The Law Societies
JOINT BRUSSELS OFFICE

# BrusAgenda

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

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## Editorial

Following the UK's referendum on its membership of the EU on 23 June 2016, we are focusing on Brexit in this month's edition of the Brussels Agenda.

Since last month's edition, where we included a special section on the issue, there have been further developments on Brexit: the EU institutions have chosen their key players in the negotiations; the UK government is, behind closed doors, developing its strategy towards the negotiations; and, as such, the Law Societies are also taking their positions on the issue.

We have viewpoint contributions from Robert Bourns, President of the Law Society of England and Wales, and Eilidh Wiseman, President of the Law Society of Scotland on the issue of Brexit. Furthermore, we have a piece from Ignasi Guardans, a Spanish lawyer and former politician, providing a European perspective on Brexit.

With a withdrawal agreement not expected to be reached for some time however, there are still plenty of other developments within the EU institutions to keep us busy, which we have included, such as new copyright proposals from the European Commission, an own initiative report on mutual recognition of certificates of adoption and the Advocate General's opinion on the EU-Canada agreement on the transfer of Passenger Name Record data.

We also welcome our new trainee solicitors, David Harry, Madeleine Lamond and Frances Shipsey, to the office. David is training at Lucas Law Solicitors in Wales, specialising in family law, real estate and private client law. Madeleine works at Laura Devine Solicitors, a specialist immigration firm in London, and is working on the criminal justice, consumer law and regulation of legal services portfolios. Frances is a trainee at Burges Salmon LLP in Bristol and is focusing on commercial areas, in particular tax, intellectual property and competition law.

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## Robert Bourns, President of the Law Society of England and Wales

The decision of the British public to vote for Brexit led to a sharp intake of breath, not just in the UK but in Europe and the wider world.

The political fallout began immediately but, even as David Cameron was resigning and the process for

replacing him getting underway, colleagues at the Law Society were meeting to continue discussions that had begun some months before the referendum.

And since the 24 June, our thinking about the legal sector and the solicitor profession in the context of Brexit has developed.

The past few months have seen us engaged on this point with all parts of the legal profession in England and Wales – including in the City, in-house and nationally - but also with colleagues overseas, foreign lawyers operating in London, and with senior figures in the EU and in the UK government.

Our priorities are clear.

**Practicing rights**

Our clients live increasingly international lives; the legal services they need cannot be bound by national borders.

Whether dealing with the supplier for their Bordeaux-based business, custody arrangements for family members in Frankfurt or supporting employees in Eindhoven, solicitors are best able to serve their clients when they can serve them wherever they are.

The Lawyers' Services Directive and the Lawyers' Establishment Directive have together opened the European market to solicitors, giving us this mobility to move along with our clients. They give us the clear ability to practice, work and re-qualify, and ensure that vital tools of the solicitors trade, such as Legal Professional Privilege that attaches to our advice, remain available to us.

Our own market is very open to foreign lawyers. We are delighted to welcome the 200 offices of overseas firms to London. Practitioners enjoy and require reciprocal rights.

Loss of these rights would not only shackle our legal professions working together in this market, but do a huge disservice to our clients and risk the integrity and standing of the market place.

**Settling disputes**

Nor must Brexit mean that progress made on settling disputes over business transactions be undermined. After all, two-way trade between Britain and the other EU countries was worth £513bn in 2015.

Within the EU we have a clear set of rules. The Brussels I Regulation allows the recognition and enforcement of court decisions in civil and commercial matters between Member States while the Rome I and Rome II give guidance as to which country's laws are applied. The Law Society will be calling for these mechanisms to be maintained in the withdrawal negotiations.

Whatever the exact form of the new regime, maintaining the same level of clear, efficient and effective cross-border dispute settlement mechanisms must be a Brexit bottom-line. Anything less imperils over £500 billion of British business.

**Working to tackle crime**

We are also asking for co-operation in criminal justice and security matters to continue.

At the moment UK police and our criminal courts work closely with their European counterparts and there are a number of existing agreements and systems that govern this arrangement.

Whatever decisions are made on the UK's future relationship with the EU, the Law Society believes that there are compelling reasons why mechanisms such as the European Arrest Warrant need to continue.

The European Investigation Order (EIO) - due to be implemented in May 2017 - meanwhile introduces mutual recognition into mutual legal assistance arrangements for investigating crime and obtaining evidence for use in criminal proceedings. It will replace the 2000 Convention on Mutual Assistance in Criminal Matters. It is expected that this mechanism will speed up processes in terms of coordinating criminal investigations and criminal proceedings.

Then there is the Schengen Information System II, an EU-wide IT system that allows countries to share law enforcement alerts in real time, for example information about arrest or people being placed under police protection.

However Brexit redefines the relationship we have with the EU, we must make sure we maintain a unified front in the fight against crime.

**Jurisdiction of choice**

Finally, I should say something about jurisdiction.

England and Wales hold an enviable position as the leading global centre for legal services. Our law is clear, certain and stable; our courts are renowned for their fairness and impartiality; our law firms are widely respected and, via their international offices, have carried Law England & Wales across the world. We must ensure that English firms are not fettered in their ability to introduce "English Law" to the corporate and commercial transactional work in the short or longer term.

This position to date has allowed the legal services sector to make a huge contribution to UK PLC, adding £25.7 billion to the national economy each year, generating £3.6 billion in international earnings, and employing an estimated 370,000 people.

One of the key challenges that the Brexit negotiations pose for the legal profession is how we ensure that exiting the EU doesn't threaten the world standing of our jurisdiction and the huge contribution it brings to our economy. We recognise that establishing the position of English Law and standing of this jurisdiction relies on a collaborative effort involving colleagues from other professions, who recognise the efficacy of our common law jurisdiction. We need to ensure that our messaging is inclusive, recognising that we work together in the interests of our respective clients.

We know that there is no good reason why Brexit should undermine England and Wales as a global legal centre. Our law will remain stable, our solicitors and their offices across the world will remain open for business and our courts will remain available to adjudicate disputes if required. Ensuring this message is out there, striking the right tone, will be a key focus for the Law Society over the coming years using our networks and position to promote the certainty, stability and confidence of the English and Welsh legal profession.

## Biography

**Robert Bourns** is the President of the Law Society of England and Wales. Robert has significant experience managing and developing a growing business across the UK, having been managing partner for six years and was more recently senior partner at TLT. He specialises in employment law, particularly in the fields of associated regulatory law and commercial firm practice management. Robert joined Council in 2011. He is the founder and director of a small arts project as well as a trustee of a charity devoted to promoting levels of attainment and opportunity for young people in deprived areas. Robert is also currently the Chair of a Community Foundation.



## Eilidh Wiseman, President of the Law Society of Scotland

Recently, I had the great pleasure to administer the notary public oath for a new notary and their choice of motto got me thinking about our own.

The Law Society of Scotland's motto is "Humani nihil alienum", a partial quote from a play by Terence, borrowing from the Greek playwright Menander. Roughly translated, our motto means "nothing of human affairs is alien to me".

How comforting at a time of constitutional and political upheaval that we should be underpinned by this sense of historical readiness. Whatever the answer is, we will find it. Sometimes life can feel rather overwhelming but if we remember that most things have come our way before, albeit in different guises, we can be sure that a path through will be found.

In the days immediately following the EU referendum, I visited the Brussels office to meet with our members working there. I was also able to meet with several MEPs and the Scottish Government office in Brussels and there was a keen interest in our thoughts on the priority issues for our members, for our legal system and for the preservation of significant aspects of European jurisprudence and co-operation.

There is still a great deal of uncertainty following the vote to leave the EU and, at this early stage, there are more questions than answers. Withdrawal from the EU will have a significant impact on the Law Society of Scotland, our work and our members. We will be monitoring developments closely and will update our members and advise them on the practical effects of the negotiations at every stage.

It will be necessary to minimise the disruption to the law caused by the withdrawal process and repeal of the European Communities Act 1972. To help ensure stability and certainty and to maintain client confidence, legislation will be needed to preserve existing law until such time as the UK Parliament or the devolved legislatures can make consequential amendments or enact new law.

We have a role in representing the public interest and the interests of our members to law and policy makers throughout the negotiation period and during the implementation of the withdrawal agreement and have offered both the UK and Scottish Governments and Parliaments access to the legal expertise that we as an organisation have available. We have already been in contact with the key members of both governments to draw their attention to some of the initial areas that we suggest should be considered, from recognition and enforcement of citizens' rights to continuity of business regulation. We have also begun a series of meetings and events that will provide an opportunity for us to hear from members and other stakeholders.

We will seek to assess what the outcome of the negotiations will mean for our members; for their business; for the domestic legislative process and for our future interaction with the EU. We will be urging the UK and Scottish governments to argue in negotiations for retaining the current arrangements for Scottish solicitors to be able to practise in the EU. As the professional body for Scottish solicitors, it will be very disappointing if the only route for our members to be able to practise in Europe in the future is to requalify in another EU jurisdiction.

There are of course discussions around Scotland remaining in the EU. The Scottish Parliament has approved a motion which 'mandates the Scottish Government to have discussions with the UK Government, other devolved administrations, the EU institutions and member states to explore options for protecting Scotland's relationship with the EU' and Nicola Sturgeon has already instigated discussions with the EU institutions. Again, this is something we will monitor closely to ensure that we are part of the debate on behalf of our membership and their clients.

What is clear is that any process to change our relationship with the EU will take a considerable amount of time, stretching to several years.

Meantime, for the Law Society of Scotland, we plan to forge on with business as currently planned and we will remain fully engaged in our work with the EU, the Council of Bars and Law Societies (CCBE), and others in Europe on matters of common interest. There will undoubtedly be new areas of work and new issues for us to think about as a result of the referendum vote, but our primary focus of leading legal excellence and being a world class professional body continues.

## Biography

**Eilidh Wiseman** is President of the Law Society of Scotland. She was first elected to the Society's Council in August 2009, was re-elected in 2011 and 2014 as one of the Edinburgh constituency representatives. She previously served as Convenor of the Education and Training Committee, on the Board of Council and the editorial board of the Society's Journal magazine. Much of her professional career has been spent in the larger commercial practices and until April 2014, she held the position of partner and UK head of Employment and Pensions at Dundas & Wilson CS LLP and sat on the firm's Board. Eilidh's other interests include being a Trustee of National Museums of Scotland, Legal Assessor and a member of the Personnel Appeal Group of the Church of Scotland. Eilidh is an enthusiastic golfer, a bookworm, novice bridge player and very slow jogger. She has two sons, Tom and Matthew, and two working cocker spaniels, Lola and Belle.

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BREXIT

## Brexit: Unravelling 40 Years

The European Union is essentially a community of law. It is certainly more than that, of course: it is also a community of values, based on a shared history (shared wars are also shared history) and, at least for those supporting it, a shared project. In fact, much of the discussion in advance of the UK referendum and the essential rationale beyond the voters' decision was related to these immaterial, political and often emotional components of the European project. Law was left out of the debate, as a nuisance sometimes presented by contemptible "experts", who should have no place interfering with the democratic debate.

However, as the fog is lifting, the complexities of an intertwined European legal framework quickly re-emerge with the strength of a cork submerged by force. And many discover a United Kingdom (and, in a way, each one of its citizens) linked to rest of the Union, its institutions, and its other citizens by a highly sophisticated legal fabric knitted together for more than 40 years. Many are now realizing that the EU is obviously not some sort of country club where you can cancel your membership to then try to negotiate access to the bridge playing room or the swimming pool on your own terms.

From chemical products safety regulation to industrial standards; from the right to benefit from a loan at the European Investment Bank to cross-border protection of family related maintenance obligations; from the common recognition and enforcement of trademarks (and soon patents) to the free movement of workers; from equal access to public procurement across the continent to airport slots and legal burdens to unload containers at an EU port; from free "passporting" of financial services to the right of selling motorbikes without customs duties across the internal market. Each of these issues, and hundreds of others, is not the result of a political handshake behind closed doors, but the effect of EU law, as implemented by a legal and judiciary system, which includes the European Court of Justice at its vertex.

Brexit requires unravelling this framework.

As it is known, this unprecedented process can only start once the decision to leave has been officially communicated by the UK Government to the European Council. After that, a negotiation with a fixed deadline of two years will begin; a negotiation which technically will only be authorized to deal with the ordained demolition of the current legal construction supporting the existing UK-EU relationship.

Demolishing such a building will require cutting cables and connections, closing currently open doors and access routes, allocating common infrastructure, and apportioning costs of such an exercise. Whilst this process will be difficult and emotionally painful on occasions, it is feasible. However, it cannot happen in isolation. It must be managed whilst at the same time taking into consideration at least the basic plans of the new legal building intended to replace the old one. The UK does not appear to want to alienate itself completely from the EU. Great Britain is not moving to somewhere in the Pacific: it will remain geographically and culturally within Europe. A new relationship will be negotiated with the Union and its remaining members, who may use this opportunity to further strengthen their integration in some areas. The negotiating parties will fight around a table to protect their political objectives, their social and economic interests and the rights of their citizens.

At this time we do not know if such a new legal building will be inspired by the one hosting the Norwegian neighbours (it was conceived for a smaller occupant), or the Swiss one (nobody likes it really), or perhaps it will emerge from creative and completely new legal drawings. But if legal security is to be preserved, the task ahead is colossal: in many ways it will be the equivalent to renovating an airplane in the middle of a flight. There is a lot of legal work ahead, both in the UK and in the EU. This includes those directly involved, those monitoring the process and, eventually, those who want to ensure that their needs or those of their clients are given due consideration during in this extraordinary transition.

## Biography

**Ignasi Guardans** is a Partner at the international law firm, K&L Gates, based at their Brussels office. He was previously a politician, elected in 1995 to the Catalan Parliament and then to the Spanish Parliament, where he stayed for two consecutive terms (1996-2004). In 2004, he was elected to the European Parliament. During this period of parliamentary and lawmaking activity, Guardans held different responsibilities as spokesperson, Chair and deputy Chair of different Committees. He focused on International and European Affairs, Media & Creative Industries, including the Digital environment, International Trade, and the promotion of Human Rights. Guardans holds a PhD in International comparative contract law.



## Commission and Parliament set up their Brexit negotiation teams

On 27 July, and as noted in our previous edition of the Brussels Agenda, Michel Barnier was named Chief Negotiator in charge of a new Task Force for Brexit for the conduct of the negotiations with the UK under Article 50 TEU.

The Task Force however only came into existence on 14 September, when the European Commission decided to kick-start the creation of the body, thus providing a raison d'etre for Mr Barnier in his new role.

As one would expect, the Commission Brexit Task Force will be in charge of preparing and conducting the negotiations with the UK and importantly will consider a feasible framework for the future relationship between the UK and the EU. It aims to coordinate the Commission's work on all issues related to these negotiations (be they operational, legal, financial, etc) and it will also be able to draw on policy support from all of the Commission services.

In the same breath as creating the Task Force, the Commission also appointed German national, Sabine Weyand (Deputy Director-General in the Commission's trade department), as Deputy Chief Negotiator, as from 1 October.

Ms Weyand brings a lot of relevant experience to her new role as she currently oversees a wide variety of matters in her current position including trade defence, WTO matters, neighbourhood policy and TTIP. She has also been a Member of Cabinet of Trade Commissioner Pascal Lamy, Head of Cabinet of Development and Humanitarian Aid Commissioner Louis Michel, as well as having been in charge of policy coordination in the Commission's Secretariat-General.

President Juncker announced that, "This new Task Force will be composed of the Commission's best and brightest. They will help Mr Barnier to conduct the negotiations with the UK effectively, benefiting from the deep knowledge and rich experience available across the whole Commission. Together, Michel and his team will live up to this new challenge and help us to develop a new partnership with the UK after it will have left the EU."

News of the Commissions newly created Task Force comes a week after the European Parliament's announcement that it will appoint Guy Verhofstadt, leader of the Alliance of Liberals and Democrats (ALDE), as Mr Barnier's counterpart.

Despite Mr Verhofstadt's subsequent statement that the EU Parliament will play a central role in talks on the UK's exit terms and any subsequent agreement on future EU-UK relations, the manner in which he will

be able to influence Brexit negotiations still remains unclear. Officially, Mr Verhofstadt's remit is limited to keeping the European Parliament's Conference of Presidents "fully informed of developments" and also to help prepare the Parliament's position in the negotiations.

With the Council and Commission each fighting for the leading role in Brexit negotiations, through their guises of Didier Seeuws and Mr Barnier respectively, it remains to be seen whether Parliament and Mr Verhofstadt will feature as heavily in negotiations as they would like. Whether the appointment is symbolic or whether too many cooks really can spoil the broth will ultimately be decided by the actors themselves.

In any event, the Commission and the EU are currently adhering to the principle of 'no negotiation without notification', so the Task Force and Mr Barnier, Mr Verhofstadt and Mr Seeuws by extension, will not enter into formal talks with the UK upon its formulation on 1 October. Whilst the date on which Article 50 is to be triggered may be out of the EU's hands, it is apparent that EU actors are doing everything in their power to prepare themselves as best they can for when the day arrives.

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## And then there were 27

The heads of 27 European Member States met at an informal meeting in Bratislava, Slovakia on 16 September. Whilst the issue of Brexit was not on the agenda, it could not be ignored with Theresa May notably absent from the 'summit of reflection' in the wake of the UK's referendum on membership of the EU.

With no formal discussion regarding Brexit expected as the UK has not triggered Article 50 TEU yet, the leaders discussed the issues of migration, terrorism and economic and social insecurity. They agreed to provide Bulgaria with extra funding to strengthen the protection of its border with Turkey and to start implementing a joint declaration with NATO, following recent calls for a European 'Defence Union', as confirmed by the Bratislava declaration and road map.

The UK's proposed withdrawal from the EU was however prominent in discussions, with Donald Tusk, President of the European Council, saying that the decision of the UK on 23 June 2016 called for an evaluation of the state of the EU and "an honest diagnosis" of the causes of the current political situation in Europe. He alluded that there was a need for trust and confidence in the EU to be renewed in the wake of the UK referendum, refugee crisis and spate of terror attacks recently.

The heads of state and government were however relatively optimistic, with the declaration stating that they are "determined to make a success of the EU with 27 Member States" and Tusk suggesting that the EU could be stronger without the UK.

Questioned by journalists afterwards, Tusk stated that the first goal of the EU in the withdrawal negotiations would be to achieve a relationship with the UK that is as close as possible but that its other, equally important, goal is to protect the interests of the 27 remaining Member States. He added that the EU is well-prepared for such negotiations and could begin them "even tomorrow".

Likewise, Robert Fico, Slovak Prime Minister added that, unlike the UK, the EU knew what it wanted; a result whereby it is clear that it is worth being a member of the EU.

Fico stated the EU would reject "cherry-picking" by the UK, referring to the UK's perceived wish to remain

in the single market but limit migration of EU citizens. He stated that there were 70,000 Slovaks in the UK who, together with many more Poles, Romanians and Bulgarians, had contributed to the wealth of Britain and that the EU would not allow such people to become "second-rate citizens".

The conclusions of the informal meeting were met with some criticism. Italian Prime Minister, Matteo Renzi, thought the meeting had skirted key issues like the refugee crisis and the budget. Likewise, the Confederal Group of the European United Left/Nordic Green Left (GUE/NGL) stated that "the declaration provides no vision or leadership for Europe" whilst the Socialists and Democrats Group said that it is not acceptable that "Brexit seems to have been the elephant in the room", calling for the UK government to start negotiations as soon as possible.

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## European Parliament debates Brexit

Following a heated extraordinary plenary session held on 28 June 2016, MEPs have continued debating the topic of Brexit, led by the Committee on Constitutional Affairs (AFCO).

On 5 September 2016, AFCO held a workshop on the future constitutional relationship of the UK and EU, inviting four experts to speak.

Francisco Aldecoa Luzárraga of the Fundacion Alternativas saw Brexit as an opportunity for European institutions, given the absence of the UK's traditional veto on deeper integration. Likewise, Mercedes Guinea Lorenete recommended that the Parliament considers how to use Brexit as an opportunity. Indeed, it seems that the institutions are already seizing such opportunities with a European 'defence union' being proposed by France and Germany and the proposal of a Pan-European tax, both of which the UK has historically opposed.

Meanwhile, René Repasi of the University of Rotterdam warned that, if the UK left the EU without any negotiation provisions for the single passport, which allows financial services operators legally established in one Member State to freely conduct business in all other Member States, non-EU financial subsidiaries established in the UK could lose their access to the European single market, instead having to request a 'third-country' passport.

Steve Peers of the University of Essex raised the issue of acquired and vested rights, which, according to the Vienna Convention on Treaties, are protected under international law, thereby potentially enabling UK citizens living in other EU member states and EU nationals living in the UK to maintain some form of immigration permission. He noted that Greenland's exit had contained an acquired rights clause for immigration status, which could stand as legal precedent.

Richard Corbett, a UK Labour MEP, cited the protests across the UK against Brexit and suggested that the withdrawal agreement could contain a conditionality clause stating that the agreement will only take effect once the negotiations regarding the future relationship have been completed, thereby delaying the deadline for a final agreement. Max Andersson MEP of Sweden alternatively suggested that the UK could firstly join the EEA and then negotiate a tailor-made agreement for access to the EU single market.

Meanwhile other MEPs urged the need for an adequate political response to Brexit whilst Pascal Durand, a French MEP, said that the EU could not wait in a 'state of suspension' for the UK government to trigger Article 50 TEU.

## Update from Westminster ☐ No 'running commentary'

Whilst Theresa May has stated that a 'running commentary' on the Brexit negotiations will not be provided, there have been several updates from Westminster regarding the UK's proposed withdrawal from the EU.

Firstly, David Davis MP, the Secretary of State for Exiting the EU, made a ministerial statement stating that the government was committed to withdrawing from the EU and would not try to "stay in the EU by the back door". He confirmed that the Government will try to build a national consensus around its approach to Brexit, consulting as many stakeholders as possible, and will take time to get the negotiations right, despite pressure from Donald Tusk and other European politicians to trigger Article 50 TEU as soon as possible.

During questions afterwards, Davis stated that, for as long as the UK remains a member of the EU, it will continue to meet all obligations relating to the Unified Patent Court. Controversially, he also said it was "very improbable" that the UK would remain in the single market, a statement that Theresa May distanced herself from, stating that it was not Government policy but rather Davis' opinion.

The Secretary of State for International Trade, Liam Fox MP, also received his first oral questions, during which he set out his department's responsibilities, which include promoting exports of UK goods and services and delivering the best international trading framework outside the EU, announcing a new UK-India Trade Working Group to look at opportunities post-Brexit.

Additionally, the Lord Chancellor, Liz Truss MP, gave evidence to the Justice Select Committee, stating that she was working closely with the Department for Exiting the EU and the Department for International Trade on the issue of Brexit and would support a piece of work by the committee looking at issues affecting the Ministry of Justice post-Brexit.

During Parliamentary Questions, the Home Secretary, Amber Rudd MP, received questions regarding the Schengen Information System and European Arrest Warrant. It was confirmed that the government will continue to cooperate with their EU counterparts on these matters whilst the UK remains a member of the EU and is exploring options for future cooperation following Brexit. It was also outlined that the government would like to maintain the UK's membership of Europol.

Finally, the Chancellor of the Exchequer, Philip Hammond MP, met with the European Financial Services Chairman's Advisory Committee regarding the financial services industry. Afterwards, he stated that he is "determined to listen to what the industry has to say on key issues, like access to the single market" and signalled that 'highly skilled' workers, including bankers, should be exempt from any curbs to the free movement of people. Hammond will be holding further meetings with a variety of sectors in the coming months.



## The Scottish Affairs Committee Inquiry into Scotland's Place in Europe

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since

1945.

Of course there have been other highly significant changes - accession to the European Economic Community in 1972, devolution to Scotland, Northern Ireland and Wales, adoption of the Human Rights Act in 1998 and creation of the Supreme Court in 2005 - which have affected the lives of many millions of people living across the UK.

However the UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, and will affect everyone living in the British Isles both in the immediate and longer term future. It also has the potential to affect many people living in the EU.

It is difficult to know just how the EU referendum result will affect Scotland's relationship with Europe; much will depend on the terms of the withdrawal agreement and those of any future relationship between the UK and EU.

The Law Society of Scotland has analysed what it perceives to be the most significant public interest issues and those confronting Scotland's solicitors, including:

- Ensuring consistent application of the law
- Freedom, security and justice
- Recognition of judgements and enforcement of citizens' rights
- Court of Justice of the European Union cases
- Immigration, residence, citizenship and employment status
- Impact of exit negotiations on the devolved administrations
- Recognition of practice rights and respect for legal professional privilege
- Continuity of business regulation

To quote Bernard Jenkin MP, Chairman of Public Administration and Constitutional Affairs Committee, from his note to the Cabinet Office on "Leaving the EU and the Machinery of Government", this is a 'Whole of Government project'.

The Law Society of Scotland thinks that the phrase, 'Whole of Government', should be interpreted as 'Whole of Governance' to include the Scottish Government, Northern Ireland Executive and Welsh Government, as well as the UK Government and Whitehall Ministries. On this interpretation, agreements between the UK Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee would need updating, taking into account the extraordinary circumstances, which apply following the UK's vote to leave and establish structures to help achieve the best outcome for the UK.

It is crucially important that communications between UK Ministers and the devolved administrations are as transparent as possible and that Whitehall departments are fully appraised of what is important to the devolved administrations and cooperate fully with them.

In June, Prime Minister David Cameron emphasised that the UK Government would "fully involve the Scottish, Welsh and Northern Ireland Governments". This was reiterated by the Prime Minister, Theresa May, following her meeting with the First Minister, Nicola Sturgeon MSP, in July. Governments however do not have a monopoly on wisdom and it is important that there is wide consultation; the UK Parliament, the Scottish Parliament and other devolved assemblies, civic society bodies, trade unions, professional bodies, universities, churches and other organisations, all have a role in informing the negotiations.

The Law Society of Scotland has outlined the various options for the UK, which may result post Brexit as below, each of which has political, legal, social and economic advantages and disadvantages:

- Participation in a WTO Membership relationship
- Joining the EFTA and EEA agreements
- Participation in a Free trade / Association agreement with the EU
- Participation in a bespoke relationship with the EU

As regards Scotland, the 2016 Scottish National Party (SNP) manifesto stated that "the Scottish Parliament should have the right to hold another referendum…if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will."

Since the referendum, Sturgeon has stated that a second independence referendum is "highly likely" following the vote. The appointment of Mike Russell MSP as Minister for UK negotiations in Scotland's place in Europe and the creation of a new sub-committee of Ministers are also indicative of the Scottish Government's commitment to examine all the options for Scotland's relationship with Europe.

In the event of Scotland becoming an independent state following a referendum, all the options, as outlined above available to the UK would apply to Scotland. Another option however is for Scotland, as an independent state, to apply to become a member of the EU under article 49.

Legal services contribute more than £1billion to the Scottish economy every year. The Law Society of Scotland has been working with Scottish Development International, UK Trade and Investment, the City UK, the Great Britain-China Council and the UK and Scottish Governments to promote the Scottish solicitors profession and the many advantages to doing business in Scotland – high quality graduates, low tax rates and lower costs than other competing regions – up to 40% lower than London and the South East of England according to Financial Times FDI Benchmark.

In the context of the UK's exit from the EU, the Law Society of Scotland will work to promote continued mutual recognition of practice rights within the EU, continued rights of audience before the EU Courts and respect for legal professional privilege as it applies to Scottish solicitors. As well as updating its members and advising them on the effects of the negotiations, it understands that the potential for economic ramifications could have a knock-on effect on the financial stability of firms. The Law Society of Scotland will therefore be monitoring events closely and will offer any necessary, tailored support for its members.

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## Jean-Claude's State of Union Address

Every year in September, the President of the European Commission delivers his State of the Union speech before the European Parliament. The speech sets out the Commission's priorities and kick-starts the Parliament and Council's work for the upcoming legislative year.

While last year's speech came at the peak of the refugee crisis, this year it was the ominous cloud of Brexit which loomed large over President Juncker as he took to the stage in the European Parliament on 14 September.

Mr Juncker used his speech to set out the key challenges facing Europe and, although the UK was notable

only by its absence from his speech (apart from his mention of Polish workers being attacked in Harlow), the President of the European Commission did tackle the issue of disunity head-on, striking a sombre chord from the beginning which resonated throughout:

"I stood here a year ago and I told you that the State of our Union was not good. I told you that there is not enough Europe in this Union. And that there is not enough Union in this Union. I am not going to stand here today and tell you that everything is now fine. It is not. Let us all be very honest in our diagnosis. Our European Union is, at least in part, in an existential crisis... Never before have I seen so much fragmentation, and so little commonality in our Union."

The Commission President blamed a rise of "populism" for the growing rifts throughout the EU, which Mr Juncker seemingly addressed in a pejorative manner, whilst simultaneously paying lip service to the needs of the working man by addressing a plethora of matters, from the low cost of milk to the need to stand up for the EU's steel industry.

Mr Juncker's speech however addressed, in the main, the themes of Europe's migrant crisis and the need to secure the EU's external borders and terrorism.

On the issue of migration, Mr Juncker announced, "Today we are launching an ambitious Investment Plan for Africa and the Neighbourhood which has the potential to raise €44 billion in investments. It can go up to €88 billion if Member States pitch in. The new Investment Plan for Africa and the Neighbourhood will offer lifelines for those who would otherwise be pushed to take dangerous journeys in search of a better life."

On counter-terrorism, Mr Juncker stressed the need to step up information exchange among national police authorities and proposed, as a consequence, strengthening Europol. He also announced a proposal for a European Defence Fund and noted the creation of an eponymously named €315 billion Investment Plan for Europe, joking that the title of the fund would ensure it is his responsibility if it fails.

Regarding the issue of strengthening the EU's external borders, Mr Juncker confirmed, "We will defend our borders with the new European Border and Coast Guard. I want to see at least 200 extra border guards and 50 extra vehicles deployed at the Bulgarian external borders as of October."

Mr Juncker concluded his speech by returning to the theme of disunity, stating that the Union, as such, is not at risk and also imparting on his audience that "Europe is a cord of many strands", which only works when everyone pulls in the same direction.

Whether you believe Mr Juncker in his assertion that the Union is not at risk or whether you side with Ms Le Pen, who stated afterwards that the President of the Commission's address was a "funeral for the European Union" the overriding message from Mr Juncker is clear - that in order to put the "U" back in the "EU", he needs you.

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## 'The Last Commissioner'

On 19 September 2016, Sir Julian King, a British diplomat, was appointed by the Council as Commissioner for Security Union after Lord Jonathan Hill resigned as the UK's Commissioner following the June referendum on the UK's membership of the EU.

King will lead the EU's security portfolio, which was created by Jean-Claude Juncker, the President of the European Commission, after the terror attacks in France and Belgium this year and last. In this role, King will be charged with delivering an operational and effective Security Union, which aims to improve information sharing between Member States (particularly after it was revealed that several of the people involved in the recent terrorist attacks had been known to law enforcement in other Member States), prevent radicalisation and strengthen the European Counter Terrorism Centre at Europol, the EU's law enforcement agency.

As the current Ambassador to France during the recent Islamic terror attacks and having worked as the Ambassador to Ireland and Director General of the Northern Ireland Office, King is likely well suited to this post.

During the hearing on King's appointment held in European Parliament on 12 September by the Committee on Civil Liberties, Justice and Home Affairs, King insisted that he would defend the European interest as opposed to the British one and began by speaking in French to prove this point.

Referring to the UK's proposed exit from the EU, King stated, "I was always proud to British, but equally proud to be European. There is no contradiction between the two". He however said that the majority of British voters had chosen to leave the EU and their will had to be respected stating, "When the UK leaves, my job here will cease." Gerard Batten MEP of UKIP however questioned his role asking, "Why on Earth is Britain nominating a Commissioner at all, given that the last one had to resign as his position was untenable?"

Nevertheless, Parliament backed the appointment of King by 394 votes to 161, with MEPs from the Alliance of Liberals and Democrats for Europe (ALDE) abstaining due to doubts about the suitability of the allocation of the Security Union portfolio to King in view of the upcoming negotiations on Brexit.

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## The big reveal: the Commission's copyright reform proposal

On 14 September, the European Commission unveiled the new package of copyright reforms. Before these were published, several documents had already been leaked including drafts of:

- the Directive on copyright in the Digital Single Market,
- the Regulation laying down rules on the exercise of copyright,
- the Commission's impact assessment and Commission communication promoting fair, efficient and competitive European copyright-based economy.

The package also includes one further Directive and Regulation on the implementation of the Marrakesh convention regarding the use of copyrighted and other protected materials for the benefit of persons who are blind, visually impaired or otherwise print disabled.

Even before the proposals were revealed, the feathers of media and sports companies in particular had been thoroughly ruffled.

A particular point they have attacked is the country of origin principle. The proposed rules would create a legal mechanism that would make it easier for broadcasters to obtain necessary authorisations from right-holders to transmit programmes online in other EU member states.  This is extremely worrying for media

companies as, according to them, it risks diluting the licensing value of content and therefore undermining the way films and TV shows are financed.

Another issue with the proposed pan-European rules that is proving to be controversial is the so-called "Google tax". Under current rules, video platforms such as YouTube and Facebook only remove material once notified on a case-by-case basis. This new "Google tax" would require the hosts of such content to shoulder more responsibility to detect copyright infringements themselves. This would entail a more proactive approach by the companies to run software checks to identify if they are hosting copyright material. Such software can be expensive and would be a particularly harsh burden for smaller technology firms. Whilst this proposal has been heavily pushed by artists and applauded by some news outlets, rather predictably, it has come under fire from the said companies.

Other areas of the reform that have been overshadowed by the above are rules on research, education and inclusion of disabled people. The proposed rules could enhance teaching and research resources. For example, they allow educational establishments to use materials to illustrate teaching through digital tools and in online courses across borders, as well as making it easier for researchers across the EU to use text and data mining technologies to analyse large sets of data. The Commission has also proposed a new mandatory EU exception, which would allow cultural heritage institutions to preserve works digitally, something that the Commission considers to be crucial for "the survival of cultural heritage and for citizens' access in the long term."

This is only the beginning for copyright reform as the Commission promises to bring further legislation on enforcement of intellectual property rights, including copyright.

Links to all proposals and papers:

- The Commission Communication promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market
- The Commission proposal for a regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions
- The Commission proposal for a directive on copyright in the Digital Single Market
- The Commission proposal for a regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works for persons who are blind, visually impaired or print disabled
- The Commission proposal for a directive on permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or print disabled

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## Apple case review: A taxing situation for MNCs

One of the current European Commission's overarching strategies is fair taxation and greater transparency. In order to achieve this, the Commission has been investigating tax ruling practices of all Member States since December 2014. These investigations have led to rulings that Luxembourg and the Netherlands had granted selective tax advantages to Fiat and Starbucks, respectively. Two further investigations into tax rulings by Luxembourg for Amazon and McDonald's are ongoing. Previous publications of the Brussels Agenda have outlined the main principles and questions to be considered in such cases. This article focuses on the specific circumstances of the Apple case.

The recently published Ireland and Apple case decision has received much media attention. The Commission concluded that Ireland granted Apple undue tax benefits of up to €13bn, which is illegal under EU state aid rules, and so have ordered Ireland to recoup the illegal aid plus interest. Both Apple and the Irish government are exerting their right to appeal the decision but, in the meantime, the sum demanded is to be placed in an escrow account pending the outcome of the appeal.

The Commission concluded that two tax rulings by Ireland to Apple substantially and artificially lowered the tax paid by Apple in Ireland since 1991. The rulings enabled Apple to establish taxable profits for two Irish incorporated companies of the Apple group which did not correspond with the economic reality. This was because the majority of sales profits were attributed to a "head office", which in fact only existed on paper, and were not subject to tax. This led to the very low levels of effective tax being paid by Apple; according to the Commission the real tax rates were 1% in 2003 and 0.005% in 2014.

The Commission concluded that the way Ireland treated Apple constitutes selective treatment. This is because it gives Apple a significant advantage over other businesses that are subject to the same national taxation rules and this is illegal under EU state aid rules. The Commission can only order the recovery of the illegal state aid for a period of 10 years preceding the first request for information in 2013. As Apple changed its tax structure in 2014, the recovery period is from 2003 to 2014, meaning up to €13bn plus interest is recoverable.

Ireland and Apple are both challenging the Commission's ruling on the basis that Ireland's treatment of Apple was not selective, all parties adhered to the laws in force and the way Apple structured its companies could have been done in the same way by other businesses too.

Ireland has low business tax legislation in place to encourage foreign direct investment and to enhance the economy's growth but, according to some sources in the media, the Commission's ruling is undermining Ireland's sovereignty over its fiscal policies. This targeted media coverage has led to a perception by businesses that Ireland's low tax system is not legally certain or trustworthy, discouraging investment. In fact, however, the decision was about discrimination, and the Commission was not taking a position on the Irish tax rates. Therefore, according to Vestager, businesses could end up in a better situation as no specific companies can be selectively advantaged over others; they are on an equal footing. However, a particular aspect of the decision businesses take issue with is that tax can be recouped *retrospectively*which, as shown in this case, could be extremely large sums.

The Irish government therefore had little option but to appeal the Commission's decision to show its support for foreign companies investing in Ireland. The strength of this decision as a deterrent for companies to be based in Ireland is demonstrated by a recent letter from 185 CEO's to the leaders of EU countries. The leader warned that the decision would undermine the legal certainty needed to attract investment. We must now wait to see how the appeals progress and whether they are successful.

Update on other state aid cases

A similar state aid case that involved a tax scheme exempting the excess profits of a number of MNCs is Belgium v Commission (T-131/15). Following the ruling that the scheme did constitute state aid and therefore ordered the taxes to be recouped, Belgium made an interim application for the suspension of the operation of the measures. This application was dismissed on 19 July 2016 by the President of the General Court.

The Commission has also initiated a new set of proceedings against Luxembourg and its tax treatment of Engie.

## Fair Taxation: Common EU list of tax havens

**The European Commission proceeds with plans to draw up the first common EU list of non-cooperative tax jurisdictions by presenting a pre-assessment of all third countries according to key indicators.**

On 15 September 2016, the Commission released a draft list of countries suspected of facilitating tax avoidance. This list was compiled based on a range of indicators including economic data, financial activity, institutional and legal structure and basic tax good governance standards.

It is now up to Member States to determine which jurisdictions are to be selected for closer scrutiny from January 2017, with the aim of publishing the first EU list on non-cooperative tax jurisdictions before the end of 2017.

The Commission says this common list should carry much more weight than the current patchwork of national lists and prevent aggressive tax planners from abusing mismatches between the different national systems.



## Antitrust: Preliminary report on e-commerce inquiry

On 15 September 2016 , the Commission published a preliminary report on its e-commerce sector inquiry. It confirmed the rapid growth of e-commerce in the EU and identified business practices that have the potential to restrict competition and limit consumer choice.

The inquiry commenced in May 2015 in the context of the Commission's Digital Single Market strategy with the objective of identifying possible competition concerns in European e-commerce markets. The evaluation of evidence from a large sample of companies in the e-commerce sector and analysis of distribution contracts has identified a number of business practices that may limit online competition. If this is the case, there would be a breach of EU antitrust rules. To ensure compliance, the Commission may open case specific investigations.

The Preliminary Report is now open to public consultation until 15 November for stakeholders commentary and the Final Report is expected to be published in the first quarter of 2017.

For more information, click here.



## Cross-Border Aspects of Adoptions: Mutual Recognition of Certificates of Adoption

In May 2016, the Rapporteur, Tadeusz Zwiefka, presented a Draft Report with recommendations to the Commission on cross-border aspects of adoption to the Legal Affairs Committee (JURI) in European Parliament.

As reported in the past, the European Parliament is concerned that there is currently no European provision for the recognition of domestic adoption orders and that the absence of such a provision could cause significant problems for parents of adopted children who wish to move to other Member States. Parents instead have to go through specific national recognition procedures or, in some counties, even re-adopt the child. The delays caused by such procedures can create a period of legal uncertainty and parents can have trouble exercising their parental authority.

The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption, by which all EU Member States are bound, concerns the procedure for adoptions across borders and mandates the automatic recognition of such adoption. However, the Convention does not cover the situation of a family with a child adopted under a purely national procedure, which then moves to another country.

The Draft Report requests the Commission to submit, by 31 July 2017, on the legal basis of Article67(4) TFEU (mutual recognition of judgments and decisions) and Article 81(3) TFEU, (measures in the field of family law) a proposal for a Regulation on the automatic cross-border recognition of adoption orders.

The main features of the proposal are:

- Automatic recognition of adoption orders made in Member States under any procedure other than under the framework of the 1993 Hague Convention.
- Recognition must not be manifestly contrary to the public order of the recognising Member State and the Member State which took the adoption decision had jurisdiction to make the decision on the basis of the habitual residence of the parent/parents/child. An adoption decision taken in a third country and recognised by a Member State will have the same recognition in all Member States.
- The provision of specific procedures for deciding on any objections to recognition in specific cases
- The creation of an European Certificate of Adoption.
- The proposal does not oblige the Member States to recognise any legal relationship between the parents of an adopted child: it only concerns the individual parent-child relationship.

The proposal can be found here. Amendments have been presented and can be found here.

The JURI Committee has not yet set a date for the discussion and vote of the amendments.

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## Consultation on the REFIT of European Consumer Law

The European Commission launched a Fitness Check (Refit) of the EU Consumer and Marketing legislation, to provide an evidence-based critical analysis of whether EU actions are proportionate to their objectives and meeting these objectives. As part of this exercise, the Commission opened a consultation on the Consumer Rights acquis.

The letter below sets out the response of the Law Society of England & Wales:

"The Law Society of England & Wales (LSEW) broadly welcomes the initiative of the Commission of a Refit of the European Legislation on consumer rights and shares the aim of closely evaluating the effectiveness of existing EU legislation with the purpose of determining if there is the need for further legislative action at EU level. A similar exercise in the UK resulted in the Consumer Act 2015, which has rationalised consumer rights *"with the aim of empowering consumers by creating a simplified and enhanced legal regime that affords greater rights when buying goods, services and digital content."**

"The LSEW recognises that the work of the EU in the field of Consumer Law has, over the last decade, been fundamental in recognising and furthering consumer's rights within the EU.

"The LSEW reiterates its conviction that the legislation on consumer rights should be applied only to business to consumer contracts, with the definition of consumer being as provided in the Consumer Act 2015: *"an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession".*

"In the eventual proposal of new legislation and in the rationalisation of the existing one, the LSEW wishes to reaffirm that:

- any EU legislation must be fully compliant with the principles of proportionality and subsidiarity; and
- any EU legislation must be based on sound and convincing proof that there is a need for it.

"Furthermore, it must be clear that no legislation can lower existing standards of protection for consumers.

"The LSEW generally supports the present framework, which sets out core wide uniform rights with the provision of minimum standards. The model of minimum harmonisation at a high level of protection has worked well in the field of consumer rights; the existing rules have created a stable, fair and open market, in which both traders and consumers have been able to operate with confidence. Any change in this approach (e.g. maximum harmonisation) should be considered with caution and only if objective evidence clearly demonstrates how minimum standards do not achieve the ultimate aim of comprehensive protection of consumer rights.

"The LSEW is open to the possible need for new legislation, particularly taking into account the fast and welcomed development of the digital economy and, in particular, the new market in digital products.

"EU legislation on consumer rights has broadly had the benefit of flexibility; therefore, the LSEW considers the Consumer Sales and Guarantees Directive 1999/44/EC adequate in its provision of the choice of contractual rights and remedies and does not believe that there is the need to add further, prescriptive rules related to the quality of goods.

"The LSEW believes no uniform rules on the content and form of commercial guarantees should be provided. Commercial guarantees are voluntary commitments so they should not be regulated by legislation; the remedies against non compliance are the same as for breach of contract.

"As for the Unfair Contract Terms Directive 93/13/EEC, in relation to possible grey lists and black lists, the LSEW does not consider a grey list objectionable per se (see the list of terms provided in Schedule 2 of the Consumer Act 2015), but there is a question as to whether the Grey List should be indicative or presumptive. The LSEW would prefer the status quo of an indicative list, thereby preserving the flexibility of the system.

"The LSEW considers, in general, that the problem of cross-border means of redress is better served by a collaborative approach between competent authorities, on the model provided by the 2004 Consumer

Protection Cooperation Regulation (CPC Regulation)."

*House of Commons Library, Briefing paper SN 6588 1 October 2015




## Impact of Brexit on the internal market for legal services: the case for continuing cooperation

The UK's vote to leave the EU on 23 June came as a surprise, even a shock, to many lawyers in the UK and across the rest of the EU.

In the following months, the legal profession has begun to look at the legal consequences of the UK's proposed withdrawal from the EU and what this means for different sectors, including its own. Professional services, including legal services, are important to the UK economy and a key part of the EU economy as a whole, with a net trade of over £4 billion with the EU in 2013.

The Law Society of England and Wales first set up an office in Brussels back in 1990. It subsequently joined together with the Law Society of Scotland and Law Society of Northern Ireland to create the Joint Brussels Office, which operates today.

One of the office's key portfolios has always been the EU-specific framework for cross-border provision of legal services, which has greatly supported the cross-border provision of legal services within the EU/EEA (European Economic Area) and Switzerland. In particular:

The Lawyers' Services and Lawyers' Establishment Directives allow lawyers to provide services on a temporary or permanent basis using their home title, practise host Member State law, work for and employ local lawyers, regulate the provisions on codes of conduct, hold professional indemnity insurance, represent clients in the host State courts or have joint practices. The Establishment Directive also allows EU lawyers to re-qualify without equivalence examination after three years of regular and effective practice of host state law, including EU law.

The Professional Qualifications Directive allows the recognition of legal qualifications (among others) through assessment and, if necessary, compensation measures such as additional tests or supervised practice. Following the CJEU judgment in Morgenbesser and review of the Directive, it now also allows the recognition of professional traineeships abroad.

Maintaining the mutual ability for UK nationals to provide legal services through cooperation and collaboration with European colleagues is something we would like to see continue, however the other aspects of the withdrawal negotiations unfold.

The Law Society of England and Wales will be aiming to ensure that the Brexit negotiations allow the existing legal services arrangements to continue or at least something equivalent to them. It is also keen to emphasise that the Law Society of England and Wales is committed to remaining an open market for

legal services and will continue to welcome lawyers and law firms from across Europe, who wish to practise in the jurisdiction.

The Law Society of Scotland has also raised continued professional recognition and practice rights, as well as respect for legal professional privilege as it applies to Scottish solicitors within the EU, as key issues of concern to its members. Whatever the outcome of the government negotiations, the Law Society of Scotland will continue to maintain positive links with colleagues in EU bar associations, seek clarity in relation to admission and continued practice rights and support its members through the transitional process.

Without a specific agreement on the cross-border provision of legal services, the UK might fall back on the General Agreement on Trade in Services (GATS) commitments which stem from WTO membership.

One of the most important differences between the WTO regime and the Lawyers Directives is the practice areas in which foreign lawyers are allowed to provide services. While the Lawyers Directives allow EU/EEA/Swiss lawyers to practise host Member State law (including EU law), it is not possible under the current GATS schedule for commitments of the EU, which is limited to '*legal advice in home country law and public international law (excluding EC law)*.' It is true, however, that individual Member States are free to grant higher levels of access to foreign lawyers on a unilateral basis and many Member States (including the UK) have done so.

Furthermore, provisions concerning requalification or integration in the host State profession are not included in the GATS schedule although it is possible for individual Member States to enact their own rules in that area. Indeed, there exist some bilateral mutual recognition agreements covering legal services, such as France-Quebec or American Bar Association-Brussels Bars.

The EU framework has not simply ensured the basic right to provide, and indeed receive, legal advice, it has also ensured representation in other Member States, including rights of audience. One key aspect is the protection of lawyer-client communications as the framework safeguards Legal Professional Privilege (LPP) for clients of all EU/EEA/Swiss-qualified lawyers. LPP is important to all of us because it is important to our clients: it is vital that none of our clients lose this protection, wherever legal advice stems from our is provided within Europe - and the UK will certainly still be part of Europe, even if not the EU.

The Law Society of Northern Ireland is in a unique position following the referendum as the only region of the UK to have a land border with another EU Member State, the Republic of Ireland (ROI). The Society is keen to ensure that cross-border practice in relation to UK and EU law is protected and an open market promoted as the exit negotiations begin. In particular, the welcome commitment to preserve the Free Travel Area with the ROI in the wake of Brexit raises questions around how precisely this will operate after exiting the EU.

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## The Law Society of England and Wales responds to the Commission consultation on regulated professions

The Law Society of England and Wales submitted its response to the Commission's consultation on the regulation of professions. The response included the comments on the UK National Action Plan (NAP) and on the proposed methodology to assess proportionality of regulation.

In its comments on the UK NAP, the Law Society of England and Wales stressed the need to have a proper evidential basis for any regulatory change and the need to strike a balance between fair competition and protecting the consumer and the public interest. Any changes to the regulation of the legal profession should be considered in the broader context, taking into account their economic effects, impact on consumers and their contribution to advancing the public interest. The latter is especially important in the case of legal services as some of them are crucial to ensure the effective operation of the courts and the lawful settlement of disputes (such as litigation and advocacy services), which are the foundation of the rule of law in England and Wales. The Law Society of England and Wales referred to its ongoing work on the regulation of legal services in the context of the Competition and Markets Authority study.

Concerning the methodology for assessing proportionality, the Law Society of England and Wales supported its development but stressed that it is a complex task, given the diversity of national regulatory regimes in the EU. Assessing the necessity of regulation is already a requirement in many jurisdictions but there exists no common methodology for such an exercise at EU level.

The consultation comes after the Commission published the Member States' NAPs in which they assess their national restrictions applying to regulated professions. The NAPs are a result of a two-year mutual evaluation of regulated professions exercise, which is carried out under Article 59 of the Professional Qualifications Directive (2005/36/EC). The legal profession was one of the professions examined during the exercise. The results of the consultation will feed into:

- the Commission's report to the European Parliament and Council (to be submitted by January 2017);
- a country- and profession-specific guidance to Member States; and
- an analytical framework on proportionality assessments.

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## Brexit: Supporting Professions event - 18 October 2016

The Joint Law Societies Brussels Office is hosting a roundtable event on Brexit: Supporting Professions.

Brexit will potentially have an impact on the ability of professionals to establish themselves and practise in and around the European Union. There are  many questions regarding and dimensions to the right to practise as a qualified professional within the EU, from the recognition and acceptance of professional qualifications to the right of equal treatment.

The workshop will provide an opportunity to learn more about the Law Societies and the ICAEW on their proposed engagement with members and stakeholders regarding the issues arising out of the upcoming negotiations and to hear from you, our audience, about your concerns.

Panellists include:

- Clive Black, Head of Relationship Management (City), Law Society of England and Wales

- Iana Vidal, Executive Adviser, Public Affairs, Law Society of England and Wales
- Marina Sinclair-Chin, Head of International, Law Society of Scotland
- Martin Manuzi, Director, Europe Region, ICAEW
- Mickaël Laurans, Head of Law Societies Brussels Office

The event will take place at the Law Societies Office, Brussels between 12.30pm and 02.00pm, with lunch starting at 12.00pm.

For more information to RSVP, click here.

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## Debate on China's Market Economy Status - 12 October 2016

The Centre and the UK Law Societies are holding a panel debate on China's Market Economy Status (MES).

2016 is an important year for EU-China relations. It will mark the expiry of the 15-year transitional period following China's accession to the WTO and therefore a number of the provisions of Section 15 of China's WTO Accession Protocol. This could lead to China gaining market economy status, a development which could have considerable ramifications for the EU and its trade defence instruments (TDIs). Within the EU, some countries – including the UK – view the deepening of trade relations with China in a positive light, whereas others fear that the influx of Chinese products will harm local industries and stifle job creation.

The debate, moderated by Ana Gradinaru of Edelman Brussels and with speakers Hannah Deringer, Policy Analyst at European Centre for International Political Economy, Leopoldo Rubinacci, Director of the Trade Defence Services at DG Trade, Claudia Vernotti, Director of China EU and Iain MacVay, Partner in King & Spalding's International Trade Practice, will therefore explore the following questions:

- What are the key conclusions of the study on MES for China? What still needs to be done by the Chinese government to have the MES granted? Is there enough political and economic will from both sides?
- Regarding the ongoing European steel crisis, how should the EU react to the alleged dumping measures by the Chinese government? What tools would the EU have to protect European industry from such measures once the MES is granted?
- How would Europe benefit from China getting the MES granted?
- What potential is there for a future trade agreement between China and the EU?

The event will take place between 6.00pm and 7.00pm at The Centre, Rue du Trône 4, Brussels.

Further details can be found here.

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## "International marketplace 2016: Future growth" - 6 October 2016

The Law Society of England and Wales will be holding its annual flagship conference aimed at expanding analysis and conveying knowledge on the current trends affecting the legal profession internationally. Three foreign delegations will participate from Latin America, Central Asia and China.

They will map economic activity and are inviting companies to share what they expect from law firms in the years ahead. They will also look at developing practice areas from a legal service and client perspective. On top of that, they are going to explore whether technology is a friend or foe.

The conference will be held on 6 October 2016 from 9.00am to 5.00pm at The Law Society in London.

Please find more information here on the conference, on the programme and how to register.

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## Opening of the Legal Year Seminar - 3 October 2016

The Law Society and the Bar Council of England and Wales hosted two parallel seminars for international bar leaders and practitioners on the occasion of the Opening of the Legal Year on the following topics: "*The impact of technology on legal services and the role of the profession*" and "*Technological advancements and their effects on dispute resolution and the regulation of the justice system*".

To find out more, click here.

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## Russian Law Week 2016 - "Establishing Bridges in Challenging Times" - 14 to 16 November 2016

The Law Society of England and Wales will be hosting a longstanding programme of annual Russian Law and English Law Weeks in London and Moscow respectively, bringing together Russian and UK legal practitioners and business representatives to promote legal links and business between the two countries.

This is a fantastic opportunity for UK legal practitioners to meet with their Russian counterparts to discuss current trends in legal services in Russia and England and Wales.

The theme of this year's conference is 'Establishing Bridges in Challenging Times'.

The event will take place at the Law Society in London from 14 to 16 November 2016.

For more information on the programme and how to register, please visit this link.

## The Law Society of Scotland launches the LawScot Foundation


The Law Society of Scotland recently established the Lawscot Foundation, a charity which will help academically talented students from less advantaged backgrounds in Scotland through their legal education journey. It will offer financial assistance, mentoring and other support to students during the law degree (LLB) stage, right through the diploma in professional legal practice.

The Foundation will also support the bright legal stars of the future by providing mentoring throughout their legal education from an experienced Scottish solicitor to help enhance the student's confidence, skills and knowledge.

To donate, click here. Alternatively, please contact Heather McKendrick, Head of Lawscot Foundation, at heathermckendrick@lawscotfoundation.org.uk if you if are interested in making a major gift or wish to register to become a mentor or a corporate sponsor, who will be happy to assist.



## Competition for Scots Law students to win 3 weeks work experience at the Scottish Parliament plus £500

The Law Society of Scotland, in partnership with the Scottish Parliament, has re-branded and launched this year's student competition for 3rd year, 4th year and accelerated LLB students as well as Diploma in Professional Legal Practice students.

Legal jargon can often mean aspects of the law that have a large impact on the public can be difficult to understand so the Law Society of Scotland is challenging students to change that. Students are being asked to create either a blog or vlog (video blog) which will communicate an aspect of the rule of law to 16 and 17 year old new voters in a way they can easily engage with. In addition to conveying a clear, simple message, contestants will be judged on their creativity and proven knowledge of their chosen subject area.

The prize is a three-week paid work experience placement at the Scottish Parliament, taking place in June 2017 and £500 in cash.

The deadline for submissions is 26 February 2017.

Watch the promotional video and find out more by clicking here.

## The Law Society of Northern Ireland launches 'Legally Able' - 5 October 2016

The Law Society of Northern Ireland, is launching 'Legally Able', a new solicitor group which has been set up to raise awareness of disability issues for those within the solicitors profession and for clients.

The group will be formally launched by Mr Andy Allen MLA on 5 October 2016 from 12.00pm at Law Society House in Belfast.

Members are invited to attend this free event. To register your attendance at the event please email Susan Duffy at cpdbookings@lawsoc-ni.org. For more information click here.

Membership of the group is open to any person who is on the Roll of Solicitors in Northern Ireland, disabled colleagues and those with experience of working with or otherwise supporting disabled colleagues, clients, family or friends or the wider community. If you wish to join the group, please email Andrew Kirkpatrick at andrew.kirkpatrick@lawsoc-ni.org. The Terms of Reference for the new group are available **Error! Hyperlink reference not valid.**.



## CCBE conference on "Innovation and Future of the Legal Profession" - 21 October 2016

Recently there have been important questions raised regarding the future of the legal profession. How are European lawyers responding to these questions? Who are the key players innovating and positioning the legal profession in an ever-changing environment?

Can the profession's core values be upheld whilst adapting to these challenges? Will lawyers even survive in the face of these challenges? How will the legal profession reinvent itself and its organisations to be an essential part of this future?

To answer these questions and more, the Council of Bars and Law Societies (CCBE) is holding a conference, which will cover four main topics as follows:

- The Future of Justice;
- The Future of Legal Services;
- The Future of Law Firms; and
- The Future of Bars and Law Societies

This conference will bring together experts from Europe and beyond such as Mr. Jean-Jacques Urvoas, the Minister of Justice for France, and Ms. Tiina Astola, Director-General for Justice and Consumers at the European Commission.

The conference will take place on 21 October 2016 at Eurosites George V in Paris.

For more information and to get your ticket, please click here.

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## European Law Institute Annual Conference

Photo: the Sbandieratori of Ferrara

The European Law Institute Annual Conference took place in Ferrara, Italy from 7 to 9 September 2016.

The ELI aims to assist the development of European law by bringing together leading experts and practitioners to help shape the law of the future.

Diana Wallis, President of ELI, said at the opening of the Conference, *"We meet at a challenging time for Europe, but in a way that has always been the case... Brexit may be an additional challenge but I am convinced that it is one that the European community of lawyers, both common lawyers and civilian lawyers, should meet together"*.

This year the work was organised mainly in workshop sessions, with plenary coming together only for the opening session, hosted by Giorgio Zauli, Rector of the University of Ferrara and Giovanni De Cristofaro, Dean of the Faculty of Law of University of Ferrara.

Panel sessions were devoted to, among other topics, criminal law, insolvency law, civil procedure, the Digital Single Market, family law and migration.

ELI project teams focusing on Rescue of Business in Insolvency Law, civil procedure and criminal law presented the outcome of their work to participants followed by fruitful discussions between the audience and the panellists.

Koen Lenaerts, President of the Court of Justice of the European Union, gave the key note speech, which was a fascinating insight of the working of the Court and the development of the comparative method used by the Court to reach its judgements.

More information on the Conference and the European Law Institute can be found here.

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## The Law Society of Scotland holds its Street Law Training Weekend

In early September, the Law Society of Scotland hosted its fourth Street Law Training Weekend.

The intensive weekend trained 30 students in the medium of Street Law – an interactive, participatory way

of teaching law. The sessions were led by Professor Efrain Marimon of Penn State University and Melinda Cooperman of American University.

Since launching its Street Law programme in 2014, the Law Society of Scotland has sent over 100 law students into over 40 schools across Scotland. The trained law students design lessons in pairs and deliver six law-themed, practical lessons in law to 14-16 year old school pupils. The feedback from schools that have taken part so far has been sensational and many of the law students involved have told the Society they have gained important skills thanks to their teaching activity.

The programme is part of the Society's ongoing work on fair access to the legal profession and is generously sponsored by Ashurst, CMS Cameron McKenna and Pinsent Masons.

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**ONGOING CONSULTATIONS**

**Internal Market**

Public consultation on Internal Market for Goods – Enforcement and Compliance
01.07.2016 – 31.10.2016

Public Consultation on Single Market Information Tool
02.08.2016 – 07.11.2016

Single Digital Gateway
26.07.2016 - 21.11.2016

**Home Affairs**

Public Consultation on the programme "Prevention of and fight against Crime"
14.07.2016 to 13.10.2016

Public Consultation on the programme "Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks"
14.07.2016 to 13.10.2016

**Banking and Finance**

Review of the EU Macro-prudential framework
01.08.2016 to 24.10.2016

Public consultation on a potential EU personal pension framework
27.07.2016 to 31.10.2016

**COMING INTO FORCE THIS MONTH**

***Migration***

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard

***Company law and financial services***

Commission Implementing Regulation (EU) 2016/1646 of 13 September 2016 laying down implementing technical standards with regard to main indices and recognised exchanges in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms

***International trade***

Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union and provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part

**CASE LAW CORNER**

**EU-Canada PNR agreement incompatible with Charter of Fundamental Rights of the EU**

On 8 September, Advocate General (AG) Mengozzi issued an opinion on the EU-Canada agreement on the transfer of Passenger Name Record data ("PNR Agreement"). He stated that the agreement cannot be entered into in its current form as it is incompatible with the Charter of Fundamental Rights of the European Union (" the EU Charter").

The opinion follows the European Parliament's referral of the agreement to the Court of Justice of the EU (CJEU) in November 2014 to assess its compatibility with fundamental rights and determine if the interference with these rights is justified. This was a significant decision as it was the first time that the CJEU has been called upon to issue a ruling on the compatibility of a draft international agreement with the EU Charter.

The draft PNR Agreement reached between the EU and Canada was signed on 25 June 2014 after four years of negotiations. Similar agreements were signed and concluded by the EU with the US and Australia.

The EU-Canada PNR agreement provides that the PNR data is to be transferred to competent Canadian authorities which may retain it and, where appropriate, further disclose it to prevent and detect terrorist offenses and other serious transnational crimes. Under the agreement, the PNR data would include information such as a passenger's travel habits, payment details, dietary requirements and other information that might contain sensitive data, e.g. a passenger's health, ethnic origin or religious beliefs. While collecting the information may be necessary for an airline or travel agent to proceed with a reservation, it

is usually deleted after the flights.

AG takes the view that, in order for the agreement to be compatible with the EU Charter of Fundamental Rights, there are several issues that it must address. First of all, it should clearly define the categories of PNR data to be retained. Importantly, sensitive data must be excluded from its scope. Secondly, the number of 'targeted' persons should be limited to those who can be reasonably suspected of being involved in criminal or terrorist activity. Thirdly, it must identify the authority responsible for processing PNR data, in such a way as to ensure accountability and protection of that data. Fourthly, an independent authority/court in Canada should be empowered to review whether the competent Canadian authority may disclose PNR data to other Canadian or foreign public authorities on a case-by-case basis. Fifth, it should provide a systematic safeguard to ensure that an independent authority can monitor the respect for the private life and protection of the personal data of passengers whose PNR data is processed.

In his comments, the AG found that certain provisions of the agreement were contrary to the EU Charter. The agreement in question extends the possibilities for processing PNR data beyond the public security objective and what is strictly necessary. It also allows the use and retention by Canada of sensitive data. Furthermore, it confers on Canada the right to disclose any information without a connection with the public security objective. It authorises Canada to retain PNR data for up to five years without a requirement for any connection with the public security objective. Finally, it allows PNR data to be transferred to a foreign public authority without the competent Canadian authority first being satisfied that the foreign public authority in question to which the data is transferred cannot communicate the data to another foreign body.

Although the opinion of the AG is not binding on the CJEU, it is often followed by the judges. It is already possible, however, that the opinion will push the lawmakers to look at other PNR agreements reached between the EU and other third countries. The EU-Canada PNR Agreement has long be considered the "least intrusive" which the EU has entered into and yet the AG pointed out to numerous shortcoming of the deal.

It is clear that the AG is prepared to provide some much needed balance to the debate of Security v Privacy which continues to rage at all levels of policy. It can only be hoped that Mr Mengozzi's opinion is one which can be heard of above the crowd in this highly controversial area of incessant discourse.

**Decided cases**

***Consumer law***

**C-592/14** *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills*

- EU law protects the EU market from cosmetic products containing ingredients which have been tested on animals. Placing such products on the EU market may be prohibited where the testing on animals has been conducted outside the EU in order to market the product in third countries and where the results of that testing are used to prove the safety of the product.

**Joined cases of** *C-8/15 P Ledra Advertising v Commission and ECB, C-9/15 P Eleftheriou*

*and Others v Commission and ECB and C-10/15 P Theophilou v Commission and ECB and in Joined Cases C-105/15 P Mallis and Malli v Commission and ECB, C-106/15 P Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB, C-107/15 P Chatzithoma v Commission and ECB, C-108/15 P Chatziioannou v Commission and ECB and C-109/15 P Nikolaou v Commission and ECB*

- The Court confirmed the dismissal of the actions for annulment and dismissed on the merits the actions for compensation concerning the restructuring of the Cypriot banking sector.
- The Court found that the European Union had not incurred non-contractual liability as the adoption of the memorandum of understanding on the macroeconomic adjustment programme, which provided financial assistance to Cypriot banks, was a proportionate interference with depositors' right to property and was justified to ensure the stability of the banking system of the euro area.

***Copyright***

**C-160/15** *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*

- The posting of a hyperlink on a website to works protected by copyright and published without the author's consent on another website does not constitute a 'communication to the public' for the purposes of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society when the person who posts that link does not seek financial gain and acts without knowledge that those works have been published illegally.
- In contrast, if those hyperlinks are provided for profit, knowledge of the illegality of the publication on the other website must be presumed.

**C-484/14** *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*

- The operator of a shop who offers a Wi-Fi network free of charge to the public is not liable for copyright infringements committed by users of that network. However, such an operator may be required to password-protect its network in order to bring an end to, or prevent, such infringements.

***Criminal law***

**Case C-182/15** *Aleksei Petruhhin*

- A Member State is not required to grant every EU citizen who has moved within its territory the same protection against extradition as that granted to its own nationals. Before extraditing the citizen however, the Member State concerned must give priority to the exchange of information with the Member State of origin and allow that Member State to request the citizen's surrender for the purposes of prosecution.

***Employment***

**Case C-16/15** *María Elena Pérez López v Servicio Madrileño de Salud*

- The use of successive fixed-term contracts to cover permanent needs in the healthcare sector are contrary to EU law. The use of such contracts cannot be justified by the requirement to cover temporary needs.

***Environment***

**C-304/15** *Commission v UK*

- By failing to correctly apply Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants to Aberthaw Power Station, the UK failed to fulfil its obligations under the directive. The power station should not have been allowed to exceed European pollution limits.

***Migration***

**Case C-165/14** *Alfredo Rendón Marín v Administración del Estado and Case C-304/14 Secretary of State for the Home Department v CS*

- A national of a non-EU country who is the sole carer of a minor EU citizen should not be automatically refused a residence permit or be expelled from the EU on the sole ground that he has a criminal record.
- Expulsion measures must be proportionate and founded on the personal conduct of the third country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of the host Member State.

**Opinion of the Advocate General**

***Legal services***

**Case C-342/15** *Leopoldine Gertraud Piringer*

- The provisions of the Directive 77/249/EEC on the establishment of lawyers and Article 56 TFEU do not preclude a Member State from declaring public notaries solely competent for authentication of the signatures on the documents necessary for the creation or transfer of real estate rights.

**Upcoming decisions and Advocate General opinions in October**

***Consumer law***

**Case C-562/15** *Carrefour Hypermarchés SAS v ITM Alimentaire International SASU*
Advocate General's Opinion on 19 October 2016

Questions referred by the French Court:

- Do Article 4(a) and (c) of Directive 2006/114/EC, concerning misleading and comparative advertising, which provides that comparative advertising shall be

permitted when it is not misleading it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, have to be interpreted as meaning that a comparison of the price of goods sold by retail outlets is permitted only if the goods are sold in shops having the same format or of the same size?
- Does the fact that the shops whose prices are compared are of different sizes and formats constitute material information within the meaning of Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices, that must necessarily be brought to the knowledge of the consumer?
- If so, to what degree and/or via what medium must that information be disseminated to the consumer?

***Criminal law***

**Case C-582/15** *Openbaar Ministerie v Gerrit van Vemde* Advocate General's Opinion on 12 October 2016

Question referred by the Dutch Court:

- Must the first sentence of Article 28(2) of Framework Decision 2008/909/JHA, on mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, be understood as meaning that the declaration referred to therein may relate only to judgments issued before 5 December 2011, irrespective of when those judgments became final, or must that provision be understood as meaning that the declaration may relate only to judgments which became final before 5 December 2011?

***Employment law***

**Case C-135/15** *Hellenic Republic v Grigorios Nikiforidis* to be decided on 18 October 2016

Questions referred by the German Court:

- Is the Rome I Regulation 1, on the law applicable to contractual obligations, applicable under Article 28 of that regulation to employment relationships exclusively in the case where the legal relationship was formed by a contract of employment entered into after 16 December 2009, or does every subsequent agreement by the contracting parties to continue their employment relationship, whether with or without variation, render that regulation applicable?
- Does Article 9(3) of the Rome I Regulation exclude solely the direct application of overriding mandatory provisions of another country in which the obligations arising out of that contract are not to be performed, or have not been performed, or does that provision also exclude indirect regard for those mandatory provisions in the law of the Member State the law of which governs the contract?
- Is the principle of sincere cooperation enshrined in Article 4(3) TEU relevant, for legal purposes, for the decision of national Courts on whether overriding mandatory provisions of another Member State are directly or indirectly applicable?

***Migration***

**Case C-218/15** *Criminal proceedings against Gianpaolo Paoletti and Others* to be decided

on 6 October 2016

Questions referred by the Italian Court:

- Must Article 7 of the ECHR, Article 49 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice, and Article 6 TEU be interpreted as meaning that Romania's accession to the European Union on 1 January 2007 had the effect of abolishing the criminal offence provided for in and punishable under Article 12 of Legislative Decree No 286/1998 (consolidated text on immigration) relating to the facilitating of the immigration and stay by Romanian nationals in the territory of the Italian State?
- Must those provisions be interpreted as precluding a Member State from applying the principle of benign retroactivity (in mitius) in respect of persons who, before 1 January 2007 (or other subsequent date on which the treaty took full effect), the date on which Romania's accession to the European Union took effect, were responsible for breach of Article 12 of Legislative Decree No 286/1998 in that they facilitated the immigration of Romanian nationals, which ceased to be an offence as from 1 January 2007?

***Family law***

**Case C-294/15** *Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki* to be decided on 13 October 2016

Question referred by the Polish Court:

- Are cases relating to annulment of a marriage following the death of one of the spouses within the scope of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments?

***Social security***

**Case C-430/15** *Secretary of State for Work and Pensions v Tolley (deceased, acting by her personal representative)* Advocate General's Opinion on 5 October 2016

Questions referred by the Supreme Court of the UK:

- Is the care component of the UK's Disability Living Allowance properly classified as an invalidity rather than a cash sickness benefit for the purpose of Regulation No 1408/711, on the application of social security schemes?
- Does a person who ceases to be entitled to UK Disability Living Allowance as a matter of UK domestic law, because she has moved to live in another member state, and who has ceased all occupational activity before such move, but remains insured against old age under the UK social security system, cease to be subject to the legislation of the UK for the purpose of article 13(2)(f) of Regulation No 1408/71?
- Does such a person in any event remain subject to the legislation of the UK in the light of Point 19(c) of the United Kingdom's annex VI to the Regulation?
- If she has ceased to be subject to the legislation of the UK within the meaning of article 13(2)(f), is the UK obliged or merely permitted by virtue of Point 20 of annex VI to apply the provisions of Chapter 1 of Title III to the Regulation to her?
- Does the broad definition of an employed person in Dodl apply for the purposes of

articles 19 to 22 of the Regulation, where the person has ceased all occupational activity before moving to another member state, notwithstanding the distinction drawn in Chapter 1 of Title III between, on the one hand, employed and self-employed persons and, on the other hand, unemployed persons?
- If it does apply, is such a person entitled to export the benefit by virtue of either article 9 or article 22? Does article 22(1)(b) operate to prevent a claimant's entitlement to the care component of DLA being defeated by a residence requirement imposed by national legislation on a transfer of residence to another member state?

***Taxation***

**Case C-591/15** *The Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty's Revenue and Customs, Her Majesty's Treasury* Hearingto take place on 4 October 2016

Questions referred by the High Court of Justice Queen's Bench Division (Administrative Court) for the purposes of Article 56 TFEU and in the light of the constitutional relationship between Gibraltar and the United Kingdom:

- Are Gibraltar and the UK to be treated as if they were part of a single Member State for the purposes of EU law and so that Article 56 TFEU does not apply, save to the extent that it can apply to an internal measure?
- Alternatively, having regard to Article 355(3) TFEU, does Gibraltar have the constitutional status of a separate territory to the UK within the EU such that the provision of services between Gibraltar and the UK is to be treated as intra-EU trade for the purposes of Article 56 TFEU?
- Alternatively, is Gibraltar to be treated as a third country or territory with the effect that EU law is only engaged in respect of trade between the two in circumstances where EU law has effect between a Member State and a non-Member State?
- Alternatively, is the constitutional relationship between Gibraltar and the UK to be treated in some other way for the purposes of Article 56 TFEU?
- Do national measures of taxation that have features such as those found in the New Tax Regime constitute a restriction on the right to the free movement of services for the purposes of Article 56 TFEU?
- If so, are the aims, found by High Court to be domestic measures (such as the New Tax Regime) to pursue, legitimate aims, which are capable of justifying the restriction on the right to free movement of services under Article 56 TFEU?

**Case C-68/15** *X; other party: Ministerraad* Advocate General's Opinion on 5 October 2016

Questions referred by the Belgian Court:

- Must Article 49 of the TFEU be interpreted as precluding national rules under which:
    - companies established in another Member State and having a Belgian permanent establishment are subject to a tax if they decide to distribute profits which are not included in the final taxable profits of the company, irrespective of whether profits have flowed from the Belgian permanent establishment to the main establishment, whereas companies established in another Member State and having a Belgian subsidiary are not subject to such a tax if they decide to distribute profits which are not included in the

final taxable profits of the company, irrespective of whether or not the subsidiary has distributed a dividend;
    - companies established in another Member State and having a Belgian permanent establishment are, if they retain the Belgian profits in full, subject to a tax if they decide to distribute profits which are not included in the final taxable profits of the company, whereas Belgian companies are not subject to such a tax if they retain their profits in full?
- Must Article 5(1) of Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States be interpreted as meaning that there is withholding tax in the case where a provision of national law requires that a tax be imposed on a distribution of profits by a subsidiary to its parent company in that, in the same taxable period, dividends are distributed and the taxable profits are wholly or partly reduced by the deduction for risk capital and/or by tax losses carried forward, whereas under national law the profits would not be taxable if they remained with the subsidiary and were not distributed to the parent company?
- Must Article 4(3) of Directive 2011/96/EU be interpreted as precluding national legislation under which a tax is levied on the distribution of dividends if that legislation has the effect that, in the case where a company distributes a received dividend in a year subsequent to the year in which it received that dividend itself, it is taxed on a portion of the dividend which exceeds the threshold laid down in the aforementioned Article 4(3) of the Directive, whereas that is not the case if that company redistributes a dividend in the year in which it receives it?

**Case C-646/15** *Trustees of the P Panayi Accumulation & Maintenance Settlements v Commissioners for Her Majesty's Revenue and Customs* Hearing to take place on 20 October 2016

Questions referred by the UK's First-tier Tribunal (Tax Chamber):

- Is it compatible with the freedom of establishment, the free movement of capital, or the freedom to provide services for a Member State to enact and maintain legislation such as section 80 of the Taxation of Chargeable Gains Act 1997 under which a charge to tax arises on the unrealised gains in value of the assets comprised in a trust fund if the trustees of a trust become at any time neither resident nor ordinarily resident in the Member State?
- On the assumption that such a charge to tax restricts the exercise of the relevant freedom, is such a charge justifiable in accordance with the balanced allocation of powers of taxation, and is such a charge proportionate where the legislation neither grants the trustees the option to defer the charge to tax or to pay in instalments, nor does it take into account any subsequent fall in the value of the trust assets?
- Are any of the fundamental freedoms engaged where a Member State imposes a charge to tax on unrealised capital gains on the increase in value of assets held by trusts at the time when the majority of the trustees cease to be resident or ordinarily resident in that Member State?
- Is a restriction on the freedom created by that exit charge justified in order to ensure balanced allocation of powers of taxation, in circumstances where it was possible that capital gains tax might still be imposed on the realised gains, but only if specific circumstances arose in the future?
- Is proportionality to be determined on the facts of the individual case? In particular, is the restriction created by such a charge to tax proportionate in circumstances where:

- the legislation makes no provision for an option to defer the payment of tax or for payment in instalments, or for account to be taken of any subsequent fall in the value of the trust assets after the exit;
- but in the particular circumstances of the assessment to tax under appeal, the assets were sold before the tax was payable and the relevant assets did not decrease in value between the relocation of the trust and the date of sale.

## 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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