The Law Societies
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Brussels Agenda

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The Law Societies' monthly publication with the latest EU news

Editorial

In this issue, we consider the effects of triggering Article 50, and the effects that Brexit will have on the legal profession.

With an article from Michael-James Clifton, Chef de cabinet to the President of the EFTA Court, on what to expect following the triggering of Article 50, as well as a review of the priorities of the legal sector in the UK's negotiating objectives in a variety of fields, we explore some of the areas that will be most affected following the UK's withdrawal from the European Union.

Over the last month we have seen the European Union Withdrawal Bill discussed in both Houses of Parliament. Following some emphatic speeches about how citizens should not be used as bargaining chips in the Brexit negotiations, the Lords voted in favour of an amendment to the Bill so as to provide clarity over the protection of the rights of EU citizens in the UK, as well as an amendment to give Parliament a "meaningful vote" (or, veto) over the final outcome of the Prime Minister's Brexit negotiations. The House of Commons has now rejected these amendments and the Lords have backed down, paving the way for the Bill to receive Royal Assent and become law. At the time of writing, Theresa May is on track to trigger Article 50 before her timeline of the end of March, and we await further developments on the negotiations for the UK's withdrawal from the European Union.

This month has also seen the Commission publish its **White Paper on the Future of Europe**. The paper sets out the Commission's vision on the future of the European Union and outlines key drivers for Europe's change. You can read more about the white paper on our website **here**.

Additionally, you will see our usual update on the latest EU policy developments, politics and case law. In particular, we discuss the idea of a "Two-Speed Europe", upcoming changes to roaming changes in Europe, the work of the National Cyber Security Centre (a branch of GCHQ), and much more.

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Michael-James Clifton

Notification and Negotiation: the practical mechanics of Article 50 TEU and future mechanisms of dispute resolution between the UK and the EU

The Prime Minister's self-imposed deadline of the end of March 2017 to make an Article 50 TEU notification is fast approaching. While the Government has declared that the UK intends to leave the Single Market, the UK is also a Contracting Party to the EEA Agreement. The EEA Agreement is incorporated into domestic law through the European Economic Area Act 1993, which amended the European Communities Act 1972. It extends the Single Market to three EFTA States: Iceland, Liechtenstein and Norway. The EEA Agreement contains an exit provision, Article 127 EEA, which is similar to Article 50 TEU: it provides for a notice period of 12 months to be followed by an international conference. However, the bill currently before Parliament does not authorise the Prime Minister to make an Article 127 EEA notification. In *Yalland and Wilding v Secretary of State,* the Divisional Court dismissed as premature the 'Article 127 EEA' litigation which followed on the coattails of *Miller*. Nevertheless, as a standalone and independent treaty it is reasonable that the UK must make an Article 127 EEA notification or be in breach of its international obligations.

The Supreme Court in *Miller* did not assess whether an Article 50 TEU notification is revocable and the question remains unresolved. In the so-called 'Three Knights' Opinion,' Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC, Helen Mountfield QC and Gerry Facenna QC advise that, if Parliament were to refuse to give legal effect to the terms of a withdrawal agreement negotiated with the EU, or were to refuse to authorise withdrawal in the absence of any agreement, the notification given by the UK of its intention to leave the EU could be treated as having lapsed (since the constitutional requirements would not have been met). Notification could even be unilaterally withdrawn, as - according to that opinion - Article 50 TEU cannot have the effect of ejecting a Member State from the EU contrary to its constitutional requirements. Remarkably, an action has been brought before the High Court in Dublin, seeking a reference to be made to the CJEU to determine whether, as a matter of EU law, an Article 50 TEU notification is revocable.

Once the UK has notified the European Council of its intention to leave the EU, the EU will convene a summit to determine its negotiating guidelines. The President of the European Council, Donald Tusk, has indicated that he will reply to the notification, presumably by letter, within 48 hours. The Commission will then promulgate a negotiation directive, which will require the Council's approval. Optimistically, it will take two months before the remainder of the EU ('rEU') will be prepared to negotiate. The withdrawal agreement shall be negotiated in accordance with Article 218(3) TFEU, being concluded on behalf of the EU by the Council (acting by qualified majority) after obtaining the consent of the European Parliament, and will take account of the framework for the UK's future relationship with the EU. The EU Treaties shall cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, after two years unless that period is unanimously

extended. While impending elections in the Netherlands, France, Germany, and potentially Italy, as well as a second Scottish independence referendum, could transform the nature of negotiations altogether, the rEU's strongest card in the negotiations is the two-year window. The unanimity requirement makes it unlikely this window will be extended, unless a draft agreement is ready, but has been referred to the CJEU. However, even if the two year window would overrun, negotiations may encounter additional difficulties as they will overlap with the May/June 2019 European Parliament elections.

The UK intends to deliver Brexit in a 'smooth orderly' manner with a 'comprehensive free trade agreement' being 'reached' within the two-year period followed by a phased process of implementation. The UK is most unlikely to achieve a perfectly bespoke agreement with the rEU. Rather, it is likely to be 'made to measure': based on an existing model relationship with the EU, but altered to take account of the parties' preferences and particularities. The greater the variations the less probable it is that the agreement will be 'reached' within a two-year period. Also, the rEU may insist on negotiating an 'exit' agreement prior to any trade negotiations, addressing the UK's assets and ongoing liabilities.

It is important to note that Brexit creates, as a matter of EU law, a new category of country – a former EU Member State – and that the negotiations will form a precedent. Professor Kalypso Nicolaïdis has argued cogently that the rEU must treat a former Member State in a manner superior to all other non-EU Member States, because of the rEU's national self-interests should they ever seek to leave the EU, and because the exiting Member State is fully compliant with the *acquis*. Understandably, the rEU will seek to minimise damage to the 'EU project'; this is demonstrated by the Commission's new white paper setting out that the EU will continue to integrate although possibly at different speeds. The UK could embrace this notion by ensuring that if it seeks a bilateral relationship with the rEU, that this be open to accession by other countries.

Looking forward to the resolution of the negotiations, it is important that serious consideration be given to ensure that individuals and companies are able to enforce their rights under the intended partnership agreement with the rEU. The UK has emphasised its determination to no longer be subject to the jurisdiction of the CJEU. Annex A to the UK Government's white paper indicates that the Government may prefer that any disputes be adjudicated through arbitration or diplomatic committees rather than before a court. Arbitration on such a scale would be extremely expensive, and it is questionable if the UK would want CETA-style investor-State arbitration.

Whether arbitration would be acceptable to the EU, however, is more than doubtful; Article 111(4) EEA, for example, states that no question of interpretation of provisions of EEA law that are identical in substance to provisions of EU law may be dealt with in arbitration procedures. Even were the EU to agree, which would require it to abandon its position taken vis-à-vis Switzerland since 2008 (and most recently expressed in the Council Conclusions of 28 February 2017), it would make the intended relationship rather amorphous, as the structures which would allow the agreement to function in practice would be lacking.

The experience of the EEA/EFTA States has been that it is of great advantage to have an 'own court.' A court provides a gateway to justice for companies and individuals that State-to-State arbitration cannot, as a party who considers that its rights have been infringed requires political support in order to bring its case. Indeed, the strength of the EEA Agreement lies in its robust institutions, most recently demonstrated in the EFTA Court's Case E-21/16 *Pascal Nobile*. The Order of the President of 20 February 2017 in that case made explicit that 'the Court assumes an essential role in the EEA legal order and the proper composition of the Court is key to the observance of the rights and obligations flowing from the EEA Agreement. Without an independent court, the purpose of the Agreement would be rendered nugatory and the EFTA States would fail to safeguard the protection of the rights of individuals and economic operators. To maintain the independence of the judiciary is not a privilege for judges, but a guarantee for the respect of these rights and a bulwark of the democratic order.'

The UK could propose the creation of a new UK-rEU court to resolve disputes under the future agreement. While institutions take time to achieve maturity, a purely bilateral new court could fall foul immediately of the ECJ's Opinion 1/91. The UK could potentially, as the EU has proposed to Switzerland, to accede to, or 'dock' to the EFTA EEA institutions: the EFTA Surveillance Authority, and the EFTA Court, with UK personnel working at those institutions and with a UK judge sitting on the EFTA Court bench for UK-rEU agreement cases. The EFTA Court is completely independent of the CJEU. It is a robust, mature, efficient and respected institution whose working language is English. The EFTA Court is the only court of general jurisdiction that the CJEU regularly cites - there are around 160 references to EFTA Court jurisprudence.

It is difficult to predict the outcome of the impending negotiations. Both sides must be positive, rational, and show understanding in order to achieve, in the Prime Minister's words, a 'mature, cooperative relationship' to the benefit of all.

All views expressed are personal and cannot be attributed to his employer.

Biography

Michael-James Clifton is a barrister and the *chef de cabinet* of the President of the EFTA Court, Carl Baudenbacher.

He obtained his LL.B. (EU) from the University of Leicester and his LL.M. Adv. from Leiden University *cum laude* and Valedictorian. Called to the Bar in 2009, he was formerly an Associate at VVGB in Brussels and *stagiaire* to Advocate General Eleanor Sharpston. From 2012 He was a Legal Secretary in the Chambers of President Baudenbacher. He completed his pupillage at Monckton Chambers. He is Co-Chair of the Procedural Law module on the Executive M.B.L. programme at St. Gallen University. He is also Editor-in-Chief of the European Law Reporter.

BREXIT

Practice rights: Law Societies' priorities for the upcoming withdrawal negotiations between the EU and the UK

At present, the single market allows the European and the UK lawyers to benefit from a simple, predictable and uniform system of commercial and personal presence in EU member states, and there is little scope for EU member states to introduce national variations.

Under the Lawyers' Services Directive 1977 ("**LSD**"), the Lawyers' Establishment Directive 1998 ("**LED**"), the Professional Qualifications Directive 2005 ("**PQD**") and the Framework Services Directive 2006 ("**FSD**"), individual solicitors and law firms have extensive rights. These rights include the right to establish permanently in another member state under their home title, the right to requalify without an equivalence examination after three years of regular and effective practice of host state law, and the right to set up a branch of a home state law firm.

The current system is considered a success as it allows all European law firms and individual qualified lawyers to be treated on a par with domestically established law firms across the EU.
The UK has an excellent reputation as being an open market for legal services. Some of the largest law firms in the world have their main base of operations in the UK, and there are more than 200 foreign law firms in London alone (including 100 US firms, and firms from over 40 jurisdictions).

Thirty six of the top 50 UK law firms have at least one office in another EU member state, and UK law firms have a presence in 25 of the 27 member states. The loss of rights equivalent to those granted under the LSD, the LED and the PQD could clearly have a negative impact on UK law firms.

The Law Societies will be asking to maintain access for lawyers to practise and establish within the EU through the LSD and LED, or equivalent mechanisms. The Law Societies also seek access for lawyers to represent their clients before the EU courts and allow their clients to benefit from legal professional privilege ("**LPP**").

Ability to practise outside of the EU/EEA/Switzerland

Outside the internal market for legal services, lawyers and law firms would lose these automatic rights to practise and establish and would need to rely on the World Trade Organisation ("**WTO**") framework and the General Agreement on Trade in Services ("**GATS**"). The EU framework for legal services offers far better market access than the GATS. Furthermore, each member state is able to list its own limitations on the market access and national treatment of foreign lawyers as part of the EU schedule of commitment under the GATS.

Access to the EU courts and Legal Professional Privilege

EU membership currently allows lawyers to represent their clients before the EU courts, and specialised tribunals for example on registration of EU trademarks, and allows the clients to benefit from LPP. The loss of these rights would be of serious concern to both lawyers and their clients. It is crucial that a firm operating

internationally is able to represent their clients in different courts, and retaining rights of audience and LPP is essential for law firms to continue to provide the best possible service to their clients.

Mutual recognition of professional qualifications

Requalification as a full member of the host state legal profession is governed by the PQD. The basic rules are that a lawyer seeking to requalify in the EU/EEA/Switzerland must show that he or she has the professional qualifications required for taking up or pursuit of the profession of lawyer in one member state and is in good standing with his or her home Bar or Law Society.

The PQD is particularly beneficial as it allows UK lawyers to requalify in any member state and vice versa which is an attractive prospect for foreign law firms who operate on an international basis.

Once the UK leaves the EU, if it is not able to maintain access to the PQD, then there should be scope for the UK to conclude one or more mutual recognition agreements.

The priorities of the legal sector in the UK's negotiating objectives for withdrawal from the EU in the field of recognition and enforcement of judgements

Within the EU there is an almost complete legal framework for the choice of law, jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

The primary goal of this legal framework is the facilitation of the recognition and enforcement of judgments reached by Member States' courts, to achieve the so-called free movement of judgments. This is achieved by the Brussels I Regulation (Brussels I), which provides for almost automatic recognition and enforcement of judgments.

There are a few alternative approaches that could provide for continued recognition and enforcement of judgments in civil and commercial matters. These are:

- maintaining the Brussels I framework as part of the EU-UK agreement on the new relationship;
- accession to the Lugano Convention on civil and commercial matters; and
- the various conventions agreed at the Hague Conference on Private International Law.

Practitioners would prefer to maintain the application of Brussels I as part of the new EU - UK relationship. Compared with any of the aforementioned alternatives, the Regulation contains the widest variety of judgments and orders, modernised rules on jurisdiction, speediest and most efficient enforcement of those judgments. The Brussels office has in their communication, however, considered at length the alternative, which are briefly surmised below.

Lugano Convention

The Lugano Convention provides for an almost parallel system of recognition and enforcement of judgments in civil and commercial matters to Brussels I. The Convention is open to the EU and EFTA States, and any other States that are invited by the participating states to join. This could provide an alternative route to guarantee recognition and enforcement of judgments to Brussels I. However, there are two specific issues that arise in this context: Brussels I was revised as to *lis alibi pendens* and recognition and enforcement; and the Lugano Convention will need to be ratified by all the parties to it.

The UK Government was strongly behind the amendments when Brussels I was being revised. Therefore, the view of practitioners is that, if access to the Brussels I recast Regulation is not possible and instead the UK will choose the Lugano Convention framework, the UK should aim to include the Brussels I amendments in the Lugano Convention.

Choice of Court Agreements Convention

An important convention that the UK should consider ratifying is the 2005 Choice of Court Agreements Convention on Civil and Commercial Matters. This Convention has been ratified by the EU (2015), Mexico (2007) and Singapore (2016). The UK is therefore already a party to this convention as an EU Member State.

As a point of priority, it should be ensured that the UK will accede to the Convention, as seamlessly as possible, as the UK withdraws from the EU membership. Usually it takes three months for the ratification to enter into force. If the UK were to deposit the ratification document only at the withdrawal, it could lead to a three month period when the Convention does not applied, which again would create a wealth of uncertainty that should be avoided.

Limits of the Choice of Court Agreements Convention

The Convention provides that it applies only to those choice of jurisdiction agreements which have been concluded after its entry into force. Without a transitional arrangement with EU then, this may create a gap whereby judgments reached by UK courts on the basis of agreements concluded before the entry into force of the Convention, but after the withdrawal from the EU membership, cannot be enforced.

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

Service of Documents and Taking of Evidence: Differences between EU Regulations and the Hague Conventions

Additionally, it is important to ensure that courts can continue to obtain documents and evidence from other EU jurisdictions. The agreement on the new EU-UK relationship could also include the Service of Documents and Taking of Evidence Regulations as they support the aims of the recognition and enforcement of judgments and speedy and efficient dispute settlement mechanisms.

The Hague Conference has previously adopted Conventions on the service of documents and the taking of evidence, to which the UK is already a party. Generally these Conventions have been widely ratified by the EU Member States.

Practitioners involved in the processes of serving documents and taking evidence have however highlighted that the procedures under the Conventions are more cumbersome and slower than those under the EU Regulations. This means that the proceedings are less expeditious and more costly for the parties involved.

Recognition and Enforcement of Judgments in Special Cases

As made clear above, the Hague Conference Conventions do not cover as wide a scope as Brussels I and the Lugano Convention. In particular, the latter applies also to protect the weaker parties in insurance, employment or consumer contracts, ensuring that defendants can only be sued only in their place of residence or domicile. Therefore, the Hague Conventions would not protect weaker parties domiciled or located in the UK, even if the Hague judgments project comes to fruition in the not too distant future. Accordingly, the loss of these frameworks needs to be carefully analysed.

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The priorities of the legal sector in the UK's negotiating objectives for withdrawal from the EU in the field of consumer law

EU consumer law provides a framework for a wide range of UK consumer rights, covering food and product safety, unfair commercial practices, consumer information, such as product labelling and packaging, and consumer redress.

The majority of UK consumer legislation derives from the EU and is implemented into the UK regulatory framework through either primary or secondary legislation, like other EU legislation.

Due to the nature of the single market and an increase in e-commerce, European consumers are now accustomed to buying products from across the EU and to travel for business and pleasure. The main uncertainties deriving from the UK's proposed withdrawal from the EU for consumers are therefore situations surrounding travel abroad and EU cross-border transactions.

Cross-border consumer transactions

Contracts governed by the consumer's home country law

The Rome I Regulation (Rome I) establishes that a contract between a business and a consumer is to be governed by the law of the country where the consumer lives on the condition that the business operates or undertakes marketing (including online marketing) in the consumer's country. This allows the consumer to be protected by the rights of their home state, which they are likely to be more familiar with.

Ideally, the UK would continue to take part in Rome I in the event of a withdrawal from the EU. If this is not possible, the UK should maintain the rules established by Rome I, in which case the UK government should immediately make it clear that they will apply the rules set out in Rome I by converting them into domestic law.

Recognition and enforcement in consumer issues

The Brussels I Regulation (Brussels I) sets out a uniform system under which civil and commercial judgments are recognised and enforced throughout the EU area.

Brussels I normally allocates jurisdiction for the courts of the state where the defendant is domiciled. It provides for an exception for consumers, where they are able sue others or defend themselves in their home court. This reversal of the normal jurisdiction rule allows the consumer under certain circumstances to have the case brought in their home court, which makes it easier for them to bring a case and feel familiar with the process. The same weaker party protection applies in case of insurance contracts, which is another advantage for consumers in insurance contracts.

The UK should negotiate continued participation in the Brussels I framework as there is a need for reciprocity between the UK and EU member states as, where the framework does not apply, consumers face the challenge of jurisdiction of choice clauses within standard terms and conditions, which mean that they are unable to have their case heard in the court that is familiar to them. UK consumers would therefore find themselves at a consistent disadvantage if the framework were to not apply, and vice versa EU consumers who buy in UK.

Some specific cases

Recognition and enforcement in motor traffic accidents

The combination of Brussels I and the Motor Insurance Directive allows UK and EU nationals who are victims of car accidents to use their home courts to pursue insurance claims after accidents occurring in another Member States. This right is particularly important where the accidents involve personal injuries or fatalities.

Passenger Rights

EU legislation on passenger rights sets a harmonised minimum level of protection irrespective of the mode of transport used. For example, under EU law, passengers can claim compensation for certain flight, train and coach delays that occur within the EU and are between EU and non-EU airports and terminals.

Roaming

The EU roaming rules have reduced the cost of making and receiving calls abroad within the EU and roaming charges are due to be phased out after June 2017. The advantages for UK consumers of remaining part of this system is therefore evident and we would recommend that the UK negotiates continued participation in these mechanisms.

Mutual recognition of product standards

Depending on the UK's future relationship with the EU on the trade of goods, there will likely be a need for the UK and the EU to have a Mutual Recognition Agreement (MRA) which provides for mutual recognition of product standards.

Even if the UK will still be applying European standards to its products, it will not have the automatic recognition of these standards, particularly where the UK has imported goods from outside the EU with the aim of exporting them to the EU; the same will apply to EU businesses wanting to export to the UK.

There will likely need to be bilateral agreements laying down the conditions under which the UK will accept conformity assessment results (e.g. testing or certification) from the EU and vice-versa.

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The priorities of the legal sector in the UK's negotiating objectives for withdrawal from the EU in the field of criminal justice

The UK is considered by many to have been one of the leading states in shaping early EU policy in the area of criminal justice and policing. The UK Law Societies have historically supported the EU's efforts to improve access to justice in a criminal context, particularly in relation to measures aimed at improving the rights of accused persons. Similarly, many of the EU mechanisms for cooperation in policing have provided benefits in terms of facilitating investigations, sharing information, and ensuring that processes - for example in terms of extradition - function more efficiently.

The review into EU criminal measures in 2014, which the Law Societies contributed to, means that the UK has recently reviewed which measures are important to ensure we have mutual co-operation in criminal justice and security and has streamlined our involvement in these matters. It would be a shame for all concerned to lose mutual trust and cooperation in fields which are of great importance for the security and well-being of citizens; crime and terrorism don't stop at borders.

Any reduction in the level of access and cooperation the UK enjoys in the criminal justice field would impair and delay effective law enforcement. Information needs to be exchanged swiftly and cross-border investigatory teams need to be established in order to have effective cross-border action. The relationships between European police forces have developed over time to achieve mutual trust and cooperation, which has been assisted by joint initiatives introduced by the EU. This level of trust towards the UK will be difficult to maintain if the UK does not co-operate with cross border mechanisms and agencies; this would be a disadvantage also for the rest of the EU, which benefits by the considerable experience and professionalism of the UK police forces.
Involvement in all of these measures will mean the UK will also have to consider safeguards for personal data which will need to be negotiated.

Coordinating criminal prosecutions and court proceedings

The UK's membership of Eurojust allows us to benefit from the co-ordinated work of joint investigation teams across Member States which facilitate the prosecution of serious cross-border criminal offences, such as terrorism and child trafficking offences.

There is precedent for non-Member States to have a relationship with Eurojust. Whilst Norway is not an associate member of Eurojust, it signed a co-operation agreement with the organisation in 2005 and has liaison prosecutors based at Eurojust. If the UK moves from national college members to liaison officers though it is likely to lose influence on the work of the organisation. The USA has also signed a co-operation agreement.

Co-operation through the sharing of information

The UK currently participates in the Schengen Information System II (SISII), the European-wide IT system to facilitate cooperation for law enforcement including persons wanted for extradition, missing persons and witnesses.

Co-operation of joint security operations

Europol focuses on intelligence analysis to support the operations of national law enforcement agencies in Member States, allowing them to work together to combat serious crime. Norway has a co-operation agreement with the EU which centres on exchange of operational information but can also include Europol activities such as exchange of strategic intelligence and specialist knowledge of participation in training.

The Law Societies welcome the recent Government commitment to adopt the Europol opt-in by May 2017, and recommend that the UK continues its involvement in Europol as a member or through a co-operation agreement.

European Arrest Warrant (EAW)

The EAW sets out a court-led process whereby the surrender request from one member state's courts or prosecutors is almost automatically recognised and enforced. The EAW is more efficient than traditional extradition requests which are usually dealt with by the diplomatic services.

The EAW is particularly important as the UK may not be able to fall back on previous extradition arrangements, namely the 1957 Council of Europe Convention on Extradition (ECE). Some Member States would be unable to apply the ECE due to superseding legislation and others never brought it into force (e.g. Ireland in relation to the UK,) so bilateral arrangements would be required which are likely to be less efficient. Our members have noted that this could lead to extraditions taking years rather than months, as under the current system; this would also create a problem for EU countries.

The Law Societies believe the UK should look to retain the EAW which safeguards UK citizens and helps ensure that the interests of justice are served.

The UK would have to be involved in the CJEU's jurisdiction under the European Arrest Warrant in some manner in order to settle inter-state disputes. A possible option could be to negotiate to have CJEU judgments as influential but not binding.

European Investigation Order (EIO)

As from 22 May 2017, the EIO will replace most of the existing laws in the area of judicial cooperation. The new mechanism will cover almost all investigative measures, such as interviewing witnesses, and obtaining information or evidence already in the possession of the executing authority. The UK should seek to remain a party to this instrument, or negotiate equivalent mechanisms. Experience shows that extending such co-operation to non-EU states can take years to negotiate and can result in more limited forms of co-operation.

The priorities of the legal sector in the UK's negotiating objectives for withdrawal from the EU in the field of the UK's position in international conventions

The EU has concluded 1,139 bilateral and multilateral agreements with third parties on behalf of its Member States, including the UK, ranging from trade, development and sectoral economic issues like aviation, energy and fisheries, to matters related to visas, human rights, and the Common Foreign and Security Policy.

A few questions have arisen in relation to the UK's position (or possible position) upon withdrawal: whether it will be able to succeed to the agreements, or whether these international agreements would need to be renegotiated and ratified; and how the UK may want to amend its participation in the agreement and whether this could be achieved.

The Brussels Office of the UK Law Societies has explored the ways to ensure the continued application of these conventions, and how the UK can rescind or amend its international obligations, a brief summary of which is below.

It is necessary to examine the two different types of international agreements that have been ratified in the context of the EU:

- Agreements that have been ratified by the EU under its exclusive competence. An example of this is the Hague Choice of Court Agreements Convention, which has been ratified simply by the EU.
- Mixed agreements, which have been ratified by both the EU and its individual member states as the competence for these agreements is shared. An example of this type of international agreement is the Aarhus Convention.

Furthermore, there are different types of international agreements:

- Simple agreements, which set out the rights and obligations of the participating states. For example, in the area of trade, agreements will stipulate that the customs tariffs will not be applied to certain products or goods.
- Agreements that set up a separate bodies, for example the UPC Agreement, which aims to set up the Unitary Patent Court.
- Complex agreements that set out separate institutional frameworks, which require rules on participation, dispute settlement tribunal or mechanism, such as the WTO, which includes the rights and obligations derived from the WTO framework, but also rules on participation on the institutional arrangements.
- International multilateral and bilateral agreements

In sum, the UK should be able to continue to participate in any multilateral agreements by a simple notification where it does not need to renegotiate the content or the extent of the UK's participation such an agreement. The UK should have a corollary power to also withdraw from these agreements by notification.

For the reasons of legal certainty and clarity, it would be advisable that the UK approaches the institution or State responsible for the administration of the agreement to affirm its continuation or withdrawal. Similarly, this right to continue by a simple notification should be given in cases where the agreement is mixed, having already been ratified by the UK separately, and where the continued participation does not entail changes to the agreement or require reallocation of the UK's share in the maintenance of the legal framework. Should the UK wish to terminate these agreements, it can do so in accordance with the terms of the agreement itself.

Where renegotiation and possible re-ratification by all the parties concerned is required or where the UK would like to change the substance of agreements, such agreements would need to be changed as the UK would be participating separately. This applies, in particular, where there are institutional consequences from the UK becoming a separate party.

Multilateral Agreements: some examples of the simplified procedures

Accession to, or resigning from, participation in simple EU only agreements

As stated above, the Hague Conference Convention on Choice of Court Agreements is an EU-only Convention that allows for the recognition and enforcement of judgments where there is a choice of court agreement between the parties.

It could be argued that the UK should be able to accede to this convention by simply giving notification as the UK is already a member of the Hague Conference in its own right and therefore has the right to ratify the

Convention. Furthermore, there is no need or scope to make any changes to the text of the Convention or in relation to its participation in the Hague Conference.

The UK, should it wish, could alternatively establish a separate agreement or terminate the current agreement, in which case, the UK would need to declare its intention to withdraw from the agreement.

Mixed agreements

As stated above, an example of a mixed type of agreement is the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The Convention has been ratified by the EU and the UK, and upon the UK's withdrawal from the EU, the UK's participation in this Convention remains valid. The UK will merely need to ensure that it has implemented legislation so as to meet all its obligations under the Convention where these have previously been set out in EU law.

If the UK wishes to change the terms of its participation, announcement of its intentions to do so should be possible where the Convention provides for reservations that are open to the participating States. Similarly, withdrawal should be possible by notification, where the terms of the agreement allow it.

Where there is need to re-negotiate and ratify the new convention

In contrast to the previous scenarios, if there are any provisions in agreements that would need to be changed for the UK to enter as a separate contracting party, such agreements will need to be re-negotiated and ratified, regardless of whether the agreement is mixed or EU-only.

One example is the Unitary Patent Court Agreement. This is simply a convention agreed between Member States. If the UK wishes to continue its membership of the court, it would be necessary to renegotiate the entry of the UK to the agreement as it is not currently open to non-EU states. The new agreement would also need to include revised rules regarding the links between the Unitary Patent Court Agreement and the EU institutions, notably the jurisdiction of the Court of Justice of the European Union, and the link to the EU Unitary Patent Regulation.

The priorities of the legal sector in the UK's negotiating objectives for withdrawal from the EU in the field of Family Law

The European Union (EU) has a limited role in family law matters. Each individual member state has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters.

It is important to note that EU rules in the family law area generally build upon the international conventions which already exist. For example the Brussels II Regulation, Europe's most sweeping piece of family law regulation, builds upon the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.

If the UK were to leave the European Union, the applicable regime in cases would be the one provided for by the International Convention which regulates the matter concerned. If, for example, the matter concerned a divorce or legal separation then the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations would apply to allow the recognition of divorces and legal separations, which follow judicial or other proceedings, to be officially recognised in a contracting state and ensure its legal effect.

In cases where the UK is a signatory as a member of the European Union, rather than a country in its own right, like in the 2007 Hague Maintenance Convention, a mechanism of succession or accession should be envisaged early on, to avoid legal limbos which could be highly damaging to the welfare of British citizens, families and particularly children.

On the whole, the aim of EU intervention is to offer citizens of the member states legal certainty in cross border family law situations by:

- ensuring that decisions made in one country can be implemented in another
- trying to establish which country has jurisdiction to hear a particular case.

In this spirit, the continued participation of the UK into the Regulation (EC) n. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation should be encouraged, as the UK is not bound by the 2007 Hague protocol. The law currently applied to maintenance obligations in the English Courts is English law, but the mechanisms provided by the Maintenance Regulation make the recovery of maintenance easier, quicker and cheaper.

It is of particular importance that the preservation of the close collaboration between courts and national

welfare authorities afforded by the Brussels II bis Regulation in matters of children and jurisdiction; recognition and enforcement of children orders with the abolition of the exequatur; child protection and child abduction is maintained.

More specifically, the Brussels II Regulation has been successful in:

- Fixing the principle and the structure of a hierarchy of jurisdiction
- Giving opportunity to transfer cases if best for the child and best for the case.
- Providing a much improved automatic system of recognition of contact orders.
- Providing easier enforcement of children orders.
- Building on Hague on child abduction and strengthening the basic principles.

It is encouraging that the Government has decided to opt-in in the proposed revision of the Regulation and the Law Society Brussels Office proposes to engage fully in the process of revision, including on the matter of the matrimonial *lis pendens* rule, which can create an unhelpful "rush to court" in divorce proceedings.

The Law Society Brussels Office would also like to see a continuing participation of the UK in the Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters, referring specifically to any protection measure aimed at protecting victims of violence. In this context, the UK should consider ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

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

Commission vows to increase accountability in decision-making

On 14 February, the European Commission **proposed** amendments to the **Comitology Regulation**, in a bid to increase transparency and accountability in the procedures for implementation of EU legislation.

The Comitology Regulation sets out the procedure whereby the Commission can adopt acts to implement EU law. As part of this procedure, the Commission submits draft implementing acts to a Committee composed of representatives of each Member State, which then vote on the draft, either in favour or against, or which can abstain.

Where there is no qualified majority for or against a measure, the Commission can usually adopt the draft implementing act however, in certain specific policy areas, the Commission must refer the case to an Appeal Committee, also composed of Member State representatives. Each representative of the Appeal Committee can again vote in favour or against the draft or abstain from voting.

Where again there is a failure to reach a qualified majority for or against the measure, the Commission can choose whether or not to adopt the proposal.

During the period 2011- 2015, 36 out of the 40 cases submitted to the Appeal Committee had the ''no opinion' vote confirmed meaning that, because Member States could not decide, the Commission had to take decision of whether or not to implement measures in these often high profile and sensitive cases, a trend that Commission President Jean-Claude Juncker described as "**not right**". This was the case in particular with respect to the genetically modified organisms and glyphosate authorisations.

The Commission therefore released a proposed Regulation, under which only votes in favour or against an act are taken into account at the Appeal Committee stage, with the aim of reducing the use of abstentions and the number of situations where the Committee is unable to take a position.

The proposal also aims to involve national Ministers by allowing the Commission to make a second referral to the Appeal Committee at Ministerial level if national experts do not take a position, and enabling the Commission to refer the matter to the Council of Ministers for an opinion if the Appeal Committee is unable to take a position.

Finally, the proposal would increase voting transparency at the Appeal Committee level by making public the votes of Member State representatives.

The proposal will now go to the European Parliament and the Council for consideration.

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EU Cross Border Portability Deal Reached

On 7 February 2017 the European Parliament and The Malta, which acts on behalf of all 28 EU states in its role as the bloc's current holder of the rotating presidency, **reached an agreement** to let consumers access their online subscriptions for services like Netflix or Sky when they travel across the bloc.

The agreement means that subscriptions to online music, games, films and TV shows can be accessed by EU citizens whilst they are travelling abroad. Currently, EU Citizens visiting another EU country are prevented from accessing and using their online content services, even though they are subscribed to these services in their member state. This is due to cross-border portability restrictions as well as territorial and exclusive licensing practices.

The new rules will facilitate the removal of these restrictions for all new subscriptions and also retrospectively, for those purchased before the rules enter into force. EU citizens will therefore be able to access this online content while abroad on for studies, business or holiday.

Maltese Minister for the Economy Chris Cardona **said** "Europeans travelling within the EU will no longer be cut off from online services such as films, sporting broadcasts, music, e-books or games they have paid for back home."

The new rules will however only apply only to online fee-based services. Free-of-charge services will not be subject to the rules, but their providers will have the option of making them portable EU wide.

The agreed text must now be formally confirmed by the Council of the EU and the European Parliament. Once adopted, the rules will become applicable in all EU Member States by beginning of 2018 as the Regulation grants providers and right holders a 9 month period to prepare for the application of the new rules.

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Nationwide Anti-Virus for the United Kingdom

The National Cyber Security Centre (NCSC), part of intelligence agency GCHQ, is designed to improve Britain's resilience to attacks and act as an operational nerve centre. It started work in October 2016 as part of a governmental £1.9bn five-year strategy, but was officially **opened by Her Royal Highness**, Queen Victoria II on 14 February 2017.

The official opening of NCSC follows **reports** from Ciaran Martin, Chief Exec of NCSC, that Britain's security has been threatened by 188 high-level cyber attacks in the last three months, which the intelligence agency **classed** as Category Two or Three attacks.

The UK has not yet experienced a Category One attack which would be something akin to the theft of confidential details of millions of Americans from the Office of Personnel Management.
"We want to make the UK the hardest target," Mr Martin **said**. "We have had significant losses of personal data, significant intrusions by hostile state actors, significant reconnaissance against critical national infrastructure - and our job is to make sure we deal with it in the most effective way possible."

As well as protecting against and responding to high-end attacks on government and business, the NCSC also aims to protect the economy and wider society.

The UK is one of the most **digitally dependent economies**, with the **digital sector estimated to be worth over £118bn** per year. Not only then is there a concern that a cyber-attack on infrastructure that could shut down power plants, but also that there could be a loss of confidence in the digital economy from consumers and businesses, as a result of online criminals exploiting vulnerabilities.

In the past, UK cyber protection was largely situated within GCHQ in Cheltenham, which had come into constant **criticism** for being overly secretive, and so the NCSC aims to be more public facing and accessible.

The Security Centre will also protect a far wider range of sectors, rather than just government and national security-related industries, like defence, as well as working on a voluntary basis with political parties and giving advice to high-profile individuals on how to protect their sensitive data.

The NCSC is working on trial services to pro-actively discover vulnerabilities in public sector websites, help government departments better manage spoofing of their email, and take down tens of thousands of phishing sites affecting the UK.

Ciaran Martin has however warned that the Government will need help from all quarters to keep the UK safe, "Government cannot protect business and the general public from the risks of cyber-attack on its own. It has to be a team effort. It is only in this way that we can stay one step ahead of the scale and pace of the threat that we face."

The end of roaming charges in sight

Nearly 10 years after the European Commission first pledged to address overcharging in roaming prices, an agreement was struck between the Commission, the Council and the European Parliament to bring an end to this "market distortion" by the summer.

In 2007, the Commission brought in a "Eurotariff" to regulate the imposition of roaming charges within the EU, capping maximum prices for phone calls made and received while abroad, in a bid to **stop** "huge telephone bills ruining your holiday budget".

Indeed, not only are high roaming charges seen as an annoyance and a huge expense to consumers and businesses alike; they are also a barrier to the EU's four freedoms, dissuading organisations and individuals from travelling to and working in other member states, and therefore have "**no rational place** in a single market".

Accordingly, in September 2013, as part of its "Connected Continent" legislative **package**, the Commission released a proposal preventing operators from charging for incoming calls while a user is travelling abroad within the EU.

Negotiations on this package led to an **agreement** between the Commission, the Council and the Parliament in October 2015 to end roaming charges by 2017, the details of which were debated for nearly one and a half years until the agreement was reached on 1 February.

One particularly tricky moment for the negotiators came when, in September 2016, just days before the President of the Commission Jean-Claude Juncker's State of the Union speech, which was meant to unite the EU, the Commission announced a proposal to limit free roaming to 30 days at a time and a total of 90 days per year, prompting complaints from consumers and MEPs that the EU had failed to keep its promise to abolish charges and that it was setting the bar too low.

The Commission therefore quickly did a U-turn on this proposal in favour of a 'fair roaming' policy, under which consumers who have "stable links" to a country will be able to roam freely but those abusing the system, for instance someone who lives in Dublin and uses a cheap Latvian SIM card to call Berlin, would not.

After this to-ing and fro-ing, it came as a relief that the Commission, the Council and the Parliament came to an agreement on the matter during its trilogue discussions on 1 February, in which - contrary to the EU's aims to ensure that decision-making is as transparent as possible - representatives of each institution meet to conduct negotiations in private. The discussions apparently went on **long** past their proposed deadline of 10pm, with the representatives missing their dinner and Parliament's chief negotiator **Miapetra Kumpula-Natri** snacking on Haribo.

Under the agreement, voice calls will be capped at 3.2 cents per minute and SMS' at 1 cent, as of 15 June 2017, while a step by step reduction will be introduced over a 5-year period for data caps - a very important component given the exponential increase in data use in recent years - decreasing from €7.7 per GB (as of 15 June 2017) to €6 per GB (as of 1 January 2018), €4.5 per GB (as of 1 January 2019), €3.5 per GB (as of 1 January 2020), €3 per GB (as of 1 January 2021) and €2.5 per GB (as of 1 January 2022).

The agreement now goes to the Parliament and the Council for approval.

Two speed Europe?

The idea of a Two-Speed Europe, of a closely integrated core Europe surrounded by more loosely linked affiliate states, is not a new one, and indeed has been the topic of much debate amongst those within the Europe for some time. France and Germany **have called** for greater fiscal and social harmonisation in the Eurozone, saying other EU countries should be allowed to settle for a less integrated Union based on the single market.

Those ideas were originally codified in a paper on Eurozone governance, by the Presidents of the European Commission, the Council, the Eurogroup, the European Parliament and the European Central Bank and **presented in June 2015**. The process had however stalled amid reluctance from some member states and diverging views between Germany and France.

Now, as the EU begins to plan for life post-Brexit the idea of a two speed Europe has again reared its head.

Speaking on Friday 3 February 2016 at the EU summit in Malta, Angela Merkel **said** that European leaders may commit to a union of "different speeds" when they make a major declaration on its future at a summit in Rome March.

Other noted supporters of a two-speed Europe are Belgium's Guy Verhofstadt, who, **introduced a motion for a resolution** in Strasbourg this month calling for a two-speed EU led by the Eurozone, and Italian Prime Minister Paolo Gentiloni who **said recently** in London that greater integration was essential to respond to "the illusions of populism".

The idea is not popular with all countries however, as Poland's Kaczynski **warned** the EU this month. Speaking to Polish media, Mr Kaczynski said that a so-called two-speed Europe would lead to the "breakdown, and in fact the liquidation, of the European Union in its current sense".

The idea of a two speed Europe is generally not welcomed by the Visegrád group – comprising Czech Republic, Hungary, Poland and Slovakia - due to fears that the inner group would start to take unilateral decisions with a Continent-wide effect.

The revival of the idea may also yet affect Brexit negotiations, as the Union looks to deal with its own internal reforms as well as the soon-to-be departed member.

The European Commission President, Jean-Claude Juncker, worried that internal divisions could be exploited by the UK in the Brexit talks, is understood to be keen to minimise talk of a rift. He **said** on Sunday 12 February he still saw the Rome summit taking place on 25 March as largely celebratory and challenged advocates of a two-speed EU to be more precise about how it would function.

The EU's 27 leaders minus Britain are due to make a declaration at the summit in Rome in March marking the 60th anniversary of the EU, in which they will set out a post-Brexit roadmap. Whether this will involve a multi/two-speed Europe remains to be seen but what is certain is that the EU may need to negotiate how it wants to progress with its members, before being able to successfully negotiate how it wants to progress with the UK post-Brexit.

Since writing this Article, the Commission has released its **White Paper on the future of Europe** which we discuss in the Editorial. That White Paper sets out five scenarios for the future of Europe, and we have considered them in more detail **here**.

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Law Society of Scotland welcomes legal aid review

The Law Society of Scotland has welcomed the news that there will be an independent review of the legal aid system in Scotland.

President of the Law Society of Scotland, Eilidh Wiseman, commented that "access to justice for all is crucial to our collective social security and underpins the rule of law. It is vital that anyone, regardless of their financial means, can access the legal advice they need and have equal protection under the law".

The review is to be chaired by Martyn Evans, CEO of Carnegie Trust, and the review group will also include solicitors with strong experience of working legal aid, including Lindsey McPhie, a solicitor advocate and past president of the Glasgow Bar Association, and Jackie McRae, a SSSC registered social worker and solicitor accredited by the Law Society as a specialist in family law.

Piecemeal approach to employment tribunal reform is dangerous

The Law Society of England and Wales has responded to the Government's consultation conclusions, stating that reforms to employment tribunals that dilute the role of industry and trade unions in resolving workplace disputes are ill-considered.

President of the Law Society, Robert Bourns, said that the greatest concern is that employer and employee representative bodies have been side-lined from employment tribunals and their role in resolving industrial disputes has been diluted without proper consultation. Diluting the lay representation in this way will greatly diminish the breadth of experience that contributes to just and sustainable resolutions.

The Law Society's response to the employment tribunal reform consultation can be found **here**.

Ministry of Justice plans mean victims of negligent drivers won't get legal help

The Law Society of England and Wales has commented on plans outlined by the Ministry of Justice in its Prisons and Courts Bill that would see people who have suffered injuries in road traffic accidents denied access to justice.

The Government has confirmed that there will be an increase in the small claims limit for all road traffic injuries to £5,000. The Law Society has commented that the proposed change will deny motorists and their passengers the right to be able to recover the cost of essential legal advice for any injuries worth £5,000 and under when a negligent driver crashed into their car.

The Bill also restricts the increase in the small claims limit to £2,000 for personal injury cases other than road traffic claims, but the Law Society does not accept that the £5,000 limit for motoring claims is reasonable.

The Law Society has concerns that the Government is treating injuries that would be regarded as grievous bodily harm in the criminal courts as small claims and that people will be forced to bring claims themselves without expert legal advice for injuries including facial scarring, fractured ribs and whiplash to the neck which would all be considered as small claims.

Scottish pupils through to semi-finals of national debating tournament

Pupils from 16 schools across Scotland have made it into the semi-finals of the Law Society of Scotland's Donald Dewar Memorial Debating Tournament.

So far in the competition, the pupils have had to debate the advantages and disadvantages of banning referendums, and the cases for and against the use of performance enhancing drugs in professional sports. The semi-final will see the pupils presented with an unseen motion just an hour before the semi-final debates begin.

Heather McKendrick, Head of Careers and Outreach at the Law Society of Scotland, said that "No newspapers, computers or smartphones are allowed in that final hour, which in this age of 24 hour digital information, really challenges the pupils and tests their skills as debaters".

The semi-finals take place in March and will final will take place in the debating chamber of the Scottish Parliament on Thursday 8 June.

Specialist Accreditation Calling Regulatory Lawyers

The Law Society of Scotland has received an application to create a new specialist accreditation category for accreditation of "regulation and professional conduct", and are keen to establish interest from potential applicants in order to help guide the Society on whether the category should be created.

The proposal is that the category would cover the law applicable to the regulation of professional conduct and applicants would need to demonstrate an understanding of the tests for professional misconduct, and be able to demonstrate significant experience in working in this area.

The accreditation scheme is designed to offer recognition of solicitors who develop specialist knowledge during their careers, and the Law Society of Scotland currently offers accreditation in 28 areas of law. More information on the specialist accreditation and the current categories offers can be found **here**.

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Ministry of Defence must be accountable if it fails in its duty of care

The Law Society of England and Wales has criticised the MoD's attempt to limit circumstances in which it can be found negligent if it fails in its duty of care to servicemen and women.

The MoD wants to introduce legislation to redefine 'combat immunity' – a well-established principle that until now holds that no one should be held negligent for decisions made in the heat of battle.

The Law Society raised the following concerns in its response to the consultation:

- The proposed definition of 'combat immunity' is too broad, including situations that are far beyond or before the battlefield. This would prevent a wide range of negligence claims against the MoD from being heard in the justice system, even if inadequate training or equipment were to blame for injury or death; and
- The proposed compulsory in-house compensation scheme lacks the transparency and impartiality of our courts.

The MoD's consultation document "Better combat consultation" can be found **here**, and the Law Society's response can be found **here**.

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Planning and environmental legislation update – February 2017

The Law Society of England and Wales has published a roundup of notable recent policy developments, appointments, practice guidance and other changes. The update includes a variety of topics, including:

- The Government's housing white paper;
- Changes to the New Homes Bonus;
- Publication of the airports national policy statement;
- The Government's response to feedback from its consultation on improving the use of planning conditions; and
- A list of open consultations from the Planning and Environmental Law Committee.

The full update can be found **here**.

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Street Law schools project wins European Association award

Street law, the Law Society of Scotland's educational programme for school pupils in disadvantaged areas, has been named Best Training Initiative at the European Association Awards.

The European Association Awards recognise and reward European organisations for their exceptional achievements.

Street Law is an initiative where law students deliver workshops to students in disadvantaged areas so that they gain an understanding of how the law affects society, themselves, their family, and their friends. The project also encourages people who may not have previously considered a career in law to become involved.

Following a review of the profession which found that fewer than one in twelve LLB entrants came from a disadvantaged background, the scheme was piloted by the Law Society of Scotland in 2014 as a way of tackling the issue of fair and equal access to the profession. By the end of 2016, the project was being delivered to over 1,000 pupils in 46 schools across Scotland, and there are plans for further growth in the coming year.

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ONGOING CONSULTATIONS

Research
Public stakeholder consultation – Interim evaluation of Joint Undertakings operating under Horizon 2020
08.12.2016 – 10.03.2017

Trade
Consultation on options for a multilateral reform of investment dispute resolution
21.12.2016 – 15.03.2017

Justice
Open public consultation for the mid-term evaluation of the Fund for European Aid to the Most Deprived (FEAD)
03/02/2017 - 05/05/2017

Transport
Public consultation on a possible initiative at EU level in the field of passengers rights in multimodal transport
23.02.2017 - 25.05.2017

Amendment of the Combined Transport Directive
23.01.2017 – 23.04.2017

Revision of the Clean Vehicles Directive
19.12.2016 – 24.02.2017

Agriculture
Consultation on modernising and simplifying the common agricultural policy (CAP)
02.02.17 – 02.05.2017

Public health
Open Public Consultation on possible activities under a 'Commission Communication on a One Health Action Plan to support Member States in the fights against Antimicrobial Resistance (AMR)'
27.01.1207 to 28.04.2017

Social affairs
Public consultation on the European Solidarity Corps
06.02.2017 – 02.04.2017

Migration
Public Consultation for the mid-term evaluation of the Europe for Citizens programme 2014-2020
09.01.2017 – 10.04.2017

Capital markets Trade
Public consultation on the capital markets union mid-term review 2017
20.01.2017 - 17.03.2017

Consumer rights

Public Consultation on the rules on liability of the producer for damage caused by a defective product

10.01.2017 - 26.04.2017

Data protection

Public consultation on Building the European data economy

10.01.2017 - 26.04.2017

Security

Public consultation on the evaluation and review of the European Union Agency for Network and Information Security (ENISA)

18.01.2017 - 12.04.2017

Taxation

Public Consultation on the special scheme for small enterprises under the VAT Directive

20.12.2016 - 20.03.2017

Public Consultation on the Definitive VAT system for Business to Business (B2B) intra-EU transactions on goods

20.12.2016 - 20.03.2017

Public Consultation on the reform of VAT rates

20.12.2016 - 20.03.2017

COMING INTO FORCE THIS MONTH

Public health

COMMISSION IMPLEMENTING DECISION (EU) 2017/253 of 13 February 2017 laying down procedures for the notification of alerts as part of the early warning and response system established in relation to serious cross-border threats to health and for the information exchange, consultation and coordination of responses to such threats pursuant to Decision No 1082/2013/EU of the European Parliament and of the Council

Immigration

COUNCIL IMPLEMENTING DECISION (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

Human rights

REGULATION (EU) 2016/2134 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 November 2016 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

Transport Agriculture

COMMISSION IMPLEMENTING DECISION (EU) 2016/209 of 12 February 2016 on a standardisation request to the European standardisation organisations as regards Intelligent Transport Systems (ITS) in urban areas in support of Directive 2010/40/EU of the European Parliament and of the Council on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport

Agriculture

COMMISSION IMPLEMENTING REGULATION (EU) 2015/220 of 3 February 2015 laying down rules for the application of Council Regulation (EC) No 1217/2009 setting up a network for the collection of accountancy data on the incomes and business operation of agricultural holdings in the European Union

CASE LAW CORNER

Decided cases

Family Law

Case C-283/16 - M.S v P.S

- Where a maintenance creditor has obtained an order in one Member State, and wishes to enforce it in another Member State, they may make an application directly to the competent authority in that Member State and cannot be required to submit the application the Central Authority of the Member State for enforcement.
- Member States are required to give full effect to the right laid down in Article 41(1) of Regulation No 4/2009 by amending, where appropriate, their rules of procedure. In any event, it is for the national court to apply Article 41(1), if necessary refusing to apply any conflicting provision of national law and, as a consequence, to allow a maintenance creditor to submit their application directly to the competent authority of the Member State of enforcement.

Consumer Law

Case C-568/15 - Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main e.V. v comtech GmbH

The concept of 'basic rate' referred to in Article 21 of Directive 2011/83/EU must be interpreted as meaning that call charges relating to a contract concluded with a trader to a telephone helpline operated by the trader may not exceed the cost of a call to a standard geographic landline or mobile telephone line. Provided that that limit is respected, the fact that the relevant trader makes or does not make a profit through that telephone helpline is irrelevant.

Employment Law

Case C-97/16 - José María Pérez Retamero v TNT Express Worldwide, S.L., Transportes Sapirod, S.L. and Fondo de Garantía Salarial (Fogasa)

The dispute in the main proceedings did not relate to a question about the organisation of working time, but to whether the person concerned must be classified as a mobile worker and therefore as an employed person for the purposes of the application of the domestic legislation. Accordingly, the dispute does not come within the scope of Directive 2002/15, and the concepts of that Directive therefore cannot apply to this dispute. The request for a preliminary ruling was therefore inadmissible.

Case C-406/15 - Petya Milkova v Agentsia za privatizatsia i sledprivatizatsionen control

- Article 7(2) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, read in the light of the United Nations Convention on the Rights of Persons with Disabilities, and in conjunction with the general principle of equal treatment enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, must be construed as allowing legislation of a Member State which confers on employees with certain disabilities specific advance protection in the event of dismissal, without conferring such protection on civil servants with the same disabilities, unless it has been established that there has been an infringement of the principle of equal treatment, that being a matter for the referring court to determine. When making that determination, the comparison of the situations must be based on an analysis focusing on all the relevant rules of national law governing the positions of employees with a particular disability, on the one hand, and the positions of civil servants with the same disability, on the other, having regard, in particular, to the purpose of the protection against dismissal at issue in the main proceedings.
- In the event that Article 7(2) of Directive 2000/78, read in the light of the United Nations Convention on the Rights of Persons with Disabilities and in conjunction with the general principle of equal treatment, precludes legislation of a Member State such as that at issue in the main proceedings, the obligation to comply with EU law would require that the scope of the national rules protecting employees with a particular disability should be extended, so that those protective rules also benefit civil servants with the same disability.

Freedom of Establishment

Case C-392/15 – Commission v Hungary

The Court declared that, by imposing a nationality requirement for access to the notarial profession, Hungary failed to fulfil its obligations under Article 49 TFEU.

Free movement of capital

Case C-317/15 – X v Staatssecretaris van Financiën

- Article 64(1) TFEU must be interpreted as applying to national legislation which imposes a strict restriction on the movements of capital, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, provision of financial services, or the admission of securities to capital markets.
- The opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.
- The possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the main proceedings, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.

Free movement of services

Case C-342/15 - Leopoldine Gertraud Piringer

- The second subparagraph of Article 1(1) of Council Directive 77/249/EEC must be interpreted as not applying to legislation of a Member State, such as that at issue in the main proceedings, under which authentication of signatures appended to the instruments necessary for the creation or transfer of rights to property is reserved to notaries, and as consequently excluding the possibility of recognising in that Member State such authentication carried out by a lawyer established in another Member State.
- Article 56 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which authentication of signatures appended to the instruments necessary for the creation or transfer of rights to property is reserved to notaries, and as consequently excluding the possibility of recognition in that Member State of such authentication carried out, in accordance with his or her national law, by a lawyer established in another Member State.

Immigration

Case C-560/14 – M v Minister for Justice and Equality, Ireland, and Attorney General

- Where national legislation provides for two separate and consecutive procedures for examining applications for refugee status and applications for subsidiary protection, the applicant is to have the right to an interview relating to his application and the right to call or cross-examine witnesses when that interview takes place.
- An interview must be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to examine that application with full knowledge of the facts. This is a matter for the referring court to establish.

Case C-638/16 - X, X v État belge

Article 1 of Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), as amended by Regulation (EU) No 610/2013, must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law.

Upcoming decisions and Advocate General opinions in March

Immigration

Case C-60/16 - Mohammad Khir Amayry v Migrationsverket opinion of Advocate General Bot

to be decided on 1 March

Questions referred by the Swedish court:

- If an asylum seeker is not in detention at the time when the Member State responsible agrees to take charge of him but is detained at a later date — on the ground that only then is the assessment made that there is a significant risk that the person will abscond — may the time limit of six weeks in Article 28(3) of Regulation No 604/2013 be calculated in such a situation from the day on which the person is detained or is it to be calculated from another time and if so, when?
- Does Article 28 of the regulation preclude, in a situation where an asylum seeker is not in detention at the time when the Member State responsible agrees to take charge of him, the application of national rules which, in Sweden, mean that an alien may not be kept in detention pending implementation [of a transfer] for longer than two months, if there are no serious reasons for detaining him for a longer period, and if there are such serious reasons, the alien may be kept in detention for a maximum of three months or, if it is probable that implementation will take longer due to a lack of cooperation from the alien or it takes time to obtain the necessary documents, a maximum of twelve months?
- If an implementation procedure is recommenced when an appeal or a review no longer has suspensive effect (c.f. Article 27(3)), does a new time limit of six weeks for implementation of the transfer start to run or is there a deduction to be made, for example, of the number of days the person has already spent in detention after the Member State responsible agreed to take charge of him or take him back?
- Is it of any importance whether the asylum seeker who appealed against a transfer decision has not himself applied for the implementation of the transfer decision to be suspended pending the result of the appeal (c.f. Article 27(3)(c) and (4))?

Case C-199/16 - État belge v Max-Manuel Nianga to be decided on 1 March

Question referred by the Belgian court:

Is Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and having regard to the right to be heard in any proceedings, which forms an integral part of respect for the rights of the defence, a general principle of EU law, as applied in the context of that directive, to be interpreted as requiring national authorities to take account of the best interests of the child, family life and the state of health of the third-country national concerned when issuing a return decision, referred to in Article 3(4) and Article 6(1) of the directive, or a removal decision, as provided for in Article 3(5) and Article 8 of the directive?

Case C-181/16 - Sadikou Gnandi v État belge to be decided on 1 March

Question referred by Belgian court:

Must Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, (1) which requires Member States to respect the principle of non-refoulement when they are implementing that directive, and the right to an effective remedy provided for under Article 13(1) of that directive and under Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding the adoption of a return decision, as provided for under Article 6 of the aforementioned Directive 2008/115/EC and under Article 52/3(1) of the Law of 15 December 1980 on entry to the national territory, settlement, residence and removal of foreign nationals and Article 75(2) of the Royal Decree of 8 October 1981 on entry to the national territory, residence, settlement and removal of foreign nationals, after the rejection of the asylum application by the Commissioner General for Refugees and Stateless Persons and therefore before the legal remedies available against that rejection decision can be exhausted and before the asylum procedure can be definitively concluded?

Case C-201/16 - Majid (or Madzhdi) Shiri to be decided on 14 March

Questions referred by the Austrian court

- Are the provisions of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection

lodged in one of the Member States by a third-country national or a stateless person that confer the right to an effective remedy against a transfer decision, in particular Article 27(1), to be interpreted as meaning that an applicant for asylum is entitled to claim that responsibility has been transferred to the requesting Member State on the ground that the six month transfer period has expired (Article 29(2) in conjunction with Article 29(1) of Regulation No 604/2013 in light of the 19th recital)?

If the answer to first question is in the affirmative

- Does the transfer of responsibility under the first sentence of Article 29(2) of Regulation No 604/2013 occur by the fact of the expiry of the transfer period without any order or, for responsibility to be transferred because the period has expired, is it also necessary that the obligation to take charge of, or to take back, the person concerned has been refused by the responsible Member State?

Employment law

Case C-98/15 – Espadas Recio opinion of Advocate General Sharpston to be decided on 16 March

Questions referred by the Spanish court

- Must Clause 4 of the Framework Agreement on part-time work, annexed to Directive 97/81/EC (1) concerning the Framework Agreement on part-time work, be interpreted as applying to a contributory unemployment benefit like that provided for in Article 210 of the Spanish Ley General de Seguridad Social, funded exclusively by the contributions paid by the employee and the undertakings having employed her, and based on the periods of employment in respect of which contributions were paid in the six years preceding unemployment?
- If yes, must Clause 4 of the Framework Agreement be interpreted as precluding a national provision which, in the case of 'vertical' part-time work (work carried out only three days a week), disregards, for the purposes of calculation of the duration of unemployment benefit, days not worked even though contributions were paid in respect of those days, with the resulting reduction in the duration of the benefit granted?
- Must the prohibition of direct and indirect discrimination on grounds of sex laid down in Article 4 of Directive 79/7 (2) be interpreted as prohibiting or precluding a national provision which, in the case of 'vertical' part-time work (work carried out only three days a week), excludes days not worked from the calculation of days in respect of which contributions have been paid, with the resulting reduction in the duration of unemployment benefit?

Case C-143/16 – Abercrombie & Fitch Italia opinion of Advocate General Bobek to be decided on 23 March

Question referred by Italian court

Is the rule of national law set out in Article 34 of Legislative Decree No 276 of 2003, according to which an on-call employment contract may, in any event, be concluded in respect of services provided by persons under 25 years of age, contrary to the principle of non-discrimination on grounds of age referred to in Directive 2000/78 (1) and Article 21(1) of the Charter of Fundamental Rights of the European Union?

Family law

Case C-175/16 - Hannele Hälvä, Sari Naukkarinen, Pirjo Paajanen, Satu Piik v SOS-Lapsikylä ry to be decided on 2 March

Question referred by Finnish court

Must Article 17(1) of Directive 2003/88/EC **(1)** of the European Parliament and of the Council concerning certain aspects of the organisation of working time be interpreted as including within its scope an activity, as described above, performed in a children's home in which the worker acts as the representative of foster parents of children in care on the parents' days off, lives during this period with the children in a family-like setting and during this time independently attends equally to the children's and family's needs, as parents generally do?

Company law

Case C-106/16 - Wykonawstwo sp. z o.o. to be decided on 6 March

Questions referred by Polish court:

- Do Articles 49 and 54 of the Treaty on the functioning of the European Union preclude the application by a Member State, in which a commercial company (public limited company) was initially incorporated, of provisions of national law which make removal from the commercial register conditional on the company being wound up after liquidation has been carried out, if the company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?
- If the answer to that question is in the negative: Can Articles 49 and 54 of the Treaty on the functioning of the European Union be interpreted as meaning that the requirement under national law that proceedings for the liquidation of the company be carried out — including the conclusion of current business, recovery of debts, fulfilment of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of those acts, and indication of the person to whom the books and documents are to be entrusted — which precede the winding-up thereof, which occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection in the form of safeguarding of creditors, minority shareholders, and employees of the migrant company?
- Must Articles 49 and 54 of the Treaty on the functioning of the European Union be interpreted as meaning that restrictions on the freedom of establishment include a situation in which — for the purpose of conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its place of principal establishment, which remains in the State of initial incorporation?

Environmental Law

Case C-196/16 - Comune di Corridonia v Provincia di Macerata, Provincia di Macerata Settore 10 –Ambiente to be decided on 8 March

Question referred by Italian court:

On a constructive interpretation of Article 191 TFEU and Article 2 of Directive 2011/92/EU, is it compatible with EU law to proceed with the verification of whether an environmental impact assessment needs to be undertaken (and possibly thereafter to carry out an environmental impact assessment) after the construction of the plant where the consent has been annulled by the national court due to a failure to verify whether the environmental impact assessment was needed, because such a verification had been excluded on the basis of a national law which was contrary to EU law?

Criminal law

Case C-171/16 - Trayan Beshkov to be decided on 8 March

Questions referred by Bulgarian court:

- How must the expression 'new criminal proceedings' used in Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings be interpreted, and must that expression necessarily be connected with a finding of guilt in respect of an offence committed or can it also relate to proceedings in which, under the national law of the second Member State, the penalty imposed in an earlier judgment must absorb another sanction or be included in it or must be enforced separately?
- Must Article 3(1), read in conjunction with recital 13, of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings be interpreted as permitting national rules which provide that proceedings in which an earlier judgment delivered in another Member State must be taken into account may not be initiated by the sentenced person but only by the Member State in which the earlier judgment was delivered or by the Member State in which the new criminal proceedings are taking place?
- Must Article 3(3) of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings be interpreted as meaning that the Member State in which the new criminal proceedings are taking place may not change the manner of execution of the penalty imposed by the Member State which issued the earlier

sentence, including in the event that, under the national law of the second Member State, the penalty imposed by the earlier judgment must absorb another sanction or be included in it or must be enforced separately?

Social Policy

Case C-190/16 – Fries opinion of Advocate General Bobek to be decided on 21 March

Questions referred by German court

- Is FCL.065(b) in Annex I to Regulation (EU) No 1178/2011 (1) compatible with the prohibition of discrimination on grounds of age under Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter')?
- Is FCL.065(b) in Annex I to Regulation (EU) No 1178/2011 compatible with Article 15(1) of the Charter, according to which everyone has the right to engage in work and to pursue a freely chosen or accepted occupation?

If the first and second questions are answered in the affirmative

- Are so-called ferry flights operated by an air carrier transporting no passengers and no cargo or mail also covered by the term 'commercial air transport' within the meaning of FCL.065(b) or the definition of that term in FCL.010 in Annex I to Regulation (EU) No 1178/2011?
- Are training and the conducting of exams in which a pilot over the age of 65 remains in the cockpit of the aircraft as a non-flying crew member covered by the term 'commercial air transport' within the meaning of FCL.065(b) or the definition of that term in FCL.010 in Annex I to Regulation (EU) No 1178/2011?

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Editorial Team

Helena Raulus
Head of the Brussels Office Ad Interim
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
Stuart Brown
Trainee Solicitor
stuart.brown@lawsociety.org.uk
Madeleine Lamond
Trainee Solicitor
madeleine.lamond @lawsociety.org.uk
David Harry
Trainee Solicitor
david.harry@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**