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

Editorial

"*August*", Irish novelist Edna O'Brien tried to convince us, "*is a wicked month".* There was a time indeed when the month passed was as dull as a Brussels summer; so bereft of news that in Britain it was called the 'Silly Season'. (The Dutch, for reasons unexplained, opted instead for *Komkommertijd* - 'Cucumber time'). Alas, such innocence is long gone, swept away by the winds of Brexit and Trump. Thus far in August 2017 we have seen White Supremacists march in the US, terrorist attacks in Paris and Barcelona and a twitter spat tending towards nuclear war.

That being said, certain politicians have bravely attempted to maintain a certain lordly indifference to calls for their profession to be a 24/7 kind of one. In Brussels, President Tajani of the Parliament **appealed** to the *"the principle of loyal cooperation among the European Institutions"* when requesting that the Commission not send over any business before September. Alas, no such defence was open to David Davis, Secretary of State for Exiting the European Union, **forced to decline** a summons from Lord Jay of Ewelme to give account of himself and his department before the Lords' EU committee, as the date proposed "…[*fell] during the summer recess."*

Foremost in their Lordships' minds must have been the pending third round of negotiations concerning the exit process. Here a flurry of activity erupted in the past couple of weeks, as proposals addressing the substantive matters start to gain shape. To that end, from the UK side, we have seen details come forward on its proposals for the Northern Ireland border, the Customs Union and a statement concerning a transitional agreement. Furthermore, *The* ***Enforcement and Dispute Resolution: A future partnership*** *paper* was published on 23 August which sets out the UK's approach to the issues of enforcement and dispute resolution and what its objectives are. Another welcome publication for us has been the ***Judicial Cooperation in Civil and Commercial Matters***.

There is still no paper, however, on settlement or calculation of the financial obligations, which remain, without doubt one of the primary concerns. As such the question remains as to whether these proposals as a whole are, firstly, acceptable to the EU-27, and, secondly, robust enough to meet the threshold of '*sufficient progress'* laid out in the Council **negotiation mandate** that would allow the Brexit talks to progress further.

On a more international scale, we also have articles this month looking at the proposals for a multilateral

investment court, at the potential impact of a UK-USA trade deal on consumer standards, and at the concept of 'frictionless trade', as well as some more detailed assessments of the new General Data Protection Regulations and proposed changes to the supply of digital content and the online sale of goods.

Lastly, we would like to say goodbye to **Stuart Brown,** whose six month seat at the Brussels office has now come to an end. Stuart, who worked on consumer protection, access to justice and equality, will now be returning to London to take up his first post-qualification position. We thank him for his hard work with us, and wish him every success in his new role. Likewise, **Arfah Chaudry** will be moving on to pastures new, after doing sterling work on data protection and on coordinating between the Law Societies and the CCBE. We wish her luck with her new role, but as she is staying-on in Brussels, we insist that she not be a stranger!

At the same time, we welcome **Eoin Lavelle,** formerly of the Irish Permanent Representation in Brussels. Eoin will be filling the vacancy of Internal Market Policy Advisor, taking up the position at a critical and challenging time. We will also be welcoming our three new trainees, **Tamasin Dorosti, Caitlin Allan** and **Harriet Diplock** who are joining the office this month from their respective law firms in England.

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Graham Matthew, President, Law Society of Scotland

I took office as President of the Law Society of Scotland on 26 May this year and while I'd love to have been the first Law Society President ever to say "actually, I think I'll have a pretty easy year", this looked unlikely from the very beginning and has so far proven to be quite the opposite.

Such is the scale of challenges (and opportunities) facing the Society and our members, 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 over three decades ago, but solicitors' willingness and ability to adapt to a changing environment remains constant.

Of course, our role is to support our members in the face of these changes and in some cases, to play an integral part in determining what they should be. We will play a full part in the Scottish Government's **review of legal services regulation**, launched in April this year, 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.

The main law governing the profession, the Solicitors (Scotland) Act, is now more than 35 years old and there has been huge change in the legal sector in recent decades. New legislation will give us the means to regulate for the profession as it is today, in the 21st century.

Ensuring access to justice is also a key priority. Another review in which we expect to play an influencing role, is the ongoing independent review of legal aid, which aims to identify a flexible and progressive system that is sustainable and cost effective. I feel very strongly that everyone, regardless of background or financial situation, should be able to access 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 on behalf of their clients, some of whom are the most vulnerable in society.

In terms of what's on the horizon, Brexit remains one of our principal concerns, with some of our bigger firms already feeling the impact of clients' becoming more wary about investing in such an uncertain climate. It is of course also difficult for solicitors to advise their clients when so much of the detail remains unknown. As the negotiations move forward, it will be vital to ensure stability in the law and maintain, as far as possible, close collaboration in freedom, security and justice measures. We want to see continued professional recognition and continued rights of audience in the EU for our members and believe there also needs to be an agreed path for recognising and enforcing citizens' rights, including the rights of parties with pending cases before the Court of Justice of the EU.

Solicitor education is another focus for my time in office and I am hugely proud to continue the good work of my predecessors in promoting our new education trust the Lawscot Foundation, which was launched last year. The Foundation will offer financial support and, importantly, mentoring with experienced solicitors to students from less advantaged backgrounds who have been accepted to study Scots law at university.

I am delighted that we are now in the position of being able to help our first group of young people. They have faced difficult challenges at a young age – from being in care or being a carer themselves, to being

made homeless. Yet despite, or perhaps because of this, they are hugely driven – they have worked hard and received offers to study law at university from this autumn. I am positive that the legal profession will be all the richer for having such an inspiring group of people as part of it in the future.

Biography

Graham is the current President of the Law Society of Scotland. He qualified as a solicitor in 1979. After an apprenticeship in Musselburgh, Graham returned to his native Aberdeenshire in January 1981 to take up an assistant post in Inverurie and never left, having now occupied the same office and same desk for 35 years.

He joined the Law Society's Council in 2005 and has sat on and convened many committees and working parties before being elected Vice President for 2016/2017 in December. He is also vice convener of Society's Guarantee Fund Sub-Committee.

Graham is enthusiastic about the legal profession icularly high street practice and all it entails, including legal aid, access to justice and education.

BREXIT & TRADE

Chlorinated Chicken: Crying foul over a UK-US trade deal?

Chlorine washed chicken is back in the news; as the UK casts around to find trade partners to replace the EU post-Brexit, some commentators are expressing doubts that the UK would be able to retain the same degree of consumer protection *vis a vis* foreign imports, when no longer part of the single market.

Believing that agreeing to liberalise trade with the US would allow food produced under lower environmental standards to enter the British market, opponents of the deal seized upon chlorine-washed chicken as being totemic of what they saw as 'inferior' US regulatory policy, claiming that chlorine-washing – while not injurious to health in itself – was an easy way of compensating for poor hygiene during the entire farm-to-supermarket production process.

Nor is this, in the eyes of sceptics, an isolated concern; GMO **crops and certain food additives** have also been mooted as potential dangers of the UK being out-leveraged by the US into either accepting goods banned from export to the EU, or to removing additional barriers which currently prevent certain prevent goods being placed on the market, such as is the case with a number of major neo-nicotinoid pesticides

The USA and the EU are both members of the WTO, and indeed the value of trade between the two is **the highest** of any pair of trading partners in the world. Restrictions on transatlantic trade generally arise due to concerns on public health and welfare (from GATT Article XX) , or as a result of so called 'Technical Barriers to Trade', where the regulatory requirements of one party have the effect of preventing certain imports from the other. If a more open market between the US and the UK is expected post-Brexit, looking at the subjects of historical EU-US disputes may offer some insight as to how that would translate in terms of new products being placed on the UK market – particularly in the case of food.

Beef Hormones

In 1989, the EU banned the importation of meat containing artificial beef growth hormones, which were approved for use in the USA. Such a ban, ostensibly to protect human health, is permissible under the terms of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS"), but only if the party imposing the ban can provide valid scientific evidence that such a ban is well founded. In the case of the hormones within the scope of the ban, the US (along with Canada) had had these in use for fifty years. The EU, responding to consumer concerns, passed legislation restricting the imports despite limited scientific evidence linking hormone raised beef to health problems.

A case was brought before the WTO Dispute Settlement body, and later to the Appeal body, which upheld, in a 1998 **decision,** that the EU's ban "*violated Art. 5.1… [of the SPS]… because it was not based on a risk assessment*". Accordingly **Directive 2003/**74 EC was enacted to amend the ban. However, the US and Canada rejected that the EU had met WTO standards for scientific risk assessment. A further WTO case was

brought in 2004, this time by the EU, seeking to have the retaliatory measures still in place dropped. Between 2009 and 2016, a memorandum of understanding ("MoU") between the EU and the US did in fact remove the retaliatory measures in return for increased quotas on imports of grain-fed beef to the EU. In December 2016, however, then President Obama took steps to reinstate the measures, with the US Trade Representative asserting that *"in recent years the U.S. beef industry has been prevented from gaining the intended benefits from the MOU because of increased imports under the duty-free quota from non-U.S. suppliers."*

GMOs (Biotech)

A 2003 dispute concerned two pieces of legislation: Directive 2001/18 "*on the deliberate release into the environment of genetically modified organisms*", and Regulation 258/97 "*concerning novel foods and novel food ingredients".* The USA (along with Argentina and Canada) argued that these – and more specifically the administrative procedures for approval of Biotech products which they established – amounted to a de-facto moratorium on the placement of Biotech products on the market. The Panel broadly **agreed**, holding that *"… Approvals were prevented through actions/omissions by a group of five EC (sic) member States and/or the European Commission."*

In an echo of the decision of the *Beef Hormones* case, the argument of the EU that the measures taken were necessary safeguards failed as it was held that the *de facto* moratorium was in fact a procedural delay, and not a measure to achieve *"sanitary or phytosanitary protection*". Subsequently, settlements involving "*technical discussions"* **led to an end** to the WTO cases.

An interesting point, which neatly encapsulates the point of disagreement in the series of disputes, can be found in the submissions; as one summary **noted**;

"The EC rebuts the U.S. argument that a positive risk assessment requires the EC or an EU member state to give final approval for commercialization of a biotech product. The EC states that EC scientific opinions are not legally binding on member states, as the U.S. believes they are, and that "scientific opinions are limited in scope, and, therefore, often do not conclude the risk assessment process, even in the narrow sense."

As can be seen from the two examples above, WTO jurisprudence follows the principle that restrictions on trade, enacted for reasons of public health and safety, must be in accordance with valid scientific evidence. It is possible to restrict imports of animal products based on grounds of public morality – as was the case with **EU Regulation 3254/91** (fur caught in leghold traps), or most clearly in the dispute in **EU-Norway, Canada Seals 2013-4.** In that last case, the Dispute Settlement Panel held **that** "*a country is allowed to have an import ban based on public morals if there is a long history of public opposition."*

Perhaps that is reason why chlorine-washed chicken has yet to make it as far as a dispute settlement body; it is hard to see how an objection on grounds of public health could succeed, given the impossibility of proving that a practice widespread in the US, with no apparent isolated impact on public health, could be scientifically shown to be harmful to EU consumers. Meanwhile, an attempted ban on grounds of animal welfare & public morality could draw uncomfortable attention to **industrial farming standards** within the EU.

What does this mean for the UK? As can be seen from the above cases, resolutions to disputes brought before the WTO dispute settlement body do not necessarily result in clear changes to the restrictive measure, but instead often result in a mutually acceptable easing or restructuring of the legal framework in question. As trade is an exclusive competence of the EU, in bilateral conflicts the scope for finding a mutually beneficial compromise is potentially as large as the single market – and bear in mind that in the case of disputes, the compromise need not be limited to similar kinds of products. Difficulties in accepting agricultural products could be assuaged by liberalising intellectual property markets, for example. Post-Brexit, it seems doubtful that the UK, with a vastly decreased market to open up to international trade– albeit while having more autonomy over that market - could recreate, if it wanted, the trade schedules of the EU and still retain enough clout to close the door on products sold in the US that are potentially undesirable to UK consumers.

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The Multilateral Investment Court: a plausible attempt at reform, or cosmetic changes only?

Introduction

Since 2015, the European Commission has worked on the establishment of a Multilateral Investment Court which would have a permanent international body with the power to settle investment disputes between investors and states. This would replace in whole or part the current system of Investor State Dispute Settlement ("ISDS") found in trade deals worldwide. The aim of instituting a new body would be to address

criticisms of the system as it exists today; namely that it lacks transparency, prioritises the financial interests of foreign investors over democratic policy goals, and that the *ad-hoc* structure does not lend itself to judicial predictability. Based on the papers thus far available, it is not clear however that changes desired by the Commission will succeed in addressing these points (or are even likely to gather the requisite international support)

ISDS mechanisms worldwide have their origins in several 19th Century Peace conferences, which were aimed at creating a forum for peaceably resolving disputes between states at a time when the customary consequence of a diplomatic failure was to send a gunboat. From there, international practice developed to allow legal persons to seek redress against states via arbitration, a custom which was formalised in the Bilateral Investment Treaties ("BITs") and Multilateral Investment Agreements signed between Western and post-colonial countries.

Although public international law has, in the last decades, evolved to include a wider range of non-state bodies, the ability of companies to pursue legal action (resulting in enforceable damages) against a state, often as a result in a change of policy carried out by that state, remains controversial. Criticism tends to come from a number of angles, namely that the process is overly secretive; that arbitrators, who often continue to act as counsel in between appointments to tribunals have an inherent conflict of interest and that the awards granted are often inconsistent across similar sets of facts, while allowing only very limited grounds for appeal. Perhaps most damningly, ISDS is often criticised for permitting corporations to roll back environmental or social legislation which has resulted, or which may result, in financial damages to them. Although these concerns are far more often cited than proven, opposition to ISDS formed such a major part of civil society opposition to the proposed Transatlantic Trade and Investment Partnership ("TTIP") deal that the Commission felt moved to respond in 2015 with a **concept paper** calling for a series of reforms that would move ISDS towards a *"a permanent multilateral system for investment disputes"*.

Towards a Multilateral Investment Court

The steps proposed in the commission paper - ***Investment in TTIP and beyond; the path for reform*** - are rather wide-ranging, and can be divided into three blocks; reforms addressing procedural issues, such as a ban on 'forum shopping' and clarifying the position on transparency and *amici curiae* submissions; reforms addressing more substantive concerns, primarily on the right to regulate, and the third block, changes aimed at establishing a new investment court, primarily by incorporating a defined – i.e., government-controlled – list of arbitrators and establishing a more wide ranging appeal mechanism.

As regards the first two blocks of reform, the changes proposed by the Commission may not go farther than restating existing ISDS customary law (although, it should be acknowledged, investment law does not operate with a formal system of precedent) and international instruments such as the UNCITRAL transparency rules.

It is unclear, however, whether these are new reforms as opposed to a restatement of existing ISDS custom. For this, a more concrete set of proposals is needed. As yet, however, little codification of the Commission's ambitions exists. Although a December 2016 Commission **press release** states that *"the signed EU-Canada trade deal (CETA) and the EU-Vietnam trade agreement both contain a reference to the establishment of a permanent multilateral investment court"*, the current CETA text restricts this to a single paragraph **(Art. 8.29)**, requiring parties to "*pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes".* The most recent text of the EU-Vietnam agreement is more laconic still, with the only reference to a dedicated EU-Vietnam procedure (as opposed to recourse to a standard model of international arbitration) being contained in **Article 23**, which provides for a list of five EU, five Vietnam and five third party arbitrators from which panels shall be constructed as needed.

On the domestic front, a consultation for public stakeholders ended in March. The results have yet to be released, however to judge from the available **responses**, scepticism runs high. Discussions do continue, but it is unclear when a model will be available, or even whether those talks are being carried out on a truly multilateral, as opposed to piecemeal, basis. Likewise, procedural concepts, such as how judges will be selected and whether the *lex loci arbitri* will depart from ICSID or UNCITRAL rules appear not to have progressed beyond the discussion stages.

Conclusion

The Commission proposals do not lack for ambition. Historically, attempts to create an international body to adjudicate investment disputes – as the WTO does for trade disputes – have foundered, in no small part due to differences in approach between developed and less-developed countries concerning state liability for expropriations. The Commission's task is therefore twofold; firstly to overcome scepticism from external actors, such as that which scuppered the 1995 attempt by the OECD to create a similar permanent investment court, and secondly to produce a court that would overcome at least some of the domestic opposition from civil society mentioned in the introduction. As things stand, bridging this double gap appears

to be some way off, and the additional hurdle placed by the CJEU's **Opinion 2/15** will present another set of political challenges for the drafters of investment and dispute settlement chapters to consider. Add to this **the distinct antipathy shown by other countries to the concept**, and it is likely to be some time before a new court is in place.

Frictionless trade

The term "frictionless trade" is familiar to many by now, thanks in part to government ministers, officals, and the EU Commission, all of whom have been repeating the phrase in speeches and press releases on Brexit over the past few months.

In April of this year, David Davies outlined the UK's desire for a "*frictionless EU-UK border*" that would be achieved through the use of technological solutions. The aim for the government, he said, was to ensure that any future trade is carried out with as little physical hindrance as possible, particularly on the UK's land border on the island of Ireland.

The EU Commission's Chief Brexit Negotiator, Michel Barnier, responded to the UK's posturing with typical firmness in July, stating that the UK Government's red lines on Brexit mean that friction-free trade is an impossibility: ***"I have heard some people in the UK argue that one can leave the single market and build a customs union to achieve 'frictionless trade' – that is not possible."***

A number of legal commentators are in agreement with the stance taken by Mr. Barnier. Dr. Katy Hayward of Queen's University Belfast described the UK's desire for a seamless frictionless border as "*almost an oxymoron*", given the UK Government's interpretation of the referendum result as being a vote to 'take back control' of immigration, laws, and trade.

Position papers on Northern Ireland and Customs

The publication of a number of position papers in August by the UK Government can be seen as an attempt to square that circle. On the 15th and 16th of August respectively, the Department for Exiting the European Union (DExEU) published papers on future customs arrangements between the UK and the EU and on future border arrangements in Northern Ireland. The first paper sets out two long-term options to replace the customs union: **"The Highly Streamlined Customs Arrangement"** and the **"New Customs Partnership with the EU."**

The first **"streamlined"** model would see the creation of a new customs border managed by the UK. Under this arrangement the UK would unilaterally simplify its requirements on EU goods entering the country (as much as is possible) and provide border "facilitations" to reduce and remove trade barriers. These "facilitations" would involve the employment of technology-based solutions (e.g. the expansion of "trusted trader" schemes and the use of number-plate recognition cameras). The position paper does concede that the implementation of this proposal would lead to **"an increase in administration".** It might also require firms to carry out self-assessments of their own customs duties.

The second model would involve the UK imposing the EU's tariffs, standards, and rules on goods that are imported for the purpose of trade within the broader EU. In order to allow the UK to pursue new trade deals with third countries, it would impose its own regime on goods that are imported solely for the purposes of trading within the UK. This double policing system will require a degree of trust on the part of other member states that might be difficult to achieve (the paper itself describes this approach as being "**innovative and untested**").

It is worth noting that a further paper was published on the 21st of August 2017, on the subject of continuity in the availability of goods for the EU and the UK. This paper helpfully acknowledges a link between the provision of goods and the provision of services, as well as setting out proposals that would ensure the availability of goods in the UK and EU markets during the withdrawal process.

Outcome and next steps

Although both models would lead to a reduction in administrative costs and waiting times for goods crossing the UK border, neither one alone would achieve the government's stated aim of maintaining friction-free trade with the EU post-Brexit. Whilst these papers represent a positive step in negotiations, it is also important to recall that these are proposals made by the UK Government. To work in practice they need to be part of a bilateral agreement with the EU, and therefore need to be negotiated and agreed with the EU. Furthermore, it is worth noting the political sensitivities that would be involved in the installation of customs infrastructure on the border between Northern Ireland and Ireland.

When considering the impact that these papers may have on the ultimate EU-UK trade agreement, it is

important to bear in mind the two-stage structure of the on-going negotiations. The EU has insisted on conducting the divorce settlement talks before negotiations on trade and customs can begin. The first round of negotiations are focused on the calculation of a **divorce bill, the rights of citizens and the question of the border between Ireland and Northern Ireland**. Once the EU deems that "sufficient progress" has been made in these three areas, talks on a future comprehensive EU-UK trade deal can be begin. Unless David Davis can convince his EU counterparts that the questions of customs and the Northern Irish border are inextricably linked, we may have to wait some time before knowing exactly what level of friction will exist on the UK's borders post-Brexit.

Update on proposed directives on the supply of digital content and the online sale of goods

Proposed Directive on the supply of digital content

The Council has now adopted its position on the proposed directive on the supply of digital content.

Background

The directive concerns business-to-consumer contracts for the supply of digital content and covers: data produced and supplied in digital form (e.g. music, online video, etc.), services allowing for the creation, processing or storage of date in digital form (e.g. Cloud storage), services allowing for the sharing of data (e.g. Facebook, YouTube, etc.), and any durable medium used exclusively as a carrier of digital content (e.g. DVDs).

Position of the European Parliament

In April 2016 it was decided that there would be a referral to a joint committee. The committees are the Internal Market Consumer Protection Committee (IMCO), and the Legal Affairs Committee (JURI). There has been no change in the position of the Proposed Directive. The Proposed Directive is still on the table, but the committees are yet to publish their decisions adopting their positions.

Position of the Council

On 8 June the Council adopted its position on the directive. The main elements of the Council's position are:

1. **The scope of the directive**

Particularly in relation to embedded digital content, 'over the top' interpersonal communication services (OTTs), bundle contracts and the processing of personal data.

The text suggests that consumers should be entitled to contractual remedies not only under contracts where they pay a price for the digital content or service, but also in cases where they only provide personal data that will be processed by suppliers.

However, where the personal data are exclusively processed by the supplier of the digital content or service, or for the supplier to comply with legal requirements to which the supplier is subject, the directive shall not apply.

2. **The remedies for lack of supply and non-conformity**

The text suggests that suppliers should be allowed a "second chance" in case of lack of supply before the contract can be terminated.

3. **The time limit for the supplier's liability**

To take into account the differences at national level, the compromise text does not fully harmonise prescription or guarantee periods, but sets out that the liability of the supplier for cases of lack of conformity may not be shorter than two years.

4. **The period of the reversal of the burden of proof**

The period during which the burden of proof for lack of conformity rests on the supplier is set at one year.

The Council has indicated that negotiations with the Parliament on the Proposed Directive will be able to start once the Parliament has adopted its position. Currently, the Council anticipates that this is likely to be in the autumn.

Proposed Directive on the online sale of goods

Position of the European Parliament

In April 2016 it was decided that there would be a referral to associated committees. The committee responsible for the dossier is the IMCO Committee. There has been no change in the position of the Proposed Directive.

There were 6 new amendments to the Draft Report which were tabled in July 2017. The amendments highlighted the importance of raising consumers' awareness of their rights with regard to the length of the legal guarantee period, and to the reversal of the burden of proof in order to increase consumer confidence in cross-border purchases.

The amendments also suggested that there is a need to provide a definition of embedded digital content and services in order to keep the directive in line with the Directive on digital content.

It was also suggested that, in the light of the previously proposed extension to the scope of the directive, it is necessary to ensure that what will be covered is specified. It is therefore suggested that public auctions should be covered by the scope as there is no logical reason to exclude them.

Finally, it was recommended that some of the wording from EC Directive 1999/44 should be transposed into the Directive, providing that Member States may require that the guarantee is drafted in one or more languages, which it shall determine from the official languages of the Union. This is an important provision from the 1999 Directive which will be repealed in the event of the extension of the scope of the current proposal, and should therefore be protected.

The IMCO Committee is yet to publish its decision adopting its position. The Brussels Office will keep an eye on the proceedings and will provide further updates in due course.

The First Annual Joint Review of the EU-US Privacy Shield

The EU-US Privacy Shield is an agreement which allows for the transfer of personal data between the EU and US. These transfers of data can occur when you buy goods or services online, use social media, cloud storage or in the case of employees of an EU-based company that uses the services of a company in the US.

EU law requires a high level of protection of personal data that is transferred to the US. As such, in the case of any personal data that is transferred to a US-based company, the company must ensure that the data is processed. They must ensure it is used, stored and further transferred in line with the established safeguards and rules.

To transfer personal data from the EU to the US, a company can use contractual clauses, binding corporate rules, and the Privacy Shield.

If the Privacy Shield is used, the company must **sign up to the framework** with the US Department of Commerce ("DoC"). In order to be certified, companies must have a privacy policy in line with the Privacy Principles of the Privacy Shield. They must renew their "membership" to the Privacy Shield on an annual basis. If they do not, they can no longer receive and use personal data from the EU under that framework.

The first Annual Joint Review will take place in the week of the 18th September 2017 in the US with the participation of eight Article 29 Working Party members ("WP29"), which also includes Commissioners and experts at staff level. The guidelines provided for by WP29 are due to be published in October.

The WP29 released a **press** statement stating that the participation of meetings for the Commission's review are open for EU Data Protection Authorities ("DPAs") of the WP29. The WP29 will seek clarification with the Commission and ensure that US authorities are able to answer concerns on the concrete enforcement of the Privacy Shield decision on:

1. **Problems raised by the EU-US Privacy Shield**

On the 12th July 2016, the Commission adopted the EU-US Privacy Shield adequacy decision. The Article 29 Working Party has since issued several **opinions** on the adequacy decisions and has stressed concerns after

reviewing cases from the European Court of Human Rights, Court of Justice of the European Union ("CJEU") and relevant US case law. The WP29 states that these particular issues need to be addressed in the annual review of the adequacy decision. Thus, the first annual review will be a key moment for the WP29 to assess the effectiveness of the Privacy Shield mechanism.

2. **Law enforcement and national security access**

The WP29 has questions relating to the latest developments of US law and jurisprudence in the field of privacy. The WP29 also seeks precise evidence to show that bulk collection, when it exists, is 'as tailored as feasible', limited and proportionate. President Trump has not nominated an Undersecretary of State to serve as Ombudsman for the Privacy Shield program, nor yet nominated new Privacy and Civil Liberties Oversight Board ("PCLOB") members. The WP29 "stresses the need to obtain information concerning the nomination of the four missing members of the PCLOB as well as on the appointment of the Ombudsperson and the procedures governing the Ombudsperson mechanism, as they are key elements of the oversight architecture of the Privacy Shield."

3. **Commercial aspects**

The existence of legal guarantees regarding automated decision making or the existence of any guidance made available by the DoC regarding the application of the Privacy Shield principles to organisations acting as agents/processors. Clarifications that will be sought also include the definition of human resources data.

The WP29 expects that it will be given the opportunity to provide comments on the Commission's report before the report is finalised and made public.

The WP29 adopted a **letter** addressing the above issues to Commissioner Vera Jourová, sharing its views and recommendations on the operational and substantive modalities of the Joint Review of the recent US-EU agreement on data transfers. The letter states the issues with the Privacy Shield in the statement above.

Other concerns over the Privacy Shield, including President Trump's Executive Orders

Following a **recent quote by Director of National Intelligence Daniel Coats** in a US congressional hearing on data relating to information referring to the difficult nature of identifying when data or communications regarding US citizens are mistakenly collected, EU DPAs may have concerns on whether US intelligence is also gathering EU citizen data in the process.

It is also interesting to note that Digital Rights Ireland have filed a **case** against the Commission regarding the validity of the Privacy Shield, which will be heard towards the end of the year.

There will also be a **case** referred from Ireland's highest court to the CJEU in early September on whether model clauses can also be used by international companies (e.g. Facebook) to move data from the EU to the US.

However, it must be noted that the Executive Order does not have any direct impact on the Privacy Shield. The rights of EU citizens against US federal agencies, in particular the right to judicial redress, are guaranteed by the **Judicial Redress Act**. Secondly, under US law, Executive Orders cannot overturn statutes enacted by Congress and, on the contrary, may only come into force "*to the extent consistent with applicable law*". The Judicial Redress Act would have to be amended (which would require a vote in Congress) in order to strip EU citizens of their rights under Privacy Shield.

Human Rights Watch ("HRW") stated in July that **US Surveillance makes the Privacy Shield invalid**. **HRW sent a joint letter along with Amnesty International to Commissioner Jourová**. HRW and Amnesty International believe that the Commission should re-evaluate the adequacy decision as *"**Section 702 of the Foreign Intelligence Surveillance Act**, which underpins at least two large-scale warrantless surveillance programs and which Congress is currently debating whether to renew before it expires at the end of this year. Another is **Executive Order 12333**, which the National Security Agency uses as the basis for most of its **communications surveillance activities** – including, according to media reports, **vast warrantless snooping programs** around the world."*

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Government publishes statement of intent on new UK data protection laws which will transpose the EU's General Data Protection Regulation (GDPR) into national law

In a 30 page **statement of intent**, the Government set out its plans for a new data protection bill, which is yet to be introduced to Parliament. The planned legislation is set to follow the **General Data Protection**

Regulation, which comes into effect on 25 May 2018, when the UK will still be a Member State of the EU.

It is interesting to note that the planned data protection law will include a number of derogations in national law from the GDPR:

1. **Giving consent to process data and protecting children online**: The Government plans to legislate to allow for a child aged 13 years or older to consent to their personal data being processed.
2. **The GDPR only allows for bodies with "official authority" (the police etc.) to process personal data relating to criminal offences and/or convictions**: EU member states can legislate at a national level in order to enable other bodies to process this category of data. The UK Government said it would seek to preserve continuity with current domestic legislation, for example, by allowing a private or third sector employer to obtain details of criminal convictions in order to carry out a criminal records check.
3. **Automated individual decision-making**: The GDPR says an individual has the right not to be the subject of automated decision-making such as "profiling". However the UK Government has stated that some functions, such as a credit check at a bank, are an appropriate means of automated decision making and thus should be allowed. The UK Government will legislate to allow automated data processing, yet individuals will have the right not to subject themselves to a decision made by an automatic means.
4. **Freedom of expression in the media**: The GDPR provides for journalistic exemptions to certain areas of data protection to allow for journalistic activity in the public interest to be carried out. The new Data Protection Bill will strike the right balance between freedom of expression of the media and the right to privacy for individuals. Here, the UK Government plans on broadly replicating **section 32 of the Data Protection Act 1998** in order to balance privacy and the freedom of expression.
5. **Research**: The GDPR requires organisations to comply with specified obligations in relation to an individual's personal data. Such obligations include, for example, the requirement that inaccurate personal data, upon notification, be rectified without delay, as well as rights of access. The GDPR, however, also allows the UK to legislate to allow scientific or historical research organisations, organisations which gather statistics or organisations performing archiving functions in the public interest, to be exempted from such obligations. However, this will only be the case if compliance would seriously impair these organisations' ability to carry out research, archiving or statistics-gathering activities.
6. **Law enforcement data protection**: The Data Protection Bill will transpose into UK law the **EU Data Protection Law Enforcement Directive** (DPLED), which must be implemented into domestic law before 6 May 2018 and will extend to domestic law enforcement as well as cross-border enforcement. Furthermore, the Government has decided that, in order to ensure consistency and certainty for criminal justice agencies, the standards which the DPLED establishes will be extended to all domestic data processing for law enforcement purposes.
7. **National security data processing**: The UK plans to legislate on the revised Council of Europe Convention for the Protection of Individuals with Regards to Automatic Processing of Personal Data (Convention 108).

The EU's e-Privacy Regulation is also set to come into effect by 25 May 2018, yet this was not referred to in the statement. The statement of intent does not give much detail as to what the final Bill will look like, however the Data Protection Act 1998 will be repealed.

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A new route to qualification: the Law Society of E&W's response to the SRA consultation

A new route to qualification: the Law Society of E&W's response to the SRA consultation

The Solicitors Regulation Authority (SRA) recently published its third consultation on the new standards for becoming a solicitor. The Law Society of E&W has responded to the consultation on proposed regulations which will provide a framework for qualification as a solicitor and for the recognition of qualified lawyers.

Read more

Sixty international bar associations to attend Opening of the Legal Year in London

The **legal year** runs from 1 October to 30 September and every year it is "opened" with ceremony at Westminster Abbey, London. The ceremony attracts senior members of the domestic and international legal profession. This year, office holders from sixty foreign bar associations will attend the Opening of the Legal Year. The Law Society is using the opportunity to engage with them on issues of international trade in legal services, diversity in the legal profession and the judiciary and technological innovation for access to justice.

Colloquium on "Business and Brexit", 22 September 2017, London

The Franco-British Lawyers Society, in association with the Franco-British Council and with support from Herbert Smith Freehills and GPlus Europe, is organising a one-day colloquium on Business and Brexit. The event will examine Brexit and the business and legal implications from a **Franco-British perspective**, drawing on expert views from industry, academia and politics, through various panel discussions.

Read more

Negotiators need to ensure UK and EU citizens' rights can be recognised and enforced after Brexit

Michael Clancy, Director of Law Reform at the Law Society of Scotland, said: "Citizens and businesses in the UK and across the EU currently rely on EU civil justice laws to deal with cross-border contractual and business disputes, divorce and family law matters, and consumer disputes.

"They must be able to access an appropriate route to resolve disputes and it will be crucial to have agreement prior to leaving the EU to allow cooperation between different EU states on the way courts deal with cross-border cases, to prevent additional cost, delay and distress for people.

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Law Society joins In-house Counsel Worldwide

As we reach the half way point of our ambitious five year strategy, at the heart of the Law Society of Scotland's ethos is to drive forward our standing as a truly international, world-class professional body.

One of the major growth areas for the Scottish legal community is solicitors working in-house. More than 3,000 Scottish solicitors work in public bodies, energy companies, financial services and the Crown Office & Fiscal Service, to name but a few. A sizeable percentage of our in-house members also work elsewhere in the UK and overseas.

It is an area of particular pride to us at the Law Society of Scotland and one increasingly attractive for new recruits to the profession. Time after time we hear from graduates and experienced solicitors thinking about the move in-house

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Accredited paralegal launch

Over 400 Law Society of Scotland registered paralegals will become known as, 'Accredited Paralegals', as of today, 7 August.

The name change better reflects the high professional status of paralegals accredited under the scheme.

Denise Robertson, manager in the Society's Registrar's team, said, "The term 'accredited' more fairly and accurately reflects what the status is and does: accrediting paralegals as knowledgeable and proficient in a particular practice area, and confirming that they have experiential learning, supported by a qualification.

"One of the aims of the accredited paralegal scheme is to provide a professional qualification and identifiable quality standard for paralegals across the profession. In turn, having a quality standard will assure clients that work is being processed efficiently and at the right level.

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ONGOING CONSULTATIONS

Justice & Fundamental Rights

Consultation on lowering the fingerprinting age for children in the visa procedure from 12 years to 6 years
17/08/2017 to 09/11/2017

Public consultation on improving cross-border access to electronic evidence in criminal matters
4/08/2017 to 27/10/2017

Financial Services

Public consultation on the prevention and amicable resolution of disputes between investors and public authorities within the single market
31/07/2017 to 03/11/2017

Public consultation on transparency and fees in cross-border transactions in the EU
24/07/2017 – 30/10/2017

Public consultation on the development of secondary markets for non-performing loans and distressed assets and protection of secured creditors from borrowers' default
10 July 2017 - 20 October 2017

Borders and Security

Consultation on the interoperability of EU information systems for borders and security
27/07/2017 to 19/10/2017

Digital Economy

Public consultation on Transformation of Health and Care in the Digital Single Market
20/06/2017 to 12/10/2017

Public consultation on the database directive: application and impact
24/05/2017 to 30/08/2017

Internal Market

Public consultation on retail regulations in a multi-channel environment
17 July 2017 - 8 October 2017

Trade

Public consultation on the exchange of customs related information with third countries
18 July 2017 to 16 October 2017

Consumer Protection

Public consultation on the targeted revision of EU consumer law directives
30 June 2017 - 8 October 2017

Migration and Citizenship

Consultation on the European Union's (EU) legislation on the legal migration of non-EU citizens (Fitness Check on EU legal migration legislation)
Monday, 18 September, 2017

COMING INTO FORCE THIS MONTH

Consumer Protection
Information to accompany money transfers — Regulation (EU) 2015/847

CASE LAW CORNER

Decided cases

Migration

Judgment in Cases C-490/16 *A.S. v Slovenian Republic and C-646/16 Khadija Jafari and Zainab Jafari*

The concerned parties made applications for international protection in Slovenia and Austria. However, these Member States took the view that, as the applicants had entered Croatia unlawfully, according to the Dublin III Regulation, it is for the authorities of the State in which the concerned parties arrived to examine their applications. The persons concerned challenged the decisions of the Slovenian and Austrian authorities, arguing that their entry into Croatia was not irregular and that the Dublin III Regulation required the Slovenian and Austrian authorities to examine their applications. As such, the Slovenian and Austrian courts asked the Court of Justice of the European Union (CJEU) whether the entry of the persons concerned is to be regarded as regular under the Dublin III regulation. The Austrian court also seeks clarification on whether the approach used by the Croatian authorities resulted in the issuing of a visa by the Member State.

The Court held that a visa does not refer to mere tolerance and is not to be confused with admission to the territory of the Member State, as a visa is required to enable admission to the territory. Thus, it declared that the admission of a non-EU national to the territory of a Member State did not result in the issuing of a visa, even if the admission was explained by exceptional circumstances, such as those characterised by a mass influx of displaced peoples into the EU. The Court also considers that crossing a border in breach of the rules applicable in the concerned Member State must be considered 'irregular' under the meaning of the Dublin III Regulation. Furthermore, the CJEU held that Croatia is responsible for examining applications for international protection by persons who crossed its border en masse during the 2015-2016 migration crisis.

Advocate General Bot's Opinion in Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*

And

Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council

AG Bot proposes that the Court of Justice of the European Union should dismiss the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers as the mechanism is a proportionate means which has enabled Greece and Italy to deal with the impact of the 2015 migration crisis. The provisions of this mechanism from the Council of the European Union, allows for the relocation of 120,000 persons from the two Member Stated to other EU Member States over a two-year period.

The AG takes the view that the argument that the Council should have consulted with the European Parliament should be rejected. Furthermore, the AG took the view that Article 78(3) TFEU permits the adoption of measures which, in order to address a clear and identified emergency situation, derogate temporarily and on specific points from legislative acts in asylum matters. The Conclusions of the European Council of 25 and 25 June 2016 do not prevent the Council from adopting the contested decision either. The decision also helps to relieve the pressure on the asylum system in Italy and Greece, thus it also has an appropriate objective. The limited efficacy of the measures were explained due to a multitude of factors, including the failure of certain Member States to implement the decision.

The Court of Justice, rejecting in its entirety the challenge brought by the claimants that the reference in Article 78(3) to a measure being passed in consultation with the European Parliament meant that a legislative procedure was needed. Furthermore, as the decision of the Council [to respond to the emergency situation by derogating from certain legislative acts], was non-legislative, "**its adoption was not subject to the requirements relating to the participation of national Parliaments and to the public nature of the deliberations and vote in the Council"**.

Judgments in Cases C-599/14 P and C C-79/15 *P Council v Liberation Tigers of Tamil Eelam (LTTE) and Council v Hamas*

The Council of the European Union adopted a common position and a regulation to combat terrorism which required the freezing of assets of those who are suspected of being involved in terrorism. The Council in 2001 also adopted a decision where it entered the Hamas movement on the list, where it remained. In 2006, the Council updated the list by including the LTTE. Hamas and the LTTE challenged the decision to be retained on this list. In 2014, the General Court delivered its judgment to annul the restrictive measures concerning Hamas and the LTTE, as the measures contested were based on information the Council obtained from the internet and from press releases.

The CJEU reaffirmed the previous case law set out in C-539/10 P and C-550/10 P Al-Aqsa v Council and Netherlands v Al-Aqsa in stating that if there is an ongoing risk of that entity being involved in terrorist activities, the Council was obliged to rely on more recent material in these circumstances.

The CJEU declared that the General Court should have annulled Hamas' retention on the European list of terrorist organisations and referred the case back to the General Court. The General Court decided to temporarily maintain the effects of the annulled measures in order to ensure the effectiveness of any possible freeing funds in the future. Subsequently, the Council appealed to the CJEU and sought to have the two judgments set aside.

Regarding the LTTE, the CJEU considers the judgment of the General Court to be warranted, despite the error of law made, and confirmed the annulment of the continued freeing of the LTTE's funds between 2011 and 2015.

Upcoming decisions and Advocate General opinions in September

Approximation of laws

Delgado Mendes, Case C-503/16

In the case of a road traffic accident resulting in personal injury and damage to property of a pedestrian who was intentionally run over by a motor vehicle of which he is the owner, which was being driven by the person who stole the car, does EU law, specifically Articles 12(3) and 13(1) of Directive 2009/103/EC (1) of the European Parliament and of the Council [of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability] preclude the exclusion by national law of any form of compensation for the pedestrian in question as a result of the fact that he is the owner of the vehicle and the insurance policyholder thereof?

Neto de Sousa, Case C-506/16

Do the requirements of the Second (1) and Third (2) Directives on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles preclude the national legislation from providing for the culpable driver to be compensated, in respect of pecuniary damage, in the event that his spouse, who was a passenger in the vehicle, dies, in accordance with Article 7(3) of Decree-Law No 522 of 31 December 1985, as amended by Decree-Law No 130 of 19 May 1994?

Ciupa and Others, Case C-429/16

Must the provisions of Article 8 of Directive 90/434/EEC of 23 July 1990 (1) be interpreted as meaning that they prohibit, in the event of an exchange of securities falling within the scope of the directive, a mechanism for deferred taxation which provides, by way of derogation from the rule that the chargeable event for capital gains tax purposes occurs during the year in which the gain arises, that the capital gain on the exchange is established and settled on the exchange of the securities, and taxed in the year in which the event bringing an end to the deferred taxation occurs, which may, inter alia, be the transfer of the securities that were received at the time of the exchange?

Freedom of establishment - Freedom to provide services

Casertana Costruzioni, Case C-223/16

Do Article 47(2) and Article 48(3) of Directive 2004/18/EC, (1) as replaced by Article 63 of Directive 2014/24/EU, (2) preclude national rules which exclude, or may be construed as excluding, any possibility for an economic operator, that is to say a tenderer, of appointing another undertaking to replace the undertaking originally relied upon as 'auxiliary undertaking' where the latter no longer has the capacity to participate or that capacity is diminished, thus resulting in the economic operator being excluded from the tendering procedure for reasons that are neither objectively nor subjectively imputable to it?

Petrea, Case C-184/16

Are Articles 27 and 32 of Directive 2004/38/EC (1) to be interpreted, in the light of Articles 45 and 49 TFEU, and having regard to the procedural autonomy of the Member States and the principles of protection of legitimate expectations and good administration, as meaning that the withdrawal of a

certificate of registration as a European Union citizen, previously granted, under Article 8(1) of [Greek] Decree 106/2007, to a national of another Member State, and the imposition on him of a measure for his removal from the host Member State, is required or permitted in circumstances where, although he had been registered in the national list of undesirable aliens and was the subject of an exclusion order on grounds of public policy and public security, that person again entered the Member State concerned and conducted a business, while failing to observe the procedure laid down in Article 32 of Directive 2004/38 for the submission of an application for the lifting of that exclusion order, when the latter (the exclusion order) was imposed on the self-sufficient ground of public policy which justifies the withdrawal of the certificate of registration of a citizen of a Member State?

Consumer protection

Andriciuc and Others, Case C-186/16

Must the information concerning the geographical address and identity of the trader, within the meaning of Article 7(4) (b) of Directive 2005/29/EC, (1) appear in advertising material for specific products which appears in a print medium, even if consumers obtain the advertised products exclusively via a website of the trader who publishes the advertisement, and which is indicated in the advertisement, and consumers can easily obtain the information required by Article 7(4) of the Directive on or via that website?

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**

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