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Editorial - Looking ahead at 2017

After the political tremors of 2016 one could understand if the world needed a second to catch its breath before diving into 2017, however, such luxuries seem absent for the political elites of Europe as a busy year of elections, Brexit and a changing global landscape begins.

In January 2017, one the large fallouts of Brexit, The Supreme Court ruling on whether a vote in parliament is required to trigger Article 50, will be handed down. The Government has had its work cut out for it, trying to convince the Supreme Court to overturn **a unanimous ruling from three of Britain's most senior High Court judges** that it is impermissible for the Prime Minister to invoke the Royal Prerogative as legal authority for a notification to be sent under Article 50 of the Treaty on European Union.

The Supreme Court Judges will consider what process is required to trigger Article 50, and also confirm what

role the devolved parliaments will play - it is also possible that the case **could be referred to the European Court of Justice**. Whatever the ruling, it is the UK Government's position that the **Brexit process will begin in March**, and as the Courts help to craft the legal landscape for Brexit, then it is hoped that the substance of negotiations will become more visible to the public.

2017 will also be the year of elections, with key votes in Netherlands, France and Germany. Italy is also **expected to hold a vote** in the aftermath of Renzi's retirement last year. With the backdrop of increasing populism across Europe and the world, the elections may come at a tough time for Europe, as the Union will not want to be seen to offer encouragement to Eurosceptic forces of Geert Wilders, Marine Le Pen, AfD and the Five Star Movement by offering the UK too favourable a deal.

Europe's Parliamentary elections may also prove a relevant, though less potentially chasmal, set of elections in signalling the political orientation of the Parliament as **it prepares for its role in the Brexit negotiations**. The EU Parliament, unlike the British Parliament, will be required to approve any EU-UK exit terms.

Throughout all of these internal changes, additionally, Europe and the UK will be looking to continually reassess their position in a politically transitionary world. The election of Donald Trump in the US has not only **halted the progress of a series of multilateral trade deals**, strongly advocated for by the EU, but it has also potentially **opened the door to greater Russian influence over the west.**

As well as this the European Union will also be looking to use 2017 as an opportunity to bring some calm to a **fragile banking sector** and stability to a rocky relationship with Turkey, as **parliamentarians voted to freeze accession talks last year**.

With all of the potential and promise of 2017, we must try heed the primary lesson of the past year – that predicting the likely path of Europe's future is a fool's errand. We are living in a time where anything truly can happen.

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Cyrus Engerer, Prime Minister of Malta's Special Envoy to the European Union institutions

The Maltese Presidency's priorities for 2017

Last year's political events have left their mark on the European Union. The need for reform has never been so pressing and the call for it to be closer to the people has never been so loud. The EU is at a cross roads and Malta for the first time in its history since acceding to the European Union will be presiding over the Council of the European Union for the first six months of 2017.

We are very much aware that the Presidency is perhaps the biggest test that Malta will face since becoming an EU Member. It will also be an opportunity for our islands and our people to demonstrate that even the smallest Member of the Union can contribute to its prosperity, peace and security.

We have made it our aim to bring the European Union closer to citizens. We feel we can make genuine progress in the six priority areas we have identified and begin to reconnect the EU with the aspirations of its citizens: single market, migration, security, neighbourhood policy, social inclusion, and maritime affairs.

The Single Market is perhaps the Union's greatest achievement. Despite some arguments to the contrary, the elimination of trade barriers in Europe has led business to flourish over the years. But it is still a work in progress. Malta, together with its Council counterparts, will strive to continue to eliminate barriers to trade and improve protection and access to services for consumers across the EU.

The dawn of the digital age has ushered in an era filled with new opportunities which were unimaginable even up to a few years ago creating growth and jobs. It is therefore paramount that we endeavour not only to complete the Digital Single Market but will also strive to ensure that whatever we achieve is fit for purpose not only for the present but for the years to come. We will work for the EU to be at the forefront of the upcoming development of 5G technology as well as to eliminate mobile phone and data roaming charges throughout Europe. Whilst on energy, we want to make third party supply of gas to the EU fairer and more transparent.

The migration crisis looms large in our thoughts. This is one area in which the EU is facing one of the greatest challenges of all time, and if left properly unaddressed, it can threaten the very existence of the European Union.

During our Presidency we want to see the delivery of a swift implementation of measures that have already been agreed upon, and to ensure that the issue stays at the top of the political agenda. People are demanding action, and we cannot afford complacency within the EU that fails to treat this subject with the urgency and importance it deserves.

Security is another area where action is needed. Recent events have demonstrated that we as a Union must remain constantly on our guard to ensure the security of our citizens. Prosperity is interlinked with security and there can be no prosperity if Europe is not safe.

In all of this, however, it is imperative that the Union finds the right balance between a strong system of security and the protection of the principles deriving from the concept of the rule of law.

Malta is justly proud of its historical record in social policy, and this is an area where our experience can benefit our European partners. We will consult closely with NGOs and citizens' groups to help us advance gender equality, ensuring that women across Europe have full and equal access to the labour market. Malta will also continue to combat gender-based violence, promoting the sharing of best practice and exchanging information on existing legislation, policies and strategies.

Europe's security and prosperity are interlinked with that of our neighbourhood. Countries bordering the Southern Mediterranean and in the Eastern Neighbourhood continue to be destabilised by armed conflict, terrorism, political instability and radicalisation. In light of this growing instability beyond Europe's borders, it is important to devote our efforts to bolstering democracy and security.

The continuing development of the maritime sector, under the EU Integrated Maritime Policy, fits squarely with the legislative priorities of an outward-looking island nation in the southern Mediterranean. The sector provides a diverse spectrum of innovative research and commercial activities that can be developed into high value-added job opportunities – in line with the Blue Growth Initiative towards growth and competitiveness.

One cannot write on the first half of 2017, without mentioning BREXIT. Questions are being asked about what will happen, and how will it happen. Unfortunately answers are in short supply as this event is unprecedented in EU's history. The UK government has indicated that it will trigger Article 5o in 2017. Despite our preference for the UK to remain part of the EU, Malta both as a country and as Presidency, feels that decision the UK electorate has made, needs to be respected.

We will work diligently and intelligently to ensure that the discussions, negotiations and subsequent agreements that will follow the eventual triggering Article 50 will be truly in the best interests of all.
In conclusion, I will move to the 'how' rather than the 'what' of our Presidency. We agreed early on in our planning that we would not be burdened by an unrealistic, overly broad agenda with unclear priorities. We do not have the luxury of time, and the challenges we face are manifold and complex. Our ultimate intention is to progress the work that brings us closer together, and brings the Union closer to its peoples.

Biography

Cyrus Engerer, born in 1981, is the Prime Minister's Special Envoy to the European Union institutions. He is also heading the Government of Malta's Relations Unit with the European Parliament during the Maltese Presidency. He graduated from the College of Europe in Bruges with a Master Degree in European Political and Administrative Studies, following his Bachelor's Degree in European Studies and Communications at the University of Malta. His areas of research include Europeanisation, European Constitutional Affairs and the European Parliament.

THE YEAR AHEAD

Karen Holden

LGBT Diversity in the Legal Profession

At A City Law Firm we have always been different in our approach to recruitment and the diverse workforce that we employ. We are aware, however, that this is not the approach taken by all law firms and acceptance

and inclusion of LGBT people is a more recent development in society. That is not to say that LGBT people haven't existed within the profession, because, of course they have, but the openness and comfort of LGBT lawyers it seems is a more recent occurrence.

If we look back, the 2005 Act legalising marriage between same-sex individuals caused a huge shift in society's opinion of LGBT individuals and as such it seems that more people than ever are out and proud. This has crossed over into the professional sphere where more professionals, who previously may have been private about their personal affairs are looking to champion their cause and normalise their LGBT status for the good of the LGBT community or more modestly are just not actively denying their LGBT status anymore.

Has this crossed over into the legal profession? Do lawyers feel comfortable regarding the openness of their LGBT status and is the profession diverse enough? Well obviously, there is always more to do but it seems as though huge strides are being made. **The Law Society's LGBT division** encourages LGBT lawyers to engage with each other, share their knowledge and expertise, network and support each other. In short, LGBT status isn't as much of a stigma anymore, it is more widely accepted professionally. The creation of the LGBT division is a huge statement to the whole legal profession that LGBT people are important and that diversity within the profession is desirable and needed.

It is hard for me to comment on the experiences of individuals who may not have had a positive experience because ACLF has always been a promoter of LGBT rights through the legal work that it undertakes and the staff that it employs. I have no doubt that discrimination has occurred in many law firms, bullying, harassment or more subtly by the individual not getting the promotion or not being put forward for certain cases, but I think that this is occurring less and less as it is simply not tolerated to act in this way anymore.

We handle discrimination cases at the firm based on sexuality, gender, and HIV etc. Sadly, these cases continue to come through our door and are often in professional institutions such as schools, banks and established city companies. So whilst society is changing we are still seeing discrimination on a daily basis.

In the coming year, I expect that transgender equality and inclusion will be focused upon and rightly should be. We have come on leaps and bounds for lesbian, gay and bisexual rights, however transgender rights have fallen behind and inclusion is a rife issue.

I think the biggest challenge faced to the LGBT community as a whole is normalisation to a point where your sexual orientation or gender status is not even a topic for discussion and in this regard we have huge strides to make. For acceptance to happen we need publication and awareness, once this task has been achieved we need normalisation. I know that this point is a disputed one and some LGBT members do not want or seek any kind of normalisation, however in the professional sphere this is exactly what the LGBT community needs. For LGBT people's sexual orientation and gender status to be irrelevant and the sole focus to be how well they can do their job.

Biography

Karen Holden is the founder of A City Law Firm having been admitted to the roll in 2005. Having obtained her degree in Law, Karen went on to achieve a Master's from the University of Cambridge and her LPC from the College of Law. Her studies were conducted whilst working full-time as a senior member of management in the public sector.

Karen's experience prior to establishing the firm was managing a busy UK department within an international London based law firm. She managed solicitors of varying experiences across several areas of law building up an impressive client base and caseload. She was often in the High Court of Justice and County Court representing clients herself and frequently managed mediations, multinational disputes and high value complex disputes.

Karen also has a wealth of experience addressing LGBT matters, some of which have been particularly harrowing. As a result she strives to enhance the legal resources available to the community and help support members find an equal footing. The firm sponsors a number of organisations and people who drive the community forward and this is specifically driven by Karen who challenges all forms of discrimination, harassment or unfair treatment.

Karen is highly regarded by her clients. Her longest standing client of 13 years says ‘she has a command of litigation and her robust approach has always proven successful for our company. It's her initiative and drive that means we achieve results'.

A European Balancing of the Books in 2017

A fresh new year with a fresh start is what the European financial sector would possibly have wished for after returning from its time off over Christmas. Unfortunately the ghost of 2016, (and even further, the ghost of the financial crisis of 2008) will prevail to make 2017 a particularly difficult year for the industry.

According to a **report** published by KPMG towards the end of 2016, the European banking sector has about 1.1 trillion euros ($1.2 trillion) in non-performing loans, almost three times as much compared to the U.S., and it **continues to suffer from**; the weak economic environment in Europe, stubbornly low net interest margins, high cost to income ratios, the impact of regulatory reform, and – for some banks – a business model that relied too heavily on the good times continuing without serious interruption.

Shortly after this report was published, the financial news of the winter hit - the latest bailout of Banca Monte dei Paschi di Siena. Italy's oldest bank, originally founded in 1472 to provide loans to "poor or miserable or needy persons" was itself in danger of being categorised as such, as the bank that had already been bailed out twice, failed an ECB stress test in July 2016 and became critically under-capitalised as a result of low investor confidence.

Now, amid fears that collapse of the bank could topple the rest of Italy's heavily indebted banking sector, new Italian prime minister, Paolo Gentiloni, has vowed not to let the bank fail. The Italian parliament has therefore fast-tracked approval of a government plan for a possible €20bn (£16.8bn) **bailout of the country's banks**.

Some observers however, are less pleased with the plan and are of the opinion that the bank should be wound down rather than propped up. Critics also point out that the plan risks short-circuiting a system EU lawmakers spent years building to break the link between governments and banks.

"This is an institution that has been on the verge of collapse for years," **said** Philippe Lamberts, a Belgian lawmaker in the European Parliament. "And therefore in the spirit of the legislators, and I was one of them for BRRD, this is precisely a case for resolution," he said, referring to the **Bank Recovery and Resolution Directive**, the EU's bank-failure law.

Italy now risks coming to logger heads with the commission as it has to convince EU Competition Commissioner Margrethe Vestager that the bailout meets the EU requirements for state aid, in a series of talks which are expected to take two to three months. The commission said last week that it would work with the Italian authorities to "assess the compatibility of the planned intervention by the Italian authorities with EU rules."

Meanwhile, not too far across the same patch of sea, Greece continues to argue with the International Monetary Fund (**IMF**) and the EU, after the IMF **labelled** plans to rescue Greece, in late 2016, as "not credible". As well as this The Basel Committee, a group of banking supervisors from nearly 30 countries, have **postponed the approval of long-awaited rules** designed to avert a repeat of the financial crisis - affording some reprieve to Europe's banking elite that fear reforms could affect their balance sheet.

Talks regarding Greece's bailout will shortly restart this year, as will negotiations on the Basel IV Implementation, but with the backdrop of the looming Italian **banking crisis** it remains to be seen whether any end is in sight for Europe's economic woes - be they new or old.

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The EU's priorities for 2017 (it's not all about Brexit...)

For the first time in EU history, the three EU institutions, European Council, Commission and Parliament, have negotiated a **joint declaration** that establishes a set of common legislative priorities for 2017. The areas of focus are jobs, security and the digital market. The declaration will help the three EU institutions to pool their efforts and to ensure substantial progress in fields where they are most needed.

In 2017, the EU will give priority treatment to legislative initiatives in the following **policy areas**:

- giving a new boost to **jobs, growth and investment** through strengthening the European fund for strategic investment, modernising trade defence instruments, improving waste management in a circular economy, making progress on the banking union and on the capital markets union
- addressing the **social dimension** of the EU, in particular through enhancing the youth employment initiative, improving social security coordination, allowing easier access of accessible products and services to the market and creating a European solidarity corps
- better protecting EU citizens' **security**, in particular through better protecting external borders (via an entry-exit system, smart border and a European travel information authorisation system), stronger

rules on buying and possessing firearms, fighting terrorism, money laundering and terrorist financing and information exchange on third country nationals
- reforming the EU's **migration** policy in a spirit of responsibility and solidarity, notably through revising the EU's asylum rules and enhancing investments in third countries to address the root causes of migration
- delivering on a **digital single market**, in particular through reforming the EU telecoms and copyright rules, allowing the use of the 700 MHz band for mobile services, preventing unjustified geo-blocking, revising the audiovisual media services directive and modernising the common data protection rules
- building an **energy** union and a forward looking climate change policy, notably through the implementation of the 2030 climate and energy framework, the follow-up to the Paris agreement and the clean energy for all Europeans package.

The Council, Parliament and Commission agreed that progress is also needed in pursuing their commitment to common European values, in the fight against tax fraud, in the preservation of the principle of free movement and in the reinforcement of Europe's contribution to stability, security and peace.

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The Brexit obstacle course for 2017

As it stands, Theresa May plans to trigger Article 50 commencing the two year exiting process from the EU by the end of **March 2017**. However, there are a number of hurdles in her way that have the potential to delay the procedure. We take a look at these obstacles and how they may affect the timetable of progress for Britain's exit from the EU in the coming year.

The largest potential impediment to May's progress is the decision of the Supreme Court on the challenge by Gina Miller and Dos Santos against the Secretary of State for Exiting the EU. This appeal case is deciding whether the government has sufficient authority through the use royal prerogative powers to trigger Article 50 itself or whether the consent of Parliament, through a vote, is also required.

If the government's appeal is upheld, May will be able to invoke Article 50 without the delay of first passing an act of **parliament** . However, if the Supreme Court upholds the High Court's ruling against the government and the parliament's permission to invoke Article 50 is required then there are several possible routes that could be followed.

It has been indicated that if parliament's consent is required, the government would like a "**one-line**" bill to be passed by parliament to minimise any delay. This would be the easiest resolution for government in this scenario and not pose a problem. However, parliament may react in a number of different **ways**; from refusing to grant such a bill on the basis that the referendum result was gained under a false prospectus, to granting the government power but only if certain conditions are met. For example, the endangering of individual rights was highlighted in the High Court's decision and may be a specific issue to be addressed prior to formal negotiations starting.

Individual rights were highlighted in the High Court's judgment. Their prominence suggests that if the Supreme Court judgment follows the ruling, the Court could even specify that a one-line bill would be insufficient. It may impose an obligation on government to protect of individual rights prior to Article 50 being triggered. If parliament's permission is required and a one-line bill is insufficient there will be additional considerations to be agreed. This would undoubtedly delay the timeline for triggering Article 50 by the end of March 2017.

Another factor that could hold up the procedure is the issue of the devolved institutions involvement. Scotland and Northern Ireland **voted** strongly in favour of remaining in the EU, 62% and 56% , respectively. Scotland's First Minister, Nicola Sturgeon has used this to emphasise that there is no mandate for Scotland to be removed from the EU, particularly the **single market**. In December, the Scottish government published a report, **Scotland's place in Europe**, outlining the relationship it wishes to maintain with Europe and the threat of a potential second independence referendum if some tailored relationship with the EU is not permitted by England. Therefore, even if government was able to leave the EU without the devolved institutions agreement, politically this would be very unlikely with the risk of another **independence referendum** on the cards. Coming to an agreement with Scotland and Northern Ireland when the electorate's positions are so divergent will be difficult and could prolong the process.

The decision of the Supreme Court is expected on 24 January 2017 and it should shed more light on how the procedure will progress and indicate the likelihood of May's timeline being met. However, the multiplicity of factors and actors involved in this incredibly complicated and unprecedented process of leaving the EU means that trying to predict, or even estimate, how it will progress on a certain timescale is incredibly difficult and highly likely to change.

Referenda of 2016 and elections of 2017

After the international upheaval of 2016, it is hardly surprising that Slovak Prime Minister Robert Fico started 2017 by **issuing a warning** to EU leaders, asking that they avoid referendum "adventures" on domestic issues as these referenda threaten to put the euro and EU at risk.

Mr Fico's concern could be considered justified as, in recent years, almost all popular votes on Europe have resulted in a negative outcome for Union.

The most notorious vote of 2016 was **Britain's EU membership referendum**, when 51.9 percent of voters chose the radical option of leaving the Union. Shortly after Italy's former prime minister, Matteo Renzi, called a referendum on constitutional reforms. He **lost in December**, which forced him to **resign** and created political uncertainty in the eurozone's third biggest economy.

These referenda in 2016 were also preceded by two other referenda on specific EU policies. The first one was held by Denmark, at the end of 2015, when a closer cooperation with other EU countries in justice and home affairs issues **was dismissed by 53.1% of voters**.

Earlier in the year, in April 2016, 61.1% of voters in a **Dutch referendum had rejected an EU-Ukraine association agreement**, casting doubts on the bloc's strategy to stabilise the war-torn country. Whilst the turnout was low, an estimated 32.28%, the threshold for a valid Dutch referendum was met. Following this the EU has **recently agreed a supplementary to the Ukraine treaty** which makes it clear what the agreement actually entails in the hope that this will enable Dutch Parliament to ratify the Treaty despite the advisory referendum.

The disenchanted relationship it appears that citizens of Europe are having with the Union is not only evident in the results of referenda, but also in the latest Eurobarometer survey (the regular EU study of public opinion) published in 2016. The survey **shows that** 36% of Europeans trust the European Union. Having said that, it still is slightly more than the proportion who trust their national parliaments (32%) and their national governments (31%).

However, whilst 2016 looked to express the popular euro-sceptic opinion of the time through the medium of referenda, 2017 looks set to be the year that national elections could define the future of the European Union.

In the Netherlands and France far-right leaders, **Geert Wilders** and **Marine Le Pen**, are running closely in opinion polls ahead of elections this year, both of whom view the European Union in an unfavourable light.

Geert Wilders has previously stated, in the wake of Brexit, that the **Netherlands should hold its own EU membership referendum**. It remains to be seen whether this time around Wilders and the PVV manage hold their steam throughout the elections.

Marine Le Pen has vowed to hold a referendum on the country's EU and euro membership if she wins May's presidential elections - even though she seems to be now **fudging her position** in announcing that the new Franc could be pegged into Euro. It is however expected that while Le Pen would make it to the second round of the presidential election, she would **lose that run-off to a mainstream candidate, who is likely to be conservative Francois Fillon**. The socialists are yet to select their candidate.

The upcoming federal elections in Germany however seem less likely to bring tumult to the bloc. Whilst the anti-migrant and anti-EU Alternative for Germany (AfD) party are growing increasingly popular, polls indicate that Chancellor Angela Merkel is likely to achieve a fourth term and it is questionable if AfD will even win one seat at the Bunderstag.

Likewise, Austrian voters rejected anti-migrant and anti-EU rhetoric at the end of last year, with Van der Bellen, a Green and pro-European politician, winning the Austrian presidential election by 53.3% beating Hofer, a far-right nationalist, with a lead higher than when the elections were first held earlier in the year.

After pollsters wrongly predicted various electoral results, most notably those of the UK referendum on EU membership and the US elections, the gloomy predictions of the upcoming elections may well be proved wrong. Indeed, French paper *Le Parisien* recently **announced** that it would stop commissioning polls in the run-up to the French presidential election.

Accordingly, whether the anti-EU and anti-establishment sentiment of the last year continues into 2017 remains to be seen. What is certain however is that the rollercoaster of 2016 is set to continue this year, and it does not look to be a ride for the faint-hearted.

Court of Justice of the EU rules on the legality of national data retention laws

The Court of Justice of the European Union delivered an early Christmas present to privacy activists on 21 December 2016 in finding that EU law precludes national legislation which requires a general, bulk and indiscriminate retention of traffic data and location data.

The judgement from the Court comes from the Watson/Tele2 cases, in which Swedish and UK communications data retention laws were being challenged as contrary to the privacy and data protection guarantees of the EU Charter of Fundamental Rights.

The legal challenge mounted by the UK was initially that of David Davis (when he was a backbench MP) and Tom Watson, Labour's deputy leader, over the legality of bulk interception by GCHQ's of online messages and call records.

Watson and Davis were supported by the Law Society and other civil rights groups such as Liberty, the Open Rights Group and Privacy International. The pair had previously won a high court victory against disproportionate state powers of surveillance granted by Data Retention and Investigatory Powers Act 2014, but the government appealed and the case was subsequently referred by judges to the European Court of Justice.

The UK has had data retention laws in place since the early 2000s, first as a voluntary arrangement, and later as the result of a 2005 EU-wide law, Data Retention Directive, after the UK had provided strong support for the same. The European Court rejected data retention in 2014, saying that it interfered with our right to privacy after a challenge from both Digital Rights Ireland and from Austrian citizens.

In its Watson/Tele2 judgement the Court has followed closely the decision of the Digital Rights Ireland case, that only under certain very strict circumstances are data retention obligations and access to that data permissible under EU law.

Regarding DRIPA, the judgement states that the legislation "*exceeds the limit of what is, strictly necessary and cannot be considered to be justified, within a democratic society*". The press release associated with the judgement provides the ratio that "*it is open to Members States to make provision, as a preventive measure, for targeted retention of that data solely for the purpose of fighting serious crime, provided that such retention is, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the chosen duration of retention, limited to what is strictly necessary*".

The decision was hailed by the Law Society of England and Wales as a step in the right direction for ensuring the protection of the privileged nature of communications between lawyers and their clients. Law Society president Robert Bourns said, "Legal professional privilege is a fundamental part of the relationship that solicitors have with their clients, ensuring that our clients can seek legal advice in the confidence that it cannot be disclosed to a third party,"

The UK case will now go back to the Court of Appeal, which will have to decide on the validity of DRIPA in the light of the CJEU ruling. The CJEU has laid down a series of requirements, at least some of which are clearly not present in DRIPA.

The significance of the CJEU judgment lies in its effect on the data retention provisions of the Investigatory Powers Act 2016 (IP Act), which replaced DRIPA on 30 December 2016. Some of the CJEU's requirements may be addressed relatively easily by changes to the IP Act, but others may cause the UK government serious difficulties.

Digital Single Market inches forward: portability, geo-blocking and copyright

The Europe's Digital Progress Report (EDPR) published last May 2016 showed unequal progress towards the digital single market ("DSM") with the development of the digital economy across

Member States varying significantly.

The Commission has been frustrated with how slow the European Parliament has been with pushing forward the proposals on the DSM to reduce these disparities between Member States. The European Parliament delayed progress with the time it took to determine the responsible committees. The **Council** on the other hand has been moving more rapidly; its commitment, along with the **Commissions'**, is demonstrated by the inclusion of **DSM initiatives** in their published priorities for 2017.

Three key areas being focused on to develop the EU digital economy are: portability, geo-blocking and copyright.

The area of greatest advancement appears to be the area of portability. The **portability proposal** was tabled in December 2015 and the Council published its **common position** in May 2016. Following a delay caused by the Parliament deciding which committee was to be responsible, the JURI Committee published a **draft report** in June 2016 and **amendments** were announced in October. Finally, the Committee adopted its position on 29 November 2016 and the trialogue is currently ongoing.

The geo-blocking proposal is also making headway. On 28 November 2016, the Council agreed on common position for a **draft regulation** to ban unjustified geo-blocking between member states. The discriminatory practice preventing online customers from accessing and purchasing products or services from a website based in another member state is intended to be abolished. The Council's approach is to prevent discrimination based on customers' nationality, place of residence or place of establishment and boost e-commerce. The IMCO Committee released the **draft report** on 22 December. Once the European Parliament's final report is approved, the draft regulation can move forward to trialogue.

The copyright proposal however appears to be making much more staggered process due to its slightly more controversial nature. A current **Initial Appraisal**, released December 2016, of the Commission's Impact Assessment regarding the proposal for a Directive on copyright in the Digital Single Market has shown that advances in the area of copyright may be stunted by the opposition of different stakeholders and also the limited quantitative data which is available to the interested parties. A number of external agents have agreed that, as a first step, **'a number of key data sets need to be generated'** in order to be greater clarity to stakeholders.

In parallel to the legislative proposals, the Commission DG COMP is conducting an ongoing **e-commerce sector inquiry**. This aims to obtain an overview of the prevailing market trends, gather evidence on potential barriers to competition linked to the growth of e-commerce and understand the prevalence of certain, potentially restrictive, business practices.

The Commission launched the inquiry in May 2015 as part of the DSM strategy. In September 2016, the Commission published a **Preliminary Report** setting out its initial findings with an overview of the main competition-relevant market trends identified in the inquiry and pointing to possible competition concerns. A public consultation open to all interested stakeholders followed which ended in November 2016. The Final Report summarising the main findings of the sector inquiry is due in the first half of 2017.

The Brussels Agenda will continue to monitor and report on developments in each of the key areas of the DSM strategy as they progress.

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Salvaging the EU-Ukraine deal

EU leaders have given the Dutch reassurances that Ukraine will not become a member of the bloc after the country voted against ratifying the EU-Ukraine association agreement.

In a referendum on 6 April, the Dutch population voted against ratifying the EU-Ukraine Association Agreement (AA), which creates a free-trade area and expands cooperation on foreign policy and crime-fighting between Ukraine and the bloc. The agreement has however been ratified by the other 27 Member States leading the Council to offer the Dutch people written **reassurances.** that the agreement does not mean that Ukraine is a candidate country for EU accession in a bid to turn around popular opinion and obtain the country's approval of the deal.

The AA replaces the **EU-Ukraine Partnership and Cooperation Agreement** and is aimed at deepening economic, political and trade links between the territories. In particular, it provides for a common security and defence policy, a free trade area and a wide range of economic cooperation and sector cooperation in areas such as energy, transport and the environment.

Negotiations on the deal began in 2007 however the process was accelerated when pro-EU Ukrainians **forced**

then-President **Yanukovych** from power in February 2014, after he abandoned the AA under Russian pressure, with the full agreement being signed by the EU and Ukraine on 27 June 2014.

Major parts of the agreement are already provisionally applied as of 1 September 2014, including in areas such as the respect for human rights, fundamental freedoms and rule of law, on justice, freedom and security and on economic and financial cooperation.

The agreement will however not enter into force until all Member States have ratified it.

The Netherlands is the only Member State not to have ratified the deal after 61.1% of voters **rejected** the deal during a referendum on 6 April, following a campaign that led many to believe that the deal would put Ukraine on a fast-track to EU membership. The campaign was also overshadowed by the **MH17** disaster of 17 July 2014, in which 196 Dutch people died when a passenger plane was shot down over Ukraine.

The result of the referendum is however not binding, leading the Dutch Prime Minister, Mark Rutte, to try to obtain reassurances from the EU on the AA in a bid to change public opinion and convince the Dutch Parliament to approve the deal.

Accordingly, following a meeting between the 28 Heads of State or Government of the EU on 15 December, the European Council issued a document confirming that the AA "does not confer on Ukraine the status of a candidate country for accession" to the EU (like Albania, Macedonia, Montenegro, Serbia and Turkey have), nor is a commitment to give Ukraine such status in the future. The Council Conclusions also confirmed that Ukrainian citizens would not be gaining rights to live and work in the EU.

The Dutch Parliament is now due to vote on ratifying the AA. Whilst in favour of the deal himself, Rutte **warned** "I can't give my colleagues a guarantee that with this binding decision the EU-Ukraine agreement will be signed by the Netherlands".

Indeed, there is a real possibility that the Parliament will reject the AA, given that Rutte's People's Party for Freedom and Democracy does not have a majority in Parliament and that the far-right, anti-EU Party for Freedom are ahead in the polls for country's general election in March 2017, a lead that actually **grew** after its leader, Geert Wilders, was found guilty of inciting discrimination at a rally where he called for “fewer Moroccans". Additionally, it is likely that politicians will not wish to vote against the will of public, especially ahead of the elections.

While Rutte has been seeking reassurances from the EU, the European Parliament and Council have been working on a deal allowing visa-free travel for **Ukrainian** and **Georgian** nationals, the former of which is provided for by the AA. On 20 December it was **confirmed** that such an agreement has been reached allowing citizens of the former-Soviet states to visit the Schengen zone for a period of 90 days in any 180-day period without the need for a visa. The regulation will now go to European Parliament for a vote at first reading, and to the Council for adoption.

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Investigatory Powers Act 2016

On 30 December 2016 the UK's Investigatory Powers Act came into effect, ushering in a new era for the United Kingdom in which its citizens would be subject to some of the most extensive surveillance measures ever seen in the civilised world.

The law, which passed through parliament in November, is intended as an update and replacement of Britain's oft criticised surveillance legislation the Investigatory Powers Act. The Bill however also includes an array of new governmental powers, such as requiring internet service providers and app companies to collect and store users' data, such as browsing records, and messages for 12 months, enabling law enforcement authorities to collect the data and have them accessed by authorities which range from the Food Standards Agency to DWP.

Despite coming into effect however, not all parts of the Bill are in force, including the government's ability to collect Internet Connection Records. This part of the Bill has been postponed until internet companies and the UK Government can reach an agreement on how to collate such information safely.

As matters stand then, only core parts of the Bill are in force for example powers to retain gathered information on citizens, and new ways in which intelligence agencies can force technology companies to provide private data have been brought into force.

The Home Office has said the provisions listed within the Bill are needed to help protect the country's national security and give more oversight than ever before. Of the Bill, home secretary Amber Rudd **said**: “This Government is clear that, at a time of heightened security threat, it is essential our law enforcement, security and intelligence services have the powers they need to keep people safe... The Investigatory Powers Act is

world-leading legislation that provides unprecedented transparency and substantial privacy protection."

Opponents of the Bill, however, state that it is a violation of privacy, and draconian in nature. Bella Sankey, Amnesty's policy director, **said** that it was a "sad day" when the bill passed into law last month.

"The Home Secretary is right that the Government has a duty to protect us, but these measures won't do the job," she said then. "Instead they open every detail of every citizen's online life up to state eyes, drowning the authorities in data and putting innocent people's personal information at massive risk.

"This new law is world-leading – but only as a beacon for despots everywhere. The campaign for a surveillance law fit for the digital age continues, and must now move to the courts."

The law has been opposed by tens of thousands of people in a **public petition**, as well as receiving **criticism from major technology companies** and a **parliamentary select committee** prior to the Bill's enactment.

In light of the recent cases of Watson and Tele2 at the European Courts of Justice, some of the central powers of the Investigatory Powers Act have now been criticised by the ECJ in their decision at the end of December 2016. As such, it is possible that the law is set to face a range of legal challenges as its predecessor, the Data Retention and Investigatory Powers Act 2014 had, and the law could be changed in the coming months and years.

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Creating a Security Union - New measures proposed

In reaction to the waive of terrorist attacks across the EU, the Commission has unveiled new measures to reinforce the Schengen Information System and target terrorist financing.

One day after a suspected terrorist drove a truck into a Christmas market in **Berlin** on 20 December, killing 12 people, the Commission, led by **UK Commissioner** Sir Julian King, released six new proposed pieces of legislation to enable better information sharing amongst authorities and to combat terrorist financing.

Firstly, three proposals were released to improve the operational effectiveness and efficiency of the Schengen Information System (SIS) in the fields of **police cooperation and judicial cooperation in criminal matters** and **border checks** and **for the return of illegally staying third country nationals**.

The SIS is a centralised information system, containing around 70 million records, that supports checks at the external Schengen borders and improves law enforcement and judicial cooperation in 29 countries throughout Europe. In particular, it provides information on illegal migrants, persons sought in relation to criminal activities and missing persons, as well as details of certain lost or stolen objects.

In line with the recommendations from the Commission's comprehensive evaluation of the SIS, the proposals intend to introduce an obligation to create a SIS alert (which appear when a relevant search is made in any of the 29 countries) in cases related to terrorist offences, preventive alerts on children at risk of parental abduction and full access rights for Europol, the EU's law enforcement agency. In relation to migration, the proposals are also intended to make more effective use of data such as facial imaging and palm prints to identify persons, make it compulsory for entry bans for third-country nationals to be entered on the SIS and introduce a new alert category for return decisions.

Whist the UK is permitted to opt-out of any EU legislation on freedom, security and justice matters, the SIS provisions related to police and judicial cooperation apply in the UK.

On the same day, the Commission also unveiled three proposals on **money laundering**, **cash controls** and **criminal asset freezing and confiscation orders** as part of its **Action Plan** against terrorist financing in order to "complete and reinforce" the EU's legal framework in these areas.

Under the proposed directive on money laundering, the EU will establish minimum rules concerning the definition of criminal offences and sanctions related to money laundering, preventing criminals from exploiting differences between different national rules, and set common provisions to improve the investigation of offences related to money laundering, whilst the proposed regulation on cash controls will tighten cash controls on people entering or leaving the EU with €10,000 or more in cash at the same time as enabling authorities to act on amounts lower than this, and extend customs checks to cash sent in postal parcels or freight shipments.

The final proposed regulation intends to widen the scope of the current rules on cross-border recognition to include confiscation from other people connected to a criminal and cases where a criminal is not being convicted, for example due to escape or death, and improve the speed and efficiency of freezing or

confiscation orders by obliging authorities to communicate with each other and creating clear deadlines.

The six proposed pieces of legislation will now be sent to the European Parliament and the Council for discussion and adoption, in line with **ordinary legislative procedure**.

Fighting populism: Changes to Social security rules

Amid anti-immigration rhetoric and the rise of populist parties across the EU, the Commission has announced new rules on social security in a bid to reduce 'welfare tourism'.

As part of its 2016 **Work Programme**, the Commission released a new **proposal** on 13 December to revise EU legislation on social security coordination in order to facilitate labour mobility and ensure fairness for those who move and for taxpayers.

Social security **rules** determine which Member State system mobile citizens are subject to and are intended to prevent a person from being left without protection, or having double coverage in a cross-border situation. The rules cover sickness and maternity benefits, pensions, and unemployment and family benefits amongst others.

The proposed Regulation would amend the current rules to mean that jobseekers can take their benefits to another Member State where they are seeking work for a minimum period of at least six months (this period is currently three months). Likewise, Member States will be able to require that unemployed citizens from other Member States must have worked for at least three months on its territory before they can rely on previous experience in another Member State to claim unemployment benefits; if someone falls unemployed after less than three months, they will fall back into their social security system at home. Additionally, the proposal clarifies that Member States may decide not to grant social benefits to economically inactive citizens from other Member States, in accordance with case law.

The proposal comes amid the growing popularity of anti-immigration parties and concerns from wealthier countries that EU citizens are moving to other Member States in order to access their more generous social security systems. Indeed, the proposed rules are similar to what EU leaders **offered** the UK as part of a compromise deal ahead of the referendum on EU membership due to the UK's concerns over such 'welfare tourism' – the deal however no longer stands after the UK's vote to leave the EU.

Employment Commissioner, Marianne Thyssen, however rejected richer countries' calls for rules allowing lower childcare benefits to be paid to parents working in one country but supporting children living in another, **stating** that "it would be a major bureaucratic exercise to set up such a system, while actually less than 1% of child allowances in the EU are exported from one Member State to another".

Whilst the Commission proposed restrictions on social security rules, the day after the release of the proposal, the European Court of Justice (ECJ) widened the scope of the current rules. In **Noémie Depesme and Others v Ministre de l'Enseignement supérieur et de la Recherche**, referred by Luxembourg's Higher Administrative Court, the ECJ ruled that step-children of a frontier worker (ie someone who lives in one country, works in another, and goes home at least once a week) may be considered to be that person's children for the purposes of qualifying for a social advantage.

The Commission proposal is complimentary to the one on **posted workers**, released on 8 March. The proposal on social security strengthens the administrative rules on social security coordination for posted workers whilst the posted workers proposal aims to revise the rules relating to the terms and conditions of employment of posted workers, including a new rule providing that the labour law of the host country of the posted worker will apply if the expected or actual duration of posting exceeds 24 months.

The posted workers proposal has however trudged through negotiations, particularly as the previous Presidency, Slovakia, has opposed the proposal along with a group of other eastern and central European countries, arguing that a law mandating higher wages for posted workers would be unfair because companies based in eastern European countries often pay higher costs in legal fees, transport and lodging to send employees to other member states.

It therefore remains to be seen if the social security proposal will meet the same fate.

Tax reform

The development of tax reforms, focusing on transparency and fairness, has been fairly swift and straightforward in recent years. This has predominantly been due to all of the groundwork laid down in the OECD Base Erosion and Profit Shifting Action Plan which has made it easier and quicker to develop proposals through the Commission. However, it is unlikely to continue at this pace in 2017.

As discussed in previous editions of the Brussels Agenda, the proposals on developing further tax transparency between tax authorities and the tax fairness initiative on **anti-tax avoidance** ("ATAP") were adopted unforeseeably quickly. The road ahead, however, is less smooth.

Firstly, the public transparency initiative has got caught in the opposition of the Member States. Currently, the proposal has been tabled on the basis of **Article 50 TFEU**, freedom of establishment. However, it is likely that this legal basis will need to be changed as the Council legal service supports the proposal changing to the taxation legal basis. Consequently, this would mean that the Council voting requirements would change from **qualified majority** voting to **unanimity**. This would inevitably make it easier for proposals to be vetoed by any Member State. The European Parliament would also become a consultative body, rather than a co-legislature.

Secondly, the re-announcement of the **Common (Consolidated) Corporate Tax Base** ("CCCTB") proposals in October 2016 are already facing opposition similar to that experienced before it was dropped back in 2011. The ECOFIN Council's attitude towards the first stage of the proposals, CCTB, are lukewarm at best whilst it has decided not to even consider the second stage, CCCTB, at this point. Although the Council has agreed to discuss the CCTB, conclusions in a **report** to the Council from its discussions on 6 December 2016 indicate that Member States have reservations about the proposal.

Despite these obstacles, the Commission and Parliament are pushing forward with their agenda to enhance tax transparency and fairness by keeping the pressure on Member States. This is aided by the **media coverage** of the **Panama Papers** and **Lux Leaks** scandals which has raised awareness and increased political pressure on Member States, as well as the European Commission, to tighten tax laws. It may even assist Member State governments to combat the rise in populism by showing their electorates that they are working on solutions for tax evasion and limiting the possibilities for aggressive tax planning.

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Legal profession unified on Brexit

The legal sector spoke with one voice as the Bar Council's new "Brexit Papers" signalled support for the positions set out previously by the Law Society of England and Wales in the wake of the 23 June vote.

"It is good to see the Bar reinforcing our common messages to government on the key issues that Brexit raises for the legal sector," said Law Society president Robert Bourns.

"Throughout this year the Bar and the solicitor profession have been engaging with the government to examine the ramifications of Brexit, and put robust information before ministers, parliamentarians and officials."

The Law Society's previously published Brexit work includes briefings for parliamentarians, submissions to select committees, a range of information for members and the public, as well as a report developed by Oxford Economics which detailed the likely effects of Brexit on the legal services sector. We also highlighted the significant contribution the sector makes to the UK economy and balance of payments.

This work will continue in 2017 with a further report, which will draw together key issues and developments over the second half of 2016 and present a comprehensive overview of the solicitor profession's needs and expectations from the Brexit negotiations.

"With the legal sector speaking together with one voice, as we are on this issue, we present a powerful united front to government.

"We look forward to continuing to work with the profession, with the Bar, and with the government as the Brexit negotiations progress, advocating for the best possible result for the legal sector and its clients," said Robert Bourns.

The LSEW has also now approved its Brexit and the law report which is available **here**.

Annual New Year Reception - 31 January 2017

The UK Law Societies will be hosting its annual New Year reception at its Brussels offices on Tuesday 31 January 2017.

The reception is being held together with the bars of Austria (Österreichische Rechtsanwaltskammertag), Belgium (Ordre des Barreaux Francophones et Germanophone de Belgique) the Czech Republic (Ceská advokátní komora), Germany (Bundesrectsanwaltskammer) and Luxembourg (Barreau de Luxembourg).

The event will take place from 18.30 to 20.30 at Avenue des Nerviens 85, 1040 Brussels.

Law Society CEO joins London Mayor's Brexit advisory group

Law Society of England and Wales chief executive Catherine Dixon today said she was honoured to be part of London Mayor Sadiq Khan's Brexit Expert Advisory Group.

"The legal sector underpins the UK economy - and not just because it is worth more than £25.7bn in its own right. In every part of the economy people rely on the advice and support of solicitors," said Catherine Dixon.

"I look forward to playing my part in the group as we assess the risks, challenges and opportunities presented by Brexit."

The Mayor's Brexit Expert Advisory group includes representatives from key parts of the London economy.

"The legal sector is interconnected at every point with the UK economy - a 1 per cent growth in the legal services market creates 8,000 jobs. Each £1 of additional turnover stimulates £1.39 in the rest of the economy. The legal economy grew by eight per cent last year," Catherine Dixon added.

"English law is a vital export with a global reputation based on its common sense approach to contract law, and its widely respected judiciary. We are also a world centre for dispute resolution."

Exciting opportunity in Brussels for trainee solicitors

The Brussels Office of the three Law Societies (England & Wales, Scotland and Northern Ireland) acts as the voice of the Solicitors' profession in Europe. Situated in the heart of the EU district we are well placed to represent the interests and views of the legal profession to key decision makers and legislators.

We are currently offering trainee solicitors from the UK a unique opportunity to undertake a six-month secondment in the Brussels Office commencing in March 2017.

There has never been a better time to be in Brussels; you will be at the centre of the biggest political change of this century, which has momentous constitutional and legal implications.

As a trainee in the office you will assist the Brussels team in actively monitoring EU legal developments that range from competition law to criminal justice, public procurement to private international law. Specific tasks will include: preparing and writing the Brussels Agenda as well as drafting legislative updates highlighting developments in the corporate client and private client areas. You will also attend European Parliament hearings and high level conferences offering the opportunity to develop contacts with MEPs, key Commission officials and UK Government departments.

Trainees interested in applying will need to provide a letter from their firm/employer confirming that it will continue to pay their salary during the secondment.

Trainees are invited to send their application, which should comprise a CV and covering letter and confirmation from your firm/employer of consent to the secondment to Antonella Verde, **antonella.verde@lawsociety.org.uk**.

The closing date for applications is Monday 30 January 2017 09.00 a.m. (GMT) / 10.00 a.m. (CET) and interviews will follow (telephone interviews are possible).

If you require an information note or would like to discuss the secondment,

please contact **antonella.verde@lawsociety.org.uk**.

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New practice note supports solicitors in the fight against modern slavery

The role solicitors have in ensuring they and their clients play their part in fighting modern slavery will be reinforced by new guidance from the Law Society of England and Wales.

The practice note brings together legal requirements contained in the Modern Slavery Act, Bribery Acts and other legislation, and gives solicitors specific advice and examples of best practice for acting as a trusted adviser assisting their clients in meeting their anti-slavery obligations and managing their supply chains, as well as in their own firms.

It was launched last night by Law Society president Robert Bourns at an event that explored emerging best practice in the implementation of the Modern Slavery Act.

"The International Labour Organisation has estimated there are 21 million people trapped in forced labour around the world, almost double the number of people taken in the history of the trans-Atlantic slave trade," said Robert Bourns.

"Slavery is not a history lesson, it is a real and immediate problem.

"The solicitor profession has a valuable role in combating it, by helping to ensure that the many organisations we advise play their part in preventing slavery and human trafficking."

The practice note forms part of the Law Society's focus on business and human rights, highlighting not only the legal and moral obligations but also the commercial and public relations advantage companies can gain from embedding a human rights focus into their business thinking.

"A respect for human rights need not conflict with a company's desire for profits and growth," said Robert Bourns.

"A demonstrated and practical respect for human rights at every stage of the supply chain can help create jobs, promote sustainable growth, and set a company apart on the ethical standards consumers are increasingly looking for.

"The United Kingdom was the first to produce a National Action Plan to implement the United Nations Guiding Principles on Human Rights and Business, and the solicitor profession has a vital role in helping business understand the role human rights must play in their daily business practices."

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Lawyers at risk: International human rights at the Law Society

The role lawyers play at the forefront of the battle for human rights is celebrated this week at the Law Society in the approach to International Human Rights Day on 10 December.

Law Society president Robert Bourns said: "International Human Rights Day is one of the most important dates in the Law Society calendar. As members of the global legal community we feel a constant responsibility to support lawyers across the world, many of whom risk their lives to defend and promote human rights.

"Respect for human rights is integral to the rule of law. These principles strengthen and protect societies and economies around the world. In the run-up to International Human Rights Day we are debating some of the most pressing contemporary human rights issues, from the Modern Slavery Act in the UK to the structural causes that put lawyers at greater risk of attack for their work."

- 7 December: Lawyers at Risk - international lawyers discuss attacks on the legal profession and their structural causes

- 8 December: Reception for human rights lawyers and experts

Secondee trainee solicitor's visit the Court of Justice of the European Union with Advocate General, Eleanor Sharpston QC, and Judge, Ian Forrester QC

Trainee solicitors on secondment in Brussels enjoyed a rare opportunity to visit the CJEU in Luxembourg in December and meet two prominent figures.
The trainees attended a hearing in the Grand Chamber, were given a tour of the courts and had lunch with Advocate General Eleanor Sharpston and the UK's Judge at the General Court of the EU. The unique opportunity to have lunch with the two highly respected members of the court was a particular highlight of the day which was filled with lively debate and discussion.

New Law Society Charity of the Year is Marie Curie

The Law Society of Northern Ireland has announced that Marie Curie will be its chosen charity of the year for 2017.

The President of the Society, Ian Huddleston was joined at the announcement of the new charity partnership by Marie Curie Hospice Lead Nurse Cindy Anderson and Ciara Gallagher, Head of Regional Partnerships & NI Fundraising.

Commenting the President of the Society said:

“The Law Society of Northern Ireland looks forward to supporting the invaluable work and services which Marie Curie provide through awareness and fund raising initiatives with our members in 2017.”

Ciara Gallagher, Head of Regional Partnerships & NI Fundraising, said:

“Marie Curie is absolutely delighted to have been chosen as the Law Society of Northern Ireland's Charity of the year.

All the funds raised from the partnership will help Marie Curie Nurses provide high quality care to people with terminal illnesses in their own homes right across Northern Ireland or in the charity's hospice in Belfast.

Marie Curie services are always free of charge for all patients and their families. This is only made possible thanks to the generous donations of our supporters ”

Marie Curie provide care and support for around 2,500 people living with a terminal illness in Northern Ireland each year.

There are more than 120 Marie Curie Nurses working in Northern Ireland, caring for around 2,000 terminally ill people and their families in their homes each year.

The Marie Curie Hospice in Belfast cares for around 500 people each year, including people staying in the hospice and those using day hospice services.

Society past president elected to head CCBE

Ruthven Gemmell, partner at Murray Beith Murray and past president of the Law Society of Scotland, has been elected as president of the Council of Bars and Law Societies of Europe (CCBE).

Mr Gemmell, who was president of the Law Society of Scotland 2006-07, was selected to join the CCBE as the Society's representative on the UK delegation in 2007. He headed the UK delegation from 2010 to 2013 when he was elected as vice president. He will take up the role of president on 1 January 2017.

The CCBE is the representative organisation of more than one million European lawyers through its member bars and law societies from 32 full member countries, and13 further associate and observer countries. It provides opportunities for bars and law societies to work together, exchange information, and share expertise.

Ruthven Gemmell said: “It is a tremendous honour to have been elected as president of the CCBE, representing more than a million lawyers across Europe.

“It's important that we have the opportunity to come together to share information, discuss common issues and develop an understanding of neighbouring jurisdictions, particularly during this time of enormous economic and political change.

“The CCBE has worked with law societies across Europe, including the Law Society of Scotland, to highlight key issues such as the protection of client confidentiality in the digital age, the protection of lawyers and the rule of law around the world, and the effect of new technologies on the role and function of the legal profession. We have supported a range of initiatives, including the ‘Find a lawyer' project, which helps clients or lawyers who are looking for cross-border legal expertise to find European lawyers in their own language, and the European Lawyers in Lesvos Project which was launched in July this year. This is an important project which sees lawyers from right across Europe travel to the Greek island to provide first instance legal assistance to migrants requiring international protection there.”

Eilidh Wiseman, president of the Law Society of Scotland, said: “I'm absolutely delighted for Ruthven. He is a superb advocate for the Scottish legal profession and will bring his wealth of talent, insight and experience to his role as CCBE president, representing lawyers in over 40 countries.

“The legal profession now operates on a global basis and, following the UK vote to leave the EU, it is important to ensure that we maintain links with our colleagues across the different European jurisdictions to share knowledge and best practice as well as continuing business interests.”

Ms Wiseman has been appointed to join the CCBE as the Law Society of Scotland representative on the UK delegation. The UK has six CCBE delegates.

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International Human Rights Day 2016 - Blog

The Law Society of Scotland speak to Professor Alan Miller, Special Envoy of the Global Alliance of National Human Rights Institutions and former chair of the Scottish Human Rights Commission, on International Human Rights Day 2016, which marks the 68th anniversary of the United Nations General Assembly adoption of the Universal Declaration of Human Rights.

Do you think it is important to mark human rights on International Human Rights Day? Why?

Yes and on every day and in every way, everywhere!

2016 has placed human rights on the back foot. Narrow political and state interests have been undermining rule of law and human rights. For example, this can be seen from the vetoes used in the UN Security Council to frustrate a resolution to the Syrian conflict, to the downward spiral of European states in response to those fleeing such conflict and to the mean-spirited Brexit debate closer to home which now risks undermining and imperiling the constitutional guarantees of rights and freedoms within Scotland.

2017 needs human rights to be on the front foot reclaiming the space in our public debates and decision-making processes. Scotland has a contribution to make in how it responds to Brexit.

You have moved from the Scottish Human Rights Commission to a new role as Special Envoy of the Global Alliance of National Human Rights Institutions (GANHRI). What does this entail?

At the call of the UN over 100 countries, including Scotland of course, have now established national human rights institutions as independent bodies to protect and promote human rights. My role is to represent and advocate on their behalf within the UN and broader international community. This includes bringing the

experiences and perspectives of these national institutions to influence the decision-making processes within the UN through holding to account member states for implementing their international legal human rights obligations. For example, this includes the implementation of commitments made towards successful implementation of the UN Sustainable Development Goals which would underpin the solutions to many of the contemporary challenges of conflict, extremist violence, forced migration, climate change, poverty and the inequalities of globalisation.

The role also involves supporting national human rights institutions and so, for example, I have just returned from Turkey where I am working with the UN to strengthen the national institution.

What's your view of Scotland's role internationally on human rights issues?

It has a developing profile. Scotland's National Action Plan for Human Rights is recognised as exemplary practice as is its championing of climate justice. The EU is widely regarded within the international community as a leading human rights influence in the world and there is considerable interest in how Scotland now responds to Brexit. Of course I am personally very pleased that the Scottish Human Rights Commission continues to be well regarded under its new leadership!

How can solicitors help protect human rights?

In many ways.

Private practitioners can protect access to justice. In-house solicitors can ensure both legal compliance as well as support the development of best practice by public authorities. Commercial lawyers can advise corporate clients of their responsibilities under the UN Guiding Principles on Business and Human Rights.

These are all the givens. More can be done through supporting law centres, clinics and NGOs and through influencing legal professional and academic bodies to proactively promote and protect our human rights framework without which rule of law and lawyers can no longer effectively serve the public interest.

What can the legal profession and/or human rights organisations do to help build awareness of human rights in everyday life?

Brexit is a defining issue. It removes one and imperils the other of our two pillars of the closest Scotland has to a constitutional framework - the required compliance with EU law and with the ECHR.

EU law guarantees rights across virtually all fields of law including employment, equality, freedom of movement, family, privacy, consumer and criminal. Many fall within reserved areas in the UK and shall be literally at risk of actually falling. Free of the EU, the UK shall be freer to leave the jurisdiction of that other 'foreign court', the European Court of Human Rights.

A lesson from the Brexit debate is not to leave communities behind and not to take the public for granted. So the benefits of the EU protected rights to everyday life have to be popularised if they are to be maintained one way or another. Legal bodies can play a big part in this.

As a member of the First Minister's Standing Council on Europe I have been engaging through a series of roundtable events with the legal community and civic society seeking to build an emerging consensus around three guiding principles for Scotland of non-regression of rights, of not being left behind future progressive European developments and of taking the lead in rights. A Scottish Universities Legal Network on Europe has stepped forward in support of this and the Law Society has also taken part. This initiative shall be further developed next year and is one way for the legal and human rights community to play their parts.

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Law Society commences legal action against SLCC on 'hybrid' legal complaints

The Law Society of Scotland has announced that, to protect the public interest and trust in the legal profession, it has commenced legal action to challenge the steps taken by the Scottish Legal Complaints Commission (SLCC).

The action has been taken in order to seek clarity on how certain types of legal complaints should be handled and where the SLCC wishes to use a recent court decision to restrict the Law Society's ability to investigate matters already referred to it for investigation.

In August, the Court of Session ruled that single issues within a legal complaint must be categorised as either service or conduct. The SLCC's practice of classifying an issue as both, a so called 'hybrid' issue, was ruled unlawful.

New complaints made following the judgment on 31 August will now be categorised as either service or conduct issues by the SLCC. However, the Law Society has raised concerns over the decision of the SLCC to recategorise around 200 complaints already in the system, with many now being classed as “service only”. This was despite an earlier analysis which identified conduct issues for investigation by the Law Society as the professional body.

The SLCC's decisions remove the Society's power to investigate and, if required, pursue disciplinary action against individual solicitors in these cases.

The Society has also questioned the legal power of the SLCC to recategorise complaints. There is also concern that revisiting decisions already taken risks calling into question historical cases where disciplinary action has been taken.

As a result, the Society has lodged appeals to the Court of Session, questioning the SLCC's decisions over a number of cases as well as the principle of recategorisation itself.

Eilidh Wiseman, President of the Law Society of Scotland, said: “The most recent issues arose because the approach taken by the SLCC towards the handling of hybrid issues was ruled to be unlawful. This is why it is so important for the SLCC's response to be legally sound and preserve the integrity of the complaints system.

“The SLCC wants to recategorise around 200 complaints already referred to us as conduct matters. Reclassifying complaints as ‘service only' means we cannot investigate and, if needed, pursue action against a solicitor to the independent discipline tribunal. As the body entrusted by parliament to protect the public interest and uphold standards, we cannot allow this to happen.

“We also have strong independent legal advice to suggest the SLCC does not have the statutory power to undertake this recategorisation work. We believe its approach is unlawful and risks establishing a precedent which could undermine the current complaints system.”

Over the last two months, the Law Society has offered to work collaboratively with the SLCC and take forward a joint Special Case to the Court of Session. This could clarify the law and agree the appropriate way forward.

Eilidh Wiseman added; “Our preferred option was to work jointly with the SLCC and seek a clear ruling on how current complaints should be handled. A joint Special Case would have allowed this. Despite the dialogue and hard work of both our legal team and the Commission's, the SLCC has yet to agree to the principle of taking forward a Special Case. Given the legal uncertainty, steps have now been taken to ensure that the Courts will resolve the matter one way or another.

Notes to editor

The Court of Session decision in the case of Anderson Strathern vs. SLCC (CSIH 71XA16/15) was in relation to an appeal against an SLCC decision on the categorisation of a complaint.

The Scottish Legal Complaints Commission is the gateway organisation for all legal complaints in Scotland. It was set up under the Legal Profession and Legal Aid Act (Scotland) 2007 and has the power to handle service complaints against legal professionals. Conduct complaints about solicitors are passed to the Law Society of Scotland to be investigated.

Conduct and Service complaints

A conduct complaint is about a practitioner's behaviour, their fitness to carry out work and how they have behaved either in carrying out a transaction or outside of business. A service complaint is about the quality of work a solicitor has carried out during the course of a transaction.

Complaint outcomes

In a service complaint matter, the solicitor may require to refund or abate fees, put matters right or have to pay compensation to the client.

For more serious matters of conduct, the Law Society will investigate the case. Following investigation the professional conduct committees, which are 50/50 solicitor and non-solicitors, decide if the matter should be prosecuted before the independent Scottish Solicitors' Discipline Tribunal. The tribunal has a range of sanctions at its disposal including censure, imposing fines or suspension. In the most serious cases, the SSDT can strike a solicitor from the roll.

In addition to dealing with conduct complaints the Law Society also provides other client protections through its master policy professional indemnity insurance scheme which all solicitors must be part of to be able to practice. We also have the client protection fund for cases of dishonesty on the part of a solicitor or one of their members of staff, who are not covered by professional indemnity insurance.

ONGOING CONSULTATIONS

***Internal Market*:**

Public Consultation on the mid-term evaluation of the Connecting Europe Facility (CEF)

28.11.2016 – 27.02.2017

***Competition*:**

Consultation on the Code of Best Practice on the conduct of State aid control proceedings

25.11.2016 – 25.02.2017

***Humanitarian Aid*:**

Public Consultation on the Interim Evaluation of the Union Civil Protection Mechanism

24.11.2016 – 23.02.2017

***Public Health*:**

Mid-term evaluation of the 3rd Health Programme 2014-2020

23.11.2016 – 23.02.2017

Trade:

Deep and Comprehensive Free Trade Agreement with Tunisia

21.11.2016 – 22.02.2017

Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea

08.12.2016 - 03.03.2017

***Taxation*:**

Public consultation - Excise duties applied to manufactured tobacco

17.11.2016 – 16.02.2017

Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes

10.11.2016 – 16.02.2017

Functioning of mutual assistance between EU Member States for the recovery of taxes

30.11.2016 - 08.03.2017

COMING INTO FORCE THIS MONTH

Debt Recovery

Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European

Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

Courts

Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure

Insolvency

Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

Pensions

Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs)

Taxation

Council Implementing Decision (EU) 2016/2265 of 6 December 2016 amending Decision 2007/884/EC authorising the United Kingdom to continue to apply a measure derogating from Articles 26(1)(a), 168 and 169 of Directive 2006/112/EC on the common system of value added tax

Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

CASE LAW CORNER

Decided cases

Case T-577/14 *Gascogne Sack Deutschland and Gascogne v European Union*

- The EU was ordered to pay more than €50 000 in damages to the claimants as a result of the excessive length of the proceedings before the General Court, which caused both material harm (the payment of bank guarantee costs) and non-material harm (the state of uncertainty in which the two companies found themselves).

Data protection

Joined Cases of C-203/15 *Tele2 Sverige AB v Post-och telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Tom Watson and Others*

- Members States may not impose a general obligation to retain data on providers of electronic communications services. EU law precludes a general and indiscriminate retention of traffic data and location data, but it is open to Members States to make provision, as a preventive measure, for targeted retention of that data solely for the purpose of fighting serious crime, provided that such retention is, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the chosen duration of retention, limited to what is strictly necessary. Access of the national authorities to the retained data must be subject to conditions, including prior review by an independent authority and the data being retained within the EU.

Freedom of movement

Case C-238/15*Maria do Céu Bragança Linares Verruga and Others v Ministre de l'Enseignement supérieur et de la Recherche*

- By making the receipt of a study grant by the child of a frontier worker conditional on the frontier worker having worked in Luxembourg for a continuous period of five years at the time the application for the grant is made, Luxembourg infringed EU law.

International trade

Case C-104/16 *Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*

- The Association and Liberalisation Agreements concluded between the EU and Morocco are not applicable to Western Sahara.

Social security

Joined Cases of C-401/15 to C-403/15 *Noémie Depesme & Others v Ministre de l'Enseignement supérieur et de la Recherche*

- A child in a reconstituted family may be regarded as the child of a step-parent for the purposes of a cross-frontier social advantage. In this field, the parent-child relationship is defined not in legal but in economic terms, in that the child of a step-parent with the status of migrant worker can claim a social advantage where his step-parent contributes to his maintenance.

Opinions of the Advocate General

Data protection
Case C-213/15 *Commission v Patrick Breyer* by Advocate General Bobek

- Regulation No 1049/2001 obliges the Commission to grant a third party access to the pleadings submitted by a Member State, of which it holds a copy, in a case that has already been closed. However, it should be the Court, as master of the judicial file, who should primarily decide on access to documents contained in that file.

Freedom to provide services
Case C-591/15 *The Gibraltar Betting and Gaming Association Limited v Commissioners for HMRC* by Advocate General Szpunar

- The UK and Gibraltar are a single Member State for the purposes of the freedom to provide services.

International trade

Opinion procedure 2/15 by Advocate General Sharpston

- The Singapore Free Trade Agreement can only be concluded by the EU and the Member States acting jointly as not all parts of the agreement fall within the EU's exclusive competence.

Upcoming decisions and Advocate General opinions in January

Asylum law

Case C-573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani* to be decided on 31 January 2017

Questions referred by the Belgian court:

- Is Article 12(2)(c) of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted to be interpreted as necessarily implying that, for the exclusion clause provided for therein to be applied, the asylum seeker must have been convicted of one of the terrorist offences referred to in Article 1(1) of Council Framework Decision 2002/475/JHA on combating terrorism, which was transposed in Belgium by the Law of 19 December 2003 on terrorist offences?
- If the first question is answered in the negative, can acts such as those referred to in point 5.9.2 of the judgment under appeal, which were imputed to the defendant by the judgment of the Tribunal correctionnel de Bruxelles and resulted in his being convicted of participation in a terrorist organisation, be considered to be acts contrary to the purposes and principles of the UN within the meaning of Article 12(2)(c) of Directive 2004/83/EC?
- For the purposes of considering the exclusion, on the grounds of his participation in a terrorist organisation, of a person seeking international protection, is the judgment convicting him of being a leading member of a terrorist organisation, which finds that the person seeking international protection has not committed, attempted to commit or

threatened to commit a terrorist act, sufficient for a finding of the existence of an act of participation or instigation within the meaning of Article 12(3) of Directive 2004/83/EC imputable to that person, or is it necessary for an individual examination of the facts of the case to be made and participation demonstrated in the commission of a terrorist offence or instigation of a terrorist offence as defined in Article 1 of Framework Decision 2002/475/JHA on combating terrorism?

- For the purposes of considering the exclusion, on the grounds of his participation in a terrorist organisation of a person seeking international protection, possibly as a leading member, must the act of instigation or participation referred to in Article 12(3) of Directive 2004/83/EC relate to the commission of a terrorist offence as defined in Article 1 of Framework Decision 2002/475/JHA on combating terrorism, or may it relate to participation in a terrorist group as referred to in Article 2 of that framework decision?
- So far as terrorism is concerned, is the exclusion from international protection provided for in Article 12(2)(c) of Directive 2004/83/EC possible when there has been no commission or instigation of, or participation in, a violent act of a particularly cruel nature as referred to in Article 1 of Framework Decision 2002/475/JHA on combating terrorism?

Civil justice

Case C-29/16 *HanseYachts AG v Port D'Hiver Yachting SARL, Société Maritime Côte D'Azur, Companie Generali IARD SA* Opinion of Advocate General Saugmandsgaard Øe on 26 January 2017

Questions referred by the German court:

- Where the procedural law of a Member State provides for independent proceedings for the taking of evidence in which, by order of the court, an expert report is obtained, and where such independent proceedings for the taking of evidence are conducted in that Member State and an action based on the findings of those independent proceedings is subsequently brought in the same Member State between the same parties, is the document by which the independent proceedings for the taking of evidence were instituted a ‘document instituting the proceedings or an equivalent document' within the meaning of Article 30(1) of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters? Or is it only the document by which the action is brought that is to be regarded as being the ‘document instituting the proceedings or an equivalent document'?

Consumer law

Case C-421/14 *Banco Primus, S.A. v Jesús Gutiérrez García* to be decided on 26 January 2017

Questions referred by the Spanish court:

- Must the Fourth Transitional Provision of Law No 1/2013 be interpreted so as not to constitute an obstacle to the protection of the consumer?
- Under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, is a consumer permitted to raise a complaint regarding the presence of unfair terms outside the period specified under national legislation for raising such a complaint, and is the national court required to examine such terms?
- Under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, is a national court required to assess, of its own motion, whether a term is unfair and to determine the appropriate consequences, even where an earlier decision of that court reached the opposite conclusion or declined to make such an assessment and that decision was final under national procedural law?
- In what way may the quality/price ratio affect the review of the unfairness of non-essential terms of a contract? When conducting an indirect review of such factors, is it relevant to have regard to the limits imposed on prices under national legislation? Is it possible that terms that are valid when viewed in abstract cease to be so where it is found that the price of the transaction is very high by comparison with the market standard?

- For the purposes of Article 4 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, can circumstances arising after the conclusion of the contract be taken into account if an examination of the national legislation suggests that this is required?
- Must Article 693(2) of the Ley de Enjuiciamiento Civil (Law on Civil Procedure) be interpreted so as not to constitute an obstacle to the protection of consumer interests?
- Under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and in particular Articles 6(1) and 7(1) thereof, and in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, must a national court, when it finds there to be an unfair term concerning accelerated repayment, declare that that term does not form part of the contract and determine the consequences inherent in such a finding, even where the seller or supplier has waited the minimum time provided for in the national provision?

Criminal justice

Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* to be decided on 25 January 2017

Questions referred by the Irish court:

- Does Article 23 of the Framework Decision on the European arrest warrant and surrender procedures contemplate or and allow for the agreement of a new surrender date on more than one occasion?
- If so, does it do so in any, or all, of the following situations: i.e., where the surrender of the requested person within the period laid down in paragraph 2 has already been prevented by circumstances beyond the control of any of the Member States, leading to the agreement of a new surrender date, and such circumstances: are found to be on-going; or having ceased, are found to be re-occurring; or having ceased, different such circumstances have arisen which have prevented, or are likely to prevent, surrender of the requested person within the required period referable to the said new surrender date?

Case C-582/15 *Openbaar Ministerie v Gerrit van Vemde* to be decided on 25 January 2017

Question referred by the Dutch court:

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

Customs union

Case C-679/15 *Ultra-Brag AG v Hauptzollamt Lörrach* to be decided on 25 January 2017

Questions referred by the German court:

- Is the first indent of Article 202(3) of the Customs Code (CC) to be interpreted as meaning that a legal person becomes a customs debtor under the first indent of Article 202(3) of the CC as the person who introduced goods if one of its employees, who is not its statutory representative, brought about the unlawful introduction while acting within the scope of his responsibility?
- If not, is the second indent of Article 202(3) of the CC to be interpreted as meaning that:
    - a legal person participates in an unlawful introduction (even) if one of its employees, who is not its statutory representative, was involved in that introduction while acting within the scope of his responsibility, and
    - in the case of legal persons who participate in an unlawful introduction, the subjective element that they 'were aware or should reasonably have been aware' is to be determined by reference to the natural person in the legal person's undertaking to whom the matter is entrusted, even if he is not the statutory representative of the legal person?
- If the answer to the first or the second question is in the affirmative is Article 212a of the CC to be interpreted as meaning that whether the conduct of a participant involves

fraudulent dealing or obvious negligence is to be determined, in the case of a legal person, solely by reference to the conduct of the legal person or its organs, or is the conduct of a natural person employed by it and entrusted with the task within the scope of his responsibility to be attributed to it?

Free movement of capital

Case C-375/15 *BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation* to be decided on 25 January 2017

Questions referred by the Austrian court:

- Is Article 41(1) in conjunction with Article 36(1) of Directive 2007/64/EC on payment services in the internal market ('the Payment Services Directive') to be interpreted as meaning that information (in electronic format) transmitted by the bank to the e-mail inbox of the customer as part of online banking (eBanking), so that the customer can retrieve this information by clicking on it after logging in to the eBanking website, has been provided on a durable medium?
- If the answer to Question 1 is in the negative, is Article 41(1) in conjunction with Article 36(1) of the Payment Services Directive to be interpreted as meaning that in such a case the information from the bank is indeed provided on a durable medium, but not notified to the customer, merely made accessible to him, or all that happens is that the information is made accessible without the use of a durable medium?

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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