have offended within the EU and out with the UK.

We understand that some non-EU member states, such as Norway, participate in the SIS. The UK Government will should give careful thought for the need for continued access to the SIS, particularly if an EAW style framework for extradition to and from EU Member States is agreed as part of the Withdrawal Agreement or the post leaving relationship between the UK and the EU.

#### *d. The European Arrest Warrant (EAW)*

The EAW is applied throughout the EU and has replaced extradition procedures within the EU's territorial jurisdiction. Judicial procedures have been designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence. Following a withdrawal from the EU it is possible that, without the trust and mutual recognition between EU Member States that underpins the European Arrest Warrant, the process for the surrender of individuals will be more expensive, complex and time consuming and would require a new treaty to underpin any alternative arrangements. Extradition proceedings would become more prolonged and, in custody cases creating significant additional cost. Costs would not only apply to the UK but also to the EU Institutions and the other EU Member States.

Lack of the EAW framework is likely to create tensions with Member States where law enforcement agencies will be hampered in assisting them. There is the possibility that an isolated incidence could create significant tensions e.g. where an individual is suspected of an act of terrorism elsewhere in

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[regarding access to the Second Generation Schengen Information System \(SIS II\) by the services in the Member States responsible for issuing vehicle registration certificates](#)

<sup>11</sup> [Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System \(SIS II\)](#)

the EU subsequently flees to the United Kingdom which results in a prolonged extradition process due to the unavailability of the EAW.

Scotland has been making use of the EAW. The Crown Office and Procurator Fiscal Service in Scotland recently published<sup>12</sup> figures relating to the use of the EWA showing that between 2011 and May 2016 there had been 48 extraditions to Scotland pursuant to EAWs, and 49 EWAs issued by Scotland during the same period.

In terms of options for re-establishing some form of mutual recognition in criminal matters with countries in the EU following a UK exit, one option could be reversion to the European Convention on Extradition 1957<sup>13</sup> (“ECE 1957”). Such an approach is likely to result in increased burden for all agencies of the criminal justice system then having to operate on a more cumbersome extradition process resulting in a high probability of delay and the possibility of less applications being made and processed. All existing EU member states have ratified the ECE 1957<sup>14</sup>, although the majority of member states have negotiated a set of reservations.

If the ECE 1957 model were adopted, the UK would need to amend its law. Part I of the Extradition Act 2003 designates the Category 1 territories which are all other member states of the European Union and which is the United Kingdom's implementation of the European Arrest Warrant framework decision. Part 2 of the Act is concerned with extradition to all other countries which have an extradition treaty with the United Kingdom. For example, post-withdrawal the UK could amend Part II of the Extradition Act 2003 to designate all existing EU member states as Category II jurisdictions. In addition to the UK having a treaty with each state, each of those designated Category II jurisdictions would likely require to enact their own domestic legislation to implement and recognise any reciprocal arrangements.

Pre-EAW framework, the UK and Ireland had an arrangement based upon the ECE 1957. Following the introduction of the EAW, the Republic of Ireland has repealed all pre-existing extradition arrangements with the UK prior to the adoption of the European Arrest Warrant Framework decision. The Irish Extradition Act 1965 provides for extradition between Ireland and countries other than the UK. This legislation is modelled on the 1957 Council of Europe Convention on Extradition to which Ireland is a party. Part III of the 1965 Act dealing with extradition between Ireland and the UK was repealed by the Irish European Arrest Warrant Act 2003. Accordingly, if the UK withdraws

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<sup>12</sup> <http://www.crownoffice.gov.uk/foi/responses-we-have-made-to-foi-requests/38-responses2016/1373-european-arrest-warrants-13-july-2016-r013208>

<sup>13</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117678/european-convention-extradition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117678/european-convention-extradition.pdf)

<sup>14</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p\\_auth=jrAnfYMx](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=jrAnfYMx)

from the European Arrest Warrant Framework completely and adopted the ECE 1957 framework with EU member states, Ireland would require to amend its domestic law to give effect to the arrangements.

As an alternative to the ECE 1957 process, the UK could consider an alternative option of negotiating a series of bilateral treaty agreements with EU Member states which is likely to be a long and complex process. In addition to negotiating new extradition treaties, the UK would need amending and implementing legislation. EU member states would subject to their constitutional requirements need to make amendments to their domestic law to reciprocate any negotiated arrangements.

In 2012, the UK Government made a positive decision to opt into the EAW framework. At the time then Home Secretary May<sup>15</sup> outlined some of the reasons in support of the decision to opt-into the framework, for example it being a streamlined process making it easier to bring serious criminals back to the UK to face trial or serve sentences. We believe those reasons for opting into the EAW are still sound and the UK Government should give careful consideration to an approach which avoids disengagement from the European Arrest Warrant process, particularly if alternative options could have a detrimental effect on the administration of justice. There should be no change to the law which would prejudice the safety and security of the individual.

#### *e. The European Investigation Order (EIO)*

The UK Government should prioritise the implementation of the directive<sup>16</sup> regarding the European Investigation Order in respect of criminal matters. The UK Government opted-in to this measure and the timescale for transposition into domestic law expires on 1st May 2017. The directive allows member states to carry out investigative measures at the request of another member state on the basis of mutual recognition. These investigative measures could, for example, include interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with additional safeguards) interception of telecommunications.

#### *f. Criminal procedure*

In respect of the treatment of accused persons, the EU published a 'roadmap' on procedural rights in 2009 to ensure that the basic rights of suspects and accused persons are sufficiently protected<sup>17</sup>.

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<sup>15</sup> <https://hansard.parliament.uk/Commons/2014-04-07/debates/14040711000001/JusticeAndHomeAffairsOpt-Out>

<sup>16</sup> [Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters](#)

<sup>17</sup> [Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#)

A number of measures followed with proposals to further strengthen procedural safeguards for citizens in criminal proceedings. Of those measures, the UK opted into and transposed the Directives on the Right to Interpretation and Translation in Criminal Proceedings<sup>18</sup> and the Right to information in Criminal Proceedings<sup>19</sup>.

The Government undertook careful consideration and made positive decisions to opt-into both Directives. We believe that the rationale for opting into these measures remain, notwithstanding the vote to leave the European Union, therefore the Government should avoid any proposal which results in a reversal or erosion of the opt-in and, which diminishes the right of the individual.

## Civil Justice

Within the EU, there is an almost complete legal framework for choice of law, jurisdiction and recognition and enforcement of judgments in civil and commercial matters. This framework aims to facilitate the recognition and enforcement of judgments reached by EU member states' courts, to achieve the so-called free movement of judgments,<sup>20</sup> creating rules for jurisdiction and choice of law,<sup>21</sup> and to provide common rules relating to evidence and service of documents.<sup>22</sup>

All of these issues are important in cross-border matters, and will continue to be relevant after the UK has left the EU. The UK will need to negotiate some form of continued participation, or develop alternative frameworks for judicial cooperation across Europe.

### *Keeping the Brussels I system as part of the new EU - UK relationship*

One option would be for the UK to negotiate to include the Brussels I framework on recognition and enforcement of judgments in civil and commercial matters as part of the new relationship with the EU. This could also include the Service of Documents and Taking of Evidence Regulations.

A possible model for this type of new relationship could be the mechanism established for Denmark in the Area of Freedom, Security and Justice to get access to the Brussels I Regulation

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<sup>18</sup> [Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings](#)

<sup>19</sup> [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings](#)

<sup>20</sup> Brussels I Regulation, which provides rules of jurisdiction and allows for almost automatic recognition and enforcement of judgements across member states

<sup>21</sup> Brussels I Regulation, which sets out rules on jurisdiction; Rome I and Rome II Regulations which provide for choice of law in contractual and non-contractual matters respectively

<sup>22</sup> Service of Documents and Taking of Evidence Regulations

framework.<sup>23</sup> The Danish Protocol extends the application of the instruments to Denmark, but creates effects only under international law and do not form part of the EU *acquis* in Denmark.

### *Lugano Convention*

Another option that the UK could consider is joining the Lugano Convention. The Lugano Convention provides for an almost parallel system of recognition and enforcement of judgments in civil and commercial matters to the Brussels I Regulation. It applies between the EU and EFTA, and is open to the EFTA states and any other states that are invited by the participating states to join it.

Key differences between the Lugano Convention and Brussels I Regulation include:

- Priority to exclusive choice of agreements – Under the Lugano Convention, if there are parallel proceedings opened in different member states, no other court can act until the first court first seised has determined whether it has jurisdiction. Some parties could try to frustrate the case by racing to open proceedings in member states where the courts are slow to make a determination of jurisdiction. The Brussels I rules allow for a court second seised to continue with the case where the parties have made an exclusive choice of court agreement.
- Ease of recognition and enforcement of judgments - The Brussels I rules help to make the recognition and enforcement of judgments almost automatic, as if they were judgments from the courts of that same member state. This increases the speed and certainty of judgments. Under the Lugano Convention, an *exequatur* is required, meaning there is a need to undertake a first recognition process at the courts of the member state seeking recognition and enforcement. However, the *exequatur* under the Lugano rules is largely symbolic, and this is not a significant difference in practice.

### *The Hague Conference on Private International Law*

The Hague Conference on Private International Law is a global organisation for cross-border cooperation in civil and commercial matters. The Conference has negotiated several agreements on the recognition and enforcement of judgments.

There is a convention on the recognition and enforcement of civil and commercial judgments from 1971, however, this convention has only been ratified by four states: Albania, Cyprus, the

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<sup>23</sup> Protocol Number 22 on the Position of Denmark

Netherlands and Portugal. Therefore ratification of this convention does not provide for a satisfactory solution.

More significant is the newer Choice of Court Agreements Convention 2005, which covers civil and commercial matters. This Convention has been ratified by the EU, Mexico and Singapore. The UK is therefore already a party to this convention as an EU member state and it should make efforts to accede to the convention, as seamlessly as possible, after the UK withdraws from the EU membership.

It should also be noted that while this convention is very important to commercial adjudication, as it provides for a recognition and enforcement of judgments where there is a choice of court agreement, it does not fully replace the Brussels I Regulation framework. Both the Brussels I Regulation and the Lugano Convention apply to all judgments in civil and commercial matters, including for example where there is a consumer, employment or insurance dispute. The Hague Conference Choice of Court Agreements convention applies only where there is a choice of court agreement between the parties.

The Hague Conference is currently working on a new global judgments convention. In 2016 the Council on General Affairs and Policy of the Hague Conference welcomed the work completed by the Working Group on this, and decided to set up a Special Commission to prepare a draft Convention. The Judgments Convention aims to provide recognition and enforcement of judgments in civil and commercial matters. However, unlike the Brussels I Regulation and the Lugano Convention, it does not aim to provide for recognition and enforcement of judgments in consumer and employment contracts. The new agreement is almost ready and it is likely to be presented to the political approval during 2017.

The Hague Conference has previously adopted conventions on service of documents and taking of evidence and the UK is already a party to these conventions. Generally these conventions have a good coverage within the EU: the Service of Documents Convention has been ratified by all EU member states apart from Austria, and the Taking of Evidence Convention has been ratified by all apart from Austria, Belgium and Ireland. Furthermore, they are currently being applied where non-EU states have ratified them. Even though these conventions are more cumbersome or slower than the EU Regulations, they do provide a global setting for the service of documents and the taking of evidence in civil and commercial matters.

## *Family Law*

The EU currently has a limited role in family law matters. Each individual member state has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters. Where EU rules do apply, these tend to build upon pre-existing international conventions. Much like for commercial and contract matters, the main focus of EU rules relating to cross-border family law issues is on ensuring mutual recognition and enforcement of judgements, and establishing rules around jurisdiction.

Continued cooperation between the UK and EU member states on cross-border family law cases will be important to support families and children through what is often a difficult and stressful time in their lives.

Some of the key instruments which the UK will need to consider in the context of withdrawal from the EU include Regulation (EC) n. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Brussels II bis Regulation on matters of children and jurisdiction, recognition and enforcement of orders relating to children, child protection, and child abduction; and Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters, referring specifically at any protection measure aimed at protecting victims of violence.

## **Legal Services**

The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another member state have been in force for a number of years. There are three key pieces of legislation that affect the legal profession:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)
- Recognition of Professional Qualifications Directive (2005/36)<sup>4</sup>

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession.

### *The Lawyers' Services Directive (temporary provision)*

The Lawyers' Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another member state - a 'migrant' lawyer - must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practises before the judicial authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

### *Permanent establishment under home title*

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a member state to practise on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the member state in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practise on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.

Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

### *Recognition of professional qualifications*

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one member state and is in good standing with his or her home bar.

The member state where the lawyer is seeking to re-qualify may require the lawyer to either:

- complete an adaptation period (a period of supervised practice) not exceeding three years, or
- take an aptitude test to assess the ability of the applicant to practise as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host member state and it must take account of the fact that the applicant is a qualified professional in the member state of origin).

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

### *Legal professional privilege*

The CJEU decided the case of *AKZO NOBEL Ltd and AKCROS Chemicals Ltd v The European Commission* (C-550/07) in September 2010. The judgement concerned the application of legal professional privileged communications between a client and in-house Counsel. The Court also decided to exclude all lawyers qualified outside the EU from the application of legal professional privilege. The case proceeded on the precedent of the ECJ in *AM&S Europe v the Commission* [1982] ECR 1575 paras 25-26 which also excluded non-EU lawyers from the application of legal professional privilege. The Court acknowledged that legal professional privilege applies to communications between a client and his independent lawyer but limited the definition of lawyer to “a lawyer entitled to practice his profession in one of the member states, regardless of the member state in which that client lives... but not beyond”. The apparent basis of the exclusion of third countries from the benefit of legal professional privilege within the EU is the difficulty of the “Court being able to ensure that the third country in question has a sufficiently established Rule of Law tradition which would enable lawyers to exercise the profession in the independent manner required and they to perform their role as collaborators in the administration of justice”. *Opinion of Advocate General Kokott*, 29 April 2010 paras 60-61. Legal professional privilege and Confidentiality of Communications is a key aspect of the Rule of Law in the UK and is acknowledged by the Courts

and Parliament as central to the administration of justice. Recently legislation such as the Investigatory Powers Bill and the Policing and Crime Bill specifically acknowledge the requirement to protect legal professional privilege and confidentiality. The doctrine is upheld under human rights law in *Campbell v UK* (1992) 15 EHRR 137. The loss of legal professional privilege and confidentiality will have a negative impact on the rights of clients and on the ability of lawyers in the UK to provide a full service to their clients when acting in EU legal issues or on matters which relate to EU Law or business in the EU. The UK legal systems clearly meet the test which Advocate General Kokott identified in respect of the Rule of Law and the independence of the lawyers in those systems and should therefore have legal professional privilege accorded to the lawyer/client relationship when EU Law is an issue.

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