THE LAW SOCIETY of SCOTLAND
www.lawscot.org.uk

Referendum on EU Membership

Discussion Paper

President's Message

A referendum on whether Britain should remain in or leave the European Union will be held on Thursday 23 June. This is the result of a Conservative manifesto promise during the 2015 general election campaign to hold a referendum on the UK's relationship with the EU.

The UK has been a member of the European Economic Community and subsequently the European Union since 1973. Membership was reaffirmed in a referendum in 1975. The structure of the EU and its decision-making processes has changed radically in 40 years, just as the world itself has changed.

As a firmly non-partisan organisation, we do not intend to advocate one view or another in respect of the UK's membership of the EU. We recognise that there are differing views within the profession as in society more widely, and that the debate will develop and change in the weeks leading up to the referendum.

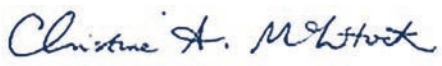
Without taking a position, the prospect of withdrawal raises a number of serious issues to which we urge campaigners and political parties to give serious consideration as part of their commitment to serving the best interests of the UK and its people.

The Referendum and the Scottish Legal Profession

We aim to highlight some of these issues in this paper, as they affect our members and their clients whether they are working in large commercial firms or high street practices; in-house for private or public organisations; in Scotland, elsewhere in the UK or in other EU countries.

We have sought our members' views in a number of ways. Over the course of the past 10 months, we have issued a general survey on the referendum to our entire membership; consulted our committees to understand how a potential withdrawal from the UK might affect their area of practice; we have spoken to representatives from big firms and the in-house community to ascertain their views on the effect of the referendum on their businesses and those of their clients; and we have sought views from members who have taken advantage of free movement to practise in other EU jurisdictions to find out what their concerns are. We held a panel debate for members in London with speakers from both leave and remain campaigns and we will organise and participate in further debate in the final weeks leading up to the referendum.

It must not be understated how significant this referendum is. We hope this paper will be a useful tool for further discussion and debate and that our members and their clients will be able to use it to help make an informed choice on 23 June.



Christine McLintock
President

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1. INTRODUCTION

The EU referendum to be held on 23 June 2016 is one of the most significant constitutional events in the UK in the past 40 years. The electorate will be asked the question *"Should the United Kingdom remain a member of the European Union or leave the European Union?"* The result of that referendum will have a significant impact on the UK's relationship with the EU irrespective of whether the UK leaves or remains within the Union.

In the Queen's Speech in May 2015 it was announced that the UK Government would introduce a Bill to hold a referendum on whether the United Kingdom should remain a member of the European Union. The European Union Referendum Bill was introduced into the House of Commons on 28 May 2015. The Act received the Royal assent on 17 December 2015 and provides the legal basis for the referendum.

The Act is the latest in a long line of legislation setting out the relationship between the UK and the EU. Other significant legislation include the European Communities Act 1972, the Single European Act 1986, the European Communities (Amendment) Acts of 1986, 1993, 1998 and 2002, and the European Union Act of 2011.

As a result of negotiations and treaty agreements the UK has slightly different terms of membership from other member states. These include the rebate on payments to the EU budget, opt-outs from the Euro and the Schengen area and opt-outs/opt-ins in relation to justice and home affairs matters.

The different arrangements have recently been amended again as a result of the decisions of the European Council on 18 and 19 February 2016 in response to proposals by the UK government to alter the terms of the relationship between the UK and EU.

The reforms focus on four main areas:

1. Changes to **economic governance**, particularly the relationship between economic and monetary union and other core EU policies. These changes seek to ensure that there is no discrimination against individuals or businesses based on the currency of the member state to which they belong.

2. Internal market **competition policy**, including improving legislation, reducing regulatory burdens on business and promoting an active trade policy

3. Issues of **subsidiarity** and **national sovereignty**, and in particular the issue of the UK's political integration into the EU. A new interpretation of *"ever closer union"* in the EU treaties has been developed to meet the UK government's concerns. The government also negotiated a new *"red card"* procedure which allows a veto to groups of national parliaments.

4. Rule changes affecting **social benefits**, namely access by newly arrived workers to in-work benefits, including indexing child benefit being sent to other EU member states to the cost of living in that country and restricting access to non-contributory in-work benefits only for a period of up to four years from the commencement of employment.

These changes to the relationship between the UK and the EU will only come into effect in the event of a vote to remain in the EU and are part of the context in which the EU referendum should be seen.

In keeping with the positon of neutrality which the Society has adopted, the Society has not commented on the terms of the decision by the European Council but if further legal changes are required the Society reserves its position to comment on technical and legal matters arising from the decision. In the meantime however it is important to focus on the implications of the referendum and the rest of this paper is designed to explore the process for leaving the EU, the implications for Scotland if the UK left the EU, what Law Society members think about the referendum, an examination of cross border practice rights and a survey of legal changes which may be required in the event of a UK exit from the EU.

2. WHAT WOULD THE PROCESS BE FOR LEAVING THE EU?

Article 50 of the Treaty of European Union (TEU)[1] provides that:-

1. **Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.**
2. **A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.**
3. **The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.**
4. **For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.**
5. **A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.**
6. **If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.**

Article 50 suggests a negotiated withdrawal, but the decision to leave does not need the agreement of other member states. Withdrawal can occur two years after the departing State notifies the European Council that it is going to leave, even if there is no withdrawal agreement.

Following notification of withdrawal, there will be negotiations between the EU and the departing state. It is expected that there would be an agreement setting out the withdrawal arrangements. The negotiation period under Article 50

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN

could be lengthy because of the legal, political, financial and commercial issues to be agreed. The parties would have up to two years to finalise the withdrawal agreement and necessary amendments to the EU Treaties.

Article 218(3) of the Treaty of the Functioning of the European Union (TFEU)[2] applies to the negotiations and the European Commission would make a recommendation to the Council of the European Union (formerly the Council of Ministers), to authorise the negotiations and appoint the EU negotiator.

The Council of the EU, with the European Parliament's consent then concludes the agreement, acting by a Qualified Majority Vote.

The withdrawal agreement rescinds the leaving state's treaty obligations. They are also dissolved two years after notification of withdrawal to the European Council. The two-year period can be extended by agreement.

Renegotiation of a member state's terms of membership cannot be conducted under Article 50 TEU.

The negotiation period under Article 50(2) is to finalise the arrangements for a member state's withdrawal. Article 50(4) makes clear that the withdrawing state cannot participate in discussions about the withdrawal agreement in the European Council.

The EU-UK withdrawal agreement

A withdrawal agreement would contain:-

- **a)** terms concerning withdrawal covering the areas of law and policy; and
- **b)** transitional provisions allowing EU law and obligations to continue to apply until the process was finalised.

Withdrawal from the existing law or policy issues like the Common Agricultural Policy (CAP) or the Common Fisheries Policy (CFP) would require great care in order to minimise disruption. Transitional arrangements for alternative regimes would have to be dealt with in relation to projects and other work funded by the EU. Recognition of rights of establishment, legal rights and obligations under EU law would also be affected. Other issues would be the termination date for participation in EU institutions and bodies and the employment of EU staff members who are citizens of the departing state.

The withdrawal agreement would follow two stages. The first would be the withdrawal negotiations; the second would be ratification of the withdrawal agreement by interested parties.

The international change process

This process at an international level could need at least 4 treaties:-

1. the withdrawal agreement as discussed above;
2. the continuing EU member states would have to finalise a treaty amending the TEU and the TFEU in order to repeal all references to the departing country;
3. if the departing country wanted to move **from the EU to the European Free Trade Area (EFTA)** there would be a treaty of accession; which would need to be approved by the four EFTA states and the joining country; and

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN

4. if the departing country wanted to **join the European Economic Area (EEA) in addition to EFTA membership**, that would necessitate a separate treaty for accession to the EEA. This treaty would need the approval of the EU, its member states, the three EFTA/EEA countries and the joining country.

Article 50(2) TEU requires arrangements for *"withdrawal, taking account of the framework for its future relationship with the Union"*.

Ultimately, the complexity of the negotiations and the speed of finalisation would depend on the agreed relationship between the EU and the departing member state. This is generally considered to be one of the following:

1. membership of EFTA and EEA (such as Norway)
2. membership of EFTA with bilateral agreements with the EU (such as Switzerland)
3. A customs union (as with Turkey)
4. WTO membership; or a Free Trade Agreement under the WTO framework.

Each option has varying implications for issues such as participation in the internal market, application of internal market freedoms, jurisdiction of the Court of Justice of the EU (CJEU), a say in EU legislation, and contribution to the EU budget.

3. WHAT ARE THE IMPLICATIONS FOR SCOTLAND OF THE UK LEAVING THE EU?

Although it may not necessarily be seen or felt, EU membership has a huge impact on our daily lives from the laws that affect us, the legal services clients access from solicitors (whether as business owners, consumers or for personal reasons); and for lawyers, the study and practice of law.

The primacy of EU law and the Court of Justice

The European Communities Act 1972 ensures that EU law has primacy over UK law. Accordingly, solicitors must be aware of the EU law in order to assess whether law made in any jurisdiction in the UK is validly made. Under the principle of direct effect, some EU laws create rights and obligations without the need for transposition. EU law covers a large range of legal topics with impact (or potential impact) on a significant number of EU citizens. Accordingly EU law is a compulsory subject for those wishing to qualify as a Scottish solicitor.

A UK exit will also have an impact on the Court of Justice of the EU (CJEU) and on the relationship between the Court and the domestic courts in the constitutive jurisdictions of the UK. The CJEU has the following functions:

- **interpreting the law** (preliminary rulings)
- **enforcing the law** (infringement proceedings)
- **annulling EU legal acts** (actions for annulment)
- **ensuring the EU takes action** (actions for failure to act)
- **sanctioning EU institutions** (actions for damages)

Currently, if UK citizens or businesses have suffered damage as a result of action or inaction by an EU institution or its staff, they can take action in the following ways:

- indirectly through national courts (which may decide to refer the case to the Court of Justice)
- directly before the General Court, if a decision by an EU institution has affected them directly and individually.

These rights would be removed in the event of a UK exit. However, provision would need to be made in UK law for how existing cases before the Court would be treated in the transitional period and beyond. There would also need to be a mechanism for the UK courts to determine cases based on EU laws which were in force before the UK exit.

The impact on the Scottish Parliament and the Scottish Government

The Scotland Act 1998 embeds EU law into the fabric of devolution. Section 29 of the Scotland Act provides that legislation passed by the Scottish Parliament *"is not law"* if it is incompatible with EU law. Compliance with EU law is therefore a basic condition of the validity of law passed by the Scottish Parliament.

Furthermore, Executive competence concerning EU law is also determined by Section 57 of the 1998 Act which states in subsection (2) that *"A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with EU law"*.

The impact on clients

Solicitors routinely advise their clients, whether they are individuals or businesses, on the impact of EU law and policies. They keep their clients informed of their rights and obligations under EU law, they ensure that they can employ relevant EU law and policies, and also that they can be properly defended or able to seek appropriate redress when matters go wrong.

Although the majority of the EU policy is of a legislative and regulatory nature, it is important not to forget the impact of distributive and redistributive policies by the EU and their impact on Scottish clients: the CAP; the CFP; the European Structural and Investment Funds (including the European Regional Development Fund and the European Social Fund); the Research and Innovation Framework Programme (Horizon 2020); and other EU funding instruments.

EU law also impacts Scottish clients in many aspects of their daily lives and business.

EU law has relevance for the individual as: an employee (working time directive, minimum standards in annual leave); a parent (minimum standards in parental leave); a man/woman (equal opportunities); a consumer (food standards; minimum standards in consumer rights; impact of EU competition policy); a business traveller or a tourist (air passenger rights); a patient (EU approval of medicines and medical devices), a person wishing to live in a safe and healthy environment (air and water quality controls), and also as to his or her right to study, work and retire in another EU member state.

EU law has relevance for businesses as: employers (working time directive, posted workers directive); inventors (European unitary patent); producers (food standards; environmental standards); procurers of services (public procurement); exporters (common commercial policy); holders of data (data protection directive and the forthcoming regulation); members of an industry impacted by EU level regulation (Agriculture and Fisheries; Banking and Financial Services; Chemical products; Energy; Healthcare; Telecoms and Technology), SMEs or large corporations (late payments directive; competition policy), and also as to their right to sell and provide cross-border goods and services and/or establish business in another EU member state.

Of particular interest to clients of solicitors when legal difficulties arise, EU law can provide redress on a cross-border basis: in criminal law matters (the European Arrest Warrant; the European Investigation Order), family law (jurisdiction, recognition and enforcement of court decisions on divorce, child custody and child maintenance – the Brussels IIa Regulation), consumer law and civil justice (European Small Claims procedure; European Order for Payment).

In the area of freedom, security and justice, the EU has established minimum standards in criminal procedural rights which ultimately impact on how Scottish clients experience the justice system in Scotland and in other member states: the right to information in criminal proceedings; and the right to interpretation and translation, to name but two directives into which the UK has opted.

There are also aspects of EU law which have particular relevance to the legal system and professions, including the Recognition of Professional Qualifications Directive, the Lawyers' Establishment Directive and the Lawyers' Cross-border Provision of Services Directive. These are considered more fully later on in this paper.

4. WHAT OUR MEMBERS THINK

From summer 2015, we have been collecting the views of our members on how they think the EU impacts them and their business. This has included a general call for views, as well as recent surveys focusing on the views of big firms, in-house members, and our members in the EU. Across all sectors of the membership, uncertainty is the main uniting factor.

We also asked our committee members how they think the EU affects their particular area of law and what the potential implications of a UK exit would be. These views are considered in chapter 5.

EU referendum survey: a general call for views

In the summer of 2015, we published an open questionnaire to which we invited members to respond to find out more about how the EU impacts them and their work as a solicitor. We wanted a better understanding of what our members think works well when it comes to Europe and what they would like to change.

Summary of results

EU membership and its impact on the profession

The majority of respondents thought that membership of the EU had had a positive impact on their business. The aspects of EU membership viewed most positively included access to the single EU market, free movement of people, and the UK's standing in the international community. However, regulatory requirements on businesses and organisations as a result of EU membership were viewed less positively. In response to questions on what respondents thought the positive and negative impacts of leaving the EU would be on them professionally and on their business, the recurring theme was one of uncertainty. However, some responses identified potential positive and negative impacts, examples of which are set out in the table below.

Table 1: Positive and negative impacts of UK leaving the EU

Positive	Negative
• Increase in work (if only temporarily) • Another referendum on Scottish independence • Interpreting law would be less complex without having to consult EU legislation and case law • Reduced regulation • Greater sovereignty for UK	• Restrictions on freedom to practise elsewhere in EU • Another referendum on Scottish independence • Impact on economy, including inward investment and knock-on effect on demand for legal services • Inability to inform EU legislation, which may continue to affect the UK • Impact on human rights

Respondents were also asked what they would change about the EU. Of the responses received, the most common themes were improved democratic accountability, less bureaucracy, reduced cost, and increased transparency.

Big firm views

More recently, further to the announcement of the referendum date and a corresponding step-up from both remain and leave campaigns, we asked representatives from the bigger firms in Scotland a range of questions to find out whether any firms were taking a position on the referendum, to what extent they were entering the public policy debate and whether this was influencing the advice they give their clients.

The feedback we received was that the firms are generally maintaining a neutral position on the referendum, partly to respect the differing views of their clients and also because there may not be unanimity within the firm. In respect of the advice they give, firms are making clients aware of the main issues potentially affecting them to the extent that this is possible, however there is a sense that due to the high level of speculation and uncertainty with regard to the impact of UK exit (or wider EU reform if we vote to stay within the Union), it is difficult to measure the effects and tailor advice to any great extent.

In relation to impact on the firms' own business, again the general uncertainty makes it difficult to measure at this time.

In-house views

In April 2016, we also surveyed our members working in-house. Again, the majority of respondents thought that membership of the EU had had a positive impact on their business; and access to the single market and the free movement of people were the factors which were identified as having the most positive impact for respondents. Similar to the general survey results, EU regulatory requirements (and associated costs) on businesses and organisations were viewed less positively.

In terms of the impact that leaving the EU would have on respondents professionally and on their businesses, again the most common theme was uncertainty. Examples of the positive and negative impacts identified by some respondents are set out in Table 2 below.

When asked what one thing respondents would change about the EU, reducing bureaucracy was a recurring answer. Many respondents also thought that changes needed to be made to EU institutions and processes to make them more democratic, efficient, transparent, accountable and cost-effective. Some respondents thought some powers needed to be returned to the UK Parliament, or that the UK should have greater controls over issues such as access to benefits for EU migrants. Some suggested a purely economic union.

Our members in the EU

On an individual basis a number of Scottish-qualified lawyers have used the internal market to move to other member states. As at March 2016, we have 118 members (just over 1%) who are based in an EU or EFTA jurisdiction outwith the UK.

Table 2: Positive and negative impacts of leaving the EU – IN-HOUSE VIEWS

Positive	Negative
• Less regulation • More legal work, at least initially • Simplification of areas of law, e.g. employment, data protection, procurement • Increased transparency • Greater sovereignty for the UK in legislating • Removal of the State Aid rules • Opportunity to change human rights law	• Greater restrictions on ability to work elsewhere in the EU • Potential loss of employment rights • Adverse effect on human rights protection • Restrictions on free movement • Uncertainty and negative impact on the economy • Loss of work for those specialising in EU law and related areas • Reduced influence at an international level

As a result, we wanted to ask our members in these jurisdictions what their views on the referendum were and what it might mean for them.

Responses received

Of our members asked, we received responses from individuals living and working in a number of jurisdictions, namely: Belgium, Finland, France, Germany, Italy, Luxembourg, The Netherlands, Romania & Bulgaria, Spain, Sweden and Switzerland. 44% of those respondents work in private practice, 24% in-house (half public, half private sector) and a further 32% in a variety of roles including legal and management consultancy, teaching, research, and writing/ translation. Less than half of respondents (43%) are eligible to vote in the referendum.

Again, the majority of respondents thought that EU membership had had a positive impact on them professionally. The reasons given for this were almost entirely focused on the single market: establishment rights, cross-border business, and the impact on clients who are either small business owners or who own property in another EU jurisdiction.

The responses from this section of the membership demonstrated considerable concern about the potential negative impacts should the UK leave the EU. This is perhaps not surprising given these members have chosen to exercise their rights of movement and establishment within the EU. Although the debate has focused on the impact within the UK and on the citizens living there, there are approximately 1.2 million UK citizens living in other EU countries[3] who also stand to be affected by this referendum.

Responses from our members in the EU focused on the challenges they would face in continuing employment in the EU, the potential loss of rights of audience in both the member state and EU Courts, or requirements to requalify should their professional qualifications no longer be recognised. A number of respondents also raised the issue of dual nationality. Some respondents have already gained dual nationality, in which case a UK exit would have less of an impact; however others, who have relied on establishment rights and who own property abroad, highlighted the uncertainty they would face if they find themselves out of work (which is a possibility, as some respondents' contracts specify that they must be an EU national). Members in this category noted that they may not have access to social security benefits while they seek new employment.

[3] *Migration Statistics*, House of Commons Briefing Paper Number SN06077, 25 February 2016

Our EU members also highlighted a number of problems with the EU and gave varied and detailed suggestions as to what needed to change. These ranged from streamlining/less bureaucracy, greater communication between the EU and citizens, a better balance between economic and social/environmental objectives (there is a perception that the EU serves the interests of business first) and greater transparency of the EU parliament (perhaps by giving national parliaments a direct role and responsibility in law making).

5. CROSS-BORDER PRACTICE RIGHTS

Free movement of lawyers

The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another member state have been in force for a number of years. There are three key pieces of legislation that affect the legal profession:

- Lawyers' Services Directive of 1977 (77/249)
- Lawyers' Establishment Directive of 1998 (98/5)
- Recognition of Professional Qualifications Directive (2005/36)[4]

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession.

The Lawyers' Services Directive (temporary provision)

The Lawyers' Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another member state - a 'migrant' lawyer - must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practises before the judicial authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

Permanent establishment under home title

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a member state to practise on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the member state in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practise on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.

[4] As amended by Directive 2013/55/EU

Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

Recognition of professional qualifications

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one member state and is in good standing with his or her home bar.

The member state where the lawyer is seeking to re-qualify may require the lawyer to either:

- complete an adaptation period (a period of supervised practice) not exceeding three years, or
- take an aptitude test to assess the ability of the applicant to practise as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host member state and it must take account of the fact that the applicant is a qualified professional in the member state of origin).

It is also worth bearing in mind that a number of our future lawyers take advantage of programmes to broaden their horizons during their studies, which rely on reciprocal arrangements with other EU universities. The ERASMUS programme, the best-known EU student exchange programme established in 1987, has a number of participants from Scottish law schools[5].

The Services Directive

The Services Directive 2006 seeks to improve access to services throughout the European Union. It requires member states to remove unjustifiable or discriminatory requirements affecting the setting up or carrying on of a relevant service activity in that country.

The Services Directive:

- sets down a number of information provisions relating to client care that solicitors need to be aware of and comply with;
- establishes 'one-stop-shops' for services providers to find information and complete the necessary formalities in one place - Single Point of Contact;
- facilitates co-operation between regulatory authorities; and
- imposes a general obligation for procedures to be electronic.

Further information about these provisions and how the Law Society of Scotland manages its own obligations under each of them is available on our website[6].

[5] From the University of Glasgow Law School alone, 77 students participated in the programme in 2015/16 and 95 provisional places have been allocated for 2016/17

[6] http://www.lawscot.org.uk/rules-and-guidance/section-d-requirements-of-and-restrictions-on-practice/ruled6-registration-of-european-lawyers/rules/d6-registration-of-european-lawyers/
http://www.lawscot.org.uk/education-and-careers/studying-law/how-to-become-a-scottishsolicitor/aptitude-test-for-eu-qualified-lawyers/
http://www.lawscot.org.uk/members/membership-and-registrar/eu-services-directive/

Lawyers and the Single Market

In his regular blog for the Law Society of England and Wales Gazette, former Secretary-General of the Council of EU Law Societies and Bar Associations (CCBE), Jonathan Goldsmith expressed the view that if the Single Market does not remain open to the UK, member states would be unlikely to change their rules to forcibly eject firms that have established there, but *"access to the courts and practice of local law, plus access to easy requalification … will probably be withdrawn."*[7]

The Lawyers' Directives apply to EEA and EFTA states (Norway, Iceland, Leichtenstein and Switzerland) as well as to the 28 member states. As noted in Chapter 2 of this paper, it has been suggested that if the UK were to withdraw from the EU, it could seek to establish a similar relationship with the EU as Norway or Switzerland. Upon withdrawal, it would no longer be a member of the EEA and so to emulate Switzerland, the UK would have to seek to re-join the European Free Trade Association (EFTA) under Article 128 of the EEA Agreement. To develop a relationship with the EU similar to that of Norway, it would then need to apply to join the EEA. It is possible that this could be addressed in the course of withdrawal negotiations with a view to the UK acceding to EFTA and the EEA as soon as it had left the EU, but the move would not be automatic.

In its briefing paper, *EU Referendum: the process of leaving the EU*[8], the UK Parliament highlights the fact that there is no precedent for a non-EU/non-EFTA state joining the EEA. EEA integration, either through EFTA membership or an association agreement directly with the EEA, has been discussed with reference to the microstates of Andorra, Monaco, and San Marino. In 2011 the EU conducted a review of EU relations with these microstates and published its results in November 2012, updated in 2013. The EEA was suggested as a possible framework for such integration, but the report concluded in section 5.4:

> *… given that the European Economic Area Agreement was concluded between two pre-existing trade and economic areas (the EU and EFTA), it would in principle be necessary for the small-sized countries first to become a member of either one in order to join the EEA.*[9]

Elsewhere views have been expressed about the UK's chances of successfully applying to rejoin EFTA. In his evidence to the House of Lords EU Committee, Sir David Edward QC, former UK judge of the EU Court of First Instance, questioned the appetite for allowing the UK to do so:

> *"Norway is a relatively small state. Iceland is a very small state. Liechtenstein is a mini-state. I am not sure that they would particularly welcome us in EFTA. It is often expressed that that is one of our choices, but I am not sure that it is."*[10]

EU rights in the event of a UK exit

Immigration and Social Security

The UK Parliament briefing paper Exiting the EU: impact in key UK policy areas[11] acknowledges that in relation to immigration, leaving the EU *"could have significant implications for the rights of UK citizens to travel to and live in EU/EEA Member States"*.

[7] EU withdrawal: at what price for lawyers? Jonathan Goldsmith
[8] House of Commons Briefing paper No 7551, 8 April 2016
[9] See COM(2012) 680 final/2.
[10] Revised transcript of evidence, Lords EU Committee, 8 March 2016
[11] House of Commons Briefing paper No 7213, 12 February 2016

Access to welfare benefits for people moving between EU/EEA member states is governed by EU law on free movement of persons and the associated provisions on the co-ordination of social security.

As with much of the detail of the potential outcomes in the event of a UK exit, it will remain to be seen what the UK is able to negotiate however the briefing paper states that two particular issues that would need to be taken into account during negotiations are:

1. how to ensure the continuity of immigration status for UK and other EU nationals exercising their free movement rights; and
2. how to protect social security rights already accrued at the point of withdrawal from the EU.

It notes that *"sudden curtailment of immigration status or mass expulsions/returns could create significant costs and upheavals, and generate legal challenges"*.

Right to Reside

The paper suggests one possibility, namely that EU/EEA citizens could continue to be allowed to live in the UK on the same basis after the UK's exit and vice versa if they have a *"right to reside"* at the time. In practice this would mean that after withdrawal, the UK would continue to be directly affected by EU free movement regulation.

Furthermore, although the right may exist, that does not mean that individual member states would necessarily make continued employment or residence of UK citizens straightforward.

For lawyers wishing to exercise their rights under the Lawyer's Directives, each member state bar is responsible for administering the process for registering EU and foreign lawyers according to the directives as implemented by their national legislature. While the UK government might be able to negotiate the right for at least some UK lawyers to continue to practise in EU/EEA member states, it would not necessarily be able to influence the operational aspects of maintaining the registration and monitoring processes.

Options for EU-based members

Taking these various factors into account, it is difficult to advise our members in other EU countries what their options are in the event of a UK exit, until any exit negotiations are concluded and the attitude of individual EU bars on how to administer any alternative arrangements for UK lawyers practising in their jurisdiction is known.

As discussed above, a number of our members have taken dual nationality, which will at least address any uncertainty in relation to immigration, employment rights and social security. However, this is a significant step, and one which is not suitable or desirable for everyone. In any event, it does not address issues in relation to recognition of professional qualifications and the potential need for requalification if the lawyer wishes to continue to practise in his or her chosen jurisdiction.

What we can suggest is that members currently practising in other EU jurisdictions (or thinking about doing so) consider their options to ensure that they can continue to do so in the event of UK exit. Requalification, either as a lawyer in their host jurisdiction or perhaps in another EU jurisdiction with a similar legal structure or more accessible requalification process, is one option; as is enquiring with the host bar what processes are in place to allow non-EU lawyers to practise in their jurisdiction.

Bars have their own requirements for requalification, including any exemptions that might apply based on the individual's professional experience. It may be the case that a separate route can be developed for UK lawyers already working in another EU state should the UK vote to leave. We will monitor developments during the period following the referendum and issue updated advice once the situation is clearer.

The Role of Law Societies and Bar Associations

There is a role for direct communication between law societies and bar associations to help manage any transitional process for our members. The Law Society of Scotland is an inclusive organisation with aspirations to grow our membership (including from among the international legal profession). We see no benefit in putting up barriers to admission beyond those required to ensure that necessary standards are met and that the consumer is protected; and we hope that irrespective of any national government negotiations, there is sufficient mutual respect between lawyers and their professional bodies to recognise and protect the benefits of cross-border legal practice.

In the event of UK exit, we will seek to ensure that our members' interests are taken into account during the negotiation process and that the government is committed to ensuring the least amount of disruption for UK citizens in the EU in that period. Whatever the outcome of negotiations, we will continue to maintain positive links with colleagues in EU bar associations, to seek clarity in relation to admission/continued practice rights and to ease the transitional process for our members.

6. EU IMPACT ON DIFFERENT AREAS OF LAW

As highlighted in Chapter 2, EU law impacts Scottish clients in many aspects of their daily lives and business. This chapter will examine some more of these areas in-depth to offer a better understanding of how EU law affects the public – both in their day-to-day lives and as clients, whether as businesses or private individuals.

In the event of a UK exit, it will be necessary to minimise the disruption to the law caused by the Article 50 TEU withdrawal process and repeal of the European Communities Act 1972. In order to ensure stability and certainty and maintain client confidence, legislation will be needed to preserve existing law until such time as the UK Parliament or the devolved legislatures can make consequential amendments or enact new law.

Civil Justice

The EU has affected the civil justice system in Scotland very widely. Article 81 of the TFEU states that:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The treaty arrangements are backed up by a number of civil justice instruments into which the UK has opted. These include the Brussels I Regulation on the mutual recognition and enforcement of civil and commercial judgements across member states, which sets out the Rules governing cross-border jurisdiction disputes. The principal rule is that court where a defender is domiciled has jurisdiction. There are a number of other regulations, such as the European Order for Payment Procedure, the European Enforcement Order, the European Small Claims Procedure and the Insolvency Regulation.

EU Law also supports the Scottish contractual principle of party autonomy and the Brussels I Regulation permits contracting parties in a civil or commercial matter to choose the law that will apply to their contract. The Brussels II Regulation does the same for non-contractual cases arising in negligence or in delict.

There are various other regulations including those on the service of documents, the taking of evidence and the Legal Aid Directive which impact on disputes and cooperation between the courts in member states.

In the event of a UK exit from the EU this body of law would cease to apply as the provisions for Article 81 and the regulations and directives flowing from it would not operate outwith the EU. Prior to the TFEU and the EU regulations arrangements were made for cross border litigation by way of a number of bilateral treaties and other conventions. In the event of a UK exit, it is likely that this solution would be adopted again.

Some might argue that EU judicial cooperation is a benefit to litigants and lawyers in the UK in as much as it is in any other member state but there may also be something to be said for the creation of particular rules and regulations on a bilateral basis or through treaties between the UK and other countries.

In the event of the UK joining the EEA/EFTA the Lugano Convention, which governs the relationship between the EU and the EEA/EFTA states, would apply. The Lugano Convention effectively applies the Brussels I regulation and other regulations to these states.

In the event of the UK leaving the EU and remaining as a WTO member the EU civil justice and cooperation arrangements would cease to apply to the UK and the UK would require to negotiate bilateral or multilateral treaties with other countries.

Company Law

The establishment of companies is essentially a matter for UK domestic law. It is reserved to the UK Parliament under the Scotland Act 1998. The EU has created a number of rules which enable businesses to be set up in any member state to encourage cross-border cooperation between businesses and to provide shareholder protection. Harmonisation of rules relating to the establishment of companies means that there is only one set of regulatory requirements and that companies do not have to meet different laws every time they establish a branch in a different member state. The directives in this area focus on capital requirements, shareholders rights, accounting, audit, takeovers, market regulation, mergers and demergers. One key regulation is the application of international accounting standards which requires EU listed companies to formulate group accounts in accordance with international accounting standards.

If the UK exited the EU and joined EEA/EFTA the UK would be subject to the EU/EEA agreement which provides that the rules of EU company law still apply to companies registered in EEA/EFTA states.

If the UK relied on its WTO membership, UK companies would only have to abide by international accounting and reporting standards. EU company law would not apply in such a circumstance. However if UK companies wished to conduct trade in the EU or set up branch offices in other member states they would still require to comply with the relevant EU directives.

Competition Law

The EU's competition policy has been an important part of the EU's work ever since it was set out in the Treaty of Rome in 1957. The treaty instituted a system with the aim of ensuring that competition in the common market is not distorted.

The main objectives of EU law in this area are to maximise consumer agreements, to outlaw cartels, monopolies of markets (and abuse of dominant position), merger clearance, and state grants and subsidies.

From a technical legal perspective, EU law promotes consistency between jurisdictions. It enables people to have integrated compliance policies which may help deliver lower costs and achieve greater market access.

In terms of EU competition case law, there is a perception at least that the EU courts are not particularly efficient[12]. In the UK, most cases are taken to the High Court in England and are concluded in around a year, whereas cases in the EU courts can take between 2-3 years. Competition law enforcement administration is also very slow. That said, EU enforcement procedures have real teeth, which might not the case in the UK.

A lot of client advice in this area currently comes from EU law and EU court interpretation of the law. While withdrawal from the EU could therefore have an impact on clients, the extent of the impact (and immediacy of when it would be felt) is difficult to estimate. The UK has had a significant level of influence on EU competition policy. With domestic reform, UK bodies now have a better reputation for implementing competitive practice and so the impact of a UK exit may not be so great. However, EU law could at least continue to be persuasive and if the UK negotiates access to the single market, it is likely that we would need to continue to comply with EU regulations in this area.

Consumer Law

EU consumer law constitutes a significant part of the EU internal market and provides consumers with protection when purchasing goods and services. Under the TFEU consumer policy is a shared competence. Where EU law has been made in a particular area of consumer law member states may not act in a manner which is contrary to that law. Regulations on contractual rights include unfair contact terms and enforcement of consumer rights such as the regulation of Consumer Protection Co-operation and the Consumer Rights Directive (2011/83).

The Commission published its consumer agenda for 2014-2020 in 2012 which aims to improve consumer safety, enhance consumer knowledge, improve implementation and enhance digital consumer rights.

At a domestic level, consumer law is generally reserved to the UK Parliament under the Scotland Act 1998 and law concerning consumer credit, unfair contract terms, sale of goods and food safety are all legislated for by the UK Parliament in implementation of UK policy. However the EU has introduced certain rights and protections in particular areas such as the consumer rights directive. The UK does not follow the EU policy on maximum harmonisation because

[12] See for example *EU Commission v Google* COMP/C-3/39.740, the 5-year case regarding the alleged abuse of Google's dominance in the search engine market.

this could limit additional protections which member states wish to adopt. If the UK joined the EEA/EFTA it would join the EEA agreement with the EU which provides that EEA/EFTA states are bound by EU consumer law.

In the event of a UK exit which results in the UK adopting the WTO approach, if the UK repealed EU consumer law it is likely that the UK would have to negotiate agreements concerning the quality of standards when selling goods to EU consumers.

Criminal Law

EU law in the criminal justice sphere covers the following:

- **a)** Judicial and law enforcement cooperation
- **b)** Criminal procedure and
- **c)** Criminal law

EU measures have been developed to deal with cross-border situations, for example where it is suspected that a criminal organisation is operating in several EU countries, or that a suspected criminal is hiding in a different EU country. In such cases, judicial cooperation is necessary. EU law and policy in this area is intended to strengthen dialogue and facilitate action between the criminal justice authorities of EU countries. One example of this is the European Arrest Warrant. It is applied throughout the EU and has replaced extradition procedures within the EU's territorial jurisdiction. Instead, judicial procedures have been designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence.

In respect of the treatment of accused persons, the EU also published a 'roadmap' on procedural rights in 2009 to ensure that the basic rights of suspects and accused persons are sufficiently protected. A number of measures have followed on issues such as interpretation and translation, the right to information and access to a lawyer.

Protocol 21 to the TFEU provides that the UK and Ireland do not take part in the adoption of any EU measures proposed by the Council relating to the area of freedom, security and justice governed by Title V of Part 3 TFEU.

Unless they specifically choose to opt in, they will not be bound by such measures or by any decision of the CJEU interpreting their provisions.

Employment Law

Membership of the EU has provided citizens with a number of employment rights.

Following the Treaty of Amsterdam in 1997, the EU Treaties provide principles relating to non-discrimination in the areas of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 19 TFEU). As a result, the EU has developed legislation in the area of non-discrimination and equality in employment and in the provision of goods and services.

Articles 151 to 161 of the TFEU provide a legal basis for all EU action in the area of social policy. For instance, Article 153 of the TFEU gives the EU legislative competence to set minimum standards in areas such as health and safety, working conditions, social security and social protection of workers and informing and consultation of workers.

Membership of the EU is not essential for the continuation of these rights due to their implementation in UK domestic law. Any future UK government (employment law is reserved to the UK under the Scotland Act 1998) would need to

consider what changes it would make in the event of a UK exit, taking into account the rights that workers have under the current law.

Environment Law

Environment Law may affect a number of EU member states and also have an impact on the functioning of the internal market. Accordingly the EU has legislated on a number of issues concerning environmental problems, pollution, health and preservation of the environment. Legislative action includes the Environmental Impact Assessment Directive, the Directive on Industrial Emissions and the Directive on the Conservation of Natural Habitats.

In the event of a UK exit from the EU and membership of the EEA/EFTA the UK would be bound to comply with EU rules as a condition of market access.

If the UK were to follow a WTO route upon exit the aspects of EU legislation which implement international agreements would apply. Signing up to further international agreements concerning environmental law and climate change would be at the discretion of the UK.

While EU law influences a lot of domestic law in this area, a UK exit would not necessarily reverse these effects. A number of EU actions concern climate change and energy policies with a view to the reduction of greenhouse gas emissions. In 2014, EU leaders agreed to a binding target of reducing EU emissions by at least 40% below the 1990 level by 2030. Equivalent UK and Scottish targets have been set at a higher level than this.

Equality Law

The TFEU provides the legal basis for EU law concerning the combating of *"discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"*. Equality legislation is generally reserved to the UK Parliament under the Scotland Act 1998 and the UK has implemented aspects of EU law concerning equality. The Equality Act 2010 brought together domestic legislation concerning discrimination on the grounds of sex, race and disability and also re-stated the law which implements some EU regulations including a number of directives. In the event of UK exit and membership of EEA/EFTA the EU law would continue to apply as part of the EEA/EFTA agreement.

In the event of the UK adopting the WTO route, it would be free to legislate its own equality legislation subject to any bilateral arrangement between the UK and the EU.

Family Law

Family law is an area which is within the sole competence of the member state. Within the UK, family law is devolved to the Scottish Parliament under the Scotland Act 1998.

However, given the increasing number of cross-border relationships and families, the EU has made law in a number of areas concerning civil judicial cooperation in cross-border family cases.

The law includes the Brussels II(a) Regulation on the jurisdiction of matrimonial proceedings, principally divorce. This regulation also allows for the mutual recognition and enforceability of judgements concerning parental responsibility and supplements the Hague Convention and provides a mechanism for the return of abducted children. The Maintenance regulation provides rules for assessing jurisdiction in maintenance disputes and for identifying the law

which will be applied as well as for the recognition and enforcement of maintenance decisions from other EU member states' Courts.

There are some practical problems with the implementation of Brussels II(a) because of the *"race to the court"* but family practitioners generally agree that the regulation makes the law in this area clearer. EEA membership would result in the UK ratifying the Lugano Convention which reflects the Brussels II(a) Regulation.

In the event of a UK exit, the UK would remain party to the Hague Conventions. It could also form bilateral and multilateral agreements and treaties to resolve jurisdictional enforcement and recognition issues.

Financial Services

EU regulation permeates financial services for businesses and individuals: from purchasing Life, Pensions and Investment products; banking and insurance regulation; protection of personal data; and money transmission and payment services.

Its main aims are customer treatment and protection however it can also result in time-consuming and often very complicated regulation, which can be costly for businesses to implement. It can take a long time between identification of the need for change and final regulations. There can also be discrepancies in standards and adhesion to timetables between member states when bringing them into force.

If there is a UK exit, some continued relationship with EU regulation is inevitable. The UK will have to negotiate according to the trading position it wants to adopt and the level of regulation expected or required for a particular area of business. That will vary, but in financial services, globalisation is currently driving increasing levels of consistency and harmonisation to manage risk.

As with competition law, the UK should not underestimate its influence in this area. However, now the regulation is driven by both the EU and the US because of global financial requirements, in the event of an exit, the UK may have limited opportunity to influence these global standards.

Human and Fundamental Rights Law

The EU is not a signatory to the European Convention on Human Rights (ECHR) and is not subject to the jurisdiction of the European Court of Human Rights. The CJEU however does apply the Convention and Strasbourg jurisprudence as general principles of human rights law, and Article 6 of TEU states that fundamental rights, as guaranteed by the ECHR, *"shall constitute general principles of the Union's law"*. The rights which arise from ECHR are also supported by the EU's Charter of Fundamental Rights (CFR). The Charter sets out the civil, political, economic and social rights of European citizens and other persons resident in the EU. These rights are derived from the ECHR and other international treaties.

In the event of a UK exit the ECHR would still apply and the UK would remain bound by it. A recent debate has been raised by some politicians who wish to remain within the EU but simultaneously exit the ECHR. There are a number of competing arguments about the viability of such a scheme: on the one hand, there is an argument that having a Bill of Rights for the UK which is consistent with and respects fundamental rights guaranteed by the ECHR could meet any treaty obligations; on the other hand, there is a view that it is a treaty obligation to ratify the Convention even if it not incorporated into domestic law. In the event that the UK were to withdraw from the ECHR but remain within the EU,

the UK would still be bound by the ECHR and the CFR insofar as the application of EU law was concerned. It would also be subject to the jurisdiction of the CJEU, although not of the European Court of Human Rights.

Immigration Law

The EU Treaties have developed from the Treaty of Rome of 1957 which established the four freedoms, one of which was free movement of persons within the EEC. The free movement of persons remains a core principle of the internal market of the EU.

Although the UK is bound by the Treaty obligations to respect the free movement of persons it has opted out of most EU Law on immigration, the best example of which is the Schengen Accords which create the common European area and framework for visas and border control. The Schengen system has come under significant pressure in the recent past due to the Middle East migrant crisis.

EU Law concerning rights of EU citizens to move and reside freely within member states encourages movement across internal borders. The Free Movement Directive (2004/38) deals with the ways in which EU citizens and their families exercise the right of free movement, the right of residence and the restrictions on those rights on the grounds of public policy, public security or public health.

UK immigration law is reserved to the UK Parliament under the Scotland Act 1998 and although the UK is bound by treaty to the principle of free movement it has retained control over some aspects of border and visa policy.

In the event of a UK exit from the EU and membership of the EEA/EFTA the UK would be subject to the agreement which provides for the free movement of person within the EEA/EFTA/EU area. The EEA/EFTA Treaty would allow some opportunity to the UK to restrict immigration on the terms and conditions set out in the Treaty.

If the UK exits and adopts a WTO position the right of freedom of movement under the EU Treaty would not apply and the UK would control its own immigration law and policy, borders and visas. Subject to any acquired or vested rights, citizens of EU states living within the UK would have to regularise their immigration, residence and visa status. Similarly, UK citizens living in other member states would have to comply with the immigration, residence and visa requirements imposed by those member states.

Intellectual Property

The protection of Intellectual Property (IP) is necessary for the single market. Non-EU UK membership of the EEA would allow IP-protected products to have single market free movement within the EEA, in so far as EU IP Directives apply EEA-wide. However, this would not apply to the European Union Trade Mark, the European Design Right or the Unified Patent.

In the event of EFTA membership, IP appears not to fall under any of the bilateral EU/Switzerland Trade Agreements, which are less comprehensive than the EEA Agreement. Instead the Swiss IP office monitors EU developments and considers unilateral adoption.

The following does not take into account any special treaties that an existing UK might desire to negotiate with the EU in the event of a vote to leave.

Effect on UK Law

In the event of a UK exit, EU Directives, Regulations, Decisions and Treaty provisions and CJEU judgments:

- would not be part of the legal order affecting the interpretation of new UK laws that commenced thereafter; and
- future EU legislation would be adopted without any UK vote.

WTO trade-related aspects of IP rights (WTO TRIPS) would remain the ultimate source of new IP laws and the UK would not negotiate future international norms as part of the EU but rather contribute on its own behalf.

In the UK, jurisdiction and enforcement of judgments would no longer be governed by EU Regulation. This would lead to probable accession by UK to the Lugano Convention.

Court Actions: applications and objections

As UK overseas territory is covered by EU Design Rights, EU Trade Marks and Unified Patent, separate applications for UK and EU would be required in future, as well as separate court actions for infringement and/or validity. This might increase the amount of related litigation in domestic UK courts.

For solicitors, this would mean that their advice would no longer be authoritative on issues arising in EU. They would have no rights of audience in the EU or before the Unified Patent Court. Applications, objections and representation before panels and courts would therefore not be direct but would need to be conducted through correspondents.

This could lead to additional expense for affected clients, potentially reduced trust in the quality of advice that they receive from advisers and reduced influence of UK business on future EU IP law.

Trademarks

Concerns in the event of a UK exit in relation to trademarks include changes to the ability to protect client brands in mainland Europe on a pan-EU basis by registering trademarks under the Community Trade Mark (CTM) procedure[13] and related loss of automatic rights at the Community Trade Mark Office.

This could result in the loss of access to the quickest and most cost effective method of protecting a mark in the UK and then extending it as a CTM. It would increase costs and timescales and mean that businesses would have to appoint EU agents to deal with brand protection and management in the EU.

Patents, EU patents and unitary patents

UK patent attorneys and lawyers would lose rights of audience at the Unified Patent Court. This could result in additional administrative costs for business to acquire both UPC patents and UK patents. Depending on the way existing rights are dealt with, if there is an opt-in fee for a UK conversion this could be significant as it would likely relate to multiple rights within a short time period.

Mental Health and Disability Law

Mental Health and Disability legislation is devolved to the Scottish Parliament under the Scotland Act 1998. The Scottish Parliament has introduced legislation relating to adults with incapacity, adults in need of compulsory mental health care and treatment, and adults who are vulnerable and at risk.[14] Withdrawal from the EU would not necessarily impinge on the rights and procedures currently provided for under such legislation.

[13] a single registration which provides trade mark rights in all EU member states.
[14] Adults with Incapacity (Scotland) Act 2000; Mental Health (Care and Treatment) (Scotland) Act 2003; Adult Support and Protection (Scotland) Act 2007.

However, a UK exit from the EU could restrict opportunities to address issues such as cross-border difficulties in operating powers of attorney and, to a lesser extent, other measures put in place to deal with personal welfare (including healthcare) matters, and property and financial affairs, for people who lack capacity. The Legal Affairs Committee of the EU Parliament is currently considering the possibility of an EU regulation to address such problems. Although this regulation could simply add another layer of bureaucracy, it has the potential to achieve greater cross-border clarity. Any benefits of such regulation would be lost should the UK leave the EU.

Succession Law

Scotland has its own distinct body of succession law and our domestic legislation is not affected to any great extent by EU law. However, as noted above, with increased globalisation comes a greater number of cross-border relationships and families, resulting in a person's place of domicile being different from their home state and ownership of property in more than one EU jurisdiction.

In August 2015, Regulation (EU) No 650/2012, known more generally as the Succession Regulation (or Brussels IV), came into force. It is designed to reduce the administrative burden on individuals who own assets in more than one EU member state. Brussels IV allows individuals to choose the succession laws of one of the jurisdictions to apply to the whole of his or her estate, meaning that only a single will is required in accordance with the laws of the chosen jurisdiction.

Although the UK didn't opt into these rules, they are still of considerable relevance to UK residents and nationals who own assets in EU countries that are signatories to the legislation. This means that Scottish solicitors may still need to know how the regulations work and be able to advise clients accordingly, irrespective of the outcome of the referendum.

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