The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

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The Law Societies' monthly publication with the latest EU news

Editorial

Whilst we lamented a quiet August in the capital during our last issue, we cannot make the same complaint about September!

With a multitude of speeches, meetings and events to listen to and attend, the Law Society has been abuzz with discussion of new developments. Regulatory proposals tackling a breadth of topics from social media to investment have been put on the table and we have devoted a number of articles to considering these evolving matters.

We are also able to share with you the Brexit implications on these topics by way of Miriam Gonzalez's and Ayla Skene's viewpoints on regulation and State aid respectively, along with our updates in the Law Reform.

The October issue of the Brussels Agenda wouldn't be complete without a status update of the Brexit negotiations; we bring you a summary of the current position along with a keynote speech of the Law Society of Northern Ireland's Annual Council Dinner presented by President Ian Huddleston, which tackles the sensitive topic of the role of lawyers and civic leaders in the current Brexit climate.

With the change of the seasons we have also seen a change of personnel at the Joint Brussels office of the Law Societies as we said "slán" to our intern, Peter Boyle.

Miriam González
Brexit is about Regulation

The British Prime Minister's speech in Florence was aimed at rebuilding bridges with the European Union after three unsuccessful Brexit negotiating rounds, while at the same time trying to unite her deeply divided cabinet. Theresa May called for a transitional period; made a concrete financial offer; softened her tone on the rights of European citizens living in the UK; and repeated her request for a new deep and comprehensive economic partnership between the UK and the EU.

Buried within her speech, the Prime Minister also made this crucial statement: "*So the question for us now in building a new economic partnership is not how we bring our rules and regulations closer together, but what we do when one of us wants to make changes*". In using these words, she made it clear for the very first time that the UK government does not intend to gravitate towards EU sectoral regulations after Brexit. If her message was not clear enough, the UK government had 'let it be known' before her speech that the UK financial services industry would not want to abide by the EU financial services regulatory framework. And the UK's Foreign Minister also 'let it be known' after her speech that he would not accept the UK abiding by 'new' EU regulation after March 2019, i.e., during the post-Brexit transitional period.

Handling regulatory divergence while providing regulatory predictability for businesses and investors on both sides is indeed the biggest legal and technical trade challenge of the Brexit negotiations. Over the years, trade negotiations have dealt successfully with dismantling tariffs, duties, market access barriers to services markets and even discriminatory standards. But they have failed at handling regulation in any meaningful way.

I was involved in the negotiations of the first WTO agreement that tackled regulatory commitments, the 1997 WTO Agreement on Telecoms. Those commitments were seen as revolutionary at the time, and yet they consisted of basic promises not to discriminate and not to foreclose the market. Since then, other multilateral and bilateral agreements have ventured into the regulatory arena. But, unavoidably, regulatory commitments continue being of a basic nature. This is simply because the logic of trade agreements is to dismantle barriers by making mutual concessions. And that logic is completely different from the logic of the sophisticated single market that the EU and the UK currently enjoy, a system based on regulatory approximation and regulatory trust under the watchful eye of an impartial supranational court.

No matter how much they could dress it up, all that negotiators are likely to be able to achieve is a system of coordination, transparency, advance warning for any regulatory changes and a system of committees or jointly chosen panels to deal with disputes. But ultimately under such a system, any ongoing disputes can only be settled by reciprocal withdrawals of preferences. And businesses who operate in the EU and the UK will unavoidably have to do so under two different regulatory frameworks.

If this was not challenging enough, the regulatory discussions under Brexit will also and uniquely be handicapped by the fact that the UK has not yet chosen what regulatory model the UK would like to have after Brexit for each and every sector of their economy. Until the UK government does that, it will be impossible to have any meaningful regulatory negotiations, as two parties cannot negotiate a common future if one of the parties has not even decided what it wants that to be.

The British Prime Minister called in Florence for creativity and an innovative approach. The Brexit negotiators will have to use plenty of that, because fitting a sophisticated regulatory negotiation within a trade agreement model, without a supranational court and without knowing the regulatory model of one of the parties is something that, so far, nobody has been able to do.

Biography

Miriam González *is a partner of international law firm Dechert LLP where she is co-chair of the firm's International Trade and Government Regulation practice. Miriam previously served seven years as a Senior Member of the Cabinet for EU External Relations Commissioners Chris Patten and Benita Ferrero-Waldner, where she had responsibility for EU relations and trade with the Middle East, the U.S. and Latin America, as well as a FCO adviser during the UK Presidency of the European Union.*

Ayla Skene

State aid Law Post-Brexit

The Brexit journey is underway and there will be plenty of twists in the tale ahead. After all, no country has ever left the EU before. The UK's legal landscape post-Brexit could get quite a shake-up, with all laws derived from the European Union potentially being subject to change. One such candidate for consideration is the perhaps lesser known branch of competition law known as State aid. Very broadly, State aid law sets out the rules on government assistance to business. It applies to State subsidies in the form of grants, loans and guarantees as well as a myriad of other ways of giving support. Whether it be the local Council providing a helping hand to fund the town library cafe or the tax man giving breaks to multinationals, State aid law comes into play.

Unlike some European laws which the UK has already incorporated into its own legislation, State aid law is mainly imposed on us from EU level (by virtue of the Treaty on the Functioning of the European Union, directly effective European Regulations and detailed case law from the European Courts). The European Union (Withdrawal) Bill 2017-19 (often referred to as "the Great Repeal Bill") will ensure that on exit day, the UK will transpose directly-applicable European Union law into domestic law. This includes State aid law. What comes next, however, is still unclear. And, while the subject may on the surface appear low on the political agenda, it should be noted that the mechanisms around subsidies will play an important role in how the UK shapes its economy going forward.

If the UK were to join Norway, Iceland and Liechtenstein as a member of the European Economic Area, rules on State aid would remain much the same by virtue of the EEA Agreement. At present what seems more likely, however, is that the UK will instead enter into a trade deal with the EU and not join the EEA. It is highly probable that as part of any free trade deal, the EU will insist that the UK retain State aid rules to maintain a level playing field for imports and exports. There is an argument to say that the UK's economy is so integrated with that of the EU that the EU will insist that the UK retain State aid controls on the same basis as the EEA. This is not guaranteed, however. While the EU has entered into a number of trade agreements containing some enforceable rules on public subsidies, such as trade agreements with South Africa and Mexico, it has also entered into free trade agreements in relation to goods with countries such as Canada which do not contain any obligations on the other party to comply with EU State aid rules and limited obligations in relation to subsidies generally. It is probably acceptable to presume, however, that the UK's location (and export market) requires a much closer form of economic cooperation with Europe. In 2014, the EU accounted for 44.6% of UK exports of goods and services, and 53.2% of UK imports of goods and services. Some form of harmonisation of subsidies rules therefore appears necessary. However, that does leave questions around enforcement of these between the UK and EU; even if mirrored State aid rules applied in both jurisdictions, what would be the mechanism by which the UK could enforce State aid rules against European competitors? It is perhaps worth noting here that the EU is not shy about encouraging adherence to its State aid policy outside its geographical territory. For example, during its accession talks, the EU had no qualms about making highly persuasive suggestions to Austria that it could introduce a 10% customs duty if it did not reduce the State aid it was considering giving at the time to two car manufacturers.

In the absence of EU State aid law (or any newly introduced domestic regime), the UK is likely to still be bound by the World Trade Organization ("WTO") Agreement on Subsidies and Countervailing Measures. However WTO rules are by no means a direct substitute for EU State aid law. In general, WTO subsidy restrictions do not cover subsidies to services sectors, but only to goods. Further, the EU rules currently apply domestically; under WTO rules, a subsidy would not be challengeable unless another country could demonstrate that its domestic industry had been adversely affected. In addition, the WTO member states are responsible for the enforcement of WTO rules, so private operators would not be able to raise a challenge against a subsidy given to a competitor. Finally, while current State aid rules help maintain a level playing field in terms of competition, they also recognise areas (whether it be geographical or sectoral) where a bit of State help is no bad thing. For example, EU State aid rules are designed to encourage investment in disadvantaged, sparsely populated regions and in the field of clean, sustainable energy by providing block exemptions. Such block exemptions do not exist under WTO rules, which offer little by way of a framework by which to pursue legitimate policy goals.

Being bound by only WTO rules would arguably give the UK greater freedom on providing subsidies domestically than under current EU rules. The UK Government's Green Paper on Building Industrial Strategy, in fact, suggests that the UK Government intends on taking a "sector specific" approach to developing the UK economy. This suggests that greater flexibility around State aid rules would help the Government somewhat in providing selective assistance to a given sector.

Devolution within the UK also further complicates matters. A significant relaxation in State aid rules could, theoretically, result in a "subsidy race" between the various jurisdictions of the UK, with the ensuing political repercussions. A significant relaxation in the rules would, in any case, be surprising. Statistics on approved State aid expenditure are published by the European Commission in an annual Scoreboard. It can be seen in the latest Scoreboard that public organisations in the UK spend less directly and selectively supporting businesses than in most other EU countries. Anecdotally, the UK is generally seen as a Member State who encourages regulation and monitoring of State aid more so than others.

It seems likely that State aid rules will persist in some form or another, with the most fitting candidate for the role of enforcement authority being the Competition and Markets Authority (CMA), an independent organisation who already has a strong grasp of competition policy. The House of Lords EU Internal Market Sub-Committee has launched an inquiry into the impact of Brexit on UK competition policy which will explore State aid rules post-Brexit, including opportunities for reshaping these. The deadline for written evidence was Friday 15 September 2017. For the time being, we should proceed on the basis that State aid rules will continue in their current form post-Brexit. This means that public bodies should be careful about even issuing statements which appear to give an undertaking that aid will be provided to a recipient post-Brexit, on the presumption that rules will be laxer. In this regard, readers are directed to the case of *Bouygues* where the European Court of Justice held that a press release by the French authorities, in essence confirming their intention to fund a telecoms company's capital base (which led to Moody's increasing its credit rating on the basis of increased market confidence), amounted to unlawful State aid. As the UK's trade relationship with the EU becomes clearer, it will become much easier to envisage what, if anything, will change about our rules on State subsidies. For now, however, as with much else, it is business as usual.

Biography

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COMPETITION AND THE UNION

Uniting the Union: Jean-Claude Juncker's State of the Union Address 2017

European Commission President, Jean-Claude Juncker delivered his State of the Union address on 13 September. His speech was positive, highlighting the progress made by the European Commission over the last year. He pointed out that the Commission has 16 months left to deliver real improvement on its positive agenda.

He stated that 80% of the proposals promised at the start of his mandate have already been put forward by the Commission. They aim to put the remaining 20% of initiatives on the table by May 2018, and work together with the other institutions to turn proposals into law and practice.

Juncker made clear his intention to finalise EU trade deals with Canada and Japan before his mandate comes to an end. He is also focused on open trade negotiations with Australia and New Zealand. Stating that the Commission "are not naïve free traders", he mentioned the need for Europe to defend its strategic interests and raised the proposal of a new EU framework for investment screening.

His vision for open trade includes transparency with the European Parliament and Member States, as well as published drafts of all negotiating mandates proposed by the Commission. His comments were applauded by the Danish Prime Minister Lars Løkke Rasmussen, who described strong trade agreements as the "key to shaping globalization in Europe's favour."

Juncker described modern cyber-attacks as "more dangerous to the stability of democracies and economies than guns and tanks." In order to combat the ongoing threat, the Commission has launched a European Cybersecurity Agency, which aims to improve the EU's preparedness to react and effectively prevent cyber-attacks.

With regards to irregular migration, Juncker drew attention to the "solid yet admittedly insufficient" progress

made by the EU over the past year. The European Border and Coast Guard have worked in conjunction with Member States to stem the flow of irregular migration.

He went on to praise Italy for their "tireless and noble work" in drastically reducing loss of life in the Mediterranean, most notably by providing training for the Libyan Coast Guard. Whilst his assertion that the number of deaths has reduced is accurate, the risk for those making the crossing has increased in 2017. The Commission will continue to work on opening up legal pathways for migration and aim to provide a "real alternative" for those making perilous journeys in order to reach Europe. Juncker re-iterated that legal migration is essential for Europe as an aging continent. He raised the Commission's proposals for skilled workers to enter Europe using a Blue Card and called for swift agreement between the institutions on this issue.

Juncker envisaged a democratic union anchored by freedom, equality and the rule of law. He stated that there should be no second class citizens, workers or consumers. Compromise and inclusivity are key in his view. He called for the Schengen area of free movement to be immediately extended to Bulgaria and Romania, with Croatia joining once they fulfil the criteria. He also pushed for a "Euro-accession Instrument" to help facilitate more Member States joining the Euro and he encouraged all States to join the banking union. He has faced criticism over his invitation, with some Eastern European officials describing it as "political pressure" likely to increase divisions.

The Commission President also touched on the European Pillar of Social Rights, which he was agreed at the Gothenburg summit. He reminded accession candidates that they must prioritise the rule of law, justice and fundamental rights if they want to be considered as part of the EU's "enlargement perspective." Focusing on Turkey, he urged those in power to "let our journalists go" and highlighted the importance of free speech.

Focusing on strength and democracy, Juncker laid out his plans for a strong economic and monetary union, as well as a crackdown on terrorism by means of a shared European Intelligence Unit. He stated that the Commission aim to have a stronger and narrower focus on relevant issues, putting forward just 25 new initiates per year. His vision also involves handing back more power to national governments and delegating 90% of State aid decisions. Stating that "European democracy deserves better", he proposed new rules for financing political parties during elections and raised the controversial topic of introducing transnational lists. He noted that the Commission have drafted a new Code of Conduct for Commissioners, which aims to strengthen integrity requirements.

Looking to the future of the Union, Juncker raised the possibility of merging the European Commission and European Council Presidents. He asserted that having a single president would "better reflect the true nature" of a Union prioritising both States and citizens.

In his closing remarks, Juncker briefly mentioned Brexit. He stated that the UK will be missed but the will of the people must be respected. He remains focused on the future of the remaining 27 Member States and is optimistic that "on 30 March 2019, Europeans will wake up to a Union where we all stand by our values."

President Juncker's full speech transcript can be found here

Previous Item	Back to Contents	Next Item

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

Commission Crackdown on Google Domination

Google recently sought to appeal a record €2.4bn fine ordered by the European Commission in June this year. The Commission stated that the internet giant had abused its market dominance as a search engine by giving an illegal advantage to its own shopping comparison website.

Google was given 90 days (deadline of 28 September) to comply with the ruling. After this date, the company faced penalty payments of up to 5% of the daily average worldwide turnover of its parent company, Alphabet. Google filed an appeal on 11 September 2017, challenging the fine. Interestingly, the last minute appeal did not include a request for an interim order to suspend the Commission's decision to provide equal treatment to competitors.

The Commission placed the onus on Google to implement a compliant fix rather than providing the company with comprehensive guidance. Google submitted its proposal to comply with the Commission's ruling at the end of August. This has not been made public, but was described as a step in the "right direction" by the regulator.

Background

Between 2008 and 2013, Google introduced its shopping comparison website in 13 EEA countries. From 2008 onward it consistently placed its own shopping comparison service at or near the top of its search engine

results. Rival comparison sites appeared in Google's search results on the basis of generic search algorithms, resulting in their shopping services being demoted and a decrease in traffic to their sites. On average, evidence showed that even the most highly ranked competitor appeared on Page 4 of Google's search results.

In 2010, The Commission launched an antitrust investigation following allegations that Google had abused its dominant position as an online search engine, violating Article 102 TFEU. Its investigation stemmed from complaints by several companies including price comparison services Foundem and Ciao, as well as French legal search site eJustice. They argued that Google had provided its own service an unfair advantage.

In the ruling which followed, the Commission cited EU antitrust rules which place special responsibility on dominant companies to not abuse their powerful market position or restrict competition.

European Commissioner for competition, Margrethe Vestager stated: "[Google] denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation."

Increased Scrutiny on Tech Firms

The Commission has advised that it will monitor Google's compliance closely and has obligated the company to provide periodic reports of its actions. It's probable that this increased scrutiny will impact other Google owned services, with the ongoing Commission investigations into Google's Android operating system and AdSense policy likely to be a growing concern for the company.

The main implication of this decision is that the Commission has found Google to be a dominant company in the internet searching field — a finding which will now influence the additional EU antitrust investigations into its behaviour. In her official statement, Vestager noted that "*today's decision is a precedent, which can be used as a framework to analyse the legality of such conduct.*"

Google is not the first tech enterprise to find itself in hot water with the Commission. Earlier this year, Amazon agreed a set of legally binding commitments with the regulator, confirming that it would no longer enforce or introduce anti-competitive clauses in agreements with e-book publishers. The commitments, agreed under Article 9 of the EU's Antitrust Regulation, allowed the Commission to conclude proceedings without reaching a decision on whether an infringement had taken place.

This was arguably a sensible decision on Amazon's part, considering the parallels to the Microsoft case concluded in 2013, in which the Commission fined the company €561 million for failing to comply with its commitments to offer users a browser choice screen to enable users to choose their preferred web browser. Amazon will need to demonstrate clear compliance with the agreed commitments over a 5 year period in order to avoid a similar fate.

US based chipmaker Qualcomm also suffered a significant setback in July this year when the General Court denied its appeal to suspend a daily fine of €580,000. The fine was enforced by the Commission after the company failed to submit information requested in relation to ongoing antitrust investigations. The Commission issued formal Statements of Objections against Qualcomm in 2015, relating to predatory pricing and exclusivity payments.

What Next?

The General Court has the discretion to cancel, increase or reduce the fine imposed against Google. Successfully appealing the fine would be a difficult task for the company, as the Court rarely rule against the Commission on Competition cases. In the event of an unsuccessful appeal at the General Court, Google may choose to appeal to the ECJ, but this would be limited to questions of law only.

The ECJ's recent decision in the long running Intel case does however provide some scope for amendment, as it backed Intel's appeal of a €1.06bn fine and referred the case back to the General Court to reconsider. Intel's appeal centred upon the General Court's omission to consider the 'AEC' test: an analysis that determines whether a dominant company's competitors are as efficient in the same field. The General Court now needs to properly evaluate this test and consider whether it agrees with the Commission's verdict that Intel forced an equally efficient competitor out of the market. This judgment has the potential to cause issues for the Commission and increase the likelihood of other companies, such as Google, successfully appealing against its decisions.

Google is also liable to face civil actions from individuals and businesses affected by its anti-competitive behaviour. Claims can be brought before the national courts of the EEA countries concerned.

With the appeal process likely to take years to conclude, it is yet to be seen how the decision will affect ongoing cases against Google and other tech firms. It is clear however, that the Commission will take a firm stance on any finding of anticompetitive behaviour and impose significant financial penalties.

Shining a Light on the Dark side of the Internet; The Spread of Fake News and Legal Responses

On September 6th, two separate events were held in the Parliament - Protecting European Democracy in a Post Truth Society, hosted by ALDE, and Fake News: Political and Legal Challenges, organised by S&D. Both events addressed the change in how information has been disseminated, used and abused throughout recent election cycles. The speakers approached the topic from a variety of angles, with some looking at the phenomenon from a structural perspective – questioning, for example, whether Fake News was a new problem, or how could it be distinguished from other reporting – with others, including professionals working on responses to the problem, discussing the topic from a technical and legal perspective.

Both events kicked off by asking how we got to this point; as the first speakers – MEP Marietje Schaake and Professor Arnaud Mercier, academic – highlighted, critical stories are not *per se* fake news. What needs to be addressed, the panellists stressed, is the tools available, which allow the spread of maliciously false stories, often devoid of any logical basis and often written by 'Bots'. As the panels also highlighted, this is a phenomenon that came to the fore in the last few voting cycles – including the Italian and Brexit referenda, as well as the US, French and Italian elections. As Lisa-Maria Neudert, University of Oxford, and Ingrid Brodnig, journalist, noted in their respective panels, the statistical evidence is clear. Referring to a study of 27 million tweets, Ms. Neudert highlighted that the ratio of 'junk news' to information contained therein was circa 7 to 1 in France – but 1 to 1 in the US. The reasons for this are unclear, although Ms. Brodnig suggested that the closeness of the US Presidential race was perhaps a factor. The German election, by contrast, where Chancellor Merkel has consistently enjoyed an advantage in the polls, proved to be less fertile ground for such a level of disinformation.

A point made by both Prof. Mercier, and also by David Kaye, UN Special Rapporteur on Protection of Freedom of Speech, is that the tech companies, whose news feeds are being increasingly relied upon by users for up-to-date information, could no longer be considered to provide "*just a platform"*, but their products/services were now considered media, and therefore such companies should be held to the same standards as other media outlets. On the question of how to address the issue, opinions diverged. Morten Løkkegaard, MEP, and Professor Vincent Hendricks, University of Copenhagen, agreed that regulation was not necessarily desirable, while Professor Prabhat Agarwal, DG Connect, commented that Fake News is bad, "*but a Ministry of Truth would be worse".*

Another common point made by speakers was that fake news is a consequence of tech revenue systems; as Ms Brodnig described it, "*angry people click more".* It was interesting, therefore, to hear from Thomas Myrup Kristensen, Facebook Managing Director of EU affairs, who explained how Facebook put into practice a policy of clearly identifying news sources as being news and highlighted that Facebook had expanded the tools available to users with which to identify content as offensive.

Two events, multiple panels, but ultimately similar findings; the term 'Fake News' is understood as a phrase to describe untrue stories which are spread with the aim of deliberately and negatively influencing opinion of a candidate. The panels agreed that, although the phrase may have been popularised recently, 'Fake News' is not a new concept, however there is an issue that the term is beginning to be loosely understood to encompass legitimate criticism. Speakers discussed the way in which social media is becoming an increasing influencer in election campaigns and changing the way in which election campaigns are reported in the news as social media platforms are becoming, to a larger and larger extent, a primary source of news for consumers. As those same platforms have an incentive to generate clicks, this leads to consumers seeing more and more of the same content which algorithms know that they will react to, thus forming a 'bubble' of self-reinforcing stories- often of dubious credibility.

Whilst legal methods are being put in place to require social media platforms to act when harmful content is reported – or face high penalties –speakers suggested that tech companies should be more proactive in weeding out false reports so that consumers and the electorates at large are better informed, thus better equipped to make decisions affecting their livelihoods and those of their fellow citizens.

Estonian Presidency – Prime Minister Ratas's half-time reflection

Summary of the 'Half-time for the Estonian Council Presidency: Uniting through balance' event (held by the ALDE party and the Friedrich Naumann Foundation for Freedom on 20 September 2017 at the Museum of Natural Sciences, Brussels)

Of Estonia's halfway point in its presidency of the European Union Council, Prime Minister Ratas was hesitant to label it a success until the full term has been completed, instead saying "*it has been a good start but harder work is ahead.*"

Prime Minister Ratas stated that he felt there was more optimism within and of the Union than one year ago. This is due to the emphasis put on the importance of stability within the neighbourhood. Prime Minister Ratas went so far as to propose that the western Balkans give up their partners in the East in order to strengthen their ties within Europe. Prime Minister Ratas expressed his hope that this would be spoken about further during the upcoming Eastern partnership summit in November which he expects to be a successful and ambitious event.

There were three key points which Prime Minister Ratas spoke of:

1. **Open and innovative European economy**
   - Prime Minister Ratas was happy with the fact that the European FCI is almost there.
   - the Council are about to begin negotiations in relation to risk reduction methods for the banking union with a view to reaching a position in 2018 and then seeking an agreement with Parliament.
   - Comprehensive discussions are being had regarding the electricity market design with the aim of empowering customers and reaping benefits within the regions. Regional cooperation is required in order to make this a success.
2. **Safe and secure Europe**
   -Issues regarding migration have improved (particularly in the Mediterranean) but this topic is still top of the agenda.
   -Prime Minister Ratas emphasised the need to co-operate with third party countries to ensure that asylum policies are followed and to work against terrorism.
   - Prime Minister Ratas felt strongly that using I.T. solutions, data transfer etc; entry/exit solutions could be found to tackle terrorism and irregular migration. He hoped that a common EU Asylum system solution would be developed and in place by the end of the Presidency.
   - Improvements of the Schengen information system was felt by Prime Minister Ratas as being crucial to tackle security in Europe. He wants to achieve the best security system without compromising the rights of individuals such as privacy. His aim is to "*move information faster without breaching privacy*."
   - There are more milestones to be achieved within the defence system including raising awareness of cyber defence, with the Cyber Defence Fund being a priority – Prime Minister Ratas highlighted the need to set clear ambitions and take more responsibility. Prime Minister Ratas hoped that the defence event in Tallinn in September was a positive example of the cyber-security potential.
3. **Digital Europe and the free movement of data**
   - Prime Minister Ratas spoke of his ambition for the EU to generate the most attractive safe digital system. The Commission's new strategy in cyber security supports this ambition. The Prime Minister stated "*data will be the coal and steel of this century*".
   - Prime Minister Ratas stressed the importance of trust and security in bringing the 'digital Europe' vision to fruition. Trust and security are important cornerstones of the digital market. His aim is for the EU to stay ahead of the tech curve and be the leader.
   - The Prime Minister felt that there had been positive moves forward in the 'digital information code' and the 'digital market strategy' and expected a prompt roll-out following the 5G declaration in July this year.

Regarding **energy and environment**, whilst he was happy that so many countries remained committed to the Paris Agreement, Prime Minister Ratas emphasised that the Union needs to commit to a more sustainable and cleaner environment. He was of the opinion that the Clean Energy Package will help to fulfil this ambition and hope that an agreement will be reached this year. He encouraged Intelligent Transport Systems and Services trials. Prime Minister Ratas was pleased that a review of the Energy Performance of Buildings Directive has been achieved. In response to a question on Emissions Trading Scheme, Prime Minister Ratas stated that it was broadly on track.

With regards to **social agenda**, the Council aims to be "*united and decisive*". Negotiations are underway regarding the posting of workers and the fight against abuse.

In terms of comments on **Brexit,** Prime Minister Ratas admitted that the "*United Kingdom leaving our union is a very sad moment*" but emphasised the need to focus on the Union's future. As far as the Union is concerned, Prime Minister Ratas stressed that it is "*most important that we protect our citizen's rights*". The Prime Minister repeated the importance of reciprocal citizen rights throughout questioning. He said once sufficient progress has been made on the issue of the Irish border and the financial settlement only then can we move to discuss the future.

Upon being questioned on the UK's position on the Eastern Partnership, Baroness Scott admitted that it was unlikely to be the agenda of the MP's yet but that it will be in the consideration of civil servants and liberal democrats. Baroness Scott stated that the UK was keen on the Eastern Partnership before the referendum

and it should remain so after Brexit.

Regarding **taxation,** the Prime Minister was confident that an agreement would be reached by December on taxation of digital companies. A colleague of the Prime Minister stated that "*the competitive edge of companies should not be based on taxation, it should be based on business structure, efficiencies and so on*".

Prime Minister Ratas was questioned over Estonia's views on the **Eastern Partnership.** The Prime Minister stated that neighbourhood policy is a priority during Estonia's presidency, that there should be a cooperation between the Eastern partners and the EU. Prime Minister Ratas reminded the meeting that whilst the border is physically between Estonia and Russia, it is also a border between the EU and Russia, as well as NATO and Russia. He believes that the Eastern Partnership Summit on 24 November this year will lead to concrete next steps being established.

As could be expected, Prime Minister Ratas stated that Estonia was very positive about the **EU's future** – Estonia feels strong and secure and the rule of law is very important there. Estonia is supportive of the free movement of trade (particularly digital solutions to support this), positive about the enlargement of the EU and felt that countries within the union are agreed on foreign policy (e.g. sanctions on Russia). Within its period of presidency of the European Union Council, Estonia wishes to find solutions to make the union work, unite it and move forward.

Commission proposes oversight of foreign investment in the EU

Within Jean-Claude Juncker's state of the union speech on 13 September, the President of the European Commission announced the creation of a new EU framework for foreign investment screening.

Such a concept has been on the cards for some months now, having been previously introduced by Emmanuel Macron during his first summit in June. The initial proposal, spear-headed by Macron and supported by Germany, was not as well-received as the French President might have liked. Portugal, Greece, Ireland, Spain and the Nordic, Benelux and Baltic countries were all against the initial suggestion of introducing a formal mechanism to restrict foreign takeovers within the EU core industries. Although the summit did go some way to agree that something should be done in order to retain key industries/knowledge in the EU, what was eventually agreed was a less formal creation of guidelines with which to analyse foreign investment.

How have Juncker's framework proposals been received?

Juncker's speech provided some reasoning as to why the new framework has been proposed, stating that "*Europe must always defend its strategic interests*" and that there is a "*political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed*".

Inevitably such remarks mean that the framework proposals have been met with cries about increased protectionism of the EU, with claims that such a framework would go against the basis of the current policy framework of free flow of capitals. Indeed there have been mutterings that this move would have been met with far more resistance had it not been for the imminent departure of the UK, traditionally a free-trade champion. Although it has been suggested that countries such as Sweden, Netherlands and Denmark may be wary of such measures given their free-trade traditions and there are other countries within the EU who will have concerns given their reliance on foreign investment as a means of bolstering their economies.

Is this Brexit-related?

Following the triggering of Article 50, there is a somewhat knee-jerk reaction to consider any new proposals to be a response to Brexit however this does not appear to be the case in this instance.

It appears that the target of this new framework is China. There was a 77% jump in the level of Chinese investment in the EU last year, reaching €35bn, with the UK and Germany getting more than half of the money. China has ambitious plans for 2017, with funding being focused on high-tech manufacturing, automation and those projects which relate to the Chinese 'Belt and Road' initiative.

The main cause for concern is the lack of reciprocity. Trade talks continue to hit the buffers, meaning that whilst China is able, via EU investments, to gain an edge in industries such as technology, EU investors are still faced with heavy restrictions when looking to invest in China. Brigitte Zypries, German Federal Minister for Economic Affairs and Energy, stated "*we need to prevent other states from taking advantage of our openness in order to push through their industrial policy interests*". Indeed there appear to be global concerns, with the US recently launching an investigation into IP rights for similar issues.

What shape are the proposals likely to take?

At present, 15 of the 28 EU nations have formal screening systems in place for takeovers and investments to assess the threat that these might pose to national security/public policy.

It is planned that these existing screening systems will be co-ordinated, made more consistent and used for the basis of criteria to be used by the rest of the bloc.

Decisions regarding the investments would stay within the member states however it is proposed that information regarding sensitive investments/those affecting other states would be shared with the respective states and the Commission. It has been mooted that the states affected/the Commission would then be able to oppose such investments but that such assessments would be non-binding.

There have been further suggestions that the EU executive might screen investments into projects that have previously received EU funding however this has proved controversial.

It is thought that the non-binding guidelines might then pave for the way for draft laws to be put in place regarding EU screening of foreign investments.

The EU's intention is, Jyrki Katainen, EU Commission Vice President for Jobs, Growth, Investment and Competitiveness explained, that *"we don't want to restrict investments, but we want to be aware, much better than today, what investments are coming in, who invests, and if something raises concerns, it [the framework] allows member states to take the right decision".*

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

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

Breakfast with the woman who sued Google

"Do markets serve the interests of consumers?"- that was the question posed by Margrethe Vestager, EU Commissioner for Competition, at a breakfast briefing hosted by the European Policy Centre, in front of an audience which included the former President of the European Council, Herman Van Rompuy.

As befits the remit of a politician recently described as *"the rich world's most powerful trustbuster"*, the scope of the Commissioner's talk was broad, covering everything from the need to ensure that the benefits of globalization are shared widely, to the need to ensure that protecting innovation remains central to competition policy. It also tackled the difficulties of applying traditional tax rules to digital operations and, inevitably, there was discussion of the recent ultra-high profile competition cases brought by the Commission against Intel, Google and Gazprom.

On the interconnectedness of the world economy, the Commissioner noted that, in order to make markets work, regulators have to intervene to ensure that successful companies do not then use that success to block innovation which would allow other, competitor, companies to eventually be as successful. It was stressed that when a company grows too big to be constrained by a national market then the burden of preventing anti-competitive behavior passes to the trans-national stage.

The theme of interconnectivity and the need for international bodies to work more closely together to tackle global problems was returned to more than once by Vestager in the course of her speech. In a nod to her fellow Commissioner Pierre Muscovici, she highlighted the recent initiatives of the Commission in tackling international tax avoidance and 'base erosion', such as the automatic exchange between Member States of tax rulings – which came into effect at the beginning of this year – and the current proposals that would impose a duty to report potentially 'aggressive' cross border tax schemes on intermediaries such as tax advisors, accountants and lawyers.

For most of the audience, the suspected draw of the briefing was the chance to hear the Commissioner discuss the competition actions brought against U.S. tech companies. They may, however, have left disappointed; by and large, Vestager deflected efforts to be drawn on specific details on the Intel case – simply stating that the matter would be reviewed by the General Court, who would need to look further into the substance of the decision "*as will I".* On Google, she was less reticent, noting that whilst its pioneering search engine had delivered real benefits to consumers, the company's promotion of its own price comparison service (by prioritising it in google search results) was an abuse of dominant position. After all, the Commissioner asked the audience; "w*ho ever looks at page four of the search results? Who even looks at page 2?"*

Another topic addressed under the rubric of State aid was the screening of foreign investment, as announced by President Juncker in his recent 'State of the Union' speech. Pointing to the delicate balance that needed to be drawn between encouraging growth and maintaining security, the Commissioner remarked that "*an economy as complex as ours can also be fragile"*, that it needs to be safe from cyber-attacks, and that key raw materials need to be protected. Reference was made to the fact that both Australia and the USA commonly screen foreign investment in this way, but Vestager was clear that screening "*does not mean*

European owned." Nor should the new screening rules be seen as being alternative to existing competition law. Instead merger analyses will remain neutral as to origin, while the screening regime will cover a deliberately broad set of criteria in order to "*allow a full assessment of the full effects"* of a foreign takeover.

Ultimately, the point to take away from the breakfast briefing was that markets require regulation, and that the overarching objective of the regulation is to be for the benefit of consumers. Citing the example of the recent investigation into a proposed Dow-Dupont merger (in which the two parties proposed cutting their R&D activities into pesticides) Ms. Vestager was clear that the actions here – requiring the research institutes of the two parties to be spun off as a separate entity before merger approval – was to the benefit of consumers across the single market, preserving, as it did, innovation in a key sector. Despite challenges thrown up by the modern economy – such as applying traditional tax rules to place of profit of digital enterprises – the principle remains; regulation and competition law should aim to ensure a level playing field, and a tax bill should not serve as a proxy measure of how well connected one is with national regulators. Reflecting that, as a politician, she had come to learn that "*…passing regulation is hard, but implementing it is ten times harder"*, the Commissioner finished her address by calling for greater co-operation from the OECD and other international bodies, envisaging that competition policy and regulation could go forward hand-in-hand – reminding the meeting that where change is needed, "*the Commission has the muscle to do it."*

Update on proposed transparency rules for tax intermediaries

In June 2017, the European Commission published a proposal for new transparency rules for intermediaries that design or sell potentially harmful tax schemes. The proposed rules come at a time of heightened EU activity in the area of tax and transparency, with public support growing in Europe for actions taken in order to tackle the perceived threat of tax avoidance, as well as tax evasion, to EU economies.

The Commission proposal targets intermediaries, which the Commission defines as firms or persons (e.g. consulting firms, banks, lawyers, tax advisors, and accountants), that help their clients to set up schemes to reduce their tax bills. The proposal sets out rules that would see intermediaries having to report any cross-border arrangement that contains one or more of a number of characteristics, or 'hallmarks' which might indicate that the arrangement is set up to avoid paying taxes. The list of hallmarks as set out in the annex to the proposed directive is as follows:

- Arrangements that involve a cross-border payment which is deductible at source to a recipient resident in a no-or low-tax country.
- Arrangements that involve a jurisdiction with inadequate or weakly enforced anti-money laundering legislation.
- Arrangements that are set up to avoid reporting income as required under EU transparency rules.
- Arrangements that circumvent EU information exchange requirements for tax rulings.
- Arrangements that have a link between the intermediary's fee and the amount of the tax advantage from the arrangement, provided that the main benefit of the arrangements is to obtain a tax advantage.
- Arrangements that ensure that the same asset benefits from depreciation rules in more than one country.
- Arrangements that enable the same income to benefit from tax relief in more than one jurisdictions.
- Arrangements that do not respect EU or international transfer pricing guidelines.

The Commission has explained that its proposal aims to provide tax authorities with information about existing and potentially aggressive tax planning schemes. In this way, the authorities will be able to scrutinize intermediaries' activities and increase their effectiveness in tackling aggressive tax planning.

However, the Commission's proposed rules have been met with criticism from practitioners, who claim that the economic and administrative burden created by the proposal goes further than is necessary in order to ensure transparency. For instance the five-day reporting deadline, whilst appropriate in some cases, has been viewed as being too narrow a time-frame for more advanced cases of disclosure. It has also been suggested that national e-portals be set up in order to make the process of reporting less onerous on both the taxpayer and tax authorities.

There is further concern regarding the wide scope of the extensive list of hallmarks annexed to the proposed

directive, with practitioners noting that these go some way beyond those outlined in the OECD's BEPS Action 12 proposal. Furthermore, the applicability of these hallmarks has been called into question due to the differing legal frameworks in which tax advice is provided across Member States at present. The fact that the hallmarks have been included in the annex has also been flagged as a potential problem, as the Commission would then have the power to amend this list without having to consult the Council.

Upon publication of the draft proposal, the Commission stated its intention for the new rules to come into force by the 1st of January 2019. However, given the level of criticism that was directed at the draft proposal, it is likely that the Council will seek to make changes to the legislative text. Therefore, it is likely that the legislative process will take significantly longer than originally anticipated. The draft text of the proposal has been submitted to the EESC and the European Parliament for consultation as well as to the Council for adoption.

The European Parliament's Panama Papers Inquiry

The European Parliament's Committee of inquiry into the Panama Papers scandal is in the process of finalising its report and recommendations.

The PANA Committee was set up to carry out an inquiry on money laundering, tax avoidance and tax evasion. The first draft of the report was published on 28 June 2017 with a debate on tabled amendments taking place on 12 October and a final vote on these amendments taken by the Committee on 18 October. The finalised report is to be voted on by the full Parliament plenary in December.

Although the recommendations are not legally binding, documents produced by similar committees have been used as a basis for Commission legislative initiatives in the past.

A number of provisions in the draft version of the report concerned the legal profession.

A number of MEPs, particularly those from the Green group, wanted to include provisions calling for the end of self-regulation of the legal profession and the introduction of rules curbing professional secrecy. Vitriol towards lawyers could be seen in paragraph 40 of the initial report which identified 'lawyers' as one of a number of professions that 'contribute' to 'aggressive tax planning'.

However, the larger, broadly centrist parliamentary groups (EPP, S&D and ALDE) now seem to have agreed to ameliorate some of the language used in the original draft, with a less accusatory tone being levelled at tax service providers.

As a result, the final version of the report that was amended and adopted by the Committee on 18 October 2017 does not contain any of the provisions that were of most concern to the legal profession.

In a recent statement, Werner Langen MEP, the PANA Committee chair, agreed that it was better for the Committee to advocate legislative changes than to point fingers at large corporations. Nevertheless, the draft text is symbolic of a growing hostility in the European Parliament to service providers dealing with tax.

Note: The Committee meeting on 18 October opened with a minute's silence for the investigative journalist Daphne Caruana Galizia who was killed in a car bomb explosion. Ms Caruana Galizia was described by Politico as "a one-woman WikiLeaks, crusading against untransparency and corruption in Malta" and she gave evidence to the PANA Committee in February 2017 about her work on the Panama Papers. David Casa MEP proposed an oral amendment to the report to condemn the “assassination” of the journalist, the amendment was overwhelmingly supported.

If you would like to access the PANA report then please click **here**.

Brexit Adds To Local Uncertainty – A Plea For Engagement

The President of the Law Society of Northern Ireland, Ian Huddleston has said that: "Brexit in whatever form

it ultimately takes, is likely to be a further disruptor, at least in the short term and as a result will make life messier not just for the legal profession, but for all of us".

The President made his remarks at the Law Society's Annual Council Dinner at Belfast City Hall on Friday 8th September 2017.

In his key note address to invited guests including senior members of the Judiciary, Members of Parliament, Government, and the legal community the President said:

"The Society throughout what have been some difficult times in Northern Ireland's history has scrupulously maintained a tradition of being non-political. But, with the prospect of Brexit looming, and the importance of the role that we as lawyers and civic leaders have, I feel that now is the time to recalibrate. There is a distinction between being "political" and being partisan.

We can be political in the sense of identifying and working for better outcomes for the law that is the framework of our society and how it functions in a way that allow us as an economy to grow and prosper and thereby benefit civil society of which we are all part.

We can do that without being partisan.

Indeed I strongly feel that we, as an objective and an independent profession – a position which we hold so dear – have a responsibility to now take a position and indeed, in the absence of a functioning NI Executive, we would be remiss if we did not take up that mantle.

And that is why we as lawyers, on behalf of society need to express our concerns as to what Brexit means – to be clear not what form it takes – that is a matter for the politicians, but rather how it is implemented.

In terms of the detail:

- we know that over 17,000 pieces of legislation have a European dimension and will be directly affected;
- we know that the re-ordering of that body of law will impact on the devolved administrations of Scotland, Wales and here in Northern Ireland and, indirectly, our colleagues in the Republic;
- we know and have heard the debate how implementation of the Withdrawal Bill will impact on the democratic process to some extent in terms of how that legislation is brought forward and the level of parliamentary scrutiny under which it will properly be put;
- we know that there is a likely divergence in regulation between the United Kingdom and the remaining EU 27 and that that divergence will impact on trade;

After explaining about the various issues which the Society has identified that will follow Brexit including:
- a question mark over the role of the European Court of Justice;
- a question mark over the enforceability of Judgments across borders;
- the continuance of legal professional privilege and mutual recognition of lawyers;"

he continued:

"that the resultant uncertainty would impact upon the ability of lawyers to provide cogent, practical and certain advice to clients across all sectors such as trade; family law; tax; or immigration".

As to the role of lawyers in that uncertain world, he said: -

"To be clear, I am not saying that the legal profession is not up to the task – we are a flexible and an inventive bunch and we will find solutions to the questions that clients pose of us.

Indeed the philosopher Jeremy Bentham said that the true power of lawyers is in the face of uncertainty in the law. But , what I am saying is that it is not an uncertainty which we seek and that those solutions and the advice we can give will inevitably be clearer and more effective the greater the certainty we have.

Lawyers are, fundamentally, enablers. We are not law or policy makers – for that we must – and indeed should - rely on our elected politicians to fulfil the role of lawmakers and policy originators. That is the proper forum in which to have those debates."

He encouraged political engagement and debate from all elected politicians to ensure that proper parliamentary scrutiny was undertaken in relation not just to the Withdrawal Bill, but all subsequent legislation and that Government bear in mind that the certainty of the law was an economic driver, which allowed the growth and continued security of both the economy and civil society.

This article was first published by Business Eye on 2 October 2017.

Biography

***Ian Huddleston** is the President of the Law Society of Northern Ireland.*

Healthcare in Scotland needs consideration as part of Brexit negotiations

The Law Society of Scotland has said that healthcare needs in Scotland should be considered alongside those of the UK as a whole, as part of ongoing Brexit negotiations.

In its analysis paper, the Law Society has said that the UK's withdrawal from the European Union will affect many aspects of the provision of health and social care and as Scotland has differing requirements, including its reliance on overseas workers, there should be an inquiry by the Scottish Parliament into the potential impact of Brexit.

The Law Society has set out a series of recommendations in its paper '**Brexit and the impact on health related matters**' which includes the Scottish Parliament undertaking research into the potential impact of Brexit on healthcare services in Scotland. The paper also looks at the impact EU regulations have had to date on UK health and social care, cross-border healthcare and cross-border collaboration for medical research after the UK leaves the EU.

Professor Alison Britton, convener of the Law Society of Scotland Health and Medical Law Committee, said: "We think it would be a positive step for the Scottish Parliament to carry out an inquiry into the potential impact of Brexit on our health and social care systems to help identify those issues which may need to be addressed.

"We know that healthcare is a priority for people and, given the differences in NHS Scotland and our social care systems from those operating elsewhere in the UK, we think this would be a valuable exercise to determine how Brexit may affect the health services provided for people living in Scotland.

"For example, what impact is Brexit likely to have on staffing in the future? Almost six percent of doctors working in Scotland qualified in another EU country, but this figure does not include EU nationals who trained and qualified here so the number is likely to be higher. So, while there may be no immediate impact, we will need to plan for the future to ensure we have the medical and healthcare staff we require, particularly as we have an ageing population who will be increasingly reliant on healthcare services."

The Law Society has also said that reciprocal and mutually beneficial arrangements for health care coverage and maintaining cross-border healthcare after Brexit should be a priority for negotiators.

Professor Britton said: "The existing reciprocal arrangements will continue in relation to the European Health Insurance Card for UK citizens living in EU states prior to the Brexit date. However it remains unclear as to what will happen after we leave. We believe that negotiations on this should be given priority to provide reassurance for UK citizens currently living in Europe and EU citizens resident in the UK.

"Another critical decision must be made on how medicines will be licensed once the UK leaves the European Medicines Agency. We have recommended an evaluation of the existing contributions and alignments from major organisations such as the Medicines and Healthcare products Regulatory Agency as well as reviewing the role of other organisations which have, to date, not played a part."

The Law Society has also raised concerns around the future of health and medical research, saying it has been highly successful as a result of strong UK-wide and international networks, but has warned that these are at risk of fracturing if not addressed.

Professor Britton said: "We have recommended that the UK and EU seek ways to preserve the major contribution that the UK currently makes to research within the EU. We believe that given the willingness of those who work in this area, current negotiations may provide an opportunity to foster new relationships and stronger collaborations in the future.

"It's important that we can fully evaluate the potential impact of Brexit on our healthcare systems, in the UK as a whole and within Scotland. We must work to ensure there will be no detriment to those who need healthcare when we leave the EU."

GDPR – Plan, don't panic

Tim Musson, Convener of the Law Society of Scotland's Privacy Law Committee, explains why the General Data Protection Regulation (GDPR) is all-important for law firms.

Not long to go now! The General Data Protection Regulation (GDPR) will be enforced across the European Union and beyond from 25 May 2018.

It is not just the headline figures of potential penalties from the Information Commissioner's Office (ICO) of up to €20M, or 4% of global turnover, which are of importance. 'Data subjects' will not only have enhanced data protection rights, but also a much greater awareness of those rights. Complaints to the ICO will result in enforcement, and any enforcement activity will have a major impact on reputation, which is all-important for law firms.

Most organisations haven't started taking serious steps towards compliance: it's not yet time to panic, but it is time to start planning and putting measures in place.

The underlying principles of the GDPR are essentially the same as the Data Protection Act 1998 (DPA), but it incorporates a great deal of what is currently seen as best practice as mandatory obligations.

The problem is that very few organisations have made a genuine attempt to be compliant with the current DPA set up. This is why GDPR compliance is likely to be challenging.

As with any new legislation, much is clear but a great deal is still unclear – guidance is slowly emerging from the Article 29 Working Party (the relevant EU committee) and the ICO. So there are some very useful activities, such as personal data audits, which can usefully be carried out now.

The ICO has made it clear that they will expect organisations to have taken suitable steps towards compliance by May, and that there will be no 'honeymoon period' for those that haven't.

Tim Musson has been delivering a number of Law Society of Scotland CPD & Training events on data protection and the GDPR. ***Find out more about upcoming CPD courses****.*

Useful links

More information on the GDPR can be found on the ICO website…

- **Preparing for the GDPR | 12 steps to take now**
- **ICO webpage on data protection reform**
- **Blogs on the ICO website about the GDPR**
- **ICO draft guidance on consent**

… and on the European Commission's websites:

- **European Commission's Article 29 Working Party webpage**

Finally, you can find the official text of the General Data Protection Regulation at **eur-lex.europa.eu**.

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

Viewpoint | In Focus | Law Reform | Professional Practice | Law Societies' News | Just Published

Standard of proof applied by the SDT - your views needed

As part of a wider consultation later this year, the SDT is expected to review the standard of proof it applies. To help The Law Society respond to this, we have published a discussion paper on which we are seeking members' views.

Read more

Parliamentary brief - Consumer rights following Brexit

This briefing outlines the Law Society's view on the effect Brexit will have on consumers and consumer protection.

Read more

Global reputation of solicitor brand prompts new training partnership

The importance of upholding England and Wales' reputation as the leading jurisdiction for businesses in the post-Brexit era has prompted the Law Society to strengthen the range of training opportunities offered to domestic and international lawyers.

The Law Society and leading international legal training provider BARBRI have today unveiled a new partnership to offer **preparation courses for foreign lawyers planning to qualify as a solicitor of England and Wales**.

Read more

The new wild west: Uneven legal playing field recipe for consumer confusion

Proposals for sweeping changes to the solicitor rulebook would create a wild west marketplace for legal services, the Law Society of England and Wales said in response to two consultations put out by the Solicitors Regulation Authority (SRA).

Read more

Global Legal Centre campaign shows why business chooses England and Wales

Key figures from global business today threw their weight behind a video campaign by the Law Society to promote England and Wales as the go-to legal destination if you want to do an international deal.

Senior figures from Roche, the European Bank for Reconstruction and Development (EBRD), and the Hinduja Group, partners from law firms Morrison and Foerster, Berwin Leighton Paisner, Freshfields and more, have all spoken in a new set of promotional films talking about why, despite Brexit, this jurisdiction continues to flourish and grow.

Read more

UK risks global reputation downgrade over human rights leadership

Britain risks its reputation for fairness and integrity if it disregards international human rights standards, the Law Society of England and Wales said today following the United Nations (UN) Human Rights Council's universal periodic review of the UK.

Law Society vice president Christina Blacklaws said: "Britain's recognition of human rights and the rule of law is respected across the world. The ability of every citizen to defend or assert their rights - regardless of wealth or standing - has been embedded in our national identity over many centuries.

Read more

Bach adds bite to calls for urgent review of struggling legal aid system

A long-awaited report into the state of the legal aid system has thrown its weight behind a Law Society call for the government to review the Legal Aid, Sentencing and Prosecution of Offenders Act (LASPO) four years after its implementation.

Read more

Transitional deal will help ease shock of Brexit

News the UK Government is to push for a transitional deal for the two years after Britain leaves the EU was today welcomed by the Law Society of England and Wales.

"We have been arguing for many months now for a deal that ensures people's rights but also that takes steps so our economy is not undermined," said Law Society vice president Christina Blacklaws.

Read more

Dates for your diary

Online and On Demand CPD with Law Society of Scotland

CPD without leaving your desk - Gaining your CPD hours just became even easier thanks to the Law Society of Scotland's online live webinars. Generally providing one hour of verified CPD, the webinars are presented in a dynamic and interactive format which gives you the chance to question the speakers

Latest on demand webinars include: **The GDPR: What? When? Why? How?**

BREXIT: Where & How To Enforce?
Building Blocks For A New Dispute Settlement System
Date: 8 November 2017
Location: European Parliament, Brussels
Richard Corbett, MEP is hosting a seminar on dispute settlement mechanisms in the context of Brexit with the Joint Brussels Office of the UK Law Societies.

During this seminar we will be discussing which dispute settlement systems are appropriate for different areas of law, looking specifically at when the CJEU would be available to parties and if it is not, what the options are. In the context we will also explore how the EFTA court, Swiss and other international dispute settlement mechanisms operate.
Find out more

The Hague Conference Judgments Project Seminar & Reception
Date: 21 November 2017
Time: 18.00-20.00
Location: Law Society of England & Wales, 113 Chancery Lane, Reading Room

The Law Societies' Joint Brussels Office and the Law Society of England & Wales are delighted to invite you to our seminar and discussion on The Hague Convention Judgments Project, which will be followed by refreshments and a chance to network.

The "Judgments Project" refers to the work which has been undertaken by the Hague Conference (HCCH) since 1992 on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of their judgments abroad.

In 2005 The Hague Convention on Choice of Court Agreements dealt with these with respect to the choice of courts agreements. In 2012 a Working Group was established by the HCCH to prepare proposals on a wider convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters. In 2016 a Special Commission was set up to prepare a draft Convention.

The seminar is well-timed, taking place immediately after the latest meeting of the Special Commission, and providing insight into the latest developments. The Judgments Project could be a crucial to the UK practitioners. It has the potential to provide for a global framework for recognition and enforcement of judgments, including in, as well as beyond Europe.

Our panellists will include:

- Professor Paul Beaumont, University of Aberdeen, EU lead negotiator in the Special Commission
- Doctor Peter Werner, Senior Counsel, ISDA
- Sarah Garvey, Allen & Overy, Chair of LSEW's EU Committee
- A representative of The Hague Conference on Private International Law

Please contact **Antonella Verde** to register.

Previous Item **Back to Contents**

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

ONGOING CONSULTATIONS

EU Citizenship and Free Movement
Initiative on residence and identity documents
12 September 2017 – 5 December 2017

Banking and Financial Services
Public consultation on transparency and fees in cross-border transactions in the EU
24 July 2017 – 30 October 2017

Justice and Fundamental Rights
Public consultation on the EU Emergency Travel Document (EU ETD)
12 September 2017 – 5 December 2017

Law Society Response

Consumer Law
Public consultation on the targeted revision of EU consumer law directives
30 June 2017 - 8 October 2017

The Law Societies of England & Wales and Scotland have responded to this consultation. Replies will be posted on their respective websites

Legislative Updates

Council Directive on Tax Dispute Resolution Mechanisms in the European Union

On 10 October 2017, the Council approved a new system for resolving double taxation disputes between member states. The directive strengthens the mechanisms used to resolve disputes that arise from the interpretation of agreements on the elimination of double taxation.

COMING INTO FORCE THIS MONTH

Tax

C-534/16 Tax Directorate of the Slovak Republic v BB construct

Judgement delivered 26 October 2017

Did the Slovak tax authorities, in the light of the principle of neutrality and the principle of proportionality, which are the fundamental principles of the common system of VAT, exceed the limits of what was necessary for achieving the objective defined by the **VAT Directive** when they refused the taxable person the right to a refund of the deducted tax on the ground that the limitation period laid down by national law for claiming a tax refund had expired, even though the taxable person could not exercise its right to a tax refund within that period and even though the tax was correctly collected and the risk of tax evasion or non-payment of the tax had been completely excluded?

May the principles of legal certainty, legitimate expectations and the right to good administration under Article 41 of the **Charter of Fundamental Rights of the European Union** be interpreted as precluding an interpretation of the national legislation under which, for the purposes of observance of the time-limit for claiming a tax refund, the time of the decision of the administrative authority on the tax refund is decisive, and not the time at which the tax refund is claimed by the taxable person?

External relations – international agreements

C-687/15 Commission v Council

Judgement delivered 25 October 2017

Must the prohibition on direct discrimination on grounds of ethnic origin in Article 2(2)(a) of **Council Directive 2000/ 43/EC (1)** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin be interpreted as precluding a practice such as the one in the present case, by which persons in an equivalent situation who are born outside the Nordic countries, a Member State, Switzerland and Liechtenstein are treated less favourably than persons born in the Nordic countries, a Member State, Switzerland and Liechtenstein?

Environment

C- 281/16 Vereniging Hoekschewaards Landschap v Staatssecretaris van Economische Zaken

Judgement delivered 19 October 2017

In circumstances where a maintenance creditor wishes to enforce in one Member State an order which has been obtained in another Member State, does **Chapter IV of EU Regulation 4/2009 (1) (the Maintenance Regulation)** confer upon her a right to make an application for enforcement directly to the competent authority of the requested state?

If the answer to the above question is in the affirmative, should Chapter IV of the Maintenance Regulations be interpreted so as to mean that each member state is obliged to provide a procedure or mechanism such as will enable the right to be recognised?

Social Policy

C-200/16 *Securitas v ICTS Portugal*

Judgement delivered 19 October 2017

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

CASE LAW CORNER

Decided cases

Approximation of laws

C-503/16 *Delgado Mendes v Crédito Agrícola Seguros*

Judgement date 14 September 2017

In the case of a motor vehicle accident resulting in personal injuries to and damage to property of a pedestrian who was intentionally run over by the motor vehicle of which he is the owner, which was being driven by a person who stole the car, EU law, specifically Articles 12(3) and 13(1) of **Directive 2009/103/EC** relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability preclude the exclusion by national law of any form of compensation for the pedestrian in question on the ground that he is the owner of the vehicle and the insurance policy-holder.

C-506/16 *Neto De Sousa v Portuguese State*

Judgement date 7 September 2017

The requirements of the **Second** and **Third** Directives do not preclude the national legislation from providing for the culpable driver to be compensated in respect of pecuniary damage, in the event that his spouse, who was a passenger in the vehicle, dies, in accordance with Article 7(3) of Decree-Law No 522/85.

Taxation

C-441/16 *SMS group GmbH v Directia Generala Regionala a Finanțelor Publice București*

Judgement date 21 September 2017

The **Eighth Directive**, read in conjunction with Article 170 of the **VAT Directive**, must be interpreted as precluding a refusal by a Member State to refund the VAT paid on the importation of goods to a taxable person who is not established on its territory in circumstances such as those in the main proceedings where, at the time of importation, the performance of the contract in connection with which the taxable person purchased and imported those goods was suspended, the transaction for which they were intended to be used was in the end not carried out, and the taxable person did not provide proof of their subsequent movements.

Transport

C-559/16 *Birgit Bossen and Others v Brussels Airlines SA/NV*

Judgement date 7 September 2017

Article 7(1) of **Regulation (EC) No 261/2004** must be interpreted as meaning that the concept of 'distance', in the case of air routes with connecting flights, relates only to the distance calculated between the point of departure and the final destination on the basis of the 'great circle' method, regardless of the distance actually flown.

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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