The Law Societies JOINT BRUSSELS OFFICE

Brussels Agenda

January 2018

The Law Societies' monthly publication with the latest EU news

Editorial

After a relaxing winter break, we are kick starting 2018 with an edition on the topical issue of free movement. This is likely to be the main focus for the year ahead, as the UK starts negotiations for its new relationship. It is yet to be seen whether it will opt for free trade arrangements or something more akin to single market.

The year has started well for the Brussels Office, as the Brussels Agenda has been nominated for the award of 'Best Association Magazine or Publication" at the European Association Awards 2018. We are thrilled with the nomination and are looking forward to attending the awards ceremony in February.

This month we have viewpoint articles from experts Sven Norberg, Georges Baur and Pascal Kerneis, which focus on post Brexit arrangements, free movement within EFTA and updates on trade policy respectively.

There are several updates on Brexit related topics such as the City UK financial services proposal for FTA mechanisms, the Home Office Stance on Free Movement of people and analysis of the recently published EU-UK Citizen's Rights agreement. We have also prepared a summary of EU free movement regulations on registration and an update on Michel Barnier's proposed timelines and the General Council meeting on 29 January.

With the New Year we have also welcomed our newest member of the Brussels Office, Benjamin Boss, who is a trainee on secondment from Burges Salmon in Bristol. We have also said farewell to one of our former trainees, Harriet Diplock who has returned to Bristol to commence her fifth seat in dispute resolution. We thank her for her hard work with us, and wish her every success in her new role.

Sven Norberg

Following BREXIT – Which arrangements are possible for the future UK-EU relationship

In addressing on 15 December 2017 the EU 27 Heads of State and Government the EU Chief negotiator Mr. Michel Barnier presented a most illustrative slide, that both addressed the various precedents available as models for a future EU-UK relationship (i.e. EEA, Switzerland, Ukraine, Turkey, Canada and South Korea), as well as explaining why the red lines established by Ms. May left only the most minimalistic of these models, the Canada and Korea ones, available for a future relationship with the UK after any transitional period. In the following an attempt is made very briefly to explain why Mr. Barnier's conclusions are fully correct, as long as Ms. May's red lines, expressed in her Lancaster House speech and in the Government's White Paper, are maintained. The first two imply that for the new arrangements with the EU there will no longer be any direct applicability/effect or role for the interpretation of the CJEU in the UK.

The particular constitutional character of the EU

First of all, it is vital to keep in mind the unique and particular character of the EU as a Union of law, where the guarantees for legal certainty and non-discrimination are particularly strong, not only for the EU Member States but also for their nationals and economic operators. This extends to the point that a citizen of a third country, with which the EU has an agreement, may use the EU Court of Justice (CJEU) to guarantee that his rights under the Agreement are respected. Respect for the autonomy of the EU and its legal order, including the role of the CJEU is fundamental for the EU, as also recalled by the European Council in its Art. 50 guidelines of 29 April 2017. This sets the limits for how far the EU may go in concluding an international treaty. A non-respect thereof will risk the CJEU finding a deal concluded incompatible with the EU Treaties and thus annulled.

The EEA precedent

The most far-reaching Agreement ever concluded by the EU is the European Economic Area (EEA) Agreement, which came into force on 1 January 1994 between the EU and it's then 12 Member States, on the one hand, and five EFTA States, on the other.

The objective of the EEA is to achieve the fullest possible realisation of the free movement of goods, services, capital and persons with the relevant *acquis communautaire* as a common legal basis. This means that the full acquis is taken over in all areas of the Internal Market of relevance for the EEA. This applies *also in the future* to new EU acts or amendments to the acquis. The EEA Agreement creates a parallel legal order to the EU one, EEA law, that mirrors EU law and which in areas covered by both orders, delivers the same result as EU law, to the benefit of individuals and economic operators within the whole of the EEA. Thus, in practice the Single Market has been widened to encompass also the EEA EFTA States.

Obviously, the legal guarantees to securing a *dynamic and homogeneous* (the two for EEA characterizing adjectives)EEA were decisive for the conclusion of the EEA. While the EC had special supranational institutions for monitoring the application of Treaty rules (the Commission) and for their interpretation (the ECJ), the EFTA side had nothing similar. Most EFTA States also followed a dualistic legal tradition as to international treaties and national law. The ECJ had shown that the 1972 Free Trade Agreements (FTAs) between the EC and the EFTA States as forming part of Community law were directly applicable. Sufficiently precise and clear provisions could also produce direct effect in the EC, if invoked by EFTA individuals and economic operators. This *legal imbalance* could not be acceptedin a future more elaborated relationship with EFTA. National courts or institutions could never replicate the supranational institutions of the EC. This led to the creation of the EFTA Court and the EFTA Surveillance Authority for the EFTA pillar in the EEA.

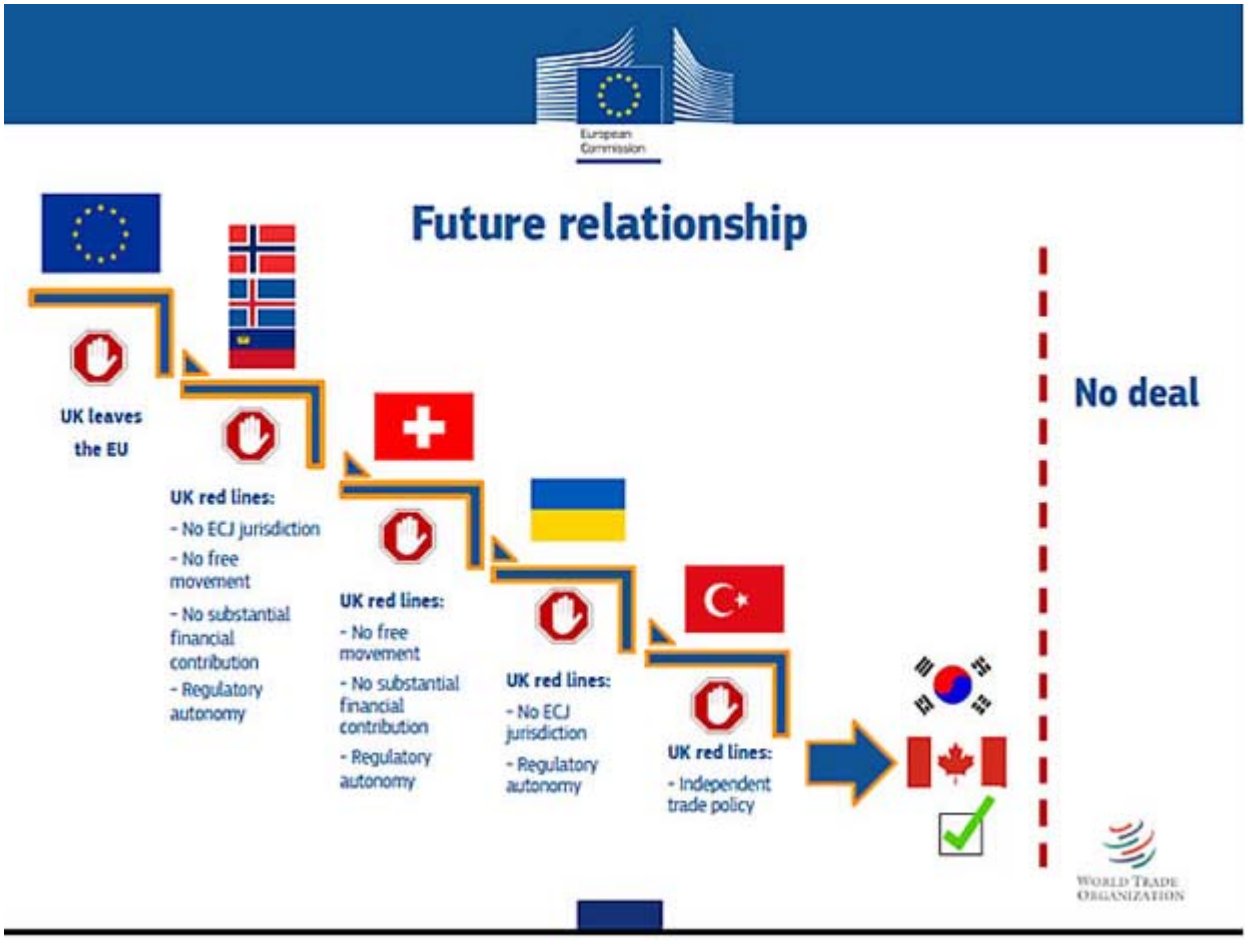
The EU Council has repeatedly, and most recently on 28 August 2017, expressed dissatisfaction with the state of affairs with Switzerland and recalled that, in order to ensure homogeneity and legal certainty for citizens and businesses, a precondition for further developing the sectoral approach is the establishment of a common institutional framework for existing and future agreements, through which Switzerland participates in the EU's Single Market. The conclusion of such an agreement would allow the EU-Swiss comprehensive partnership to develop to its full potential.

Conclusions

Today the EU Internal Market, 25 years after the completion of the Delors Commission White Paper program, has become comprehensive and complex in a way that is without precedent. The areas of the four freedoms are now so interdependent that, apart from full EU Membership, participation in the Single Market can only be granted if sufficient legal and institutional guarantees for homogeneity and legal certainty are given. Of the different arrangements listed by Mr. Barnier, only the EEA has the necessary institutional mechanisms to allow participation in the EU Internal Market on equal and non-discriminatory conditions. Since Switzerland, that is closest to the EEA, does not offer the guarantees for legal certainty and non-discrimination, the EU has put a break on further developments. Even if, as in the Swiss case, the ambitions as to the scope of participation in the Single Market would be more limited than in the EEA, credible institutions and guarantees for equal treatment and non-discrimination are needed in order to prevent a *legal imbalance* in relation to the EU. The Canada and South Korea examples are much less advanced both as to substance and institutionally. Disputes are settled between Contracting Parties either by WTO or special arbitration panels. Individuals or economic operators have no direct access to Courts.

As to which arrangements that may be possible for the UK-EU relations after BREXIT, given the UK red lines it is clear that the Canada and South Korea FTAs provide the most advanced models. The answer could also be expressed by modifying the famous quote from Bill Clinton's 1992 presidential campaign to: "It's the institutions stupid!"

Slide presented by Michel Barnier, European Commission Chief Negotiator, to the Heads of State and Government at the European Council (Article 50) on 15 December 2017:



This note is based on a more elaborate article published in Europarättslig Tidskrift 3/2017 pp 471 et seq; see also **here**.

Sven Norberg Jur.dr.h.c. is a Senior Advisor at KREAB, Brussels. Former posts held include those of Director, DG Competition, EU Commission, Judge of the EFTA Court and Director Legal Affairs, EFTA.

Georges Baur
"Participation in" vs. "having access to" the EU's Internal Market

In the current discussion about Brexit and the future relations of the UK with the EU, models are being discussed for how to go about the latter: European Economic Area (EEA or "Norway"), Switzerland, Ukraine, and/or Canada. These discussions range from close to full participation in the Internal Market to having very little access. Even a standard Free Trade Agreement provides a form of basic access to the EU's Internal Market. The question, therefore, is the quality of the access, bearing in mind that the greater the access, the more important the institutional structure monitoring that access. The most sophisticated model – currently the EEA Agreement - includes a supervisory authority and a court.

While the EU favours an off-the-shelf model, the UK wants a bespoke relationship. At the same time as it rejects the customs union, being in the Internal Market, free movement of people and the jurisdiction of the Court of Justice of the EU (CJEU, formerly ECJ), the UK Government expects to participate in or have access to the Internal Market as much as possible. "Participating" and "having access" however, are not the same. They have different consequences.

A recent example highlighting the differences is the expectation of parts of the financial services sector to continue having access to the Internal Market through a continuation of passporting rights beyond Brexit. Passporting, in short, is the right of a financial services provider with residence in one of the member states of the Internal Market/EEA to freely, and in an unlimited manner, operate and service clients in the whole market under one licence. It has been suggested by some lobbyists for British financial services that one could interpret equivalence in a way that corresponds to passporting. This point of view is justified with the argument of logic and problem solving in a pragmatic manner.

Now, all of this does not correspond with the reality of the EU as a community of law. This is not to say that the EU won't compromise in the course of the negotiations, but rather to underline that the starting point is always the law.

And in this case the law is that passporting is only available to financial service providers that are based in a country which participates in the EU's Internal Market, i.e. the EU Member States and the three EFTA States that are a party to the EEA Agreement. This not only encompasses the four freedoms, but it also imperatively comprises an institutional structure to ensure legal homogeneity, with a mechanism of surveillance, enforcement and dispute resolution.

For any other country, though it might have (partial) "access to" the Internal Market in financial services, this access is provided by way of an equivalence decision taken by the European Commission. This will be unilaterally conceded and is revocable, and covers only some of the financial service instruments. In addition, as Switzerland has recently experienced, such decisions come with (political) strings attached.

Switzerland has a set of agreements with the EU that gives the country access to the respective sectors of the internal market, but no agreement which covers financial services, and no overarching institutional arrangement. Hence, equivalence was only offered with regard to the new Markets in Financial Services Directive (MifiD II), for one year, to be renewed – or not – depending on progress of the long-running negotiations between the parties on an institutional agreement.

This Swiss example highlights the more general point that it is important to clearly distinguish between certain notions because in a legal environment the differences matter.

Georges Baur is the Assistant Secretary-General of EFTA and is based in Brussels

Pascal Kerneis
Prospects for trade policy in 2018

2018 will be as busy as 2017 with regards to the trade policy of the EU. The action will be divided into five main phases:

- One will focus on the implementation of existing agreements, notably the EU-Canada Comprehensive

Economic Trade Agreement (CETA), but also the EU-Ukraine, EU-Georgia and EU-Moldova agreements.

- The second will aim at signing and ratifying agreements that have been concluded by the negotiating parties, with EU-Singapore likely to come first, followed possibly by an EU-Japan Economic Partnership Agreement, where a political deal was reached in July 2017 and the conclusion of all texts last December. After the legal scrub, the Commission will send the agreement for signature to the Council and then to the Parliament for ratification. Despite the fact that the EU-Vietnam FTA was concluded before the deal with Japan, it seems that this one will come third on the list of ratification, because of the possible difficulty in getting Parliament's approval due to the weakness of human rights protection.
- The third action of the trade policy will focus on pushing for the conclusion of on-going trade negotiations. Two negotiations are now into the last phase, and much bargaining took place in the final weeks of 2017 in an attempt to conclude them by the end of the year: The revision of the EU-Mexico FTA, (originally entered into force in 2000 for trade in goods and 2001 for trade in services) should be concluded first. Mexico is under tremendous pressure from the USA to revise NAFTA and strengthen their efforts to diversify trade, and the EU is the right partner to do that. However, the EU is asking for efforts on Geographical Indications and in Public Procurement, as well as some further openings in services, which makes the last mile difficult. General and presidential elections in June and July are additional elements which may reduce the window of opportunity. The EU-Mercosur negotiations started in 1999, and have been suspended and relaunched on many occasions. Agriculture is clearly the stumbling block, with difficult bargaining on beef meat, ethanol and sugar. It is the first time in a decade that Argentina and Brazil are on the same political path, and such occasion might not last for long. December 2017 also saw the greenlight for the launch of the revised EU-Chile FTA. Negotiations will come at full speed in 2018, with a first round in January. The talks on the EU-Indonesia FTA will be pursued, but will likely take time. Negotiations of the EU-Malaysia deal may start again after a long pause Similarly, negotiations with Thailand may also resume if the political regime evolves positively as announced. It is unclear whether the EU-Philippines FTA negotiations could start again, given the human rights breaches under President Duterte's regime. Finally, negotiations of the Bilateral Investment Agreement between the EU and China are still on the agenda, but progress is slow and dependent on other trade matters.
- The last activity in trade policy will be in launching new negotiations: At the State of the Union speech given by European Commission Jean Claude Juncker on 13 September 2017, the idea of launching deep and comprehensive trade agreement with Australia and New Zealand was announced. The "scoping exercises" were concluded between executives of the parties. The Commission sent draft negotiating mandates to EU Member States that same day, and in a radical move towards transparency, published them. The Commission asked for negotiating directives on trade related matters only, taking some conclusions from the CJEU Opinion of May 2017 on the competences of the EU in trade policy. The Council will now debate on EU strategy for future deals and decide whether the EU will negotiate two agreements; one of full competence, covering more than 90% of the substance, and one of mixed competence, including issues where Members states keep some sovereignty but require unanimity and ratification by all competent parliaments of the Member States. This debate might delay the start of the negotiations with Australia and New Zealand.
  Last year the Commission also sent a mandate request to the Council regarding the possible modernisation of the Custom Union with Turkey, which will be of great interest to the services industries. Due to the political situation in the country and a rather tense atmosphere between the two parties, it is difficult how to predict how the discussion will evolve, however the odds are not favorable.
  December 2017 also marked the 11th WTO Ministerial Conference that took place in Buenos Aires. The results were extremely disappointing on the multilateral front, with a very minimal agreement taking place at the last minute to save the organisation by allowing the continuation of two moratoria; one on e-commerce and one of TRIPs plus the establishment of a WTO informal work programme for MSMES. Some "joint ministerial statements" were agreed between groups of countries, which will allow continued work in Geneva during 2018. This includes the possible launch of new plurilateral negotiations in three areas; i) Investment Facilitation for Development, ii) Electronic Commerce, and iii) Services domestic regulation.
- One final trade related activity will be strongly debated in 2018, but it is difficult to classify it under trade policy alone. The European Council gave its consent to start the second phase of Brexit in December 2017. The UK and the EU will now start to discuss the "future relationship" between the two parties. It includes many aspects like defense and security, nuclear cooperation, judiciary and regulatory cooperation, and of course the negotiations of a trade agreement. The trade aspects draw much attention, but proper negotiations will not effectively start before the exit date in March 2019. Many trade related issues are likely to arise during the course of the "transition" or "implementation" period, which will need to be inserted in the transitional agreement.

In summary, the work programme on trade policy in 2018 is considerable and has the potential of creating many business opportunities for the services industries.

Pascal Kerneis achieved his Ph. D. in European Law in 1990 in France. He was Legal Expert in the European Commission in Brussels from 1988 to 1990, and then worked for the European Banking Federation, as International Affairs Adviser. He was appointed Managing Director of ESF (European Services Forum) in 1999.

FREE MOVEMENT

Written on behalf of Bristol JLD
Freedom of movement of junior lawyers – past, present and future

Legislation

EU lawyers currently have a distinct regime governing their freedom of movement which consists of two directives, the Establishment Directive (98/5/EC) and Lawyers Services Directive (77/249/EEC). In addition, the provisions of the general regime also apply to lawyers. Framework Services Directive (2002/21/EC) and Mutual Recognition of Professional Qualifications Directive (**MRPQ**) (2005/36/EC) include provisions that apply to all services providers insofar as there are no sectoral provisions (in which case the latter take priority).

The two instruments make a distinction between establishment and temporary provision of services by lawyers. "Lawyer" is defined through a different method to other services, i.e. someone holding a title (as listed in the Establishment Directive).

In the UK, the titles covered by the directives are advocate, solicitor and barrister (thus excluding legal executives or trademark attorneys). Since the Lawyers Directives only cover fully qualified lawyers, they do not apply to trainee/part-qualified lawyers (or those with non-equivalent qualifications).

Case Law

However, other instruments which regulate the free movement of people and services, have been held to apply to partly qualified lawyers.

The case of *Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* (C-313/01) concerned a student who had completed law studies in France and undertaken training in that country, as well as Italy. Her application to the Bar of Genoa to be included as a trainee lawyer was refused.

The Italian court referred the case to the CJEU where the latter held that if the national competent authorities would not take into account the period of training and work experience obtained in another member state, the freedom of movement and establishment would be hindered.

As a result, the competent authorities must assess applicants' competencies, knowledge and ability to carry out the role of lawyer in the host country prior to arranging for any shortfall or compensation for a gap in knowledge (see the Solicitors Regulation Authority guidelines which were developed in the wake of the judgment for those who wish to requalify in England and Wales).

The case lists the duties of a competent authority in relation to the evaluation of qualifications, including assessment of:

a. Abilities, knowledge and competences to carry out the role of "lawyer" in the host country;
b. Knowledge, learning and skills as a whole (no prior equivalence of academic training stage);
c. Professional experience (*Vlassopoulou [1991] ECR I-2357*);
d. "professional qualification", wherever gained;
e. A list of topics "knowledge of which is essential in order to be able to exercise the profession" in that country, as a yardstick against which an application must be judged; and
f. Objective differences in the context of training and legal practice.

Position

The above case law was embedded in the EU law (revised MRPQ - Directive 2013/55/EU) which included

'professional traineeships' required for access to a regulated profession carried out in one Member State and set out the conditions for relevant competent authorities to assess the candidates' qualification and experience prior to taking a decision to recognise their qualifications. It did so through setting the limits on the permissible duration of such a traineeship and by issuing detailed guidelines 'on the organisation and recognition of professional traineeships...'. Member States are required to publish such guidelines (*Article 55a (2)* of the Professional Qualifications Directive, as amended).

Future

Equivalent recognition of lawyers qualifications and their right to provide services and/or establish themselves in an EU member state (including trainees and junior lawyers) will form part of negotiations between the UK and the EU. The EU internal market is one of the most deeply integrated legal services markets in the world despite considerable differences in each country's legal system and the fact that it integrates both common law and civil law jurisdictions.

Even other common law jurisdictions, such as the US, Australia and New Zealand, either require bar examinations for equivalence from UK qualified lawyers (US) or require additional steps for trainee lawyers to qualify once qualified in the UK (New Zealand and Australia). The UK is likely to require a good negotiating position to argue for jurisdictional equivalence for legal services (trainee or otherwise) post-Brexit. This, however, will largely depend on the form which the future EU-UK relationship will take. In case of the Free Trade Agreements (FTAs), for example, services provisions have been traditionally less prominent than those on goods and are thus less attractive options to regulate provision of services.

Previous Item **Back to Contents** **Next Item**

Viewpoint **In Focus** **Law Reform** **Law Societies' News** **Just Published**

Access to Financial Services Post-Brexit

The EU's focus on Banking and Economic and Monetary Union is encouraging in light of the impending second tranche of Brexit negotiations between the UK and the EU. The services sector as a whole accounts for approximately 79% of UK Gross Domestic Product and EU regulators' continued focus is particularly important when considering the new basis required to enable businesses to provide financial services cross border.

The International Regulatory Strategy Group (**IRSG**) published a third report on the basis of a future EU-UK trading relationship with a starting point that it is in the mutual interest of the EU 27, the UK, businesses and the financial services sector as a whole, for cross border flows to continue. The report builds on the idea that the current EU third country/equivalence regime is not sufficient to support cross-border flows in services and analyses relevant components of a financial services chapter in any potential free trade agreement (**FTA**). It presents many interesting ideas and promulgates potential solutions, however, many of these are not currently viable due to the EU's stance. Maintaining the current state of service flow post-Brexit is seen as *cherry-picking* by the EU and circumstances would have to change (and other concessions be made) in the EU position before the solutions in the report could carry weight in negotiations.

Report Coverage

It is noted that much of the machinery is already in place. The EU and UK have aligned legal and regulatory regimes and supervisory cooperation between regulators, ensuring prospective enforcement, however, FTAs, despite providing a precedent for trade in financial services, do not provide for license-free access for firms across borders. The UK government is aiming for the *freest possible trade in financial services* and the EU has confirmed its commitment to a *bold and ambitious FTA*, but a question mark arises over the mechanics for each party getting its way. In light of this, the report summarises what are seen by a broad cross-section of players from the UK financial services industry as *key issues* in relation to mutual access as follows:

a. Multi-sector context – common issues compared to sector specific approaches;
b. Existing FTAs – "national treatment" and "market access" are common provisions for an FTA but licence-less cross border services supply is unprecedented in an FTA;
c. Alternative cross-border access mechanisms – existing passporting rights will cease and both parties must find a way to secure access to each other's markets;
d. Range of activities – which financial services will be covered and in which ways will access be given;
e. Reservations/Exceptions – carve outs for FTAs;
f. Proposed "prudential carve out" – allows the parties to restrict the scope of the FTA to preserve market stability and providing market stability;
g. Conduct of business – which rules would apply to be followed, those rules in the home state or host state;
h. Current alignment – UK and EU must be satisfied that firms from the other state are appropriately regulated;
i. Assessing divergence – there must be a mechanism for assessing future divergence when this will be

a barrier to mutual access;

j. Ongoing alignment and regulatory cooperation – processes for dealing with regulatory changes which may affect the alignment between the parties to an FTA. This reflects the fact that standards (ie information sharing and regulatory transparency) will cease to apply to the UK upon Brexit;
k. Supervision – mutual access requires supervision of individual firms including dispute resolution;
l. Resolving Disputes;
m. Consequences of divergence – not all material, negative or adverse but consequences must be specified; and
n. Termination – how either party could withdraw from the FTA.

In addition to listing issues, the IRSG incorporates a summary proposed approach for adoption in respect of each of the above-mentioned key issues into the report.

Constraints

Regardless of negotiating strategy and the wants and requirements of the parties, both the UK and the EU remain subject to existing obligations as members of the WTO and other existing trade agreements. The effect of these agreements on any mandate for an FTA will play a role in a starting point for negotiations on financial services and mutual recognition. Important considerations include which existing agreements can form part of the structure of negotiations and models for this (including, *inter alia*¸ GATS, CETA and other recently negotiated agreements) and reviews of such agreements and their differing negotiations and format is included in the report for reference.

This includes a reminder of the limits of the EU's competence to enter into international agreements in accordance with the EU treaties and the fact that technically the UK cannot conclude (or begin negotiations for) international agreements with third countries. Post-Brexit, individual EU member states are also prohibited from entering into trade-related agreements individually with the UK, the EU maintaining sole competence.

As a practitioner-led group from the financial services sector with the overall goal of promoting sustained economic growth (in this instance supported by The City UK and the City of London), the IRSG provides invaluable insight into those who will be closely affected by the pending negotiations on equivalence for financial services.

Previous Item **Back to Contents** **Next Item**

Viewpoint **In Focus** **Law Reform** **Law Societies' News** **Just Published**

Who is in v who is out? And what are their rights?

Free movement of people - alongside free movement of goods, services and capital - is one of the four founding principles of the European Union. It gives all citizens of EU countries the right to travel, live and work wherever they wish within the EU. In certain circumstances individuals have a right to residence, and in even more limited circumstances, they have access to the welfare system of the country they have moved to. The point at which EU job seekers can access these benefits will vary in each member state and depend on each country's own rules. In addition, each member state will have its own requirements for registering migrants when they enter the country.

This article considers the rules under the Citizens Rights Directive 2004 (the 'Directive') to summarise and compare free movement regulations on registration and unemployment benefits in stricter countries such as Belgium, Germany and Poland to the less strict such as the United Kingdom.

Under the Directive, all EU citizens have an unconditional right of residence in the territory of another EU for the first three months. For short stays of up to three months there are no formalities for the right to reside other than to hold a valid identity card or passport, however in some member states there still may be a requirement to register your presence. It should be noted that Belgium is the only country to require EU citizens to report their presence.

For periods of longer than three months, the host member state may require the citizen to register his or her presence within a reasonable and non-discriminatory length of time. Table 1 shows the different registration requirements which apply in our selection of member states. While generally for stays of more than 3 months registration is required, an exception exists for jobseekers who can stay for up to 6 months without registering.

The UK is one of a small number of member states not to require EU citizens to hold a registration certificate for the right to work or reside, which presents a significant problem of not being able to know for certain who has moved there from another member state and for how long. It has been argued that the relaxed attitudeowards migration and registration requirements has led to a migrant crisis in the UK. This is what led many to vote Brexit and what the Leave campaign sold Brexit as a solution to.

During the initial period of three months, an EU citizen is not entitled to any social assistance. The Directive does not allow free movement of persons simply to benefit from the social security systems of other member states. The judgment in *Dano v Jobcenter Leipzig (Case C-333/13)* confirmed this position by stating that there is no right under EU law for economically non-active EU citizens to claim right of residence in another member state, when they do not have sufficient resources to maintain themselves.

When the period of residence is longer than 3 months, but less than 5 years as was the case in *Dano,* one of the conditions laid down by the Directive for a right of residence which applied, is that economically inactive persons must have sufficient resources of their own. The Court of Justice confirmed that an exclusion to certain German benefits is lawful in the case of member state nationals who go to another member state with no intention of finding employment there.

Subsequent case law from the CJEU in Jobcenter *Berlin v Nazifa Alimanovic (Case C-67/14)* held that denying the basic social assistance to EU citizens in Germany under Table 2, where right of residence arises solely out of the search for employment does not contravene the principle of equal treatment. It stated that an EU citizen can claim equal treatment with nationals of the host member state but only if residence in the territory of the host member state complies with the conditions of the Directive and as we have established, the Directive requires economically inactive persons to have sufficient resources of their own.

The position taken by the Court seems to allow member states to withhold equal access to social benefits without needing to terminate the inactive citizen's residence rights. Therefore, EU citizens residing in a host state must have sufficient resources in order to be self-sufficient, either through employment, savings or pension entitlements from their state of origin.

Table 1: registration rules

	UK	**Belgium**	**Poland**	**Germany**
Short stay < 3 months	No registration requirements	If staying for less than 3 months, registration of presence within 10 days of arrival at the Town Hall.	No registration requirements	No registration requirements
Long stay > 3 months	You do not currently need to apply for a document to prove you can live in the UK unless: • You are an extended family member of someone from the European Economic Area (EEA) or Switzerland • you want to apply for British citizenship • you want to sponsor your partner's visa application under the Immigration Rules	If staying for more than 3 months, migrants are required to register at their Town Hall within 3 months of entering the country.	For stays between 3 months and 3 years an individual must apply for a temporary residence permit. There are also permits for long term or permanent residency.	Registration at the Town Hall is required if you wish to stay for more than 3 months or wish to take up residence.

Table 2: Right to unemployment benefits

UK	**Belgium**	**Poland**	**Germany**
If you are an EEA or non-EEA national and you have not worked since arriving in the UK, to get income-based job seekers allowance you must prove that you have been living in the UK or Common Travel Area for 3	An individual can only claim out of work benefits if they have previously worked between 312 and 624 days within 21-42 months.	An unemployed person is eligible for benefits for every calendar day since the day of registration provided that during the preceding 18 months they have been for the total period of at least 365 days employed or engaging in work/service provision with salary equal to at least the national minimum wage.	There is a two-tiered system for claiming unemployment benefits in Germany • Unemployment benefit can be claimed providing you meet the qualifying period (paying contributions for at least 12 months of

months before you claim			the 2 years before becoming unemployed) and certain other conditions; or • Unemployment benefit II ("Hartz IV") which is basic jobseekers allowance for those not eligible to unemployment benefit and who satisfy certain criteria.

Legal services in the Internal Market and free trade agreements

Since the UK decision to leave the EU, many regulators, lawyers, academics and political analysts have discussed the future relationship between the two. Some of these discussions concerned a vital area for the UK economy – professional services.

In 2016, UK exports of financial and professional services were £55.5 billion and as part of that group, legal services contribute almost £26 billion to the UK economy, including a £3.4 billion surplus to the balance of trade and generate over 380,000 jobs. In addition, within the EU, the UK is part of one of the world's largest trading blocs and a major regulatory centre.

In the case of legal services, the UK enjoys the same freedoms as other member states. Free movement of lawyers and legal services is regulated by the Framework Services Directive, Lawyers Services Directive, Establishment Directive and Mutual Recognition of Professional Qualifications Directive. It has been a great success and, in case of the UK, made it easier for the UK lawyers and law firms to establish on the continent (and vice versa, the EU lawyers come to the UK) and have their professional qualifications recognised.

There are very few international agreements that can replicate the level of market access and regulatory convergence as the EU's Internal Market. With its four freedoms, the Internal Market is the most integrated in the world and despite its shortcomings represents an impressive example of successful integration.

Internationally, however, the regulation of legal services represents a fraction of what is covered by the Internal Market rules. The main international agreement regulating their provision is General Agreement on Trade in Services (GATS) which is of limited scope and contains numerous opt-ins and opt-outs. Most of the countries that are parties to the agreement do not make significant commitments in the field of legal services.

Other agreements, such as Trade in Services Agreement (TiSA) have attempted to advance the discussions on services and find the best ways of how to regulate them internationally. The most recently signed FTA by the EU, Comprehensive Economic Trade Agreement (CETA) between the EU and Canada, includes many useful chapters that can facilitate trade in services. However, neither TiSA or CETA include significant degree of liberalisation of trade in legal services. The only example of an FTA which included commitments on legal services was EU-Korea.

Given the geographical proximity and the level of integration between the EU and the UK, relying on the FTAs to regulate trade in legal services and ensure similar market access and regulatory convergence as currently enjoyed will be nearly impossible. While in theory the FTAs could provide an interesting avenue for the legal services markets to be opened, in practice this is unlikely to happen. One of the major reasons for that is that the current 'offer' under a trade agreement is subject to the most favoured nation clause obliging the parties to the agreement to extend the same 'offer' to other parties in their future agreements. This means that if the EU presents a generous offer to the UK, it will be bound by that offer in its future agreements. So far, the EU has been extremely cautious in liberalising its legal services market and this is unlikely to change in the future.

Home Office Stance on Free Movement of People

On 18 January, the Home Office issued a **response** to the House of Lords European Union Committee **Report** on UK-EU Movement of people. In the open letter, Rt Hon Brandon Lewis praised the Committee for their report, which considered the implications for free movement of people post-Brexit.

The main legislative measure used to facilitate Brexit will be heavily criticised European Union (Withdrawal) Bill. In short, this will repeal the European Communities Act 1972, incorporate relevant EU legislation into UK law and provide extensive powers to the UK government with regards to secondary legislation. These so called 'Henry VIII' powers have been a cause for concern for many, particularity the Scottish and Welsh governments who recognise that their devolved powers may be limited as a result. The Bill completed the Report and 3rd reading stages on 17 January 2018 and will progress to the House of Lords for Second Reading on Tuesday 30th and Wednesday 31st January. The government has also announced that it plans to introduce an Immigration Bill post-Brexit, which will likely be used to end free movement of workers.

Last autumn marked the leak of a controversial post-Brexit immigration **document** from the Home Office. The 82-page report provided an in-depth view of the UK government's plans for EU and third country migrants, both during the transition period and longer term. The three-stage approach was set to include the introduction of an Immigration Bill, stricter rules being enforced during the implementation period and final plan for long term immigration controls. The paper focused on introducing a very selective approach to migration, with controls based on the social and economic needs of the country. This stance was reiterated in Brandon Lewis' letter, where he stated that reducing net migration further is a key aim for the Home Office.

With regards to border control, the leaked document set out that all EU citizens would require a passport to obtain entry to the UK, with identity cards no longer being accepted. The government have not yet provided a timescale for the introduction of this requirement, but did state that 'adequate notice' of the change would be given.

Economic Migrants

The UK government plan to prioritise 'resident labour' and enforce stricter rules for economic migrants. Post-Brexit it will likely be significantly more difficult for both EU and third country workers to obtain employment in the UK. This is part of the government's long-term plan for controlled, selective migration. The Home Office document states that "immigration should benefit not just the migrants themselves but also make existing residents better off." It also sets out the government will have more power over the decision to allow economic migrants access to the country, limiting employers' rights to hire workers from outside the UK.

One proposed measure is the introduction of an income threshold for EU nationals residing in the UK. Current EU rules require self-sufficiency for the first five years of residence in a host state, therefore the new UK rules could result in conflict depending on how they are formulated. With regards to work permits for third country nationals, the standard term will be just 2 years, with some highly-skilled workers granted a longer permit up to 5 years. During the implementation period, EU citizens will need to apply for a residence permit if they wish to stay in the UK for longer than 3 months.

The Migration Advisory Committee was appointed by the government to advise on immigration issues in July 2017. There are currently conducting a study into the positional of EEA nationals in the UK labour market. The final report is due in September 2018.

The Current Shape of UK Asylum Law and Illegal Migration

Asylum Law

The EU asylum law is based on directives adopted in the framework of the Common European Asylum System (CEAS). The UK initially opted into the first instruments adopted in the CEAS in the early 2000s. The CEAS was revised in 2011 and most EU countries adopted further directives. In 2016, a reformed version of the CEAS was proposed which aims to harmonise asylum systems further, using regulations rather than directives. The UK did not opt into these newer instruments and instead still applies the original directives on asylum procedure and qualification for refugee status.

Accordingly, the UK currently relies on Directive 2004/83/EC, the Qualification Directive, as a primary source

of asylum law. This sets out the minimum protection a member state must provide to stateless refugees and those otherwise in need of international protection. Post-Brexit, the UK will most likelyithdraw from the minimum protection directives, and will no longer be required to comply with the procedural safeguards and specified standards set by EU law. Fundamental protection will still be provided under the ECHR and 1951 UN Convention relating to the Status of Refugees. However, it should be noted that the Conservative Party has previously stated they intend to withdraw from the Refugee Convention and Human Rights Act 1998.

The CJEU regularly rule on procedural matters relating to asylum cases. They have also provided several rulings on issues substantive law, such as the 2013 judgment in case **C-201/12** which concluded that homosexual applicants for asylum can constitute a particular social group who may be persecuted on account of their sexual orientation. Such interpretations are specific to questions arising under EU law, therefore it is unclear what the role of the Court will be in the UK following Brexit. It is likely that there will be convergence from the approach followed by the CJEU over time.

With regards to humanitarian (subsidiary) protection, EU law confers multiple rights to relevant individuals under the Qualification Directive. This protection is available to persons who do not qualify for refugee status, but are nevertheless at risk of serious harm on return to their country of origin. Under the Directive, individuals benefit *inter alia* from the right of family reunion, the right to work and access to core benefits. Conversely, the UK's minimum requirement is simply a grant of 6 months temporary immigration status. Unless the UK voluntarily replicates the standards of the Directive post-Brexit, it is likely that individuals granted humanitarian protection will have considerably less rights.

Irregular Immigration

Recent developments have made clear the government's intention to crackdown on irregular migration. The Illegal Immigration (Offences) Bill has been proposed to create offences in respect of persons that have entered the UK illegally or who have remained in the UK without legal authority and for connected purposes. The Bill was presented to parliament last September for a first reading and is expected to have its second reading debate on Friday 6 July 2018. The contents have not yet been made public.

This month the government's controversial bank account checks also came into force. The checks form part of a series of measures in the Immigration Act 2016 aimed at encouraging illegal immigrants to leave the country voluntarily. Banks and Building Societies are required to check whether account holders are legally resident in the UK and report those who are not. The Home Office published guidance for its caseworkers on 20 December 2017 which set out factors to be considered when deciding whether to apply for a bank account freezing or closure order.

The measures have come under scrutiny from experts who warn that there is a high risk of mistakes being made in cases of mistaken identity and similar names. The move has also been described as a hostile attempt to make life intolerable for people alleged to be in the UK unlawfully. An open letter from MPs and various campaign groups was sent to Home Secretary Amber Rudd last month, urging her to halt the 'inhumane' policy. With checks beginning this month, it remains to be seen whether the government will back track on their plans.

Previous Item	Back to Contents	Next Item

Viewpoint	In Focus	Law Reform	Law Societies' News	Just Published

Analysis of the EU-UK Citizens' Rights Agreement

On 8 December 2017, a **report** was published jointly by the UK and EU negotiators. The report records the progress made during the first phase of negotiations under Article 50 TEU, including agreements reached on protecting the rights of EU and UK citizens, to be included in the final Withdrawal Agreement.

The citizen's rights debate was a key issue during the first phase of negotiations, with much discussion regarding what rights would be retained and how they would be protected. The report aims to "provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law... where those citizens have exercised free movement rights by the specified date." EU citizens and their family members will be able to claim settled status in the UK and vice versa. The agreement has been widely welcomed, however there is still a lack of clarity on several issues.

CJEU Role

The agreement states that the use of Union law concepts must be interpreted in line with the case law of the CJEU up until the specified date. It is unclear to what extent this influence will continue after the UK leaves the EU, and whether the interpretations will apply indefinitely for citizens to whom the Withdrawal Agreement applies.

The agreement also refers to the issue of judicial redress, stating that the Withdrawal Agreement will apply to any applicant who is waiting for final judgment in a judicial redress case sought against rejection of their

application for settled status. However, it does not specify whether judicial redress can be sought from the CJEU.

The CJEU is referred to as the "ultimate arbiter" for interpretation of EU law, and UK courts are instructed to have due regard for relevant decisions of the CJEU after the specified date. This also includes the right for UK courts to ask the CJEU questions regarding the interpretation of citizens' rights for up to 8 years. Further information is needed to clarify the scope of CJEU involvement and confirm what mechanisms could be put in place to establish effective communication.

Family Reunion

The proposed rules for family members of citizens protected by the Withdrawal Agreement are likely to face legal challenges if enforced. The agreement states that specific categories of third country family members will be entitled to join EU citizens who obtain settled status in the UK, and vice versa. This would result in EU citizens with settled status in the UK being conferred greater rights than UK citizens residing in the UK (i.e. those who have not exercised their free movement rights). This could potentially result in discrimination against UK citizens who attempt to bring their third country national family members to live with them in the UK.

Implementation Mechanisms

The agreement refers to several mechanisms that will be introduced in relation to referrals to the CJEU and coordination of social security systems, as well as an Independent National Authority to act as controller for the implementation of the final Withdrawal Agreement. Given the complexities involved in navigating the implementation (or transition) period, these mechanisms should be agreed and set up as a matter of urgency.

Cut-off date

The report refers to the "specified date" for free movement rights to be exercised. At the time of the report being published, this was assumed to be the date of the UK's withdrawal (29 March 2019). However, draft **negotiating directives** from EU diplomats recently come to light which propose extending the deadline until 31 December 2020. This extension would block the UK from introducing new immigration controls for a further 21 months. A spokesperson for the Conservative party has warned that this position, if final, would make the possibility of a no deal scenario more likely.

Brexit Negotiations Update

On 15 December 2017, the European Council found that 'sufficient progress' had been made in the Brexit negotiations such that talks could progress to second phase in the new year. On 20 December 2017 the European Commission published a first draft of the EU's negotiating directives for the next phase. This new set of directives, concerning the proposed transition period, will be adopted by the Council of the EU at the end of January 2018. However, a second set of negotiating directives concerning the future EU-UK relationship are not expected to be adopted until March 2018. Only after this date can negotiations between the EU and UK on the final deal commence.

The EU's position on the transitional deal states that:

- The UK will continue to participate in the Customs Union and the Single Market (while applying all four internal market freedoms). The EU acquis should continue to apply in full to and in the UK as if it were a member state. Any changes made to the acquis during this time should automatically apply to the UK;
- All existing EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will apply, and the jurisdiction of the Court of Justice of the European Union in the UK will be maintained;
- The UK will be considered as a third country as of 30 March 2019. As a result, it will no longer be represented in the EU's institutions, agencies, bodies and offices;
- The transition period will be clearly defined and precisely limited in time. The Commission has recommended that it should not last beyond 31 December 2020.
- In comparison with its previous stance, the EU has indicated that it would be possible to create a mechanism to include FTAs and other international conventions with third countries and other organisations.

Trade negotiations between the UK and the EU are expected to be carried out throughout 2018 and 2019 but it is unlikely that they will manage to conclude negotiations on a fully-fledged trade agreement by 29 March

2019. The transitional period could thus be used to continue negotiations for a EU-UK trade agreement.

Revisions to the EU Copyright Directive

Discussions on the reform of copyright continue within the EU institutions. The proposal for a directive on copyright in the Digital Single Market has had a troubled inception since its provision to the Council by the Commission on 14 September 2016, forming part of the Commission's broader initiatives under the Digital Single Market Strategy.

The European Economic and Social Committee and the Committee of the Regions adopted their respective opinions in January and February 2017 largely supporting the Commission's proposal. These were followed by Parliament Rapporteur Therese Comodini Cachia's report for the JURI Committee in March 2017, which proposed a number of amendments to the proposal, opposing the creation of a new right for publishers for the digital use of their publications and providing more powers to press publishers in order to help them enforce their copyright claims more effectively through a given ability to bring proceedings in their own name before tribunals (against infringers of the right held by authors of the works contained in their press publication).

Her return to Malta to take public office saw the appointment of Axel Voss (EPP, Germany) as Rapporteur in June 2017 and this appointment, coupled with the adoption of IMCO's opinion (prepared Catherine Stihler (S&D, UK)) on the proposal, saw an increase in the number of amendments to the proposal and, in the former case, a change of direction in amendments. The IMCO opinion went in the same direction as Comodini Cachia's report, enlarging the scope of the text and data mining exception and resisting the introduction of a press publishers right. However, it also proposed much more substantial amendments to the Commission's proposal through, among other things, introducing new exceptions to copyright protection such as the public lending of literacy works and user-generated content, as well as the introduction of fair and appropriate compensation for the uploading of online copyright protected works.

A compromise proposal was circulated on 26 September 2017. However, strong disagreements between Member States with regard to entrenched provisions and the German delegation's request for an opinion of the Council Legal Service on a series of questions concerning the measures imposed on internet service providers, further slowed progress.

Amendments now stand at over a thousand and the vote on the European Parliament report by the JURI committee, originally scheduled for 10 October 2017 will now take place in January 2018. In the interim period, the Council of the EU published a report on 13 December 2017 on the progress made thus far and putting forward differing compromise options taken from commentary.

In brief, the major sticking points that remain concern the following provisions:

- **Article 3** – Text and Data Mining – will EU-wide permission to conduct research using text and data be limited to research institutions only;
- **Article 11** – Copyright for news sites – will all use of journalistic content online (even if linked) require a license from the publisher;
- **Article 13** – Censorship Machines – will internet platforms be forced to monitor user behaviour (identify and prevent infringement) where they can upload content; and
- Regulation of creative and free internet culture.

Germany's differing and strict view on copyright law provisions, enforcement and objectives in comparison to many member states has made them strong critics of the format and content of the proposal so far. Axel Voss, himself a German MEP, has waited for the German government to form as they are likely to hold the key in final decisions on whether the amendments go far enough for compromise to be reached amongst the harshest critics of the text.

Freezing and confiscation: Council agrees general approach on the mutual recognition of freezing and confiscation orders

On 8 December 2017, the Council agreed a general approach on the draft regulation on the mutual recognition of freezing and confiscation orders. The presidency will now be able to start negotiations with the European Parliament.

The legislation has been drafted with the aim of making the EU more secure. Freezing and confiscating assets which were obtained through criminal activity is an effect way to combat the financing of crime, including terrorism.

The Commission's initial proposal was presented in December 2016 and is a key component in its plan to combat terrorist financing.

The main elements of the draft legislation include:

- Adapting a single regulation to legislate freezing and confiscation, which is directly applicable in the member states. This will help resolve current issues relating to mutual recognition.
- Increasing the scope of current confiscation types, such as non-conviction based confiscation, including certain systems of preventive confiscation, provided that there is sufficient link to criminal activity.
- Standardising documents and procedures, which will improve the speed and efficiency of obtaining orders.
- Ensuring that victims' rights to compensation and restitution are respected in cross-border cases.

The press release regarding this decision can be found **here**.

Previous Item	Back to Contents	Next Item		
Viewpoint	In Focus	Law Reform	Law Societies' News	Just Published

Commission welcomes the entry into force of new rules to prevent tax evasion and money laundering

In January the EU Commission welcomed the entry into force of new rules obliging Member States to give tax authorities access to data collected under anti-money laundering legislation which came into effect on 1 January 2018.

Under the new rules national tax authorities will have direct access to information on the beneficial owners of companies, trusts and other entities, as well as customer due diligence records of companies. These rules are designed to help combat the problems with certain business structures, a concern highlighted by the European Parliament in particular in the wake of the recent Panama and Paradise Papers scandals.

The French Commissioner for Economic Affairs, Pierre Moscovici, said that the aim of the new measures was to "*give tax authorities crucial information on the individuals behind any company or trust. This is essential for them to be able to identify and clamp down on tax evaders.*" The new amended rules are enshrined in the Directive on Administrative Cooperation (**Directive 2011/16/EU**).

Previous Item	Back to Contents	Next Item		
Viewpoint	In Focus	Law Reform	Law Societies' News	Just Published

Anti-Money Laundering Update

December was a busy month in Brussels for those following EU action in the area of anti-money laundering.

In mid-December the European Parliament (EP) adopted the final report and recommendations of the Panama Papers Committee of Inquiry. The Committee had been tasked by MEPs with investigating the repercussions of the Panama Papers leaks in 2016. Although the report and accompanying recommendations have no legal effect, recommendations made by past committees of inquiry have been relied upon by the Commission when drafting legislative proposals. It is therefore reasonable to expect that some of the recommendations made by the committee may be transposed into law at some point in the future.

In its recommendations the EP called for stricter regulation of banks and accounting firms, the creation of a permanent public registry for beneficial owners of companies, and expanded rules protecting whistle-blowers. They also recommended that a new permanent inquiry panel should be set up in the EP that would have expanded investigative powers to probe tax evasion by multinational corporations. The final report was approved by a vote of 492-50 and included 211 non-binding recommendations in total.

In separate news, the Council of the EU and the EP reached a provisional agreement in December on the final shape of the revision of the 4th Anti Money Laundering Directive. The main changes to the directive concern:

1. Enhanced access to beneficial ownership registers to improve transparency in the ownership of companies and trusts. These registers will also be interconnected to facilitate cooperation between member states. Access to information on beneficial ownership is foreseen by the draft directive as follows:
    - public access to beneficial ownership information on companies;
    - access on the basis of 'legitimate interest' to beneficial ownership information on trusts and similar legal arrangements;
    - public access upon written request to beneficial ownership information on trusts that own a company that is not incorporated in the EU;

2. Improving cooperation between the member states' financial intelligence units (FIUs) with more powers being granted to FIUs.
3. The inclusion of additional requirements to be imposed upon self - regulatory authorities.

Brussels Office News

Brussels Agenda and Lawscot Foundation Nominated for European Association Awards

This month we are celebrating our recent nomination for the award of 'Best Association Magazine or Publication' at the **European Association Awards 2018**. Law Society of Scotland has also been nominated for the awards of 'Best National Association' and 'Most Innovative Development by an Association' for their new charity, The Lawscot Foundation. The charity was set up in 2016 with the aim of helping academically talented students from less advantaged backgrounds in Scotland through their legal education journey.

The awards are intended to recognise individuals, teams and initiatives and highlight excellence in how associations operate and serve their members. An awards ceremony is taking place in Brussels at the Steigenberger Wiltcher's Hotel on the afternoon of February 23rd. In 2017, more than 250 senior people attended the ceremony and represented the breadth of industries and professionals from across Europe with feedback being unanimously positive.

Other awards include; 'Best Association Networking Event,' 'Best Association Conference,' and 'Best Lobbying or Advocacy Campaign.'

We are very grateful for our nomination and it is great to hear that our efforts are appreciated! We also congratulate the Law Society Scotland for their well-deserved nomination.

UK Law Societies' Joint Brussels Office visit to the CJEU

On 13 December, the UK Law Societies' Joint Brussels Office arranged a visit to the Court of Justice of the European Union. Policy Advisor Eoin Lavelle, and seconded trainees Caitlin Allan, Tamasin Dorosti and Harriet Diplock, were joined by seven other trainees from UK and international law firms with offices in Brussels.

The visit included a briefing on case

T-884/16 Multiconnect / Commission, in which the applicant sought an annulment of the Commission's measures in relation to the ongoing Telefonica merger case M.7018.

This was followed by a highly informative meeting with Advocate General Sharpston, who described to us how the Court functions on a daily basis and how language and translation play a fundamental role. She also told us about her varied and extensive career and responsibilities as an Advocate General. The trip culminated with a tour of the Court buildings, including the library, Salle de Conference and Grand Chamber.

The visit received high praise and great reviews by everyone who attended. The Law Societies' Joint Brussels Office would like to thank the Court of Justice of the European Union, our tour guide G. Dimovski and Advocate General Sharpston for welcoming us.

Law Society Scotland News

UK Customs Bill

The Law Society of Scotland has submitted **a response** to the UK Government's White Paper ***Customs Bill: legislating for the UK's future customs, VAT and excise regimes***. In its response the Society points out that customs arrangements are closely linked to a whole host of other internal market measures and need to be considered in the round. For example, it is not only customs tariffs which can prove a barrier to entry of goods into given markets but also quotas or regulatory barriers. It also points out that the legal arrangements regarding customs are inextricably linked to discussions regarding the border between Northern Ireland and the Irish Republic.

UK Trade Bill

After submitting **a response** to the Department for International Trade's **paper on future UK trade policy** in November, the Society gave evidence before the Public Bill committee in the House of Commons on the subsequent Trade Bill on 23 January. While the bill deals with existing trade agreements at the time of the UK's withdrawal, we recommended extending a whole of governance approach to future trade negotiations, particularly where they relate to devolved competences. The **Joint Ministerial Statement** published in October indicates that the government intends to establish "frameworks" for devolved issues. Although trade agreements themselves are reserved, we consider that an indication of how a framework might function in relation to trade negotiations where these incorporate policy areas which have been devolved. We are still taking a view on whether trade agreements should be subject to a greater level of parliamentary scrutiny than exists at present however on the EU Withdrawal Bill, we have taken **a general stance** on the importance of effective scrutiny as a point of principle.

More of the Society's work on the Trade Bill can be found **here**.

Law Society of Scotland calls for restrictions on using term 'lawyer'

There are current and long standing legal restrictions on who can call themselves solicitors or advocates in Scotland. However, there is no such restriction on the use of the term 'lawyer' with any person able to use that title, even those without any legal education.

The Law Society of Scotland is calling for the term 'lawyer' to include only those who have recognised legal qualifications and are regulated, as is the case for solicitors and advocates. Its recommendation is backed by new independent research, which has found that almost nine out of ten Scottish adults (87%) think there should be restrictions on who can describe themselves as a lawyer. The findings follow on from previous research which highlighted that nearly two-thirds of consumers (63%) did not recognise the difference between a solicitor and a lawyer.

You can read the full press release **here**.

Call for Volunteer Immigration Lawyers: Future European Lawyers in Lesvos (ELIL)

The ELIL project was founded by the Council of Bars and Law Societies of Europe (CCBE) and the German Bar Association (DAV) who represent the bars and law societies of 32 member countries and 13 further associate

and observer countries across Europe.

It was set up to send volunteer European Immigration and asylum lawyers to the hotspot of Lesvos, Greece to provide preliminary legal assistance, ensuring every person in Lesvos seeking international protection is able to receive legal assistance, at no cost, from an independent European lawyer.

This legal assistance is principally focused on explaining the asylum process to applicants for international protection and preparing applicants for their asylum interviews. Volunteer lawyers also assist applicants who have family in Europe to apply for family reunification under the Dublin Regulation.

The ELIL has welcomed 103 volunteer asylum lawyers from 16 European countries and provided assistance to over 3,600 individuals, and is now governed by an independent ELIL organisation to ensure sustainability and effective running. 8,500 applicants for international protection remain in Lesvos and 6,300 of these people, predominately originating from Afghanistan, Iraq and Syria, are in Moria Reception and Identification Centre.

The project requires more volunteers to commit to a period of three weeks or more, and is currently welcoming applications for the period 1 January – 31 March 2018. Costs for each volunteer's travel to Lesvos are covered by the project (maximum €500) and their accommodation and daily expenses (up to €20) are also included.

The project is ongoing and it is also possible to apply for other dates. For more information on the project please visit **www.elil.eu** and/or **http://www.europeanlawyersinlesvos.eu/**. For specific information on applications please visit: **www.elil.eu/how-to-become-a-volunteer-lawyer/**.

Previous Item **Back to Contents** **Next Item**

Viewpoint **In Focus** **Law Reform** **Law Societies' News** **Just Published**

Opportunity for Traineeship in the General Court of the European Union

Two unpaid traineeships will be available in the chambers of Judge Ian Forrester at the General Court of the European Union in Luxembourg from, respectively:

l) 9 April 2018 to 13 July 2018
2) 4 September 2018 to 14 December 2018

The General Court handles appeals against actions of the EU institutions at the instance of individuals, corporations, governments, NGO's and other entities. Successful candidates will have an opportunity to gain unique experience of how European law is applied judicially. The caseload of the Court and the cabinet includes competition, mergers, state aid, trademarks, dumping, access to documents, restrictive measures related to terrorism, civil service disputes, and regulations on many different technical topics.

The court is a friendly institution with a rich mixture of nationalities and experience and languages, and the cabinet team currently has six nationalities, Applicants should have good academic credentials as well as a good basis in European Union law. Although the court handles cases in 23 languages, its working language is French. The cabinet works in French and English but to contribute successfully the applicant should have a comfortable command of French. Additional experiences and talents and languages are very welcome. Applications, consisting of a brief CV and cover letter, should be sent by email to **cliona.hurley@curia.europa.eu** by 9 February 2018.

Previous Item **Back to Contents** **Next Item**

Viewpoint **In Focus** **Law Reform** **Law Societies' News** **Just Published**

Dates for your Diary

'How Digital Transformation Drives European Integration' Conference in London

Date: 27/02/2018

Location: Freshfields Bruckhaus Deringer, Northcliffe House Entrance, 26–28 Tudor Street, London EC4Y 0AY

As Europe stands at the crossroads of change, the need for greater insight by the UK into legal developments on the Continent becomes increasingly clearer.

There is much merit in the UK doing its part to ensure that work at home follows the same trajectory as that in other European jurisdictions. Similarly, lawyers on the other end of the Channel have signalled their eagerness to be kept abreast of developments in various legal fields in the United Kingdom and to actively engage in issues that affect Europe as a whole.

Find out more

'Four Jurisdictions Family Law' Conference in Dublin

Date: 26/01/2018 & 27/01/2018

Location: Conrad Hotel Dublin

Lady Hale will open the Conference on Saturday 27th January. The Conference will deal with Sessions on Parenthood and Identity Rights for Children, The Role of Forensic Accounting in Matrimonial Litigation, GDPR and Family Law, Brexit, the Common Law, and Families.

The Conference concludes with a black tie dinner in the Conrad from 8 pm on Saturday 27th January 2018.
Click here to view the programme

Find out more

Immigration Practitioners' Group

Date: 01/02/2018

Location: Law Society House, 96 Victoria Street, Belfast

The Immigration Practitioners' Group has been setup by the Law Society of Northern Ireland in support of solicitors and their clients many of whom are refugees, immigrants etc.

The group will work to identify support mechanisms for both solicitors and their clients in promoting access to justice, to a solicitor of choice and by helping to reduce the language and cultural barriers which may impede communication between client and solicitor and in so doing build on the legal advice and support offered in Northern Ireland

The keynote address will be provided by The Honourable Mr Justice McCloskey

RSVP to **Susan.duffy@lawsoc-ni.org** by 29 January 2018

Previous Item **Back to Contents**

Viewpoint **In Focus** **Law Reform** **Law Societies' News** **Just published**

ONGOING CONSULTATIONS

Digital economy and society
Public consultation on fake news and online disinformation
13 November 2017 - 23 February 2018
Public consultation on EU funds in the area of investment, research & innovation, SMEs and single market
10 January 2018 – 8 March 2018

Banking and financial services
Public consultation on building a proportionate regulatory environment to support SME listing
18 December 2017 - 26 February 2018
Public consultation on fitness check on supervisory reporting
1 December 2017 - 28 February 2018

Migration and Asylum, Borders and Security
Modernising the EU's common visa policy
24 November 2017 - 2 February 2018

Migration and Asylum, Borders and Security, Justice and fundamental rights
Consultation on extending the scope of the Visa Information System (VIS) to include data on long stay visas and residence documents
17 November 2017 – 9 February 2018

Justice and Fundamental Rights

Public consultation on modernisation of judicial cooperation in civil and commercial matters in the EU (Revision of Regulation (EC) 1393/2007 on service of documents and Regulation (EC) 1206/2001 on taking of evidence)
8 December 2017 - 2 March 2018
Public consultation on EU funds in the area of security
10 January 2018 – 8 March 2018

CASE LAW CORNER

DECIDED CASES

The European Court decision on legality of sharia divorce: what is it really about?

Summary of article by David Hodson OBE MCIArb, The International Family Law Group LLP (www.iflg.uk.com). He is grateful for the help of Richard Kwan of iFLG

On 20 December 2017, the CJEU handed down judgement on a request by the German court for a preliminary ruling. It is action number C372/16 and the case is Sahyouni v Mamisch. The Attorney General opinion is 14 September 2017. They can be found here, respectively:

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1514506278698&uri=CELEX:62016CJ0372

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1514506278698&uri=CELEX:62016CC0372

The husband and wife have dual Syrian and German citizenship and are currently resident in Germany, albeit at separate addresses. In 2013 the husband divorced his then wife in Syria. He did so by his representative attending before a religious sharia court in Syria, pronouncing the necessary form of words for an Islamic divorce. There was apparently no involvement of any state or public authorities and it was said the involvement of the so-called religious sharia court did not constitute it a divorce under Syrian law. The wife was involved to an extent although not in the divorce itself. About four months after the event, she acknowledged she had received the necessary financial payments under the marriage contract and declared that her then husband was released from his marital obligations to her.

The former husband then applied in Germany for recognition of that divorce under German law. The first instance court did so. The former wife challenged that outcome and the court referred the matter to the CJEU for a preliminary ruling on a number of questions, broadly on the application of an EU law known as Rome III to private, including private foreign, divorces.

Rome III now determines which national law will be applied in any particular set of circumstances on divorce and legal separation. It works in those countries which operate applicable law and are signatories to the Regulation (the UK is not). The CJEU said in a previous ruling that Rome III does not of itself apply to recognition of a divorce granted in a third country. The Court noted that a number of member states have, since adopting Rome III, introduced into their legal systems the opportunity for divorces to be pronounced without the involvement of a state authority i.e. informal private divorces. It stated very clearly that doing so required arrangements to come under the competency of EU legislation. Calls to allow the application of personal or faith-based laws in national legal systems are increasing in many westernised jurisdictions

The CJEU concluded that a divorce resulting from a unilateral declaration made by one spouse before a religious court, as opposed to a national civil court or regulated or registered with a civic public authority, does not come within the substantive scope of Rome III

The article explores the relevance of the case to the UK and examines these fundament issues of national, international and personal laws, which will be of considerable importance for family law over the coming decade. The article can be found at **http://www.iflg.uk.com/blog/european-court-decision-legality-sharia-divorce-what-it-really-about**

Area of freedom, security and justice

Case C-372/16 Sahyouni v Mamisch

Judgment date 20 December 2017

The case related to the recognition of a divorce decision delivered by a religious court in a third country. The court considered the interpretation of Articles 1 and 10 of the Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of law applicable to divorce/separation.

The court reasoned that at the time of the Regulation, participating Member States' public bodies alone were able to adopt legally valid decisions in the area and it was not the intention of the EU legislature that the Regulation be applicable to other types of divorce. Numerous Member States had introduced the possibility of divorce without state involvement into their legal system, however, due to the definition of divorce in the Regulation, the objective was clearly to cover divorces pronounced either by a national court or by, or under the supervision of, a public authority.

Accordingly, Article 1 of the Regulation must be interpreted as meaning that a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, does not come within the substantive scope of the Regulation.

Competition

Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain, SL

Judgment date 20 December 2017

Here, the questions for the court related to the classification of an intermediation service (the Uber application), the purpose of which is to connect (through a smartphone application) for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys. In short, should the service in question be classified as a 'service in the field of transport' (and thus excluded from scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31).

The court held that the intermediation service meets in principle the criteria for classification as an 'information society service' within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. Moreover, it is to be classified as 'a service in the field of transport', and is covered not by Article 56 TFEU on the freedom to provide services in general but by Article 58(1) TFEU. It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the instant case are to be provided in conformity with the general rules of the FEU Treaty. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

Right of Residence

Case C-442/16 Gusa v Minister for Social protection, Ireland

Judgment date 20 December 2017

The facts of the case concerned a Romanian national, who, after entering Ireland in 2007 and being supported by his adult children, worked as a plasterer for four years (paying taxes and social security). Upon an absence of work caused by the economic downturn, he registered as a jobseeker but his application for jobseeker's allowance was refused on the grounds that he had not demonstrated a right to remain in Ireland. He no longer satisfied the conditions of the Irish Regulations which transposed Article 7 of Directive 2004/38 into Irish law.

The court was asked to rule on whether an EU citizen who: (i) is a national of another Member State; (ii) has lawfully resided in and worked as a self-employed person in a host Member State (for approximately four years); (iii) has ceased his work or economic activity by reason of absence of work; and (iv) has registered as a jobseeker, retains the status of 'self-employed person' pursuant to Article 7(1)(a) (whether pursuant to Article 7(3)(b) of Directive 2004/38 or otherwise)?

The court held the situation equivalent to a worker who had involuntarily lost their job after a period of employment, being eligible for the protection afforded by Article 7(3)(b) of Directive 2004/38. Accordingly, Article 7(3)(b) of Directive 2004/38 must be interpreted as meaning that a national of a Member State (in the current circumstances) retains the status of self-employed person for the purposes of Article 7(1)(a) of that Directive.

Transport

Case C-102/16 **Vaditrans BVBA v Belgische Staat**

Judgment date 20 December 2017

The facts of the case concerned an action for annulment of a Belgian Royal Decree under which a fine of €1800 may be imposed when a lorry driver takes his regular weekly rest period in his vehicle. The Court considered whether EU Regulations prohibited weekly rest periods being spent inside a vehicle and consequently, (i) if yes, do the relevant Regulations breach the principal of legality in criminal proceedings in Article 49 of the Charter, there being no express prohibition; or (ii) if no, do the Regulations permit Member States to lay down such a prohibition.

It was held that Article 8(6) and (8) of Regulation (EC) No 561/2006 (and repealing Council Regulation

(EEC) No 3820/85) must be interpreted as meaning that a driver may not take the regular weekly rest periods referred to in his vehicle. Accordingly, there is no effect on the validity of Regulation No 561/2006, having regard to the principle of legality in criminal proceedings enshrined in Article 49(1) of the Charter of Fundamental Rights.

Trade Mark

Case C-291/16 Schweppes SA v Red Paralela SL and Red Paralela BCN SL

Judgment date 20 December 2017

This case concerned an infringement claim by Schweppes that the defendants had imported and distributed bottles of tonic water bearing the trade mark Schweppes from the United Kingdom to Spain. They claimed that the marketing was unlawful as the tonic was not placed on the market by the exclusive license-holder (or with their consent) and, in view of the identical nature of the signs and goods in question, consumers were in no position to distinguish the commercial origin of those bottles.

The court had to interpret Article 7(1) of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks (and Article 36 TFEU) and held that Article 7(1) must be interpreted as precluding the proprietor of a national trade mark from opposing the import of identical goods bearing the same mark originating in another Member State in which that mark (initially belonging to the proprietor) is now owned by a third party which has acquired the rights thereto by assignment. This reflects the complex nature of the company structures involved and the court provided further guidance on the terms of assignment and the actions of the proprietor.

UPCOMING DECISIONS AND ADVOCATE GENERAL OPINIONS

Freedom of Residence

Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrari and others*

In this case, a Romanian national and a US national had cohabited for four years in the US before marrying in Brussels. Two years after marrying and in reliance on the Directive on the freedom of movement (which permits a spouse of an EU citizen exercising that freedom to join his or her spouse in the Member State where the latter resides), the couple applied for documents from the Romanian Government to allow the US citizen to permanently reside and work in Romania. The Romanian authorities refused to grant right of residence as there was no 'spouse' of an EU citizen, Romania not recognising same-sex marriage.

In his opinion, Advocate General Melchior Wathelet held that the Directive makes no reference to Member State law in the determination of the nature of 'spouse'. The meaning refers to a relationship based on marriage while nevertheless being neutral as to the sex of the persons concerned and indifferent as to the place where that marriage was contracted. Therefore (and in view of the general evolution of the Member States of the EU in the area of same-sex marriage), the case law of the ECJ, under which 'according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex' can no longer be followed.

He further found that the term 'spouse' is necessarily linked to family life, which is protected in an identical manner by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR). The ECHR has recognised that same-sex couples, first, can enjoy a family life and, second, must be afforded the possibility of obtaining legal recognition and protection of their unions and accordingly the concept of 'spouse' within the meaning of the Directive also includes spouses of the same sex.

State Aid

Case C-363/16 European Commission v Hellenic Republic

Opinion of Advocate General Sharpston 10 October 2017

In February 2012, the European Commission adopted a decision finding certain measures of financial support provided by Greece to United Textiles S.A. to be State aid incompatible with the internal market and requiring Greece to recover the aid. It seeks a declaration of Greece's failure to comply. within the prescribed period. Greece argues that, since the recipient of the aid was declared insolvent (ceasing activities), the distortion of competition caused has been removed. It follows that Greece has taken all the measures necessary and is not in default.

According to Advocate General Sharpston, by failing to take, within the prescribed period, all the measures necessary to recovery from the recipient the State aid declared illegal and incompatible with the internal market by Article 1(1) of Commission Decision 2012/541/EU and by failing to inform the European Commission sufficiently of the measures taken, in accordance with Article 4 of

Decision 2012/541, Greece has failed to fulfil its obligations under Articles 2, 3 and 4 of that decision.

Financial Services

Case C-304/16 American Express Co. v The Lords Commissioners of Her Majesty's Treasury,

Appeal from decision

This decision concerned the operation of the American Express payment card scheme (a 'three party scheme'). In the EU, Amex entered into a number of co-branding and service provision arrangements with other entities. In accordance with those agreements, subject to the interpretation of the Regulation, the restrictions imposed by the Regulation on four party payment card schemes were applicable to its transactions. Amex had applied to the referring court for permission to bring a claim for judicial review of the obligation and/or intention of Her Majesty's Treasury (7) to enforce and apply in the United Kingdom certain aspects of Articles 1(5) and 2(18) of the Regulation. The point at issue specifically concerned two of the three situations provided for in Article 1(5) and 2(18) of the Regulation, in which certain three party payment card schemes were classified as four party payment card schemes.

The decision of the court (now being appealed) was to rule the questions referred as inadmissible and reply that Articles 1(5) and 2(18) of Regulation (EU) 2015/751 on interchange fees for card-based payment transactions must be interpreted as meaning that a three party payment card scheme issuing card-based payment instruments with a co-branding partner or through an agent must be classified as a four party payment card scheme, regardless of whether or not the partner or agent is involved in the issuing of cards and/or the acceptance of payments. They confirmed that no factor has been revealed which was liable to affect the validity of Articles 1(5) and 2(18) of Regulation 2015/751.

About us

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

Subscriptions/Documents/Updates

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

Editorial Team

Helena Raulus
Head of the Brussels Office
helena.raulus@lawsociety.org.uk

Anna Drozd
EU Policy Advisor (Professional Practice)
anna.drozd@lawsociety.org.uk

Rita Giannini
EU Policy Advisor (Justice)
rita.giannini@lawsociety.org.uk

Eoin Lavelle
EU Policy Advisor (Internal Market)
eoin.lavelle@lawsociety.org.uk

Harriet Diplock
Trainee Solicitor
harriet.diplock@lawsociety.org.uk

Tamasin Dorosti
Trainee Solicitor
tamasin.dorosti@lawsociety.org.uk

Caitlin Allan
Trainee Solicitor
caitlin.allan@lawsociety.org.uk

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