The Law Societies
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Brussels Agenda

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The Law Societies' monthly publication with the latest EU news

Editorial
Cross-border Private Client

Cross-border private client work is a largely underreported area of law, and yet it is one that is well worth knowing about. It affects millions of people around the world on a daily basis and can be the difference between someone's last wishes being fulfilled, or lengthy and intractable legal proceedings engulfing all concerned.

In order to provide some insight, we have called upon the views of a number of experts in the field. Richard Frimston, Partner and Head of the Private Client Group at Russell Cooke, provides the Viewpoint on international trusts, with Alberto Pérez Cedillo and David King providing In Focus articles on succession. Finally, Dr Timothy Lyons QC provides a practical overview of international private client tax law.
As always, the Brussels Agenda is packed with the latest updates on EU law and policy. In this edition, the Council's new tax proposals, the Energy Union, Brexit and the Action Plan on Terrorism are all covered, alongside much more.

So whether you are a non-domiciled, non-habitually resident expat, or not, then read on and enjoy!

Alongside this theme we include the usual updates on EU law and policy, plus a continuation of our new sub-section, Case Law Corner.

So enjoy the clear sky of understanding, before the looming cloud of confusion wrecks it ('wrexit').

Richard Frimston

A Matter of Trust, but what's the Use?

In the EU legal space time continuum, it is perhaps the question of trusts that brings differences rather than similarities most to the fore. The journey of English trusts from the 1535 Statute of Uses through strict settlements to reach full discretionary trusts is a long one. However, it is perhaps wisest to understand that the common law lawyer's view of trusts and equitable principles is completely different to that of politicians, the media and civil lawyers, for whom, trusts are solely dodgy structures used by shady people in sunny places.

Having been brought up on the swathe of 1925 legislation, I am still astonished at the lack of understanding of the Land Registration Act 1925. The ordinary oyster card holder on a Clapham omnibus, believes that the Land Registry records the ownership of land. Explain that the registered proprietors are entitled to deal with the land, but are not necessarily the owners, and puzzlement is shown and the question asked, “Surely this is a recipe for fraud?”.

For us, trusts are what make the law of England & Wales work. Pensions, insolvency, administration of estates, ownership of land and so many other areas of law need trusts to operate. How do civil systems operate without them?

EU citizens broadly have the same issues to contend with, but different legal systems produce different solutions. Matrimonial property regimes, *usufructs*, *fidei commisum* and assurance vie are some of the answers. France introduced the *Fiducie*, after it was found necessary for some French commercial arrangements to be structured in London through English trusts.

Broadly, however, a trust under the law of England & Wales is usually not accepted or recognised in most other EU Member States for civil law as opposed to tax purposes. The 1985 Hague Trusts Convention, Hague 30, has only been ratified by five EU Member States: Italy, Luxembourg, Malta, Netherlands and UK.
There are broadly two ways to tax trusts; tax the trust as a separate entity on creation or tax the trust as if the trust assets remained those of the settlor during their lifetime and then tax the beneficiaries on his or her death. The UK uses the former, whilst the USA and many EU Member States use the latter. One of the issues created by the EU Succession Regulation No. 650/2012 is that it is now possible for UK citizens most closely connected to England & Wales to choose that law to apply to their estates. Although the UK is not bound by the Succession Regulation, other Member States that are must apply English law in these circumstances. Although the Succession Regulation cannot impose trusts as rights *in rem*, the nearest most similar structure will need to be found by way of adaptation.
As the effects of the Succession Regulation become more widespread, there will be obvious tensions between the fact that trusts may be taxed as strange foreign structures and yet adapted into local structures for succession purposes.

If the UK remains in the EU, the question of recognition, acceptance, adaptation and enforcement of structures between Member States will become more pressing.

It is high time that the UK government recognised the value and merit of trusts and fought tooth and nail for the ratification of Hague 30 by the EU as a whole. Use it or lose it.

Biography

Richard Frimston is a Partner and head of the private client group at Russell Cooke LLP. His areas of expertise include cross-border estates and international private law issues. Richard is a member of various professional bodies (including the International Academy of Estate and Trust Law). He has received a number of prestigious accolades (including The Society of Trust and Estate Practitioners (STEP) Geoffrey Shindler Award for Outstanding Contribution to the Profession 2014/15) and has authored many publications. He is currently Chair of the EU STEP Committee and co-Chair of the STEP Public Policy Committee as well as being a member of the The Law Society of England and Wales EU Committee.

In Focus

CROSS-BORDER PRIVATE CLIENT

Freedom come? Brussels IV and Succession Planning

Differences between legal systems in EU Member States yield a considerable number of problems, particularly in matters of succession.

The death of a European citizen outside their country of nationality raises the question of which law is applicable to their succession. The problem is exacerbated if that person owns property in territories of two or more EU Member States.

In response, the European Parliament approved Regulation 650/2012 on succession (i.e. Brussels IV). Brussels IV is applicable to all Member States, with the exception of the UK, Ireland and Denmark*. It applies to the estates of all individuals dying on or after 17 August 2015. In this article, I consider its key provisions.

Scope

In the Regulation, the legal expression '*disposition of property upon death*' only refers to the Will and the agreement as to succession. Brussels IV therefore expressly excludes from its scope other succession-related matters, such as matrimonial property regimes and maintenance rights.

Applicable law

Brussels IV determines that the applicable succession law will, generally (and by default for intestate estates), be that of the deceased's habitual residence at the time of death.

The applicable law may however be the law of the nationality which the deceased had at the time of making the choice of law, or at the time of death. The choice of law necessarily has to be made in a disposition of property upon death, either expressly or in such a way that it may be inferred in a clear manner. It may be modified or revoked at any time, using the same type of instrument.

Definition of habitual residence

In Brussels IV, '*habitual residence*' is different from the common law concept of '*domicile*'. Domicile presupposes objective proof of residence in and integration into another country, and the intention to remain there permanently.

The authority must determine the place where the centre of interests (the centre of activities or the 'existence' of a person) is located, having regard to factors such as: residence; job location; acquired assets; and conditions of stay.

In the case of testate succession, the testator should therefore state in the clearest possible terms the place of their habitual residence.

States with more than one legal system

Brussels IV addresses the problems that may arise when applied in States that have different laws on matters of succession within their own territory: the country's own internal conflict-of-laws rules will apply.

Special rules in succession matters

Brussels IV provides a series of special rules relating to succession, outlined in the longer version of this article (see **link**).

European certificate of succession

The Regulation introduced the creation of a certificate of succession (to be applied for at the individual's discretion): an authentic instrument establishing succession rights, once the law which is applicable to the deceased has been determined. The rights are those relating to the heir, legatee, and executor of the Will or administrator of the estate.

The certificate has evidentiary effects, needing no further procedures in the State in which it is to produce its

effects. Those effects include that of being a valid document for the recording of succession property in the register of a Member State, though it must meet the necessary requirements to proceed with that recording in the State in which the register is located.

The certificate may only be issued by a court, or by public officials who are vested with competence in matters of succession.

Conclusion

Brussels IV is a positive step in resolving the difficulties around succession in the EU. Yet it remains vague, for example it does not define what it means to be habitually resident in a country other than the individual's nationality.

A central European succession certificate registry is not yet fully operative; one wonders what will happen if contradictory certificates of succession for the same estate are in circulation.

Interaction with other bilateral treaties between EU members which the regulation does not supersede may prove difficult to navigate.

There are also issues of public policy in certain aspects of the regulation such as statutory legacies

The complexity of Brussels IV will make it difficult to apply in practice. Persons residing outside the country of which they are nationals, or who have properties in another Member State, should self-regulate their succession property by making a Will and formally recording their habitual residence.

**Editor's note: while Brussels IV does not apply to the UK, readers should be aware of this important measure for clients who have family or property. The UK angle is explored in the next article.*

Alberto Pérez Cedillo practices in London, where he opened his own practice in Lincoln's Inn ten years ago. He is now expanding his practice in Spain where he opened an office in Madrid three years ago and has just opened an office in Marbella. Alberto is also the chairman of the Spanish Branch of The Society of Trust and Estate Practitioners (STEP), chairman of the British Spanish Law Association and a committee member of the Private Client Section of the Law Society of England and Wales.

Foreign affair: the Right to Grant and the Validity of the Will

I have limited this article's scope to cover the right to the grant and determining the validity of a deceased's will. I consider these in light of 'Brussels IV' (the Regulation).

Although the UK has opted out of the Regulation, it still affects all of those assets in states which have implemented it, regardless of the citizenship or place of death of the deceased, even if they have no connection to those States.

It is important to remember that the law of a testator's domicile governs the foreign moveable assets of their estate for the purposes of succession. When dealing with foreign-domiciled individuals, or foreign assets, practitioners should be aware of the fixed succession laws that operate in different jurisdictions.

Foreign-domiciled grants

For wills made by persons dying domiciled outside of England and Wales, the general rule is that, provided the will has been accepted by the deceased's country of domicile as valid, or is executed in accordance with the law of the place of domicile of the deceased at the time of their death, or at the time it was made, it will generally be admissible in England and Wales.

If the deceased died intestate, it is possible to apply for an order to enable the person beneficially entitled to the estate, in accordance with the law of the place where the deceased died, to take out a grant in England and Wales.

Where the deceased was domiciled in England and Wales, there is a requirement that the will must have been executed in accordance with section 9 of the Wills Act 1837 (WA 1837) or the will cannot be proved.

If the deceased was domiciled outside of England and Wales, and had made a will which accords with the laws of their domicile, but does not meet the WA 1837 criteria, we need to turn to the Non-Contentious Probate

Rules (SI 1987/2024) (NCPR 1987).

Rule 19 of the NCPR 1987 sets out that, where evidence as to the law of any country or territory outside England and Wales is required on any application for a grant, a district judge or registrar may accept:

- an affidavit from any person, having regard to the particulars of their knowledge or experience given in the affidavit, they regard as suitably qualified to give expert evidence of the law in question; or
- a certificate by, or an act before, a notary practising in the country or territory concerned.

Making an application for a grant

An order for a grant to the person beneficially entitled to the estate can be applied for, either prior to, or simultaneously with, the application for the grant relating to the Will itself. Making the application simultaneously ensures that the application is dealt with as timely as possible. No fee is payable here.

When considering who is entitled to apply for a grant, rule 30(1) of the NCPR 1987 states that a grant may be ordered:

- *'(a) to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled;*
- *(b) where there is no person so entrusted, to the person beneficially entitled to the entire estate by the law of the place where the deceased died domiciled...; or*
- *(c) ... to such person as the registrar may direct*.'

Resealing a colonial grant

It is possible for a foreign grant to be resealed in the courts of England and Wales using section 2(1) of the Colonial Probates Act 1892 (CPA 1892).

Provided that the deceased was domiciled in a country that is covered by the CPA 1892, practitioners should always consider whether a grant has been obtained in the country of domicile. If so, consider having the grant resealed in the courts of England of Wales, as opposed to applying for a grant in the courts. In many cases, if a grant has not been obtained in the country of domicile, and the CPA 1892 applies, I would advise obtaining a grant in the country of domicile for resealing in England and Wales.

Brussels IV

The Regulation brings clarity to those estates which contain foreign assets. It provides unification of the succession laws which will apply to a deceased's estate.

In those States that have implemented the Regulation, the law of the country in which the deceased was habitually resident will apply to their succession, unless the deceased was manifestly more closely connected with another State.

The law applied under these initial tests can be overridden by an express election (usually in a will) for the law of the deceased's nationality to apply.

David King is a solicitor at Hugh James and specialises in probate, tax and trusts.

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Cross-border tax and the private client

Cross-border taxation is no longer the exotic concern of a relatively limited number of individuals. It's a standard part of the private client practitioner's work. Domestic tax law, the laws of the EU, the activities of international bodies such as the OECD and the impact of international treaties all have to be taken into account.

Double tax treaties may be the most important treaties to consider in the context of income tax and capital gains tax. Treaties are not so numerous in relation to inheritance tax. The UK, for example, has only 10 tax treaties relevant to inheritance tax. Consequently, provisions on unilateral relief, where they exist at all, are of considerable importance.

Other treaties are also significant. Take, for example, the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, 1988 updated in 2010. It entered into force in relation to the UK in 2011 and is in force in relation to 59 countries altogether. China, Singapore and Saudi Arabia ratified it this

year. It provides for exchange of information and assistance in recovery of taxes. In relation to the UK, it encompasses inheritance tax as well as other taxes. EU directives and the Common Reporting Standard are, of course, also important in this context.

Traditionally, private clients have placed a significant value on privacy but privacy is not absolute. Now, the privacy of clients' tax affairs needs to be considered in the light of money laundering laws and registers such as those required under Part 21A of the Companies Act 2006.

Turning from the administration of tax systems to the imposition of tax charges, practitioners confront tax at every turn. In relation to marriage or entry into a formal partnership the availability of reliefs for transfers between spouses and partners will be important, particularly where individuals have different common law domiciles or places of tax residence. In the UK, an election to be treated as UK IHT domiciled must be exercised carefully. An election may result in the double taxation of transfers.

When it comes to death, many countries impose tax on recipients of legacies and not on estates. Sometimes regional or municipal inheritance taxes will be relevant. Inheritance tax is not charged in a significant number of EU Member States but even then it's impossible to relax. Some countries will treat a legacy as income and subject it to income tax. An alternative, adopted in Portugal, is to impose a stamp tax on certain inheritances.

If cross-border taxation, and frequently double or multiple taxation, is a problem it is a problem that is becoming more widely recognised. The EU Commission, for example, has been looking at this area. Keep an eye out for some interesting developments in 2016.

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Timothy has authored a wealth of publications within this practice area and is ranked as one of the leaders in the latest edition of the Tax Controversy Leaders Guide 2015 as well appearing in the other major professional guides.
Timothy is a member of The Society of Trust and Estate Practitioners (STEP's) Cross-Border Estates Group and its EU Committee. He was one of the rapporteurs of the European Commission's expert group advising on individuals active across borders. Its report on inheritance tax obstacles is available via Timothy Lyons' biography at www.39essex.com

Clarification of the procedure for the division of assets in cross border formal relationships... but not for the UK

The European Commission has recently announced that it is to proceed to formally adopting two new proposals which aim to clarify property regimes for international married couples and international registered partnerships, by way of enhanced co-operation procedure.

The two proposals, one of which deals with **married couples** and the other **registered partnerships**, were initially launched by the Commission back in March 2011. However, they failed to reach formal adoption at the European Council in December 2015, as all twenty- eight Member States could not reach a unanimous decision as to the final content of the proposals.

The primary objective of the proposals is to clarify the procedure for dividing up joint assets of individuals, that are located in different Member States, upon the event of: divorce; separation; or death. The proposals aim to implement a single set of measures that can be applied universally throughout Member States, by:

- clarifying which national court is the competent body to distribute/manage property in the case of divorce, separation or death;
- clarifying the rules of applicable law i.e. which law shall apply if the laws of several countries potentially apply;
- recognising and enforcing the judgement of another Member State in relation to property matters.

Figures estimate that presently there are sixteen million international couples falling within the EU's remit and the associated legal costs of dealing with the separation of a number of those couples are in the region of €1.1 billion per year. The figures clearly highlight that European citizens experience burdensome administrative procedures and unclear legal situations as a consequence of cross-border relationship breakdown.

Against this backdrop, and the failure at the European Council in December 2015 to adopt the proposals, seventeen out of the EU's twenty-eight Member States, campaigned to the Commission to put forward a

decision to the Council authorising the implementation of the proposals by way of **enhanced co-operation procedure**; which was finally adopted by the Commission on 2 March 2016.

The proposals will of course only apply to those **seventeen Member States** who chose to participate in the initiative and will not apply to the eleven non-participating Member States, which includes the UK.

Non-participating Member States shall therefore continue to apply their national law to cross-border situations. However, all non-participating Member States will maintain their right to join the other Member States in adopting the legislative framework if they so wish at a later date (Article 331 TFEU).

EU and US agreed on the new framework for transatlantic data flows, the Privacy Shield

On 29 February 2016, the Commission released the **legal texts**, including the **draft adequacy decision**, that will put into practice the new EU-US framework for transatlantic data flows, called the **Privacy Shield**. The publication follows the conclusion of the EU-US negotiations on the agreement which was announced by Commissioners Ansip and Jourova on 2 February 2016.

The Privacy Shield is designed to provide legal certainty for business and to protect the fundamental rights of EU citizens. In particular it will impose:

- stronger obligations on US companies to protect EU citizens data;
- stronger obligations for the monitoring and enforcement by the U.S. Department of Commerce and Federal Trade Commission (FTC), as well as cooperation with the European Data Protection Authorities (DPAs);
- clear conditions, limitations and oversight concerning the access to the transferred personal data by US public authorities for national security purposes (the US Office of the Director of National Intelligence has provided written guarantees to that effect);
- several possibilities for redress for EU citizens including the imposition of:
    - a complaint system to the European DPAs which can refer the matter to the US FTC;
    - a dedicated Ombudsperson in the field of national security, within the US Department of State, independent from national intelligence services;
    - an obligation that complaints must be dealt with by companies within 45 days;
    - a free of charge Alternative Dispute Resolution (ADR) system;
    - an arbitration mechanism (a last resort mechanism to make sure that the complaints are resolved);
- commitment to an annual review of adequacy decision. The review will be conducted by the Commission and the US Department of Commerce with involvement of national intelligence experts from the US and European DPAs. The review will also be able to draw on other resources such as transparency reports of companies. The Commission will have to report to the European Parliament on the results of each review.

The legal texts, as well as the agreement itself, have attracted criticism from some NGOs and politicians. Max Schrems pointed out that although the Privacy Shield has some minor improvements, it does not address the core flaws of the US legal system that allows bulk surveillance. The current written guarantees from the US refer to six situations in which bulk surveillance would be allowed. This may raise questions among the DPAs and the Article 29 Working Party as the CJEU judgment clearly stated that any forms of bulk surveillance is a violation of fundamental rights.

On her Twitter account, Sophie in't Veld MEP (Netherlands, ALDE) questioned the legal status of written guarantees given by the US, whilst Jan Philipp Albrecht MEP (Germany, Greens EFA), home affairs and data protection spokesperson and former rapporteur on data protection regulation, stated that 'The new 'Privacy Shield' framework appears to amount to little more than a remarketed version of the pre-existing Safe Harbour decision, offering little more than cosmetic changes.'

The European DPAs and the European Ombudsman also **expressed doubts** about the position of the Ombudsman being taken up by a senior US government official rather than being given to an independent body.

The agreement will now be consulted within a committee composed of representatives of the Member States.

In addition, Article 29 Working Party will give its opinion and in particular its assessment of the agreement against the criteria set out by the case law of the CJEU. Most recently, the judgment in the **Schrems case** invalidated the previous EU-US data transfer scheme, Safe Harbour, and set out clear conditions that must be satisfied by any transfer scheme of personal data to third countries. The agreement will also have to be approved by the College of Commissioners.

On their part, the US will make the necessary arrangements to put in place the new framework, its monitoring mechanisms and the new Ombudsperson.

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Commission presents Action Plan to strengthen the fight against terrorist financing

On 2 February, the Commission presented its '**Action Plan to strengthen the fight against terrorist financing.**' The plan, which was adopted in the framework of the **European Agenda for Security**, consists of a list of actions to better coordinate the efforts of Member States. The Annex to the action plan presents a detailed list of planned actions to support its two main objectives:

- identifying the sources of terrorist funding and preventing the movement of funds; and
- disrupting the sources of revenue for terrorist organisations.

One of the most important actions is a proposal to bring forward the date for effective transposition of the 4thAnti-Money Laundering Directive (AMLD) to end 2016 at the latest. The Commission intends to speed up the work under the AMLD to identify high risk third countries. It also plans to improve the exchange of financial intelligence between Finance Intelligence Units (FIUs) and third countries, and between FIUs and the private sector.

Moreover, the Commission will review the 4th AMLD (until the end of 2nd quarter 2016) the following:

- enhanced due diligence measures/countermeasures with regards to high risk third countries;
- virtual currency exchange platforms (bringing them within the scope of the directive);
- prepaid instruments (changing the thresholds below which identification is not required);
- centralised bank and payment account registers and electronic data retrieval systems; and
- the access of FIUs to, and exchange of, information.

Moreover, the Commission will consider a self-standing legal instrument to broaden the access to such central registers (beyond the scope of AMLD). This would include law enforcement investigations such as asset recovery and tax offences. The Action Plan also envisages a series of actions to improve the enforcement of sanctions, such as an EU-wide regime for freezing terrorist assets or a legislative proposal targeting illicit cash movements.

All actions under the plan are scheduled to be carried out until the end of 2017.

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The Commission presents a sustainable energy security package

The Commission presented on 16 February its **energy security package**. The main aim of the package is to strengthen the EU's resilience to gas supply disruptions through moderating energy demand, increasing production, further developing a well-functioning and fully integrated energy market and diversifying energy supply and routes.

The package consists of four different actions.

The key legal initiative is the proposal for a **regulation** concerning energy security. This proposal aims to ensure that all Member States have put in place appropriate tools for preparing and managing the effects of gas shortages due to disruptions in supply or exceptionally high demand. To facilitate this, the draft regulation proposes stronger regional coordination, with certain principles and standards set on the EU level. The regulation sees that the Member States are to conduct regional risk assessments which will be subjected to the Commission's oversight and approval. The risks identified through regional risk assessments will be addressed in regional preventive action plans and emergency plans, which the Commission will approve.

The Commission also proposes that it should have oversight on agreements relevant to gas security concluded by the EU Member States with non-EU States. This ex-ante compatibility check is to ensure that the

agreements signed are transparent and comply with EU competition and internal market laws. Before signing the agreements, the Member States will need to take full account of the Commission's views.

The liquefied gas (LNG) strategy aims to improve access of all Member States to the LNG as an alternative source of gas. It does this by building the strategic infrastructure and identifying the necessary projects to end the single-source dependency of some Member States.

Finally, the heating and cooling strategy focuses on removing barriers to decarbonisation in buildings and industry. It links the increased energy efficiency and use of renewables to energy security, as these actions may lessen interdependence on external suppliers.

Taxation Update: the Presidency Roadmap on future work on taxation and the new Tax Transparency Agreement with Monaco

The Dutch Presidency published on 19 February 2016, a **Roadmap** to their proposed future work in corporate taxation and the fight against tax evasion. The Presidency considers that the two new proposals **tabled** by the Commission on 28 January on mandatory exchange of information in tax matters and anti-tax avoidance are a short-term priority. The Presidency would like to see political agreement on the proposals in March and May, respectively, to be able to finish the files before the end of Presidency.

The proposal on mandatory exchange of information in tax matters seems to be on track. It has been reported that the Economic and Financial Affairs Council (ECOFIN) reached on 8 March a political **agreement** on the proposal, including the country-by-country reporting obligations included in it. The UK has a parliamentary reservation on this political agreement, which means that the UK Government will consult its parliament first, before it can confirm its position. The Government is supporting the proposal. What remains after that is the European Parliament opinion, after which the Council can formally adopt the proposals.

Once adopted, the new rules will apply to all multinational companies that operate cross-border across the EU. The rules include obligations for multinational corporations to disclose details of their revenue, their profit or loss before income tax, the income tax paid and accrued, the number of employees, the stated capital, the retained earnings and the tangible assets of the group.

It remains to be seen whether the more ambitious anti-tax avoidance proposal will be agreed in May. It may be optimistic against the background of the reports from the 12 February ECOFIN meeting. The reports show that Member States are not simply welcoming the package, but that they are raising questions in particular about the scope of the anti-tax avoidance proposal.

Most Member States say, following the German lead, that this proposal should first target the implementation of the OECD's Base Evasion and Profit Shifting (BEPS) proposals, and that the issues separate from it (i.e. those which have been part of the Common Consolidated Corporate Tax Base (CCCTB) discussions, such as the General Anti-Avoidance Rule (GAAR), switchover clauses and exit taxation provisions), should be tackled separately. Furthermore, some Member States also want to further examine the impact of the proposal on competitiveness and whether the proposal infringes on national competences.

In the short term the Dutch Presidency also wishes to see the adoption of the revised Interest and Royalties Directive. The Presidency is seeking a political compromise on the Minimum Effective Taxation clause and whether it is possible to include a **modified nexus approach**. Furthermore, the Presidency seeks to continue the work on hybrid mismatches, patent boxes and good governance in tax matters with third countries.

As to what has already been achieved, the EU and Monaco initialised a new tax transparency **agreement** on 22 February. Under this agreement, Member States will receive the names, addressees, tax identification numbers and dates of birth, and certain financial information, including the bank account balances of their residents with accounts in Monaco. Similar agreements have been signed before in 2015 with Switzerland, San Marino and Liechtenstein, and earlier this year with Andorra. The automatic exchange of information element will start from 2018.

Finally, later this month we will also see a new Communication from the Commission on the Future of VAT. This is due to be published on 16 March and in this the Commission is promising to set out some options for the future of common VAT system.

In the light of the importance of the VAT communication, as well as all these tax law developments outlined above, our next Brussels Agenda in focus section will be on tax. In this, we look to explore further the dimensions of the developing EU tax law.

Trade update

The coming year is likely to be a busy one for the EU's trade officials. The ambitious plans include the completion of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA), analysis of the possible granting of market economy status to China, meeting with India on the possible re-launching of trade agreement negotiations and the beginning of the scoping exercise for trade agreements with Australia and New Zealand.

TTIP

The 12th negotiating round of the Transatlantic Trade and Investment Partnership (TTIP) took place in Brussels on 22-26 February. During the stakeholder meeting on 24 February, the chief US and EU negotiators reported substantial progress on the texts of the main chapters of the agreement. These included regulatory cooperation, sanitary and phyto-sanitary measures (SPS) and tariffs. The US is expected to table their offer on public procurement shortly after this negotiating round. The negotiators have also reported that much of the work is done outside of the negotiating rounds during technical meetings.

The ambition of the EU, as **indicated** by Commissioner Malmström, would be to approach the 'end game' in negotiations by the summer of 2016. The negotiators have already planned two further rounds in April and July.

However, as reported by some stakeholders, there are still issues that need resolving. These include financial services that are currently excluded from the scope of regulatory cooperation and maritime services that in the US are covered by the Jones Act which does not allow any foreign competition in the sector. Finally, the negotiators are expected to hold discussions soon on the **EU proposal for investment protection** which was sent to the US at the end of 2015. Despite numerous changes, the proposal continues to cause controversy among organisations on both sides of the Atlantic for allegedly granting more privileges to multinational corporations and for by-passing the national courts.

TiSA

The EU negotiators of TiSA are also ambitious in their plans to finalise the negotiations by the end of 2016. The last negotiating round, which took place in Geneva from 31 January to 5 February 2016, focused on movement of natural persons (Mode 4), financial services, electronic commerce, telecommunications and data localisation.

While progress was made on such issues as e-signatures, consumer protection and customs duties, there are some key unresolved matters such as data flows, data localisation and access to source code. Regarding data flows, the EU could not participate in the talks due to the ongoing negotiations on the now agreed Privacy Shield agreement (EU-US) and the consultations with the Member States.

Currently, there are 23 WTO members negotiating the agreement: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong (China), Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, South Korea, Switzerland, Turkey and the US. The parties agreed that it will be possible for other WTO members to join the agreement at a later stage provided they accept its objectives. The next negotiating round will take place in April. In total, there are five rounds planned for 2016.

China

2016 will also be a year of intense discussions on the granting of market economy status (MES) to China and the future of the EU trade defence instruments (TDIs). Since some provisions relating to China's MES are set to expire at the end of 2016, the Commission is now busy analysing the impact of the change. We reported on the subject in our previous edition of the Brussels Agenda. In addition, the EU and China have now reached consensus on the scope of the planned investment agreement. It is expected that further talks will take place during the EU-China summit planned for spring 2016. The EU does not currently have a free trade agreement with China.

India

In January this year, the EU chief negotiator Ignacio Garcia Bercero met his counterparts in India. Although the parties did not take any decisions on the re-launching of the trade negotiations that were stalled in 2013, they agreed to hold another meeting to discuss the matter. In its **Trade for All strategy** published last year, the Commission stated that it was ready to resume talks with India although it did not set any target date. India has also expressed its readiness to restart talks with the EU. It is possible that the EU-India summit will be held in the first half of 2016 where further talks will take place. The negotiations were never formally

suspended but went into a deadlock following the EU's concerns over high tariffs on wines and spirits and India's concerns over limitations on the free movement of workers.

Australia and New Zealand

In its recently adopted **motion for resolution**, the European Parliament expressed its strong support for opening trade negotiations with Australia and New Zealand. In the second half of 2015, both sides expressed their interest in opening trade negotiations as soon as they agree on the scope and approach to these talks. Australia and New Zealand are in the group of few countries, alongside Russia and China, with which the EU does not have a trade agreement.

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On the 12th round of trade talks, my TTIP gave to me... ... a proposal yet to be agreed.

Despite the European Commission's attempts to make the TTIP negotiations more transparent by devoting an entire, and decently **resourced**, section of its website to them, the 12th round has come under roughly the same sort of criticism as, well, the other 11.

The talks took place from 22-26 February. As with other rounds, stakeholders were invited to make their presentations for the consideration of the negotiators. A **list** of those stakeholder presentations can be found on the aforementioned website, and it includes such luminaries as the Plasma Protein Therapeutics Association and the American Sugar Alliance.

The key subject for many will be the level of protection to give investors, especially in light of the mass outcry regarding proposed provisions related to the investor-State dispute settlement mechanism. This subject led to the EU **abandoning** discussions on the topic at a previous round of talks in January 2014 before coming back to the matter with a proposal for a new Investment Court system.

Politico says that EU Trade Commissioner Cecilia Malmström' proposed permanent court with 15 independent judges and six appellate judges appointed by the U.S., the EU and a third country for such cases, has been met with scepticism by the US Government and its business community. Indeed, more than **280** organisations from Europe, the US and Canada signed a statement condemning what they called the European Commission's 're-branding' of the old investor state dispute procedure.

Nonetheless, the US Trade Representative office seems confident that "*[b]y the end of this round, or shortly thereafter, we anticipate having specific agreement language under discussion in nearly all areas*".

On top of the investment protection system, Europeans still cannot accept the possibility of US **genetically** modified crops inundating its market, as part of general concerns about food safety, in addition to the fears about limits on data sharing by international Internet companies.

The talks also come in the light of the latest Wikileaks **revelations**: that the US has been spying on many of the nations and leaders from the EU that will be participating in these negotiations.

Something tells us that this will not be the knock-out round.

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The new EU ODR Platform goes live!

On 15 February the new European online dispute resolution platform became available to consumers and traders.

It offers a single point of entry that allows EU consumers and traders to settle their disputes for both domestic and cross-border online purchases. This is done by channelling the disputes to national Alternative Dispute Resolution (ADR) bodies that are connected to the platform and have been selected by the Member States according to quality criteria and notified to the Commission. Around 117 ADR bodies are connected to the platform, but not all of Europe is covered geographically: Croatia, Germany, Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia and Spain are still missing.

Having browsed the platform, and filled forms in various languages, we can say we are impressed by the easiness of use: choice of language, only three steps to fill the complain form, totally online procedure (by choice), translation service.

The challenge now is to get all countries and as many traders as possible to sign up, and of course inform consumers of its existence!

Proposal for two Directives on certain aspects concerning contracts for the online and other distance sales of goods and for the supply of digital content

These two proposals (**(COM(2015) 635) and (COM (2015) 634))**, published in December 2015, are now with Council and Parliament, for examination, discussion and amendments.

The Dutch Presidency is very keen to press ahead with their approval, seeing as how these are the first two Commission initiatives on the Digital Single Market agenda, and it has published a very tight calendar of Council meetings on the subject. Furthermore, the Justice Commissioner Vera Jourová and her officials have started doing the rounds of the capitals of Europe to illustrate and explain the proposals.

On the side of Parliament an argument has flared up between the IMCO and the JURI Committees, who both claim competence on the matter. This is not just a petty power struggle between Committees, but reflects the different points of view on the nature of the proposals, seen either as regarding consumers' rights or contract law. Until this conflict is resolved, no work will be done in Parliament, which might frustrate the Presidency's ambition of an early approval.

There appears to be three main points of contention arising from a first reading of the proposals, namely:

1. Whether the Commission is right to have chosen a method of targeted maximum harmonisation. This is a legal solution that the Commission often appears to prefer in the EU consumer *acquis*,but it is a solution that raises concerns in terms of subsidiary and also in terms of whether it is the appropriate approach to deal with the difficulties perceived or faced by traders in relation to Art 6.1 of the Rome I regulation. A final concern regarding the method of targeted maximum harmonisation that needs to be addressed is what the potential consequences of these proposals are for the rest of the consumer *acquis*.
2. Whether the Commission is right to introduce a dichotomy between offline and online sales and associated consumer rights, albeit as a temporary measure. The Commission appears to consider this approach as the 'pragmatic' way to progress rapidly before Member States develop their own distinct digital consumer rights regimes. However, it is questionable whether a more appropriate approach would be to revise the whole consumer *acquis* according to the new method of targeted maximum harmonisation.
3. In the digital content proposal, whether the Commission correctly introduced payment in personal data in addition to payment in monetary means. As far as we know this is a new legal development, as no Member States have considered or adopted this innovation so far. A question that therefore needs to be addressed is what the key legal issues arising from this development are.

Some specific measures on the reversal of the burden of proof and limitation periods are also cause for worry, particularly in the UK where the Consumer Act 2015 has very recently settled these matters and where a further change might not be welcomed by stakeholders.

Brexit Update

Believe it or not, this whole Brexit thing is still unresolved.

The major change since the last Brussels Agenda, aside from the confirmation of the referendum date as being 23 June 2016, is that people are beginning to pick sides.

Cameron faces a **rebellion** of potentially as many as 150 Conservative MPs, among which are six members of his Cabinet and charismatic mop-top Boris Johnson (who, apart from getting **caught on zip lines** and flattening **small Japanese children**, is also the Mayor of London).

Perhaps the most troublesome critique of Mr Cameron's position came very recently from the Justice Secretary Michael Gove, who set **legal minds** whirring when he claimed that the recently agreed renegotiation deal is not legally enforceable. The idea is that Court of Justice of the EU has the power to strike the deal down. The UK, for its part, has recently **registered** the agreement with the United Nations.

The consensus of the 'Out' camp seems to be that Mr Cameron's renegotiation package was somewhere between unsatisfactory and outright pathetic; therefore not enough reform has occurred for them to have changed their minds. The 'In' campaign maintains the old, and reasonably **well-argued**, economic arguments for 'Bremain'.

Meanwhile, various political parties in the EU seem to be gaining some kind of inspiration from the UK's Del Boy style 'don't ask you don't get' approach. The Front National in France has claimed that they would campaign for a '**Frexit'**, and the Czech Prime Minister has also threatened a '**Czexit'**. It seems that the only thing stopping further threats of exit is the dubious nature of the wordplay that this might involve depending on the nation: Bulgexit, Spexit, and Itexit are, for this writer, the clumsiest examples and therefore the least likely to happen.

The joint office of the UK Law Societies will be taking a neutral stance on the Brexit debate. It is our belief that we should report the facts and that the readership should form their own opinions.

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Dalton MEP Report on non-tariff barriers in the Single Market

The **Draft report** on non-tariff barriers (NTBs) in the Single Market awaits the vote in the Committee on the Internal Market and Consumer Protection (IMCO) on 15 March 2016. The report, drafted by Daniel Dalton MEP (UK, ECR), critically assesses the main barriers to strengthening the Single Market.

The report points out that there still remain national differences in relation to non-tariff barriers. It adds that where they exist they should be proportionate, non-discriminatory and justified on grounds of furthering public policy objectives. Among the most important barriers, the report identified restrictions on the legal form of service providers and their shareholding management structure which can hamper cross-border service provision. There are also many restrictions to accessing and exercising regulated professions that are disproportionate.

While the report recognises that some of the barriers may be justified on grounds of public interest, it also points out that it is necessary to have accessible and up-to-date information about them. Indeed, the report is critical about the current performance of the Product Contact Points and Single Points of Contact and calls on the Commission to improve their enforcement efforts. Finally, the report also stresses that the removal of existing barriers would help small and medium sized businesses in delivering cross-border services.

The report was discussed during the **hearing** organised by IMCO on 14 January. The event brought together representatives from small businesses, retail, consumer organisations, experts and the representatives of the Dutch Presidency. There was a broad agreement among stakeholders that the use of NTBs throughout the EU goes against the spirit of the Single Market.

Dalton's report was tabled for amendments on 18 January 2016 and is presently open to comments from other MEPs, until the Committee votes on 15 March 2016.

If the Report, albeit of a non-legislative nature were adopted by the European Parliament, Dalton claims that it would **"lay the groundwork for further opening up European markets to Britain and the creation of a truly single market."**

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24 February 2016 - Law Society of England and Wales publishes guidance for work experience providers in legal sector

The Law Society of England and Wales has published guidance for employers that provide work experience to

people interested in a legal career. The guidance, drawn up in collaboration with the Junior Lawyers Division of the Law Society (JLD), advises employers of best practice and of issues that they should consider before, during and after a work placement.

The reasoning behind the formation of the guidance emanated from the JLD 2014 Early Career Work Experience Survey, which showed that of the nearly 80 percent of respondents that took part in the study that had done some sort of unpaid work experience, less than half of that number felt that the experience had enhanced their job prospects.

In 2014, over 16,000 students graduated with a law degree but there were just 5,000 training contracts available. Therefore, with such intense competition for work experience, people seeking a placement often face the dilemma of taking a position under conditions that are not in their best interests or not taking placements at all. This raises significant equality, diversity and social mobility issues, both for students and for the future of the profession.

The Law Society guidance therefore states that in order to be fair and accessible, work experience opportunities should:

- Be clearly defined
- be openly advertised and fairly recruited
- be remunerated to national minimum wage or above, where possible; where work experience placements are unpaid, they should last no longer than four weeks
- cover reasonable expenses incurred by participants

Access to the full article can be found **here**.

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Joint seminar with the French National Bar Council, 5 April

Join the Law Society in London to discuss surveillance and business and human rights issues. The seminar will be followed by a networking reception.

Book now

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Business Council for Africa's Annual Debate and Gala Dinner, 20 April

The Law Society of England and Wales is proud to announce it is the exclusive strategic partner for this year's Business Council for Africa's Annual Debate and Gala Dinner.

Read more

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Scottish Trainee solicitors to benefit from new Living Wage requirement

The Law Society of Scotland has agreed an increase to both its recommended and mandatory minimum pay rates for trainees.

From April 2016, only trainee contracts that are equal to or above the Living Wage, as set by the Living Wage Foundation, will be accepted by the Law Society Council.

The Council also agreed to bring the recommended pay rate up to £17,545 for first year trainees and £21,012 for second year trainees, from June 2016.

It will still remain for individual law firms or in-house employers to decide how much to pay trainee solicitors, provided it is over the mandatory minimum pay rate, which was set by the National Minimum Wage 2012, however, the Law Society's recommended wage is often used as a benchmark for employers and therefore is a welcomed step by trainees.

The full article can be accessed **here**.

COMING INTO FORCE THIS MONTH

- **Decision (EU) 2016/253 of the European Parliament and of the Council of 25 November 2015 on the mobilisation of the Flexibility Instrument for immediate budgetary measures to address the refugee crisis**

Internal Market:

- **Council Decision (EU) 2015/137 of 26 January 2015 renewing the terms of office of the Vice-President of the Office for Harmonization in the Internal Market (Trade Marks and Designs) and of two Chairmen of the Boards of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs**)

Digital Economy and Society:

- **Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market** In force date 10 April 2016

CASE LAW CORNER

Decided cases:

Asylum law

Case C-601/15 J.N. v Staatssecretaris van Veiligheid en Justitie, **judgment** of 15 February 2016

EU law allows an asylum seeker to be detained when the protection of national security or public order so requires

Joined Cases C-443/14 Kreis Warendorf v Ibrahim Alo & Case C-444/14 Amira Osso v Region Hannover, **judgment** of 1 March 2016.

A place of residence requirement may be imposed on beneficiaries of subsidiary protection if they face greater integration difficulties than other non-EU citizens who are legality residence in the Member State that has granted such protection.

EU citizenship and rights of EU citizens

Case C-179/14 Commission v Hungary, **judgment** of 23 February 2016

Certain aspects of the SZEP leisure-card and Erzdebet meal-voucher schemes, under which employers in Hungary may provide their employees with benefits in kind under favourable tax conditions are incompatible with EU law

Case C-299/14 Garcia Nieto and Others, **judgment** of 25 February 2016

The Member States can exclude during first three months of residence and without having the status as employee, access to special non-contributory cash benefits.

Air passangers rights

Case C-429/14 Air Baltic Corporation v Lietuvos Respublikos, **judgement** of 17 February 2016

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air, must be interpreted as meaning that an air carrier which has concluded a contract of international carriage with an employer of persons carried as passengers, is liable to that employer for damage occasioned by a delay in flights on which its employees were passengers pursuant to that contract, on account of which the employer incurred additional expenditure.

Advocate General Opinions:

Brussels I Regulation

Case C-559/14 Meroni, **Opinion** of Advocate General Kokott, 25 February 2016

According to the Advocate General, a freezing injunction issued by a court of a Member State as a provisional measure without a prior hearing of all persons whose rights may be affected by the freezing injunction does not infringe public policy clause of the Brussels I Regulation or the Charter of Fundamental Rights at least where any person is affected by the judgment has the right at any time to request the court of the State of origin to very or discharge the judgment.

Employment law

Case C-351/14 Rodríguez Sánchez, **Opinion** of Advocate General Spuznar, expected on 3 March 2016 According to the Advocate General, national law decides whether the relationship of worker member in a cooperative, which is characterised by the national legislation as associative (one of membership), be considered to amount to an employment contract under Union law, as long as it does not exclude without reasons these employees from protection. English version of the Opinion is not yet published at the time of writing the update.

European Arrest Warrant

Case C-241/15 Bob-Dogi, **Opinion** of Advocate General Bot, 2 March 2016

According to the Advocate General, European Arrest Warrant can only be given to implement an national warrant order, it cannot be issued without one. English version of the Opinion is not yet published at the time of writing this update.

Upcoming decisions and Advocate General Opinions:

Brussels I Regulation

Case C-12/15 Universal Music International Holding, **Opinion** of Advocate General Spuznar, expected on 10 March 2016

Concept of 'place where harmful event occurred' under the Brussels I Regulation, if damage consists exclusively of financial damage which is the direct result of unlawful conduct which occurred in another Member State

Passenger rights

Case C-94/14 Flight refund, **judgment** expected on 10 March 2016

The operation of Article 19 of the Montreal Convention together with the European order for payment procedure.

Taxation

Case C-18/15 Brisal, Advocate General Kokott, **Opinion** expected on 17 March 2016.

Whether free movement of services and Article 56 TFEU precludes national tax legislation under which financial institutions not resident in Portuguese territory are subject to tax on interest income in that territory.

VAT

Case C-543/14 Ordre des barreaux francophones et germanophones and Others v Council, Advocate General Sharpston, **opinion** expected on 10 March 2016

Whether by making services supplied by lawyers subject to VAT, without taking into account the right to assistance to a lawyer and the principle of equality of arms, or whether the client qualifies for legal aid, is compatible with the Charter of Fundamental Rights, the European Convention on Human Rights and the Aarhus Convention.

Hearings:

The Court held a hearing *Case C-72/15 Rosneft* on Thursday 23 February. In this case Rosfnet has challenged the UK measures implementing the EU decisions introducing the restrictive measures against Russian companies, which prohibit EU nationals from engaging in activities connected with Russian oil exploration. Rosfnet was granted to seek judicial review before the UK High Court of Justice, Administrative Division. The referring court asked the Court of Justice to rule on the validity of the EU Regulations and Decisions, as well asking for clarification of certain terminology used in order to ensure that the sanctions regime is uniformly enforced. The EU Regulations and Decisions measures have also been challenged directly before the General Court (Case T-715/14).

ONGOING CONSULTATIONS

Taxation, Customs:

- **Improving double taxation dispute resolution mechanisms**
  16.02.2016 – 10.05.2016

Environment:

- **Consultation on the functioning of the Auctioning Regulation pursuant to the scheme for greenhouse gas emission allowances trading within the Community (EU ETS).**
  22/12/2015 - 15/03/2016

Access to Justice:

- **Public consultation on the review of the European Disability Strategy 2010-2020**
  22/12/2015 - 18/03/2016

Migration:

- **Consultation on "Tackling migrant smuggling: is the EU legislation fit for purpose?"**
  13/01/2016 - 06/04/2016
- **Consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights**
  09/12/2015 - 15/04/2016
- **Public consultation on due diligence and supply chain integrity for intellectual property protection**
  20/01/2016 - 06/04/2016

Data Protection and Technology

- **Public consultation on the public-private partnership on cyber security and possible accompanying measures**
  18/12/2015 - 11/03/2016

About us

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

Subscriptions/Documents/Updates

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

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