The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

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The Law Societies' monthly publication with the latest EU news

Editorial

We at the Brussels office are notoriously up to date with current affairs and always have our ear to the ground. That's why we can report, in an exclusive scoop for the Brussels Agenda, that there are apparently rumours of a possible British exit from the European Union.

We have decided to call this potential event, inspired by the now long-forgotten danger of a Greek exit, 'Brexit'.

What does Brexit mean in practical terms? No one knows. When would it happen? No one knows for sure. What is the likelihood of it happening? It's hard to say.

To do some much-needed light-shedding, we have brought in a number of eminent external contributors in the hopes that they will bring forth their knowledge and flex it ('flexit').

The President of the Law Society of England and Wales, Jonathan Smithers, opens this edition with his 'Viewpoint' based on the Law Society's 'The EU and the Legal Sector' report, ably flanked by 'In Focus' articles from Philip Wood CBE QC of Allen & Overy, and Darren Jones of the Young Lawyers Network. We also have a summary of the Institute for International and European Affairs' report ('Brexit: Legally Effective Alternatives') as well as staff contributions.

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

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

Jonathan Smithers

The EU and the Legal Sector

Earlier this month I was in Vienna for the European Presidents Conference. This gathering of European bar presidents dates back to the 1950s and was for a long time the only forum where Eastern and Western European lawyers could meet. Those interested in law, policy and politics will have been following the Brexit debate and will have seen European Council President Donald Tusk's letter which was published on 2 February. We expect that a referendum date will therefore be set in the not-too-distant future.

In light of all of this, it seems the ideal time and place to reflect on the UK's relationship with the EU and in particular what this means for the UK lawyers who are currently also EU citizens, and UK law firms which are also EU entities. As president of the Law Society of England and Wales I speak from the UK perspective but the mutual recognition and reciprocal nature of the EU framework means that for every change to the members of this Society, and those of the Law Societies of Scotland and Northern Ireland, there is a flipside which would also mean changes for our European colleagues.

Any change to the existing relationship would have significance for lawyers as legal services providers and for the legal rules and rights which many members of the Law Society deal with on a daily basis. This was the topic of a bespoke report on **The EU and the Legal Sector** which we published last October. The report looked at the UK's relationship with the rest of the EU and how a change in this relationship might affect both the business of law and the substantive law applied in particular areas of practice. We also looked at alternative models for engagement such as "being Norway" or "being Switzerland" and what those would mean.

The EU's Internal Market is built on the principle of freedom of movement. Because of the unique nature of legal services, the EU has drawn up a specific set of lawyers Directives, aimed at facilitating the free movement of lawyers and legal services while safeguarding the interests of clients. A number of members have identified these Directives and their forerunners as a key enabling factor in the expansion of UK firms throughout the Internal Market. This in turn, created a broad platform for expansion at a global level.

But the system is not just about law firms; it also provides opportunities for individual lawyers to work in other EU countries. Reciprocity means that our EU counterparts can also come here. In particular, City firms report the recruitment opportunities this provides in allowing them to attract talent, both pre- and post-qualification. This can help bolster their cross-border legal services offering. Free movement of services also allows clients based in one EU Member State to instruct lawyers in another so UK lawyers can provide advice to clients from Amsterdam to Zagreb.

Of course a number of our members have a more domestic focus and the legal services Directives and rights pertaining to the principle of free movement of services and workers do not have such an immediate effect on their professional lives. Nonetheless, EU law may still be highly relevant in terms of advising clients. Our report also looks at how the EU legal framework interacts with our own legal system. Lawyers who are not providing cross-border services themselves may well act for clients who are themselves looking to trade goods or provide services across EU borders, so Internal Market rules come into play once more.

Furthermore, in specific areas of law - financial services regulation, intellectual property, family, and environment, to name but a few – EU law has a direct effect on the rules and regulations lawyers are dealing with. The EU legal framework has been built around considerations of access to justice in both civil and criminal cases with a cross-border dimension. These are broken down for examination in the report which provides an overview and analysis of key mechanisms and pieces of legislation which give our EU legal system its particular characteristics.

I have been interested to see from the report the ways in which a change in the existing relationship might affect fellow practitioners in areas with which I am less familiar. As a UK citizen, and therefore an EU citizen, I have also learned a little more about what the UK's relationship means for me as an individual.

I very much hope that you enjoy reading the report. I very much hope that you enjoy reading the report.

Biography

Jonathan Smithers is President of the Law Society of England and Wales, and is a Senior Partner at CooperBurnett LLP. He has been involved in local law societies for over 25 years. He is the immediate past Chair of the Conveyancing and Land Law Committee, and was instrumental in setting up the Conveyancing Quality Scheme

BREXIT

A Lawyer's View on Brexit

The Allen & Overy Global Law Intelligence Unit has published a paper dated 5 February 2016 called "*A lawyers' view on Brexit*". The Intelligence Unit is an in-house think-tank at the firm which expresses independent views that are not necessarily the views of the firm. The paper maintains that the legal angle is relevant because the issues on Brexit are ultimately expressed through the law and because the law is considered the most important ideology underpinning our societies.

The author, Philip R Wood CBE QC, maintains that although societies may decide that they can do without other ideologies, such as their religions or their philosophies of life, there is no question that societies cannot do without law. The law is the one universal ideology which practically everybody believes in and which is fundamental to our survival and prosperity.

The paper covers contingency planning for businesses and suggests that for most firms it would often be risky to take specific action before a referendum because of the uncertainty of the result and the uncertainty of what a post-Brexit regime would look like. Of course firms may need to take positions as regards their market investments and currencies.

It follows with a primer on the essential features of the EU, such as statistics on the member countries, how EU laws are made, national sovereignty in the EU (concluding that the transfer of sovereignty is much smaller than is commonly thought) and what the EU spends its funding on as set out in a typical budget. About 6% of the typical budget of around €150bn is spent on administration, nearly 40% on agricultural support, and about 40% on development of less developed regions so that all the other activities of the EU – from the Galileo satellite to humanitarian aid - absorb a quite modest amount.

There is a short comparison of the EU with the US and China which debates why the 312 million people in the US and the 1400 million people in China can develop a national identity but the 500 million people in the EU seem to owe their identity mainly to their own nations.

The survey provides a summary of the pros and cons of Brexit as articulated by the opposing groups of those who want to leave and those who want to stay.

Those who favour the departure of Britain from the EU are sceptical of claims about the economic benefits of free trade in goods and services, object to what they see as a wasteful agricultural policy, think that the EU costs too much and wastes too much, oppose the burden of EU regulation, insist that Britain should be able to make all its own decisions, and want to control immigration from EU Member States.

Those who favour the maintenance of Britain's membership of the EU base their arguments on the economic importance of the free trade in goods and banking, insurance and other services and the free movement of people. They say that Britain would not be able to participate in the development of EU policies, such as product standards, passporting rules for businesses or regulation, and yet would still be subject to them in order to carry on business in Europe.

They refer to the potential loss of skills by not being able to hire across Europe and the erection of barriers not just to trade but also to activities as various as capital markets and students, scientific research and security. They stress the adverse impact on the City by Brexit and fear political splintering and fracturing (e.g. Scotland) and greater impetus towards a potential EU breakup, which could make things even worse for the UK.

They allude to the possible impact on UK finances from prolonged uncertainty, from the unravelling and cutting of the ropes, and draw attention to the possibility of lost investment (which moves to Continental Europe), of an increase in the current account trade deficit, and of a need for excessive borrowing to shore up UK finances. They fear that the UK may dwindle when it should be a potent financial power.

They also believe that Britain might be more exposed to security threats, lose a great deal of its influence in a world where crucial decisions are taken by Beijing, Brussels, Washington and Moscow but not London, and that the UK might become marginalised, isolated and ignored at a time when the UK should be strong and at the centre of affairs; a leader not an onlooker.

A further area of focus is the impact on free trade in goods, on banking, insurance and other services, including London as a financial centre, on employment, professions and immigration and concludes that the impact of Brexit could be prejudicial to the UK. The paper covers how we got here on EU law and regulation. There are some 30-40 areas of law and regulation in the EU which are briefly summarised so as to provide a bird's eye view. It is generally considered that the UK might well adopt large parts of the existing corpus of EU regulation, (e.g. in the fields of financial services, competition law, environmental law, data protection, public health and safety, and employee and consumer protection). It points out that regulation is not just a Brussels phenomenon. Hence the UK on Brexit might leave the EU but not leave its regulations.

The paper also comments on defence and security, the Eurozone and the common currency and what a transition after Brexit would involve. It is considered that the transition could easily take between two and five years. This transition would involve negotiation of mutual reciprocity treaties with the EU on such matters as court jurisdiction and judgment recognition, of current EU free trade agreements, the assumption of any support for farmers and aid to less-developed regions of the UK and a massive programme of transposition of

the acceptable portions of EU law into UK law – probably, a highly political process. In the meantime there might be considerable uncertainties.

The paper expresses the view that Brexit could have an adverse effect on law firms in Britain.

The paper is available **here**.

Philip R. Wood, CBE, QC (Hon) *is the Head of Allen & Overy Global Law Intelligence Unit's. He is also Visiting Professor in International Financial Law, University of Oxford, a Yorke Distinguished Visiting Fellow at the University of Cambridge, and a Visiting Professor at Queen Mary College (University of London). He is the author of The Fall of the Priests and the Rise of the Lawyers (Bloomsbury/Hart 2016).*

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Young lawyers *"unwilling to stand by and do nothing"* in preparation for the EU Referendum

It's the morning after the night before.

Britain has voted to leave the European Union.

Some will cheer. I will not.

In an ever unstable world - with heightened military tensions, the rise of terrorism, the effects of climate change, a changing jobs market and ever sensitive global markets - our retreat into a small, island nation disconnected from the wider world is a move backwards and not forwards. It's a threat to our economic security, our national security and the security of a pipeline of future opportunities for British business and the British people.

Europe may not be perfect. It needs to reform. But a strong, outward facing Britain at the heart of reform puts us in a stronger position to define our own future. Being on the fringes will make us a recipient of change as opposed to the change-makers we deserve to be.

That's why I, along with hundreds of other lawyers from across the country, have come together to campaign to keep Britain as part of the European Union. We do so in a personal capacity and we do so with the belief that, but for our contribution, the morning after the night before may be based on an outcome we all dread. We are unwilling to stand by and do nothing.

As part of a wider Lawyers' Network, I chair a national Young Lawyers' Network. Young people especially have benefited from membership of the European Union and we seek to benefit from our collective future - be it educational or travel opportunities, or the shared benefits of a single digital market and a collective response to climate change.

With only a matter of months until the likely polling day, we have to grow our network rapidly. If you're a law student, trainee or pupil, or solicitor or barrister self-defining as 'young' please join us. You can do so by joining our LinkedIn group **here**.

Darren Jones is the National Chair of the Young Lawyers' Network campaigning to keep Britain as a part of the European Union. He is a Technology Solicitor at Bond Dickinson LLP and he tweets at @TechLawyerJones.

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Brexit: Legally Effective Alternatives - a Summary

This article is a summary of 'Brexit: Legally Effective Alternatives' by Paul Gallagher of the Institute of International and Economic Affairs, an independent, not-for-profit organisation with charitable status based in Ireland. The report is available, free of charge, ***here****.*

What legal routes and options can the UK rely on when asserting its demands in the current renegotiation?

The legal entitlement of Britain to withdraw is not an issue (see Article 50 TEU), but the terms of that withdrawal are and these are what create legal uncertainty (e.g. over access to the single market) in the event of withdrawal. Further, with regard to the British demand for concessions it may be that some of the concessions demanded would require a Treaty change. Due to a lack of political will it would not be possible to implement Treaty change by the time of the referendum, although it would be legally possible to do so using Article 48 TEU.

That said there is flexibility in the Treaties themselves, so an amendment may not be necessary, at least in respect of the majority of British demands. In respect of demands which could be satisfied by a clarification (as opposed to an alteration) of the EU Treaties, a Decision of the Heads of State or Government can provide legal guarantees as to the legal effect of the Treaties. This method was used after the 2008 Irish referendum, which initially rejected the Lisbon Treaty. Subsequently, the guarantees embodied in the Decision were attached to the Treaties in the form of a legally binding Protocol, which was ratified at the same time as the next Accession Treaty. The Protocol confirmed that matters of concern to the Irish People were unaffected by the entry into force of the Lisbon Treaty. The guarantees were worded in general terms, applied to all Member States, and clearly stated that the Protocol would clarify but not change either the content or the application of the Treaty.

Even without a subsequent Protocol, guarantees embodied in a free-standing decision of the Heads of State or

Government binding in international law are legally secure. They would be irreversible without unanimity and could not be ignored by the CJEU. Guarantees cannot, however, be used to amend or enlarge the Treaties.

Specific British Demands

Economic Governance

A key demand of the UK Conservative Government is for no discrimination or disadvantage against any business on the basis of the currency of the country in which they are based, and recognition that the EU is multi-currency. The House of Commons European Scrutiny Committee ('the Committee') has expressed the view that this would require the legal certainty of a Treaty change. However, the recognition of multiple EU currencies is already explicitly acknowledged in the Treaties (see Article 140 TFEU and the UK Protocol).

Furthermore, non-discrimination is a fundamental principle of the Treaties and is enshrined in Article 21 of the Charter of Fundamental Rights and Freedoms.

While a more direct decision-making role in Eurozone matters could well require a Treaty change, it is not clear that this is what the UK is demanding.

Competitiveness

On the issue of cutting 'red tape', the UK and the Commission share a common interest. The Committee believes that this can be achieved through secondary legislation.

Further assurances could be given by an endorsement from the European Parliament, or if absolutely necessary a Heads of State or Protocol guarantee.

Sovereignty

The concept of "*ever closer union*" is provided for in Article 1 TEU, though the original emphasis is on union between the "*Peoples of Europe*", not Member States.

The UK is concerned however that the CJEU will interpret this concept broadly. Although the words do not create any legal right or obligation the Court has used the concept as an interpretative tool of last resort (as in *Pupino*). The concept has been referred to very infrequently in rulings (less than 60 occasions out of over 3,000 rulings and opinions).

Again, a guarantee could be provided clarifying that the concept does not embody a commitment by Member States to further integration. Such a guarantee would not require Treaty change - though this depends on achieving agreement on the meaning of the concept. The European Council's June 2014 Conclusions provide some guidance: "*the concept of ever closer union allows for different paths of integration for different countries allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen it any further*."

Further assurance would come through the UK's 'red card' demand - that groups of national parliaments could block unwanted legislative proposals. This would require an amendment to Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality - although a less robust option could be strengthening the subsidiarity reasoned opinion procedure included in that Protocol.

Immigration

Amongst other demands, the UK asks for a total ban on sending child benefit overseas, and a four-year delay before those coming to the UK from the EU qualify for in-work benefits or social housing. This potentially raises very fundamental Treaties issues.

Free movement and the social security rights required to make it meaningful are core EU values. The EU has broad-ranging Treaty powers to adopt measures in the field of social security in order to facilitate this principle (see Article 21(3), Article 153(1)(c), Article 48 and Article 79(1) TFEU, Article 34 of the Charter, and Regulations 883/2004 and 987/2009).

The scope for addressing Britain's demands is limited because it will not be possible to alter these provisions and principles without Treaty amendment. Secondary legislation can be used to alter social security rights, which are not mandated by Treaty obligations, provided the alterations comply with the general principles of EU law.

That said, the elements of this British demand that focus on fraud and abuse of the system could easily be addressed through secondary legislation. Two recent CJEU judgments, *Dano* and *Alimanovic*, also indicate the Court's willingness to tackle this angle.

Conclusion

The British demands pose considerable legal problems if they are to be accommodated, but legal structures exist which can provide the necessary legal protection if political agreement can be obtained. It would assist if the concessions can be framed in general terms so as to apply them to all Member States.

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Do you feel lucky, Tusk? Brexit renegotiations continue

In our December 2015 edition of the Brussels Agenda, we included an article about the British Government's renegotiation demands regarding Britain's membership in the EU.

The demands covered four key areas: guarantees of the rights of non-Eurozone members; the reduction of excessive regulation; migration (in particular access to benefits); and a British opt out from the 'ever closer Union'.

Since then, one major **development** is that Donald Tusk, President of the European Council, will announce further "*concrete proposals*" for discussion at the Council's summit on 18-19 February - proposals that

presumably will follow on from his letter of 2 February.

That **letter** outlined what might amount to a provisional **deal** between Mr Cameron and Mr Tusk:

- Eurozone - "*necessary reassurances*" on the concerns of non-eurozone countries, but these "*cannot constitute a veto or delay urgent decisions*" on eurozone policies. Mr Tusk's letter states that British taxpayers' money can never be liable to support the eurozone.
- Regulation - a common ground for the Commission and many of the EU's Member States, the letter says that the EU and its members "*will make all efforts to strengthen the internal market and to adapt it to keep pace with the changing environment*", boosting competitiveness, and that the EU "*will regularly assess progress in simplifying legislation and reducing burden on business so that red tape is cut*".
- Migration - an 'emergency brake' on in-work benefits for non-UK EU citizens for up to four years if there is exceptional pressure on a particular Member State. This break would be 'graduated' and would have to be approved by the Council. There will also be limits on the "*export of child benefits*".
- Union v Sovereignty - The proposed deal states that the "*ever-closer union*" is "*not an equivalent to the objective of political integration*" and that the UK has a "*special situation*". A 'red-card' system is proposed, which would allow a group of national parliaments making up more than 55% of votes on the Council to be able to veto EU legislation. The document also contains a strong commitment to the principle of subsidiarity.

The deal has (**along** with Mr Cameron) come under **criticism** in the British media and amongst some Eurosceptic MPs, but was **welcomed** by Commission President Jean Claude Juncker and some formerly sceptical members of Mr Cameron's party.

The head of the Commission's Brexit taskforce, Jonathan Faull, has expressed **hopes** that February's meeting will be "*a decisive one*". UK Prime Minister David Cameron has **stated** that substance, rather than timing, is important.

However, a **growing** number of voices are sceptical of a February deal for several reasons (**demonstrated** by the recent renegotiation 'war games' organised by Open Europe), and one reason in particular. While some see Mr Cameron's softer demands (e.g. less regulation) as achievable, a serious challenge remains on the topic of access to in-work benefits for non-UK EU citizens. Mr Cameron wishes to have such citizens, if they are new arrivals, wait for four years before benefits can be claimed.

The renegotiation is being played out in the shadow of the looming Brexit referendum, whose date has not yet been set (though it has been guaranteed by the end of 2017) – if, however, the referendum were to go ahead in 2016 (as seems to be desired by Mr Cameron), then the renegotiation would have to be concluded by then if it is to have a certain impact upon the referendum's outcome. The 'In' campaign hopes that a successful renegotiation will lead to the British public voting to remain in the EU.

Is Brexit good for lawyers?

The Financial Times, on 20 January, released an article on their front page claiming that UK lawyers were preparing for a "***Brexit bonanza***" as companies are rushing to them for advice on Brexit's implications for tax, employment, financial regulation, intellectual property and company law.

Major UK law firms have set up special task forces to provide answers, and clients are apparently beginning to pay in greater numbers for guidance. Simon Gleeson, a financial regulation partner at Clifford Chance, is quoted as saying: "*You know people are starting to take something seriously when they start spending money on it, and we're starting to see that*".

Yet the view of the profession seems far from set. Just two days after the above article, the same paper released another **piece** reporting that 300 senior lawyers, led by Freshfields Bruckhaus Deringer partner John Davies, had established a pro-EU group by the name of 'Lawyers – In For Britain'. They are joined by a youth wing of 38 members.

While the profession has a tradition of not commenting on political issue, the lawyers in the group feel that "*the UK's economic future and security is better protected as being part of the European Union*".

There are good reasons for a cautious approach to Brexit from lawyers, aside from the fact that firms have clients on either side of the debate. The Law Society of England and Wales published a report in October 2015 ('**The EU and the Legal Sector**'), in which it made three key findings:

1. Legal services would be disadvantaged disproportionately compared with the UK economy as a whole.
2. The stronger negative effects on the legal services sector are due to the sector's reliance on intermediate demand from sectors which are likely to be adversely affected by a UK withdrawal from the EU, particularly the financial services sector and other professional services, and from the subsequent lower levels of business investment.
3. The scale of the impact would depend on economic drivers shaped by the UK's withdrawal negotiations and subsequent UK government policy actions.

It has also been pointed out that UK lawyers may also face greater **difficulties** in establishing practices in the EU due to the Directives on temporary provision of services and permanent establishment being (presumably) affected. Those Directives allow solicitors to, as the Law Society Gazette puts it, "*cross borders temporarily or permanently under our home title, and to practise everywhere and do practically everything in the EU*". The Directive on professional qualifications, and several Court of Justice decisions, also allow for access to the professional title of other Member States "*on the easiest of terms*".

Most commentators appear to give the ultimate lawyer's response, however, to the question of Brexit's effect on the legal profession: it depends. Like any good lawyer, one should first consider definitions: what does 'Brexit' mean? If it means continued access to the single market on the same terms as now, then many of the dangers highlighted by the Law Society could be averted. Yet if Brexit means an acrimonious separation

involving tit-for-tat cutting of trade privileges, then the future looks far from rosy.

Agreement reached on the data protection reform package

After six months of intensive negotiations, the Parliament and the Council have agreed, on 17 and 18 December, on the final text of the data reform package. The package consists of a Regulation and a Directive, the latter to govern processing of personal data for law enforcement purposes. It is expected that the package will be formally adopted by the Parliament and the Council in March this year. In the case of the Regulation, the stakeholders (Member States, companies, law firms and other organisations) will have two years to adjust to the new regime. The Directive will need to be transposed into national legislation over the same period of time.

The Regulation was one of the most heavily lobbied pieces of legislation in the EU. It attracted interest from a large variety of organisations, both public and private and from in and outside of the EU.

The Regulation sets out the conditions for collecting, processing and storing the personal data of EU citizens. These include data subjects' rights, lawfulness of processing, conditions for cooperation between the data protection authorities and the requirements for the security of processing.

The Regulation introduced several important changes compared to the 1995 Directive, currently in force:

- the Regulation's scope of application extends beyond the EU's borders since the Regulation applies to the processing of personal data of EU citizens even if the controller is not based in the EU but offers goods or services to EU citizens or monitors their behaviour.
- the definition of personal data has been expanded and now includes online identifiers and location data. Also, the Regulation expands the definition of sensitive personal data which now includes genetic, biometric and health data. Moreover, Member States are allowed to introduce further conditions as well as limitations with regard to processing these categories of data.
- the regulators will be able to impose fines of up to 4% of firms' total worldwide annual turnover.
- the controller will have 72 hours to report a data breach to the regulator following its detection. If it is not feasible to report the breach in this period, the controller will have to submit a reasoned justification for the delay. If the breach is likely to result in high risk to the rights and freedoms of individuals, the controller should also notify the data subject.
- controllers and processors from the public sector or the private sector with more than 250 employees will have to appoint a data protection officer if they are handling significant amounts of sensitive data or monitoring the behaviour of many consumers.
- controllers will have to carry out a data protection impact assessment if their type of processing, especially when it involves new technologies, is likely to result in high risk for the rights and freedoms of individuals or when processing sensitive personal data.

As is currently the case, the new regime will rely on consent as the most important legal ground for the processing of personal data. Other grounds include the situation when processing is necessary for:

- the performance of a contract;
- to ensure compliance with a legal obligation;
- to protect the vital interests of the data subject or any natural person;
- performance of a task carried out in the public interest; or
- carrying out the legitimate interests of the controller.

Consent is defined as *"any freely given, specific, informed and unambiguous indication of his or her wishes by which the data subject, with by statement or by a clear affirmative action, signifies agreement [...]".* Therefore, it is a more restricted concept than under the current Directive as the controllers can no longer rely on 'opt-out' consent in some circumstances.

A new element is that the assessment of whether consent is freely given must take into account whether the performance of the contract, including the provision of a service, is made conditional on the consent to the processing of the data (Article 7(4)).

Finally, the Regulation sets out new rules for transfers of data to third countries (which takes into account the most recent judgment in the *Schrems* case) and introduces a new mechanism for cooperation between the data protection authorities.

Although the text is not yet formally adopted, most organisations and public bodies have already started analysing it in detail and getting ready for the two-year implementation period. It is expected that some categories of controllers will have more rules to comply with as compared to the current regime.

Concerns mount over the rule of law in Poland

On 13 January, the Commission launched a probe into the recent and swift changes to Poland's Constitutional Court and the country's media law. The probe is part of a three-stage procedure under a reformed **Framework for the Rule of Law**, where the Commission starts a dialogue with a country where there is a suspected systemic threat to the rule of law. The framework complements the procedure envisaged by Article 7 of the Treaty on the EU which can lead to suspending certain rights of a Member State such as voting rights

or the reception of EU funding.

Since its coming to power in October 2015, the Polish government, now dominated by the Law and Justice party, has introduced several reforms that sparked an outcry from the EU institutions and numerous international organisations, both public and private. The new laws include changes to the composition and voting of the Constitutional Tribunal, increasing State control over public media and increasing the scope of investigative powers by the police. Further plans include reform of the Polish civil service.

The reform of the Constitutional Court in particular has caused concerns over the violation of the principles of the separation powers and checks and balances. In Poland, 19 December saw a wave of protests against the proposed changes in all major Polish cities and even abroad, in Brussels and London. The Committee for Defending Democracy (KOD), set up as a social movement to give a voice to those who disagree with the current government's policies, held another wave of protests on 23 January, this time in defence of freedom of speech.

In their reactions to the proposed changes, both the **Polish Bar Council** and the **National Council of Legal Advisors** (links are Polish language versions only) submitted their comments and pointed out serious breaches of the constitutional principle of the separation of powers, and the unconstitutional nature of other provisions, notably those concerning procedural matters.

The quality and pace of these changes in Poland have not escaped the attention of top EU officials, such as the Commission's President and Vice-President, Jean-Claude Juncker and Frans Timmermans respectively.

The latter sent a letter to the Polish government asking for clarifications on the new legislation. In his **reaction**, Polish Foreign Minister Witold Waszczykowski expressed his surprise at the Commission's request and stressed that the reforms aimed to reverse the effects of 25 years of "*liberal indoctrination"*. In his interview with the German magazine **Bild**, Minister Waszczykowski also expressed his contempt for the world which is "*a new mixture of cultures and races, a world made up of cyclists and vegetarians who only use renewable energy and fight all forms of religion*". The Justice Minister Zbigniew Ziobro interpreted the letter from Mr Timmermans as an attempt to exert pressure on a democratically elected government and warned him against issuing similar statements to a sovereign State. In his reply, Mr Timmermans denied any attempt at exerting pressure on Poland and invited the Minister to discuss the various matters at his earliest convenience.

During the debate in the plenary session of the European Parliament on 19 January, the Polish Prime Minister Beata Szydlo was invited to answer questions from MEPs, the Commission and the Dutch Presidency. Ms Szydlo stressed that the debate on the Constitutional Court was a political and not a legal one and it was an internal matter for Poland. However, she also stressed she was ready to talk to the opposition. She reassured the audience that the ongoing reforms are not designed to diminish the rule of law but to restore the years of mistakes of previous governments. The Parliament will vote on its resolution on Poland in February.

The recent political developments in Poland have led to a fierce and, at times, divisive debate on the reasons for the changes and their consequences. While it is clear that the current government was democratically elected, doubts are raised as to the constitutionality of the changes made and to the potential future plans.

The changes made to the media law have already resulted in redundancies in the field of public television. However, even before this there were signals that the current government would be unlikely to accept plurality of opinions, when the Culture Minister Piotr Glinski **attempted to stop the premiere** of a controversial theatre play and attended the premiere of **another one** to evaluate it.

It remains to be seen whether the pressure exerted on Poland internationally, even if only reputational, will bring the expected results. Although many Poles agree with the Commission's action, many do not, and the process is presented by some as an international conspiracy against the country. What is clear is that there is an understanding in Poland that the situation is perceived as serious in the EU, and that its institutions are ready to take necessary action.

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Calais Calling: Migrants' victorious Court decision

In what some are calling a groundbreaking ruling, three Syrian children (16-17 years old) and a 26 year old dependant adult in the Calais migrant camp have been granted permission to come to the UK immediately.

The dependent adult has serious mental health issues, and all have been living in the "***intolerable conditions***" of the Calais 'Jungle' since October 2015. The United Nations has branded the camp "*a stain on Europe*" and a "*living hell*", the court **heard**.

All four fled the Syrian civil war, saying they had witnessed traumatic events, both in Syria and Calais, including bombings and death. Two of them claim to have been detained and tortured by the Syrian government. All of the applicants have relatives resident in the UK.

The Home Office had rejected the initial application on the basis of the Dublin II Regulation, which states that applicants must apply for asylum in the first country they arrive in – however a **further** application can be made to another EU State if the applicant has one or more relatives there - 'relatives' here means the nuclear family as a default, though Member States have discretion to widen this definition. A written application for asylum in France was accepted as evidence of this first application, and it was accepted that the applicants had an Article 8 ECHR right to family life.

Further, the applicant's lawyers appear to have successfully argued that the Dublin system is "*not working*". Instead of waiting for the French government's "*bureaucratic failings*" to clear up, the Immigration and Asylum Tribunal ruled that the UK should accommodate the applicants urgently.

The case was **brought** by Citizens UK, the Islington Law Centre and Bhatt Murphy Solicitors. Judge Mark Ockelton and Mr Justice Bernard McCloskey heard the case.

Lawyers for the applicants **claimed** that the key factors in the decision were that the applicants were unaccompanied minors, and that they had relatives in the UK.

The decision was **welcomed** by refugee rights organisations. The Refugee Council has said that no 'stay' has been placed on the court's order, meaning the children and adult in Calais could be allowed to travel to Britain at the earliest opportunity.

However, the ruling was criticised by MigrationWatch UK as "*simply wrong*" and said that the application appeared to be a move to "*short-circuit*" international asylum laws.

The full judgment is expected in early February, and will specify the "*conditions*" pertinent to the ruling. The Home Office is expected to appeal.

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No privacy in this cubicle: can employers spy on private emails?

Countless coffees spurted from the mouths of employees on 12 January as they scrambled for the 'Turn off chat' option on assorted Internet messengers.

The reason? ***Barbulescu v Romania***. Widely, and inaccurately, reported as giving carte-blanche to employers to spy on employees' private messages, the decision was made in the European Court of Human Rights' (ECtHR) seven-judge Chamber and was held by six votes to one.

The claim was under Article 8 ECHR (right to respect for private and family life, the home and correspondence) and was lodged in December 2008. Mr Barbulescu, a Romanian national, had used a professional Yahoo Messenger account – established at the request of his employer for the purposes of answering clients' enquiries – to message his brother and fiancée regarding personal matters. The employer's regulations explicitly prohibited all personal use of company facilities, including computers and Internet access.

These actions were initially denied by the claimant but his employer produced a transcript of the messages. Mr Barbulescu's contract was terminated in August 2007, shortly after the incident.

The domestic courts found against Mr Barbulescu, holding that the employer's conduct had been reasonable and that the monitoring had been the only method of establishing whether there had been a disciplinary breach.

The ECtHR found that accessing of the claimant's professional account, and the use of the transcript of that account in domestic litigation, was sufficient to invoke Article 8. The court made two **conclusions** however which defeated Mr Barbulescu's claim.

Firstly, it did not find it unreasonable that an employer would want to verify that employees were completing their professional tasks during working hours and noted that the employer had accessed the account in the belief that it contained client-related communications. Access had been limited to the specific professional account, receivers of the messages were not disclosed, and the access was in the context of a disciplinary proceeding. In other words, the monitoring of the employee's professional account had been proportionate and limited.

It was acknowledged however, using *Copland v UK*, that had there been no prior warning of monitoring (a disputed fact in *Barbulescu*) then the claimant could have had a reasonable expectation of privacy.

Secondly, Mr Barbulescu had been able to raise his arguments related to the alleged breach of his private life and correspondence before the domestic courts and there was no mention in the ensuing decisions of the actual content of the communications. According to the court, a fair balance had been struck.

The dissenting opinion provided by Judge Pinto de Albuquerque held that both Article 8 and Article 10 (freedom of expression) were engaged. Judge de Albuquerque stated that the right to privacy was not lowered by the workplace setting, nor was such an interference unrestricted or at the employer's discretion. Rather, any processing of personal data for the purposes of breach of contractual obligations must be regulated either by law, collective agreement, or contract. There had to be clear and detailed guidance on Internet usage at work, available and consented to by all employees – not simply a blanket ban and general warning, as was the case. The dissenting opinion also considered the claimant's rights under EU (rather than Convention) law; something the ECtHR declined to do.

In addition, some **experts** claim that the judgment is "*very poorly reasoned*" due to internal inconsistencies, a failed application of Article 8(2) and a disregard for certain key points of previous case law.

Mr Barbulescu has three months to appeal the decision.

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Dieselgate deepens: Parliament sets up a Committee of Inquiry into car emission tests

The European Parliament has **decided** to set up a Committee of Inquiry to investigate breaches of EU rules on car emission tests, and to see how the Commission has been enforcing EU standards in this area. 45 members have been appointed to the Committee and it will hold its first meeting in February to name its chair and co-chairs.

The Committee will have one year to finalise its report and recommendations. It will present an interim report after six months.

The Committee will investigate the Commission's alleged failure to keep test cycles under review and to introduce tests reflecting real-world driving conditions. Furthermore, the Committee will inquire into the alleged failure of the Commission and the Member States to take proper and effective action to enforce and oversee enforcement of the explicit ban of 'defeat devices' and whether the Commission or the Member States had evidence of the use of the these mechanisms before the Volkswagen emissions scandal emerged on 18 September 2015.

Finally, the Committee will also investigate whether the Member States have failed to lay down effective, proportionate and dissuasive penalties against the manufacturers who have infringed the rules.

The Committee of Inquiry can ask for written evidence and witnesses to give testimony from the Member State authorities as well as those who it considers fit to answer its questions. According to **Rule 198** of the Parliament's Rules of Procedure, a Committee of Inquiry can hear evidence and the persons called to give evidence before the Committee may claim the rights they would enjoy if appearing as a witness before a tribunal in their country of origin. However, the means of enforcement, in cases of non-compliance, are more limited. There is a bona fide duty under the Treaties for the Member States and the Union institutions to comply, but there is no punishment devised for non-compliance.

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Ruddy hell, it's a Fire Monkey!: China's market economy status hotly debated

The political and legal debate at the World Trade Organisation (WTO) is intensifying on whether China can be granted market economy status (MES) or should continue to be treated as a non-market economy (NME). The status is crucial in determining export price in trade defence investigations (i.e. anti-dumping and anti-subsidy). At present, the situation is more favourable to the EU by allowing it to set higher level of anti-dumping measures such as tariffs.

The provision at stake is Article 15 of the **China WTO Accession Protocol** (2001) which lays out the conditions for determining subsidies and dumping. These differ from the general WTO regime and allow an importing member not to carry out a strict comparison with domestic prices and costs in China in determining the export price.

Article 15 (a)(ii) allows the importing country to use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry. Article 15 (d) stipulates that these provisions will expire in 15 years after the date of the accession. It is on that provision that China and the supporters of China's MES rely. However, as some analysts point out (see **Tietje/Nowrot** or **O'Connor**), the provisions of Article 15 (a) and in particular (a)(i) remain in force and could potentially allow some importing countries to continue to apply the NME status to Chinese exports. Moreover, there are other provisions in the general WTO regime that could potentially allow for a different treatment of imports when a "*particular market situation*" can be proven (Article 2.2 of the **Anti-Dumping Agreement**).

Apart from the complex legal issue of the interpretation of Article 15 of the Accession Protocol, there are political sensitivities over granting China the MES. The EU itself is divided along geographical lines with the Nordic countries, UK and the Netherlands in favour of the MES and the Southern countries against. The position of Germany is more nuanced as it would most likely support the MES but with safeguards for sensitive industries. Many industry associations from Europe warn against MES as it may result in dumping even more goods on the EU market since, as some of them point out, imports from China increased substantially even with the current measures (see for example **BusinessEurope** or **Economic Policy Institute**). Organisations such as the European Trade Unions Confederation (ETUC) **raise the issue** of job losses and workers' rights in the EU and in China.

China is already treated as a market economy by Brazil, Russia and Australia. Chinese officials are keen to be granted MES as this would give a further boost to their exports, especially given that Chinese economic growth is slowing. Their cause may be helped by the most recent **WTO Appellate Body ruling**, which declared the anti-dumping measures imposed by the EU on Chinese nuts and bolts, contrary to the provisions of WTO law.

The EU itself has not pronounced itself in favour or against granting MES to China. Although the Commission's legal service recommended granting China MES (in a confidential note, as **reported by the Wall Street Journal**), the Parliament tabled a **motion for resolution** suggesting the opposite. In its first o rientation debate on the implications of China MES on 13 January, the Commission decided to delay its recommendation on the issue to the second half of 2016. This may also be partly due to the fact that the Commission is awaiting a study carried out by an external contractor on the impact of treating China as a market economy for the purposes of the anti-dumping investigations.

In its recently published **roadmap**, the Commission explores different options to give effect to the expiry of certain provisions of the WTO Accession Protocol. It also acknowledges the "*significant excess capacities*" in several Chinese sectors and stresses the need for carrying out a detailed impact assessment in that regard.

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Commission takes the first step towards the CCCTB: New proposals from January

The Commission **published** on 28 January a new anti-tax avoidance package: the Common Consolidated Corporate Tax Base (CCCTB). This includes a **Communication** on tax avoidance package and two new proposals, one on **anti-tax avoidance** measures and another on increasing tax transparency through **automatic exchange of information** between national authorities. The Commission has also published **the**

Staff Working Document to explain further the political and economic rationale behind these initiatives.

The core aim of the proposed anti-avoidance Directive is to create a set of legally binding anti-avoidance measures, which all Member States should implement. These **rules** include implementation of several OECD anti-BEPs (base erosion and profit shifting) initiatives. For example, they introduce EU level Controlled Foreign Company rule, which will be triggered if the effective tax rate in the third country where the company has created a subsidiary is less than 40% of the Member State in question, and a 'Switchover' rule to prevent double non-taxation of certain income. The proposal also introduces new rules to treat exit taxation, interest limitation and hybrids, and a general anti-abuse rule to tackle artificial tax arrangements if there is no other anti-avoidance rule that specifically covers such arrangements.

What is new about the automatic exchange of information proposal is that it includes country by country reporting between tax administrations, through which they can exchange tax-related information on multinationals operating in the EU. Under this proposal a parent company of a multinational group will have to provide specific information on the whole group to the tax authorities in the Member State where it is resident.

The Communication further sets an External Strategy for Effective Taxation. This Strategy aims to set common EU policy towards third countries and "*a path for a clear, consistent and effective EU approach to promote tax good governance globally and respond to external tax avoidance threats*". It includes updated tax good governance criteria and sets the need to have a common approach to tax clauses in agreements, assistance to developing countries on tax matters, and new rules on tax good governance conditions for EU funds, as well as EU screening and listing processes.

The Commission is still promising to come up with a follow-up instrument to introduce Common Corporate Tax Base, maybe even this year. The current initiatives are to be considered as steps towards the CCCTB. Accordingly, whether we will see a new CCTB proposal in 2016 will greatly depend on the speed that the current instruments will be adopted and accepted by the Member States.

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Schengen, Schmengen: the borders close, but only by the rules

"***Schengen is dead***" – these words were not uttered by Nietzsche, reincarnated into the body of a loose-talking Commission official, but rather by the ex-President of France Nicolas Sarkozy.

He is not alone in this thought. The Financial Times, commenting on 21 January 2016 about new border controls imposed by Germany, Austria, Hungary, Denmark, Sweden and others over the last few months due to the 'migrant crisis', claimed the agreement appeared to be in its "*death throes*".

Certainly the EU faces an unprecedented movement of people into its borders. Yet what is underreported is that actually scrapping Schengen would require a change to the EU Treaties and how, at least in the case of Danish and Swedish measures, Member States appear to be **adhering** to Schengen's provisions.

This is because the Schengen Agreement allows **two forms** of suspension: a short suspension of up to three months, and a long suspension for up to two years.

The short suspension is actually fairly commonly used (e.g. for international summits) and is permitted in cases of public security and public policy. So far it is this option that has been used by Member States. The three-month period can be renewed, on the recommendation of the Council, for up to six months at a time for a period totalling two years but only in "*exceptional cases*" where there is a "*serious threat to public policy or public security*" in the Schengen area or parts of it.

It is this extended version of the short suspension that **some** German politicians appear to be considering.

In addition, Schengen provides for the possibility of an even longer suspension (i.e. over and above the extended short suspension). This is a far more serious measure as it involves a collective suspension of the agreement, and is also subject to a Commission report. A **leaked** Council document appears to have recommended this option some months ago in light of the Greek State's inability to deal with the numbers of migrants arriving on its shores.

In March the Commission is expected to release its **smart borders** proposal. This will in all likelihood contain the Commission's proposals on how to work further on Schengen while current pressures stress the system. All the better, given that Donald Tusk, President of the Council, **believes** there are only two months left to save Schengen.

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Hungary for justice - the Hungarian surveillance ruling

The case of ***Szabó and Vissy v Hungary*** was decided on 12 January and confirmed a breach of Article 8 ECHR by the Hungarian State.

The case concerned Hungarian legislation, introduced on 1 January 2011, on secret anti-terrorist surveillance powers. These powers included, secret house searches and surveillance with recording, opening of letters and parcels, as well as checking and recording contents of electronic or computerised communications. The powers were granted to the Hungarian Anti-Terrorism Task Force (ATTF).

The applicants were Hungarians Máté Szabó and Beatrix Vissy, who both worked for an NGO critical of the Hungarian Government. They had failed in 2013 to successfully challenge the new ATTF powers in the Hungarian Constitutional Court.

The applicants brought their case to the ECtHR on 13 May 2014, arguing a breach of Article 8 (right to

privacy), as well as Article 6 (fair trial), and in conjunction Article 13 (right to an effective remedy).

The ECtHR's Chamber of seven judges held unanimously that, as regards the Article 8 part of the claim:

- There had been an interference with the applicants' right to respect for private and family life as concerned their general complaint about the ATTF's powers (not any actual interception of their communications).
- The legislation directly affected all users of communication systems and all homes. So the scope of the measures could include virtually anyone in Hungary, even persons outside the original range of operation.
- The domestic law did not provide any possibility for an individual who suspected that their communications were being intercepted to lodge a complaint with an independent body.
- While the legislation had a legitimate legal basis (i.e. national security) and while the situations permitting secret surveillance for national security purposes were sufficiently clear, it did not provide safeguards which were sufficiently precise, effective and comprehensive as to the ordering, execution and potential redressing of such measures were concerned. No categories of persons were prescribed, and the individuals' actual or presumed relation to a terrorist threat was not required. Nor did any evidence need to be provided by ATTF to justify the surveillance.
- The legislation did not make it clear whether the surveillance warrant of 90 days could be extended once or repeatedly.
- There was no external, certainly not judicial, oversight of the process in order to prevent abuse – only the justice ministry's (i.e. the executive) approval was needed.
- No notification of secret surveillance measures is required by Hungarian law. The ECtHR held that as soon as notification could be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should be provided to the persons concerned.

Given the finding relating to Article 8, the Court considered that it was not necessary to examine the Article 6 complaint. The Court reiterated that Article 13 could not be interpreted as requiring a remedy against the state of domestic law and therefore found that there had been no violation of Article 13.

The news agency Euractiv **claims** that the case demonstrates an ongoing tension between more a rights-oriented judiciary and more surveillance/security-focused governments in Europe, and that many more such cases will follow.

The Hungarian State has three months to appeal the decision.

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An offer we can't refuse? TiSA negotiations continue

18 January saw MEPs **vote** on a series of recommendations, drafted by Viviane Reding MEP (EPP, Luxembourg), relating to the Trade in Services Agreement (TiSA).

TiSA is a deal being negotiated with 23 WTO members (accounting for 70% of world trade in services) with the aim of enhancing international rules in sectors such as financial, digital and transport services.

The recommendations were adopted by 33 votes to 6, with 1 abstention. They are designed to serve as guidelines for the Commission, which is currently negotiating the deal on behalf of the EU.

The recommendations are primarily divided into 'blue lines' and 'red lines':

'Blue lines'

- achieve "*reciprocity at all levels with all parties*" with a view to consolidating the EU's position as the world's largest services exporter,
- seek an ambitious opening up of partners' public procurement, telecoms, transport, financial and professional services markets,
- deliver more opportunities for highly-skilled EU professionals to work outside the EU,
- curb third countries' restrictive practices (e.g. forced data localisation), and
- reduce red tape and increase information for SMEs

The blue lines also called for EU consumer protection as regards roaming fees, commission paid on credit card use abroad, and spam and geo-blocking when using online platforms.

'Red lines'

- "*clear and explicit*" exclusions for sensitive EU sectors, including all public services,
- no compromise on EU data protection standards,
- citizens' personal data must flow globally in full compliance with EU data protection and security rules, and
- TiSA must include an "*unequivocal and legally-binding exemption of the existing and future EU personal data protection provisions*".

Further recommendations included:

- On movement of persons, EU commitments should be limited to "*highly-skilled professionals providing a service for a limited period of time and under precise conditions stipulated by the domestic legislation of the country where the service if performed*".
- EU "*to refrain*" from giving new commitments on "*inward mobility*" for their third-country counterparts, at least until other parties "*substantially improve their offers*".
- Negotiators to "*legally secure*" the right of EU, national and local legislators to regulate in the public interest (e.g. environment and consumer protection).
- Negotiators to "*further*" transparency (e.g. by giving all negotiating documents to all MEPs and providing fact sheets to the public).
- China to join the negotiations; seek to ensure "*multilateralisation*" of TiSA.

Ms Reding MEP was quoted in a Parliamentary press release as saying:

"*these negotiations can and must be a safety net for our citizens at home and a market-opener for our companies abroad*".

Organisations such as War on Want have been highly **critical** of TiSA and its negotiations. War on Want's Executive Director John Hilary responded to the vote by saying:

"*MEPs have once again turned their backs on the needs of their own constituents in favour of the business lobbyists of Brussels. This highly secretive deal has been shown through various leaked texts to be wholly by and for big business, much like TTIP and CETA. And just like with TTIP and CETA, MEPs have once again shown their disdain for public services, workers' rights and democracy.*"

TiSA **appears** to be largely favoured by the EPP, S&D, ECR, ALDE and (after initial opposition) the Greens, but is rejected by the far-right, far-left and many unions. Negotiations on the deal started in March 2013. In September 2015, Uruguay and Paraguay dropped out of the talks citing concerns about losing the ability to regulate.

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European Ombudsman Public Consultation on transparency of trilogues

The European Ombudsman, Emily O'Reilly, opened an investigation last May into the transparency of trilogues with a view to boosting transparent law-making in the EU.

Trilogues are informal negotiations between the European Parliament (EP), the Council and the Commission aimed at reaching early agreements on new EU legislation.

The Ombudsman asked for information about disclosure policies on trilogue documents, including details of meetings, documents relating to ongoing trilogues, minutes or notes drawn up after such meetings, as well as lists of participants.

The answers of the three Institutions were not encouraging for the Ombudsman:

The Commission stated that such investigation does not fall into the remit of the Ombudsman since its powers are limited to situations where there is a suspicion of maladministration, and trilogues are merely "*preparatory steps in negotiations of a legislative nature*".

The EP was more open in its answer, though some might say not much more useful. President Schulz said in his letter of reply: " *An undue formalisation of the trilogue process might have the opposite result, as the real negotiations might then take place at other occasions, without having ·all political groups in the room and without text proposals being exchanged in an orderly way between the Institutions. This would put the internal transparency and accountability of the decision-making process at risk.* "

The Council, in its response, points out that it is a prerogative of the EU co-legislators, both of whom are accountable to citizens through democratic elections, to organise the legislative procedure for which they are politically responsible.

The Ombudsman has now invited members of the public to put forward their views on the issue, asking for views on transparency of proceedings, publication of documents, lists of participants, distinction between political and technical meetings, increase of accessibility and visibility of public documents.

The deadline for responses is 31 March 2016. You can find the Institutions' answers and the consultation **here**.

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The Commission Solves It... No, really

The words 'Commission' and 'solved' are, seemingly, almost never used in the same sentence without the addition of the word 'not'.

However, a little-known service provided by the Commission looks like it may be turning things around.

Solvit aims to help EU citizens and businesses assert their EU rights when these are breached by public authorities in another EU country and when that citizen or business has not yet taken their case to court. The service can even be used after proceedings are issued if it is simply an administrative appeal.

The service is mainly online and aims to find solutions in 10 weeks. It works by claims being submitted to the claimant's home country's Solvit centre. The home centre contacts the claimant within one week and, if necessary, asks for further information. It will then check whether or not the problem falls within Solvit's remit, and if it does, the home centre will prepare the case and send it to the Solvit centre of the country where the issue occurred (the 'lead Solvit centre').

The lead Solvit centre will confirm within one week whether or not they will accept the case. If they do, they will try to find a solution together with the responsible public authority.

The target deadline for solving problems is 10 weeks from when the lead Solvit centre accepts your case.

Typical issues involve recognition of professional qualifications, enforcing pension rights, working abroad, cross-border capital movements and benefits access. There are limits however: Solvit cannot deal with company-company disputes, consumer-related problems, compensation claims, or as mentioned if the dispute is in court already.

Law Society of England and Wales

3 February - The Law Society Diversity Access Scheme (DAS) opens

The Law Society of England and Wales' DAS opens for applications on 3 February.

Individuals earn the title solicitor through a dedicated commitment to legal education, training and development. They meet high professional and ethical standards, and provide a wide range of advice and services to protect the interests of their clients. The Diversity Access Scheme aims to improve social mobility in the legal profession by supporting talented people who meet these criteria, but that face exceptional social, educational, financial or personal obstacles to qualification as a solicitor.

In addition to financial assistance to undertake their Legal Practice Course (LPC), the scheme offers awardees high-quality work experience, a professional mentor and networking opportunities.

Application forms, eligibility criteria and guidance will be available to download from the **DAS webpage** from midday on 3 February.

Applicants must be ready to start their LPC in September 2016 and must confirm they do not have access to finance to pay for their LPC fees.

In 2016 the Law Society will offer up to 10 standard DAS awards.

We will offer **one DAS PLUS award** comprising an LPC scholarship and a fully funded training contract at a National Law Centre for those who already volunteer or work at a National Law Centre.

27 January - Law Society of England and Wales President tackles cross-border barriers to legal services at ICAEW event in Brussels

On 27 January Law Society of England and Wales President Jonathan Smithers addressed a number of practical issues affecting cross-border trade in legal services within the EU. Different ownership and shareholding requirements for law firms, equivalence of professional indemnity covers and conflicts of ethical rules were some of the issues faced by lawyers exercising their Treaty rights to practise in another Member State.

Jonathan Smithers was part of a panel including Vicky Ford MEP (UK, ECR), the Chair of the Internal Market and Consumer Protection committee at the European Parliament. Vicky Ford highlighted the tireless work of the committee to enrich the single market in services, recognising that each service sector may require different solutions. She then turned her attention to the issue of Brexit, concluding that "*if you are not at the table* [negotiating single market rules with the other Member States], *you are on the menu*".

Other contributors included Martin Manuzi (Europe Region Director for the ICAEW), the European Commission's Jurgen Tiedje, and Jeroen Hardenbol of Business Europe.

Joint UK Law Societies' Brussels Office

26 January - New Year's Reception

The Brussels office, along with our colleagues at the German, Austrian, Czech, Belgian and Luxembourgish Bars, hosted our highly successful New Year's Reception on 26 January.

The event was attended by over 120 representatives from the European Parliament, the European Commission, international law firms and international organisations.

25/26 January - P.R.I.M.E. Finance Annual Conference

Helena Raulus, the Brussels Office Internal Market Advisor, participated in the 5th P.R.I.M.E. Finance Annual Conference, which took place on 25 – 25 January 2016 in the Hague. P.R.I.M.E. Finance stands for the Panel of Recognised International Market Experts in Finance, a collaboration launched in January 2012 to help resolve, and to assist judicial systems in the resolution of disputes concerning complex financial transactions.

The Conference gathered together leading financial experts to discuss complex financial regulation and dispute settlement. Speakers included a long list of the highest level of professional expertise, from the financial regulation, arbitration and dispute settlement world.

The following themes were discussed this year: (i) Dispute settlement; (ii) the use of toolkits and benchmarks

in the global financial disputes, the use of experts in financial disputes; (iii) insolvency processes and mechanisms for assessing losses, FX speculation and bank duties; and (iv) regulation surrounding banking and bankers.

Law Society of Scotland

Scottish Parliament Manifesto launch

The Law Society of Scotland has published its priorities for the forthcoming Scottish Parliament elections. Following discussions among the many lawyers, academics and other experts from outside the profession who contribute to its work, the LSS has identified five key policy areas that they would urge the political parties to take on board, promoting them in government and opposition:

- Access to justice
- Modern legislation for a modern profession
- The legal profession at the heart of a thriving economy
- Access to education
- Law reform and quality of legislation

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

27 January - Vice President meets Mary Honeyball MEP

The Law Society of Scotland's Vice President, Eilidh Wiseman, met with Mary Honeyball MEP (UK, S&D) to discuss equality and diversity in the legal profession, well as issues related to equality and diversity more broadly.

COMING INTO FORCE THIS MONTH

- **32016R0100: Commission Implementing Regulation (EU) 2016/100 of 16 October 2015 laying down implementing technical standards specifying the joint decision process with regard to the application for certain prudential permissions pursuant to Regulation (EU) No 575/2013 of the European Parliament and of the Council (Text with EEA relevance)**
- **32016R0102: Commission Implementing Regulation (EU) 2016/102 of 19 January 2016 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Eichsfelder Feldgieker/Eichsfelder Feldkieker (PGI))**
- **32016R0103: Commission Regulation (EU) 2016/103 of 27 January 2016 amending Regulation (EC) No 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS)**
- **32016R0089: Commission Delegated Regulation (EU) 2016/89 of 18 November 2015 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest**
- **32016R0068: Commission Implementing Regulation (EU) 2016/68 of 21 January 2016 on common procedures and specifications necessary for the interconnection of electronic registers of driver cards**
- **32016R0052: Council Regulation (Euratom) 2016/52 of 15 January 2016 laying down maximum permitted levels of radioactive contamination of food and feed following a nuclear accident or any other case of radiological emergency, and repealing Regulation (Euratom) No 3954/87 and Commission Regulations (Euratom) No 944/89 and (Euratom) No 770/90**
- **32016D0049: Political and Security Committee Decision (CFSP) 2016/49 of 7 January 2016 on the appointment of the Head of Mission of the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) (EUAM UKRAINE/1/2016)**
- **32016R0039: Commission Implementing Regulation (EU) 2016/39 of 14 January 2016 amending Annex I to Regulation (EC) No 798/2008 as regards the entry for Mexico in the list of third countries, territories, zones or compartments from which certain poultry commodities may be imported into or transit through the Union in relation to highly pathogenic avian influenza (Text with EEA relevance)**
- **52016XC0116(02): Commission notice on current State aid recovery interest rates and reference/discount rates for 28 Member States applicable as from 1 February 2016 (Published in accordance with Article 10 of Commission**

Regulation (EC) No 794/2004 of 21 April 2004 (OJ L 140, 30.4.2004, p. 1))
- **32016D0034: Decision (EU) 2016/34 of the European Parliament of 17 December 2015 on setting up a Committee of Inquiry into emission measurements in the automotive sector, its powers, numerical strength and term of office**
- **32015R2426: Commission Implementing Regulation (EU) 2015/2426 of 18 December 2015 amending Regulation (EU) 2015/1998 as regards third countries recognised as applying security standards equivalent to the common basic standards on civil aviation security (Text with EEA relevance)**
- **32015R1998: Commission Implementing Regulation (EU) 2015/1998 of 5 November 2015 laying down detailed measures for the implementation of the common basic standards on aviation security (Text with EEA relevance)**
- **72004L0038IRL_233465: S.I. No. 548 of 2015 EUROPEAN COMMUNITIES (FREE MOVEMENT OF PERSONS) REGULATIONS 2015**

CASE LAW CORNER

Decided

Case C-336/14 Sebat Ince, **judgment** of 4 February 2016

- EU law may preclude the imposition of penalties in respect of the unauthorised cross-border intermediation of sporting bets carried out in Germany. This is particularly the case in so far as the former public monopoly, which has been held by the German courts to be contrary to EU law, has persisted in practise.

Case C-375/14 Rosanna Laezza v Italy, **judgment** of 28 January 2016

- National rules on betting and gaming may be contrary to the principle of proportionality if they require the licencee to transfer free of charge the equipment used for the collection of bets.

Case C-515/14 Commission v Cyprus, **judgment** of 21 January 2016

- According to Cypriot legislation, a civil servant under the age of 45 who resigns from his employment in the Cypriot civil service to carry on a professional activity in a Member State other than Cyprus, or within an EU institution or other international organisation, receives a lump sum and loses his or her future pension rights. That, however, is not the case for civil servants who continue to carry on a professional activity in Cyprus.
- In support of the scheme, Cyprus argued that variations in conditions under which social security benefits are granted could put the balance of the Cypriot system at risk. That system aims to ensure the stability of the occupational scheme for civil servants whilst respecting the principle of proportionality.
- The Court ruled that this legislation places migrant workers at a disadvantage in relation to those who do not leave Cyprus, is contrary to EU law, and that the legislation deters workers from leaving Cyprus to work in another Member State. The Court acknowledged that national legislation may constitute a justified restriction on a fundamental freedom if it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest. In this case, the authorities must satisfy the proportionality test and prove that the measure is appropriate for securing the attainment of the objective and that it does not go beyond what is necessary to attain that objective. The Court found that such evidence was lacking in this case.
- Therefore, the Court held that this legislation is contrary to EU law.

Case C-428/14 DHL Express (Italy) and Others v Autorità Garante della Concorrenza e de Mercato and Others, **judgment** of 20 January 2016

- In the field of competition law, the leniency programmes of the EU and of the Member States can coexist autonomously. Those programmes reflect the system of parallel competences of the Commission and national competition authorities.

Advocate General opinions

Cases C-165/14 Alfredo Rendón Marin v Administración del Estado and C-304/15 CS v Secretary of State for the Home Department, **Opinion** by Advocate General Szpunar delivered on 4 February 2016

- According to the Advocate General, a non-EU national having sole care and control of a minor child who is a citizen of the EU may not be expelled from a Member State or be refused a residence permit simply because he has a criminal record.

Case C-47/15 Sélina Affum v Préfet du Pas de Calais and Procureur général de la Cour d'appel de Douai, **Opinion** by Advocate General Szpunar delivered on 2 February 2016

- According to the Advocate General, a foreign national who was not stopped when illegally crossing an external border of the Schengen Area cannot be imprisoned solely on the basis of his illegal entry into the territory of a Member State.

Cases C-145/15 and C-164/15, K Ruijssenaars & A. Jansen v Staatssecretaris van Infrastructuur en Milieu and *J.H. Dees-Erf v Staatssecretaris van Infrastructuur en Milieu*, **Opinion** by Advocate General Bot delivered on 14 January 2016

- This case concerns the Air Passengers Rights Regulation and how to challenge the

adequacy of the compensation. Under the Dutch legislation, he Ministry of Infrastructure and Environment is generally responsible for such requests, however, any challenges must be brought to the civil courts. The Dutch Council of State is asking whether the Dutch authority is also obliged to consider the claims as to the adequacy of the compensation.
- The responsible authority is not obliged to do so as they cannot take enforceable action against the airlines.

Upcoming judgments

- *Case C-429/14 Air Baltic Corporation*: airline compensation for delays, judgment expected on 17 February 2016.
- *Case C-214/14 Sanoma v Nelonen Media*: freedom to provide services and audiovisual programmes, judgment expected on 17 February 2016.

New cases brought to the Court

- *T-755/15 Luxembourg v Commission* and *T-760/15 The Netherlands v. Commission*, the Netherlands and Luxembourg have brought annulment proceedings against the Commission state aid decisions.

SUBMITTED CONSULTATIONS

The UK Law Societies have submitted the following responses to the Commission consultations during December and January:

- Consultation on modernising **VAT** for cross-border e-commerce, response submitted by the Law Society of England and Wales.
- Consultation on **geoblocking** and other geographically based restrictions when shopping and accessing information in the EU. The responses to this consultation were submitted by the Law Society of England and Wales and the Law Society of Scotland.
- Consultation on the re-launch of the **Common Consolidated Corporate Tax Base**, response submitted by the Law Society of England and Wales.
- Consultation on the review of the European **venture capital funds** and European Social Entrepreneurship Funds, response submitted by the Law Society of England and Wales.
- Call for evidence: EU regulatory framework for **financial service**, response submitted by the Law Society of England and Wales.

ONGOING CONSULTATIONS

Internal Market:

- **Public consultation on the 'Proposal to reform the procedure whereby Member States notify new regulatory requirements applicable to services providers'**
  26.01.2016 – 19.04.2016
- **Public consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights**
  09.12.2015 – 01.04.2016

Employment and Social Affairs:

- **Public consultation on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (the so-called "Written Statement Directive")**
  26.01.2016 – 19.04.2016
- **Public online consultation on the Your First EURES job (YFEJ) mobility scheme and options for future EU measures on youth intra-EU labour mobility**
  22.01.2016 – 22.04.2016
- **Public consultation on the review of the European Disability Strategy 2010-2020**
  22.12.2015 – 18.03.2016

Banking and Finance:

- **Non-binding guidelines on methodology for reporting non-financial information**
  15.01.2016 – 15.04.2016
- **Green Paper on retail financial services: better products, more choice, and greater opportunities for consumers and businesses**
  10.12.2015 – 18.03.2016

Home Affairs:

- **Tackling migrant smuggling: is the EU legislation fit for purpose?**

12.01.2016 – 06.04.2016

Communications Networks - Content & Technology, Information Society:

- **Public stakeholder consultation on next phase of EU-US cooperation in eHealth/Health IT**
  22.12.2015 – 15.03.2016
- **Public consultation on the contractual public-private partnership on cybersecurity and possible accompanying measures**
  18.12.2015 – 11.03.2016
- **Public consultation on the review of national wholesale roaming markets, fair use policy and the sustainability mechanism referred to in the Roaming Regulation 531/2012 as amended by Regulation 2015/2120**
- 26.11.2015 – 18.02.2016

Environment:

- **Consultation on the evaluation of the Environmental Noise Directive**
  21.12.2015 – 28.03.2016
- **Streamlining monitoring and reporting obligations in environment policy**
  18.11.2015 – 10.02.2016
- **Consultation on the functioning of the Auctioning Regulation pursuant to the scheme for greenhouse gas emission allowances trading within the Community (EU ETS).**
  22.12.2015 – 15.03.2016

Justice and Fundamental Rights, Environment, Climate Action, Banking and Finance:

- **Public consultation on long-term and sustainable investment**
  18.12.2015 – 23.03.2016

Energy:

- **Preparation of a new Renewable Energy Directive for the period after 2020**
  18.11.2015 – 10.02.2016

Equal opportunities:

- **Public consultation on possible action addressing the challenges of work-life balance faced by working parents and caregivers**
  18.11.2015 – 17.02.2016

Competition:

- **Empowering the national competition authorities to be more effective enforcers**
  04.11.2015 – 12.02.2016

About us

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

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