The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

April 2017

The Law Societies' monthly publication with the latest EU news

Editorial

Brexit has again dominated the headlines this month, and in this issue we take a closer look at some of the issues which have arisen following the UK Government's notification under Article 50 that the UK will leave the European Union. Our viewpoint article this month is from Colin Passmore and Oliver Thomson who consider the implications of Brexit on legal professional privilege between the UK and the EU and the EEA.

We also have articles from the Law Society of Scotland and the Law Society of England and Wales (Wales Office) on the subject of Brexit and devolution. Furthermore, we set out some of the key figures who will be involved with the negotiations from the Continent, along with the initial reactions to the UK's triggering of Article 50.

Additionally, you will also see our usual update on the latest EU policy developments, politics and case law. In particular, we have an article considering the conflicting opinions of Advocates General Kokott and Sharpston in two very similar cases concerning religious discrimination in the private sector, as well as reporting the CJEU decision on these cases. We also have an update following the publication of the draft report of the Committee on Legal Affairs on the proposal for a directive on copyright in the Digital Single Market.

And finally… some of the eagle-eyed readers amongst you would have spotted an error in last month's edition of the Brussels Agenda where we referred to Queen Victoria II in our article on the National Cyber Security

Centre. We, of course, meant Queen Elizabeth II (and suspect that some of us had spent too much time watching "Victoria" in the run up to publication). Thank you to those of you who pointed this out!

Colin Passmore

Brexit, Legal Professional Privilege and the European Union

The UK's exit from the European Union will have ramifications for legal professional privilege across the continent, and especially for lawyers qualified in England and Wales.

Legal privilege against the disclosure of communications to the European Commission has largely been developed by the CJEU through case law. There are no provisions regarding legal professional privilege in the TFEU, or any other Council or Commission instrument. The basis for legal professional privilege in an EU context lies in an exception – developed through case law – to the Commission's general power to examine all documents under the original implementation regulation, *Regulation 17/62* of 13 March 1962 ("Regulation 17/62").

The leading case is *AM&S Europe Ltd v Commission (Case 155/79 [1982] ECR 1575)* ("*AM&S*"). The ECJ held that Regulation 17/62 should be interpreted to recognise the confidentiality of certain communications between a lawyer and his client. This privilege is available only in narrow circumstances, to protect against requests for disclosure of confidential documents in the course of a client's dealings with the European Commission, for example during a cartel investigation. In proceedings before national courts, national rules on privilege will apply, even if the litigation concerns the consequences of an EU investigation.

The *AM&S* exception is only available provided that two conditions are satisfied. Firstly, the communication must be for "*the purposes and in the interests of the client's rights of defence*". Secondly, the communication must be between a client and external independent legal counsel, who are qualified to practice in an EEA member state. This second condition excludes the advice of in-house lawyers and lawyers not qualified in an EEA member state. We will come back to this latter point.

The privilege established by *AM&S* was subsequently expanded by the General Court in of *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission (Case C-550/07 P) [2010]* ("*Akzo*"). The General Court applied EU privilege to documents prepared for the instruction of external counsel. The General Court held that the preparatory documents could be protected from disclosure even if they had not yet been exchanged with an external lawyer, or even if they were never created to be physically sent to the external lawyer, provided that the documents were drafted exclusively for the purpose of seeking legal advice.

Britain's exit from the European Union has implications for legal professionals in England and Wales. The *AM&S* case suggests that the clients of English qualified lawyers will be unable to assert legal professional privilege arising from communication with those lawyers against the Commission should the UK cease to be an EEA member state post-Brexit. Therefore the advice of English qualified lawyers given after the date of Brexit will not be treated as privileged in the EU and therefore not capable of being withheld from the Commission during the course of an investigation. AG Kokott stated in her 29 April 2010 Opinion in *Akzo* that, even if the *AM&S* privilege was eventually expanded to include in-house lawyers that were accredited within the EEA, "*the inclusion, in addition, of lawyers from third countries would not under any circumstances be justified".*

For EEA qualified lawyers wishing to continue practising in the UK, the privilege regime will remain unchanged. The case of *IBM Corp v Phoenix International (Computers) Ltd [1995] 1 All ER 413* confirmed that legal advice privilege in the UK applies to qualified foreign lawyers, provided that there is a clear lawyer / client relationship and that the other existing requirements for privilege are met. This is the case regardless of whether the foreign lawyer is advising on English law or the law of his or her qualification. The case of *Garfield v Fay [1968] 2 W.L.R 1479,* shows that the operation of litigation privilege will remain similarly unchanged by Brexit.

The effect of Brexit on privilege, whilst significant, is unlikely to affect the majority of the English legal profession. Legal professional privilege before courts in England and Wales will remain unchanged, as will the privilege regimes currently extant in individual EEA member states. Although Brexit is still two years away, many solicitors who practice EU competition law have already started to cross-qualify into other EEA jurisdictions and firms in Brussels have started to exclude those qualified in a UK jurisdiction from acceptable

applicants for some jobs.

Biography

Colin Passmore is the Senior Partner of Simmons & Simmons in 2011, but continues to maintain his litigation practice. Over the last 31 years Colin has worked in England, Hong Kong and the Middle East from where he has developed a varied commercial litigation practice that encompasses both international and domestic disputes. His particular focus areas are retail finance litigation, extradition disputes and large professional indemnity claims.

Colin published the 3rd edition of “Privilege” in July 2013. This is one of the leading textbooks on the subject of legal professional privilege. Colin also authors ***Passmore on Privilege: a blog***, which reviews the more interesting cases arising under the law of legal professional privilege

BREXIT

Bernard Jenkin MP, Chairman of Public Administration and Constitutional Affairs Committee

Brexit and Devolution – The Law Society of Scotland

It is important to recognise the importance of the ‘whole-of-government' concept in terms of the negotiations with the EU because of the breadth, depth and scope of EU Law as it applies throughout the UK. In this context “whole-of-government” should be interpreted as “whole-of-governance” to include not only the UK Government but also the Scottish Government, the Northern Ireland Executive and the Welsh Government.

In December 2016, the Scottish Government published a paper, Scotland's Place in Europe, setting out its preferred approach to negotiations and proposals for a differentiated settlement for Scotland, and its views on further devolution and the wider impact of Brexit on Scottish devolution. The UK Government's White Papers on the UK's exit from and new relationship with the EU, and on the Great Repeal Bill, set out some of the plans and priorities of the UK Government in the negotiations ahead, and acknowledge the role of the devolved administrations. The Prime Minister confirmed the importance of respecting devolution settlements while simultaneously negotiating as one United Kingdom. Mrs May confirmed that there will be full consultation on where the powers repatriated to the UK from the EU should sit within the devolution framework of the UK and with the expectation that the devolved administrations will gain further powers as a result. However, speculation remains about what future relationships between the UK and the EU and the intra-UK relationships will look like.

Different arrangements for devolution apply in each of the UK's three devolved nations. Consequently, the impact of the UK's withdrawal from the EU will be different for Scotland, Northern Ireland and Wales. Understanding how the different jurisdictions will be affected, will require careful analysis, stakeholder engagement, consultation and respect for the rule of law - a “one size fits all” solution is simply not workable.

For Scotland, there are particular issues about our legal system, constitutional arrangements such as legislative competency, and how EU laws are dealt with once they are repatriated. This will affect justice and home affairs, environmental law, farming, and research, amongst other areas of law and policy.

The extent and method of post-Brexit devolution is a matter for political negotiation between the UK Government and the devolved administrations.

Options currently being explored include: -

- A constitutional convention
- A commission (similar to the Smith or Calman Commissions)
- The JMC (EN) or another sub-Committee of the JMC
- A new structure including UK, Scottish, Northern Irish and Welsh Ministers, subject experts and stakeholders.

The principles of legality, openness, transparency and clarity should guide the decision making process and a

spirit of cooperation will be fundamental.

As the Law Society of Scotland, we have already begun promoting a set of principles which, in the interests of both the public and our members, we believe the UK should adopt in forthcoming negotiations.

We have been briefing politicians on the legal aspects and implications of Brexit negotiations, and responding to the wide range of parliamentary inquiries on Brexit issues in areas such as devolution, the justice system and human rights.

We have participated in the Scottish Government's EU Justice and Security Summit, held our own member events and attended the main political party conferences, where we hosted fringe events on Brexit. We will continue to play our part in the discussion. For further information on our Brexit work, visit our **website**.

Previous Item	Back to Contents	Next Item

Viewpoint	In Focus	Law Reform	Law Societies' News	Just Published

Brexit: The view from Wales

The terms of the UK's exit from the EU will apply equally to all the nations of the UK and the view from Wales is complex. The UK Government is leading the negotiations with the EU but since the turn of the century it no longer has an exclusive role in governing the UK. The distinct requirements of the devolved administrations are emerging.

All the constitutional Acts of Parliament devolving powers to Wales have been made within the framework of European legislation. The latest Wales Act received Royal Assent only in January this year. This Wales Act provides a shift in law-making powers from a narrow 'conferred powers' model where there were defined subjects to a broader 'reserved powers' model approach where the restrictions are defined instead. The approach adopted in this Wales Act will no doubt throw up some problems around the extent of powers (there were three referrals to the Supreme Court under the Government of Wales Act 2006 and the basis of the decisions in those cases mean that there is plenty of room for disagreement under the new Act).

As we approach a future with no overarching European law the impact of the terms of the withdrawal of the UK and the repatriation of policy and law-making in those areas which operate within an EU regulatory framework currently raises the concern that Wales' priorities, in so far as they do not align with the UK as a whole, will not be defended.

Areas of EU policy such farming, fisheries, the environment and economic development are of particular interest in Wales. At the point of exit from the EU, when EU regulatory and administrative frameworks cease to apply, these powers will continue to be devolved in Wales. Similarly, a number of reserved powers in which Wales has an active interest, and which directly impact on devolved policy areas, such as competition policy, employment law and international trade, will continue to be the function of the UK Government and Parliament. Even though current EU law is to be preserved in the first instance, the ensuing activity to re-legislate will inevitably lead to a challenging environment for both the UK and Welsh governments.

The Welsh Government (Labour) has published a **White Paper** which was developed in conjunction with Plaid Cymru, the Party of Wales. The paper sets out six areas to be addressed in the Brexit negotiations, they are: the single market and international trade; migration; finance and investment; constitutional and devolution issues; social and environmental protections and values; and transitional arrangements.

A particular issue for Wales is the constitutional change that will flow from leaving the EU. The Welsh Government advocates the establishment of a constitutional convention to review constitutional arrangements and practice within the UK. Further, these changes require a new approach to the UK's governance structure that reflects the interdependencies and interests between devolved and non-devolved. As EU frameworks provide an element of consistency across the UK internal market there will be a need for new UK-wide frameworks which will require wholly new inter-governmental machinery.

The Wales Office of the Law Society of England and Wales represents the profession across the National Assembly for Wales, the Welsh Government and Welsh civic society. We have held and will be holding events to explore the implications for Wales as well as developing solutions.

Previous Item	Back to Contents	Next Item

Viewpoint	In Focus	Law Reform	Law Societies' News	Just Published

Embarking on the UK – EU negotiations: What is under discussion

Following PM May's triggering of Article 50, Donald Tusk has published for the European Council the draft guidelines for the negotiations. This means that the UK and EU are entering the withdrawal negotiation process. While it is impossible to predict the outcome at this stage – there are simply too many unknowns –

it is possible to say what will take place next: how the negotiations will be started and what will be on the menu at each stage.

Orderly withdrawal

The first principle is that the EU will aim to reach an agreement on an orderly withdrawal. Article 50 includes a danger that the UK will simply fall out of EU membership: If the withdrawing state and the remaining EU member states do not reach an agreement within 2 years from triggering Article 50, and they do not agree unanimously to extend the time period for the negotiations, the EU treaties shall cease to apply to the withdrawing state.

This is the cliff-edge scenario, where the UK simply ceases to be an EU member state, without a separate formal exit agreement, transitional provisions or new trading relationship having been agreed.

The problem with this disorderly withdrawal is that it will hit hardest those people and businesses who have been able to benefit from free movement, and who have forged cross-border lives or trading relationships. These are those EU citizens living in the UK, UK citizens living in the EU – including those who work at the EU institutions – or those businesses who are engaged in cross-border trade. Including them and their family members, a disorderly withdrawal impacts the lives of tens of millions of people.

Negotiations: phased approach

The second principle is that the negotiations will be conducted with a phased approach. This means that there will be no negotiations in parallel about the exit and the possible new relationship, at least until the main issues for the exit have been agreed. The purpose for the EU is to first set an orderly exit, and after that establish a new framework.

This corresponds to what Article 50 TEU provides. It establishes a process for an exit agreement and simply mentions that those arrangements may take account of the new relationship, which is to be negotiated under Article 218 TFEU process. This means that there will be at least two treaties with the EU: one on exit, another on the new relationship.

Exit agreement ending the UK membership

The exit agreement will be about institutional issues surrounding the finalising of the UK's EU membership. The crucial issue here is to settle the final budgetary contributions and financial responsibilities. These are those contributions that the UK has agreed to make as an EU state.

Further issues in this category will be setting dates for ending the various posts that the UK holds in the EU institutions: the Commissioner, Judges at the Court of Justice, and what will happen to the UK citizens employed by the UK institutions, their rights to employment and pensions.

The draft guidelines see that the exit agreement will also contain provisions on the rights of the EU and UK citizens and businesses. Furthermore, the agreement will aim to ensure that the businesses or individuals are not left in a legal vacuum once the UK's membership ends.

These parts of the agreement are likely set out cut off dates, e.g. who gets to benefit from the EU citizenship laws and who does not anymore. This would also include cut off dates for the cases pending before the Court of Justice and national courts with UK and EU parties, or for the Commission investigations.

Finally, it is possible that parts of the agreement aim to settle also more permanently some aspects for the future. The draft guidelines recognise the special circumstances surrounding the Northern Irish border and provide that the EU and UK should seek for flexible and creative solutions in order to avoid hard border between the Northern Ireland and the Republic of Ireland.

Agreement on the new relationship

A separate agreement on the new relationship will be needed in order to determine the new legal framework between the UK and EU. This may take the form of a free trade agreement or something more ambitious, including areas beyond just trade in goods.

Both the UK and EU are going to be seeking a special relationship or partnership. The UK government is seeking an agreement on trade, but also on issues such as security and fight against crime or terrorism.

The EU draft guidelines remind us simply that the new deal cannot be expected to provide the same benefits as the Union membership and must not undermine the proper functioning of the internal market. It furthermore needs to set a level playing field and include competition and state aid and include safeguards against fiscal, social or environmental dumping.

Transitional agreement

The likelihood of an agreement on the new relationship being agreed within the two-year period prescribed for the exit is small, in particular if the parties are looking to include areas not normally covered by the FTAs, e.g. criminal justice or access to intelligence sharing in the fight against terrorism and crime, while seriously limiting the present framework in relation to trade in services or free movement of persons.

This means in turn that there may be a need for a third agreement, a transitional agreement, which allows a continued legal framework to be applied between the UK and EU, without the UK being formally a member of the EU any longer.

The draft guidelines suggest that this is likely to take the form of preserving the status quo on the legal framework that is applied to individuals or businesses. This makes sense in that if there were to be major amendments to the present framework, it would be a new agreement, which needs to be negotiated and agreed by the parties.

What's next?

At the next stage the Commission is aiming to submit its draft mandate for the negotiations in early April. This Commission mandate will in turn be adopted by the Council and it will bind the EU both as to the scope of the negotiations and the team that the UK government will be negotiating with.

The draft mandate is likely to follow closely the guidelines set by the European Council – in particular, as the draft guidelines repeat quite faithfully what the Commission lead negotiator, Michel Barnier, has already proposed. He has asked for a staged approach, whether he will ask for the starting only of exit negotiations in the mandate, at this stage, will be one of the issues to watch for. After the mandate is adopted and the team appointed, the EU side will be ready to start.

The rest, time will tell, how these negotiations will go, how long will they take and how many stages will we see.

This article has been written for the Law Society of Scotland's Journal.

EU negotiation parties: Which EU institutions are involved in the negotiations

Article 50 TEU, together with Article 218 TFEU, set out the main procedures to follow. These follow closely the other EU procedures: the Commission will present a mandate, form a team, report to the Council, and the Council and the European Parliament will accept. The mandate proposal is likely to be tabled by the Commission is April. Meanwhile, the European Council has published draft negotiation guidelines.

From the above, three things stand out: First is the question what is really the power balance between the Commission and the Council, second, how does the European Council fit into this, and third, how the Parliament seems to have quite a weak role as it will be only engaged at the very last stage, when the agreement is to be accepted.

Balance of power between Commission and Council

The Commission will start the procedure by asking for a negotiation mandate. This mandate will provide the scope of the negotiations: what topics are going to be under the negotiation, whether there will be first a negotiating mandate for exit and later for a new relationship, and who will be in the negotiation team. This mandate will need to be adopted by the Council and it will bind the EU negotiating team.

Even though the Commission will be acting under the watchful eye of the Council throughout the negotiations, as it will need to report to it periodically and take instructions from it, it has certain advantages over the Council.

One is internal cohesion: the exit deal, or any change in the negotiations, will need to be approved by the qualified majority of member states. One member state cannot rock the boat.

On an agreement on the new relationship, it depends on how ambitious the agreement will be. If the agreement will be a simple free trade agreement on goods, then the EU can ratify the agreement on behalf of the member states, with the Council adopting the agreement by qualified majority.

However, if the agreement goes any deeper, it will be subject to unanimity requirement or it may be that it will need to be ratified at the national level. As the latter is likely, one member state, or even one national parliament, can rock the boat. This is one reason why a good transitional framework will be needed.

Another advantage for the Commission is that it has also a wealth of expertise in its disposal. Michel Barnier

and his team can reach out to the different Directorates General for specialist knowledge, whereas it is unlikely that every member state will have a big team dedicated for Brexit.

The position of the European Council

The European Council, institutionally a different body from the Council of Ministers, and its President, Donald Tusk, have been in the limelight after publishing draft negotiation guidelines. These are not the same thing as the mandate above, and will not be binding: the European Council does not have the power to propose or adopt the mandate, but can provide impetus and high level instructions as to what it would like the Union to do.

The European Council is important as it consists of representatives at the highest national political level: the Heads of State and Government. Furthermore, it adopts its positions by unanimity.

This means that when the European Council adopts its guidelines for the negotiations on 29 April, these will provide clear instructions for the Commission and the Council to proceed, having been endorsed unanimously by the highest national political leaders. Consequently, any future statements, or important omissions, by the European Council will also have a special meaning.

Hidden strengths of the European Parliament

Although the European Parliament has officially role only at the end of the process, as it has the power to accept or reject the final agreements, it has also other tools in its disposal to influence the result. The Parliament will be the only institution discussing the negotiations in public.

In fact, it has already started the work though the AFCO Committee and setting up a European Parliament negotiating team, which is led by Guy Verhoefstad. It can, and intends to, exert public pressure on the negotiating parties. It may be argued that it has already done so. The Parliament has been very vocal on the need to reach an agreement on the EU and UK citizens' rights. This has been now fully recognised by the European Council draft conclusions.

Furthermore, measure of the early and active role of the Parliament can be found in the *Motion for a Resolution* published on 29 March. This resolution welcomes the appointment of Barnier, whilst reminding the other institutions that the "*full involvement of the European Parliament is a necessary precondition for it to give its consent to any agreement reached between the European Union and the United Kingdom".*

During the negotiations Parliament can also ensure that it has the Commission's ear. It has the power to ask questions from the Commission and request that the Commission will take part in the Parliament's hearings.

The Commission has, in fact, already pledged to act transparently throughout the negotiations. This is likely to mean that negotiation texts will be published, questions answered, and more regular updates are given to both the Council and the Parliament than is normally the case. This may seem an unusual step for negotiations such as these, and presumably reflects both the intense public interest in this case, as well as the criticism previously borne by the Commission during the CETA/ TTIP negotiations.

All this, in turn, means that the European Parliament may prove an influential platform for other organisations needing further information, and trying feed into the negotiations.

This article has been written for the Law Society of Scotland's Journal.

Brexit key players

Outside of the scholarship of international law, treaties rarely become known by name – although many a Conservative MP could probably tell you where they were when Maastricht was signed. Still less commonly does an individual article become known by name. Article 51 of the UN Charter, the right to act in self-defence, became briefly notorious in the run up to the Iraq war, but normally chapters and provisions normally sink into obscurity, beyond the specialised communities of lawyers and bureaucrats tasked with their interpretation and application. Article 50 TEU, of course has changed that, leaping out from the Lisbon Treaty, and onto a thousand front pages.

Institutionally, the path towards Brexit is clear. The Council will mandate, the Commission will negotiate and

the Parliament and the Council will vote. But, as Emerson reminded us, '*an Institution is the lengthened shadow of one man'*, and so, with Article 50 triggered, attention is turning to the personalities who will be at the table – or on the menu.

First of all is **Donald Tusk,** President of the European Council since 2014. Visibly emotional on receiving the formal confirmation that Article 50 was being triggered, the institution of which he is President ultimately must channel the demands of the 27 remaining member states into a negotiating mandate for the commission. This is unlikely to be a harmonious task, and the early inclusion of a Spanish interest over Gibraltar may well be a taste of the specific national interests that will rise in the bargaining to come. The impact of the poisoned relations between the current Polish government and Tusk on the Brexit process remain to be seen.

The legal basis for the process can be found in Article 218(3) of the Treaty on the Functioning of the European Union, which provides for the Council to authorise the opening of negotiations. The actual discussions between the UK and the EU, however, will be carried out by a Commission team headed by **Michael Barnier.** Three times a cabinet minister of France – including for Foreign Affairs and European Affairs – Barnier interspersed national roles with high level European jobs, serving as commissioner first for Regional Policy and later for Internal Market and Services. This last post, which included responsibility for the financial services package following the 2008 crash, led to him being described as '*the most dangerous man in Europe'*, due to his oversight of financial regulation.

On top of his service in the College of Commissioners, he also served as VP of the EPP from 2010 to 2015. Following that, he acted as an unpaid advisor on defence to Juncker, before being appointed as Chief Negotiator in charge of the Preparation and Conduct of the Negotiations. Despite this undoubted wealth of experience, questions have been asked as to how much independence Barnier will enjoy, with *Politico* noting that his team will have to report to one of Juncker's aides, **Richard Szostak**, who will oversee the work of the negotiating team on behalf of Juncker's chief of staff **Martin Selmayr.** Thus the line of oversight over Barnier runs to the top of the commission, meaning that, combined with his duty to report back to the Council on the negotiations, Barnier is a man with two masters.

The overall team is expected to be pulled from across the EU, with *Politico* **giving a round-up** of the 30 or so known at this stage; some stand-outs include **François Arbault** and **Stefaan de Rynck**, both financial service experts, along with **Sabine Weyand,** former deputy-director at DG Trade and now deputy Chief Negotiator. The composition of the team course reflects the nature of the game; lots of expertise needed on finance, lots of input expected from member states, and lots of cooperation needed from each Commission department.

On the Parliamentary side, **Guy Verhofstadt** heads up the negotiating team. Formally, the Parliament has no role until negotiations have been completed, however Verhofstadt was never expected to wait in silence until 2019. Probably the most active – and engaged – EU politician on social media, his twitter account has been jam-packed with Brexit news since he was appointed to the role in September. Whether praising Britain's contribution to the EU, chastising Boris Johnson for intemperate comments about punishment beatings, or advocating for an associate EU citizenship for post-Brexit Britons, his contributions have been both vocal and unique. On the institutional side, the Parliament – and thus Verhofstadt – has sought to make its mark already in two ways; firstly by stating that six months will be needed for them to consider any EU UK deal before voting, thus shortening the 2 year Article 50 negotiation time by a quarter, and secondly by the resolution, prepared by the heads of four of the eight political groups, detailing Parliament's interests and their expectation that the Council will take their views into account during the framing of the negotiation guidelines.

Beyond the institutions, a few wildcards exist on the European side. Germany will go to the polls in September, with **Martin Schultz**, departing President of the European Parliament hoping to succeed Angela Merkel. Schultz is perceived to be a Brexit hardliner, although that may well change if his political hinterland orientates from Brussels to Berlin. At the opposite end of the Europhile spectrum **Marine Le Pen** is now trailing in the French Presidential elections, but if she follows the pattern set by the election of Trump and Brexit in the last year, the effect of a Front National President being part of the European Council is unlikely to further the goal of harmonious negotiations.

The likelihood is that, the final agreement will not happen solely between the UK and the institutions. As we have seen in the troubled ratification of CETA, and also in the opinion that AG Sharpston submitted to the European Court of Justice concerning the EU- Singapore, there are strong signs that any future, comprehensive trade deal will be a 'mixed' agreement. This means that individual member states must also agree – on the basis of unanimity – to the deal. Depending on the constitutional framework in place, that can mean an effective veto for regional assemblies, as briefly appeared possible when Belgian found itself unable to sign the final agreement due to the opposition of its French speaking region, Wallonia. As such, a final key player in the negotiations will be the **unknown member state.** There will be 27 national interests to be considered in the final agreement. Already in the draft negotiating mandate released by the Council, we saw the explicit recognition of a Spanish veto over future Gibraltar- EU arrangements. Furthermore, It is broadly

expected that the UK will lose economically and politically by Brexit, and we can expect to see the negotiation mandates protecting the interests of the Union as a whole – but also reflecting the scramble for Britain, as member states attempt to restructure the deal in their own favour. This can be seen already in the tactical struggles surrounding passporting rights on financial transactions, as both France and Germany presumably position themselves to receive a share of the City. Other interests, will, no doubt, arise during the negotiations or at the ratification stage, when the threat of a national veto could plausibly cause the negotiations to be set-aside. Thus it will be appreciated that while Brexit may now be inevitable, a smooth and orderly process is far from guaranteed.

Update following the publication of the draft report of the Committee on Legal Affairs on the proposal for a directive on copyright in the Digital Single Market (the "Report")

Background

The evolution of digital technology has changed the way works and other protected subject-matter are created, produced, distributed and exploited. In the digital environment, cross-border uses have intensified and new opportunities for consumers to access copyright-protected content have materialised. The objectives and principles laid down by the EU copyright framework remain in place but, in the light of changing technology, there is a need to adapt.

The Digital Single Market Strategy identified the need to "reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU". The Commission subsequently outlined targeted actions and a long-term vision to modernise EU copyright rules; this article focusses on one of the measures which aims to address some of those specific actions and issues.

The proposed Directive considers a variety of issues, and the JURI Draft Report focusses on topics including, but not limited to:

- Text and data mining;
- Use of works and other subject-matter in digital and cross-border teaching activities;
- Rights in publications; and
- Fair remuneration of authors' and performers' contracts.

This article will look at some of the recommendations on these four issues. A copy of the complete Report can be found **here**.

Text and data mining

Text and data mining allows for the reading and analysis of large amounts of digitally stored information in order to gain new knowledge and discover new trends. For text and data mining to occur, information needs to be accessed and reproduced (or 'normalised'). This normalisation constitutes copyright-protected use as it is a reproduction by change of format of the information, or extraction from a database into a format capable of being processed. The relevant process in text and data mining is not the mining process itself, but the access and normalisation of information in view of its automated analysis.

The Report identifies that an exception is required to address the reproduction or extraction carried out during the normalisation process as this is not already regulated in the copyright acquis (unlike the process of access to information protected by copyright which is regulated).

Research organisations often have difficulty in obtaining access to the many scientific publications that are required for research by text and data mining and, in order to facilitate innovation and research, publishers are obliged to provide those organisations with normalised datasets. The Report suggests that where normalised data sets are provided by publishers, compensation may be required by those publishers to cover the costs of the normalisation.

Use of works and other subject-matter in digital and cross-border teaching activities

The Report also identifies that the use of copyrighted material for illustration in teaching must be limited to truly educational activities, and this exception needs to cover all formal schooling in schools and universities which are recognised or accredited as educational establishments by their relevant Member State's systems of recognition and accreditation. However, the Report also recognises that restricting the exception solely to places where teaching takes place is inconsistent with the goal of lifelong learning and recommends that the exception should therefore be linked to recognised and accredited teaching activities, regardless of the structural context.

In order to extend the scope of the exception to include these recognised and accredited teaching activities, the Report suggests the following definition at Amendment 30:

'teaching activity' means an educational process taking place either on the premises of an establishment recognised or accredited by the relevant national authority as an educational establishment, or within the framework of an education programme recognised or accredited by the relevant national authority.

Rights in publications

Copyright solutions affect both the rightholders, and all stakeholders who access the copyright in question, and the solutions must therefore be adequate, necessary, proportionate and focussed.

Digitalisation makes it easier for the contents of press publications to be copied or reused, and press content used by others is clearly disproportionately harmful to the financial interests of press publishers. However, digitalisation also makes it easier to access news and press and using digital technology to facilitate the finding of news and press is not necessarily harmful to the financial interest of publishers. Indeed, in some cases these online linking systems (such as hyperlinks) make it easier for users to access online news portals.

The Report recognises that press publishers depend on the enforcement of their rights to protect their investment in publication and suggests that measures are needed to strengthen the enforcement position. The amendments therefore recommend that press publishers are given legal standing to bring proceedings in their own name over the infringement of the rights of the authors of the published works, and also recommends that press publishers are presumed to represent the rightholders of those who contribute to their publication.

Fair remuneration for authors' and performers' contracts

The Report indicates that authors and performers face the greatest challenge in ensuring fair remuneration for the exploitation of their works and performances from those to whom they have licenced or transferred their rights.

The Report therefore recommends the following four measures:

- A declaration on authors' and performers' right to fair remuneration;
- Increased transparency;
- Contract adjustment mechanisms; and
- More accessible redress.

According to the Report, authors and performers are given better representation for the recognition and enforcement of copyright under Articles 14, 15 and 16 of the proposed Directive.

Reactions from MEPs

Whilst in general the Report has been praised as being well-balanced, and an improvement on the Commission's original proposal, there are still many contentious areas and agreement on the Report is not to be expected immediately.

It was widely agreed that a fair balance must be struck between the protection of creative content, and what access there is to that content. It is also generally agreed that remuneration should be fairer in the sector, and several MEPs have expressed disappointment that the Report has not done enough in relation to fair remuneration for authors' and performers' contracts; one suggestion has been to introduce a direct compensation mechanism in order to achieve this.

Additionally, whilst most of the MEPs have welcomed the amendments in relation to rights in publication, some disagree that there is a need to create more rights for publishers and have suggested that there is a risk of over-complicating matters.

The full JURI Committee meeting can be streamed **here**.

The deadline for tabling further amendments has now passed and the debate is expected to continue when these amendments are considered by the Committee on 3 May 2017.

Competition in virtual reality and the rising power of the super-platform

Date: 10 May 2017
Time: 12.30 - 14.00 (lunch starting at 12.00)
Location: Law Societies Office, Avenue des Nerviens 85, 1040 Brussels

The Joint Law Societies Brussels Office is delighted to invite you to our roundtable event on Virtual Competition and the Rise of the Super-platform.

The Digital Single Market has increased access for consumers to buy goods online. This increase in online shopping has revolutionised the way consumers buy goods. The use of big data to direct the flow of personal data in market competition, which has been seen to target consumers, and the rising power of the super-platform pose many questions which will be discussed.

Our panellists include:

- ***Professor Ariel Ezrachi, Slaughter and May Professor of Competition Law at the University of Oxford***
- ***Claire Bury, Deputy-Director General of DG Connect***

Please note that the event will take place under the Chatham House rule. If you would like to attend this event please RSVP by clicking **here** to register.

Please note that this event will be free-of-charge.

MOJ fee scheme will jeopardise administration of justice

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

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

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

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

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

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

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

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

Solicitor judge sworn into the higher judiciary

Sir Gary Hickinbottom became the second solicitor appointed to the Court of Appeal when he was sworn in at the Royal Courts of Justice on 15 March.

The Law Society of England and Wales gave a lecture and dinner in his honour last month where Sir Hickinbottom spoke on the importance of diversity in the judiciary and how the experience of solicitors gives them a skill set which well-equips them to deal with much modern judiciary work.

You can read Sir Hickinbottom's speech in full **here**.

Anger and frustration at Scottish Legal Complaints Commission's budget plans

The Law Society of Scotland has said that the SLCC's plans to increase its annual levy by eight times the rate of inflation have caused unprecedented 'anger and frustration' within the legal profession. The SLCC has argued that recent increases in complaints against solicitors requires an increased budget.

The Law Society has said that the increased cost for individual solicitors is unacceptable, and has disputed the SLCC's justification for the increasing, arguing that recent rises in the numbers of legal complaints only equates to a handful extra each week. The Law Society believes that these numbers can be accommodated within the existing budget.

Chief Executive of the Law Society, Lorna Jack said: “At the heart of the concern is the proposal to increase the annual levy by 12.5%, almost eight times the rate of inflation. In all the years of consulting with solicitors on successive SLCC budgets, we have never experienced such anger in response.”

You can read more about the Law Society's response **here**.

Pupils from four Scottish schools through to final of national debating tournament

Pupils from schools in Dundee, Glasgow and St Andrews have earned places in the final of the Donald Dewar Memorial Debating Tournament, having pitted their wits against schools across the country.

Only four of the 128 teams that originally entered the Law Society of Scotland's national debating tournament will take part in the final.

The semi-finals required the students to debate a range of topics, including:

- The prioritisation of public safety over the right to strike;
- State compensation for victims of crimes committed by reoffenders;
- Punishing parents for crimes committed by their children;
- And the rise of social media as the primary source of news distribution.

The final of this year's competition will take place in the debating chamber of the Scottish Parliament on 8 June.

The Law Society will donate £1,000 to the winning team and the Glasgow Bar Association will donate £250 to the runner up for their schools. The top two teams will share £500 worth of educational books presented by tournament sponsors Hodder Gibson.

Law Society of Scotland launches financial benchmarking survey of law firms

On 30 March, the Law Society of Scotland launched a new online survey to help solicitors assess their firm's financial health alongside how they are performing in the legal market.

The Law Society has working with leading software and services provide Tribal Group to develop a new financial benchmarking survey which will replace its annual cost of time survey, and is intended to be an effective business tool for law firms across Scotland.

The new system will gather more relevant information and offer interactive, online reporting on the findings to help solicitors assess how their own business is faring year on year, as well as comparing how they have performed in the wider market.

You can find more information about the survey **here**.

Law Society of Northern Ireland announces Xperience Group Limited as a New Sponsor

The Law Society of Northern Ireland has announced Xperience Group as its newest sponsor. Xperience Group is well established as one of the UK and Ireland's leading IT solutions providers.

The President of the Law Society, Ian Huddleston, has said that the sponsorship and ongoing support from Xperience Group in matters relating to IT and Cybercrime will be of immense benefit to the members of the Law Society of Northern Ireland and their firms.

The Group Director of Xperience Group, Patrick Leggett, has agreed that Xperience is well positioned to provide best practice advice, and to assist firms with defence strategies.

Opting out of human rights agreement disproportionate and dangerous

The Law Society of England and Wales has responded to the Joint Committee on Human Rights (JCHR) consultation on the MOD's proposals to derogate from the ECHR in future conflicts, saying that proposals to opt out of international human rights agreements in future conflicts are misguided and risk stripping people, including British troops, of their rights.

Law Society President, Robert Bourns, has said that “the proposal to opt out of an international human rights agreement to prevent false legal claims is not only disproportionate, it is dangerous”. He added that “this could stop genuine claims ever being heard and would undermine hard-won international accords that protect our most fundamental shared values”.

You can find more information on the evidence submitted by the Law Society to the JCHR **here**.

ONGOING CONSULTATIONS

Agriculture
Modernising and Simplifying the Common Agricultural Policy
2 February 2017 - 2 May 2017

Culture & Media
European Parliament and European Commission cooperation in communication in EU countries
1 February 2017 - 8 May 2017

Digital economy
Public consultation on Building a European data economy
10 January 2017 - 26 April 2017

Economy, Finance and the Euro
EU initiative on restrictions on payments in cash
28 February 2017 - 31 May 2017

Education & Training
Public consultation on the Key Competences Review 2017
22 February 2017 - 19 May 2017

Open Public Consultation on Erasmus+ and predecessor programmes
28 February 2017 - 31 May 2017

Financial Services
Public consultation on the operations of the European Supervisory Authorities
21 March 2017 - 16 May 2017

Public consultation on FinTech: a more competitive and innovative European financial sector
23 March 2017 - 15 June 2017

Justice & Fundamental Rights
Open public consultation for the mid-term evaluation of the Fund for European Aid to the Most Deprived (FEAD)
3 February 2017 - 5 May 2017

Public Consultation on "Whistleblower Protection"
3 March 2017 - 29 May 2017

Public consultation on combatting fraud and counterfeiting on non-cash means of payment
1 March 2017 - 24 May 2017

Neighbourhood Policy
Thematic Evaluation on Support to Economic Governance in Enlargement and Neighbourhood Countries - Open Public Consultation
1 February 2017 - 28 April 2017
Public consultation on the External financing Instruments of the European Union
7 February 2017 - 3 May 2017

Research & Innovation
Public Stakeholder Consultation – Evaluation of Public-Public Partnerships (Art.185 initiatives) in the context of the Horizon 2020 Interim Evaluation
27 January 2017 - 30 April 2017

Single Market
Public Consultation on the rules on liability of the producer for damage caused by a

defective product
10 January 2017 - 26 April 2017
Public consultation on the functioning of the administrative cooperation and fight against fraud in the field of VAT
2 March 2017 - 31 May 2017

Trade
Public consultation on the mid-term evaluation of the EU's Generalised Scheme of Preferences (GSP)
17 March 2017 - 9 June 2017

COMING INTO FORCE THIS MONTH

Energy
COMMISSION REGULATION (EU) 2017/459
of 16 March 2017
establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013

COMMISSION REGULATION (EU) 2017/460
of 16 March 2017
establishing a network code on harmonised transmission tariff structures for gas

COMMISSION REGULATION (EU) No 984/2013
of 14 October 2013
establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council

Migration
REGULATION (EU) 2016/1953 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 26 October 2016
on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994

REGULATION (EU) 2017/458 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 15 March 2017
amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders

Trade

COMMISSION DIRECTIVE (EU) 2017/433
of 7 March 2017
amending Directive 2009/43/EC of the European Parliament and of the Council as regards the list of defence-related products

Transport
COUNCIL DIRECTIVE (EU) 2015/652
of 20 April 2015
laying down calculation methods and reporting requirements pursuant to Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels

CASE LAW CORNER

Decided cases
Discrimination & Employment

The CJEU and Conflicting Advocate General Opinions on Religious Discrimination in the Private Sector
The cases of C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (*Achbita*) and C-188/15 *Asma Bougnaoui and*

Association de défense des droits de l'homme (ADDH) v Micropole SA (*Bougnaoui*) were referred to the CJEU on similar matters, on whether the claimants had experienced discrimination on religious grounds in the private sector.
Both cases ask whether prohibition to wearing a headscarf constitutes direct or indirect discrimination on grounds of religion. Direct discrimination occurs when a person is treated differently due to a characteristic such as their religion. Indirect discrimination constitutes when a neutral guideline puts people of a certain group at a disadvantage. Article 4(1) of the Directive 2000/78 states that direct discrimination will be unlawful in all circumstances however, indirect discrimination can be lawful when it is an express derogation or a proportionate means of achieving a legitimate aim as is found.
The questions referred to the CJEU were different and the facts of the case show nuances. This is why Advocate General (AG) Kokott and AG Sharpston came to different conclusions in their opinions. Yet, both AGs acknowledge that the cases are very similar as both women wore headscarves at work and that the issues surrounding headscarves are socially sensitive. The CJEU was therefore faced with a difficult task having to navigate between the two cases and the two AG Opinions.

Case C-157/15 Achbita

The Belgian Court in *Achbita* asked whether: Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 could be inferred to mean that the prohibition on wearing a headscarf does not constitute direct discrimination “where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?”
AG Kokott opined that direct discrimination had not occurred as G4S's general company ban on wearing any religious, philosophical or political symbols manifesting an employee's belief, means that the rule demonstrated “neutrality”. Therefore, AG Kokott did not agree that there was favourable or less favourable treatment based on religion. Some instances could lead to indirect discrimination on religious grounds, however AG Kokott concluded that the general company ban was a legitimate and proportionate company policy especially when Article 16 Charter of Fundamental Rights of the European Union (CFR) is applied. AG Kokott believes it is ultimately for the Belgian courts to strike a fair balance under Article 4(2) TFEU whilst taking into account these 4 factors.
Thus she based her conclusion on 4 factors:

- The size and conspicuousness of the symbol
- The employee's nature of work
- The context which that activity is carried out
- The national identity of the concerning MS

The CJEU agreed there was no direct discrimination as the company's rule on wearing any visible signs of political, religious or philosophical belief “therefore covers any manifestation of such beliefs without distinction.” The rule treated all employees in the same way to dress neutrally. Under indirect discrimination, the CJEU held that the neutrality requirement of employees pursued consistently was a legitimate aim linked to the freedom to conduct a business (Article 16 CFR).

Case C-188/15 Bougnaoui

The French Court in *Bougnaoui* asked whether Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 should be understood as meaning that a dismissal of an employee wearing a headscarf is allowed, and whether a prohibition due to a customer finding the headscarf offensive “is a genuine and determining occupational requirement … of the context in which the [work is] carried out?”
AG Sharpston's opines that the freedom to manifest one's religion is an essential part of freedom of religion, enshrined within Article 10 CFR, Article 9 European Convention on Human Rights (ECHR) and Article 14 ECHR. As such, Ms Bougnaoui was seen by AG Sharpston to have been treated less favourably on the ground of religion because a person with the same occupation who did not choose to wear a religious garment would not have been dismissed. AG Sharpston concluded that Ms Bougnaoui's dismissal was due to direct discrimination on the ground of religion.
AG Sharpston noted that despite there being a general principle of EU law on freedom to conduct business found in Article 16 CFR, this principle is subject to certain limitations which includes the need to protect the rights and freedoms of others. Therefore direct discrimination cannot be justified due to potential financial losses caused for the employer. For the balance of proportionality however, AG Sharpston believes that Article 16 CFR could justify indirect discrimination.
Here the CJEU held that a violation had occurred, as the employer's ban on the headscarf was based on the client's preference to no longer have the services of that company due to a worker wearing the headscarf rather than a neutrality rule, which the employer pursued consistently. It therefore “cannot be considered a genuine and determining occupational

requirement." Thus, the CJEU ruled this was direct discrimination on the grounds of religion.

Conclusion

The slight differences of the case facts demonstrates the different considerations that were taken into account by the AGs and ultimately the CJEU. The CJEU considered the two opinions and came to differing judgments in both cases, just as the AGs did. Although the legal issue may be the same, both Opinions are justified by EU law and case law from not only the CJEU but also the European Court of Human Rights.

Concerning the genuine and determining occupational requirement, this is where the decisions diverge most. *Achbita* sways towards the freedom to conduct a business (Article 16 CFR) whereas *Bougnaoui* does not see this as justifiable. In *Achbita*, the CJEU and AG Kokott seem to have not followed the *Eweida* line, where the UK was found not to have protected *Eweida's* right to wear a discrete Christian cross and so to manifest her religious beliefs.

The key differences to bear in mind are the origins of the AGs relating to attitudes on displaying religion; the origins of the cases in regards to the different social attitudes to displaying religion; and the amount of contact each job has with the public (, *Achbita* was a receptionist, whereas *Bouganoui* had only 5% contact with the public).

Data protection

Case C-536/15 *Tele2 (Netherlands) BV, Ziggo BV and Vodaphone Libertel BV v Consument Autoriteit en Markt (ACM)* on 15 March 2017

The CJEU has held that the Universal Service Directive does cover all requests covered by an undertaking established in another Member State under Article 25(2) of the directive in question, and that the information should be made available in a non-discriminatory manner. The lack of distinction to undertake requests established in the same or another Member State is compatible with the directive so to ensure the availability of good quality publicly available services through effective competition and choice throughout the EU. If a data request is refused on the grounds that they are established in another Member State, it would be incompatible with the principle of non-discrimination.

Regarding whether data subjects are given an option to give their consent depending on the country in which the undertaking requesting that data provides its services, the CJEU refers to its ruling in C-543/09 Deutsche Telekom. Where a subscriber has been informed by the undertaking which assigned him a telephone number of the possibility that his personal data may be passed to a third-party undertaking, with a view to being published in a public directory, and he has consented to that publication, renewed consent is not needed from the subscriber for the passing of the same data to another undertaking. However, this is only the case if it is guaranteed that the data in question will not be used for purposes other than those stated for which the data was originally collected.

In such circumstance, the attempt to pass the same data to another undertaking with the intention to publish a public directory without obtaining renewed consent from the subject is not capable of substantively impairing the right to protection of personal data, recognised by the Charter of Fundamental Rights of the European Union.

Regardless of where the undertakings are established in the EU, undertakings who provide publicly available telephone directory enquiry services and those directories which operate within highly harmonised regulatory frameworks, make it possible to ensure the same respect for requirements throughout the EU, relating to the protection of subscribers' personal data. It is unnecessary for the undertaking in question when assigning telephone numbers to its subscribers to differentiate in the request for consent addressed to the subscriber according to the Member State to which the data concerning him could be sent.

Right to be forgotten

Case C-398/15 *Camera do Commercio, Industria, Artigianato e Agrocoltura di Lexxe v Salvatore Manni* on 9 March 2017

The public nature of the company's register ensures legal certainty for companies and third parties who are dealing with one another. The CJEU notes that requiring the availability of personal data in the companies register can continue to arise, even many years after the company has ceased to exist. One must take in to regard:

- The range of legal rights and relations which may or may not involve a company with actors in other Member States, even in the event or after its dissolution and
- The limitation periods provided for in each Member State varies, thus it is very difficult

to identify a single period after which the entry of the data in the particular register and its disclosure will not be necessary.

Here, Member States cannot guarantee that a natural person has the right to obtain the erasure of personal data, which has been included on the company register, after a period of time from the company's dissolution date.

This is not disproportionate to the Charter of Fundamental Rights because:

- There is only a limited number of personal data items entered in the company register and
- It is justified that natural persons who opt to take part in trade though limited liability companies or joint stock companies, whereby their only safeguards for third parties are assets of that very company, should be required to disclose data relating to their identity and functions with that company.

Furthermore, upon expiry over a sufficiently long period of time after the dissolution of a company, third parties who can show a specific interest in consulting the data of a specific person will have limited data access on that person. This is assessed on a case by case basis. Members States must decide what the exact limitation of access is in its national legal system.

Freedom of movement of workers

Case C-652/15 *Furqan Tekdemir, legally represented by his parents Derya Tekdemir and Nedim Tekdemir v Kreis Bergstraße* on 29 March 2017

Article 13 of Decision No 1/80 is to be interpreted as meaning that the objective of efficient flow management migration may constitute an overriding reason in the general interest justifying a national measure introduced after the entry into force of that decision in the Member State concerned requiring a third national under the age of 16 years to hold a residence permit to enter and reside in the concerning Member State. However, this measure is not proportionate to the objective pursued. Article 13 of Decision No 1/80 in Tekdemir's circumstances, means that the national legislation is disproportionate to the objective of the Decision. The requirement that third country nationals under 16 years of age hold a residence permit to enter and reside in the Member State, taking into account child nationals of third countries born in Member States and where a parent is a Turkish worker with a lawful residence permit in that Member State, goes beyond what is constituted as necessary in order to attain the objective of the efficient management of migration flows. Requiring children under 16 years of age from third countries born in the Member State to hold a residence permit to enter and reside in the Member State is not proportionate to the objective.

Public security

Case C-544/15 *Sahar Fahimian v Bundesrepublik Deutschland* on 4 April 2017

National authorities may refuse to grant a visa to an Iranian national with a Master's degree in Information Technology Security from Sharif University of Technology subject to restrictive measures due to their support of the Iranian Government and the military field, as this could constitute a threat to public security.

National authorities enjoy a wide discretion on the definition of public security, however the decision to refuse a visa must be based on “duly justified grounds and a sufficiently solid factual basis.”

The aim of Directive 2004/114 on the conditions of admission of third country nationals for study purposes is to promote Europe as a world centre of excellence for study and as such also to promote students of third countries to travel to the EU for educational purposes. For an educational third country national visa to be granted, the Directive requires that the applicant is not a threat to public security. The national court who brought the question to the CJEU asked if national authorities enjoy wide margins of discretion (subject to limited judicial review) on determining whether an applicant represents a threat to public security or not, whether a national authority is entitled to refuse a visa in those circumstances such as those of the case presented.

The CJEU held that national authorities do enjoy wide discretion in assessing facts to be able to ascertain with all relevant factors of the situation of the third country national applying for a study visa, that individual does pose a threat, even if potential, towards public security. The directive does not prevent a visa for study purposes from being refused to a third country national who:

- Possesses a degree from a university which is subject of EU restrictive measures due to large scale involvement with the Iranian Government in military related fields
- Plans to carry out research in a field which is sensitive for public security and if other information and factors available to the competent national authority gives a clear reason to fear that knowledge acquired by that individual during the research could then be used for purposes contrary public security.

Furthermore, in these circumstances the collection of confidential information in western countries, internal repression or human rights violations are purposes which amount to be contrary to the maintenance of public security.

Upcoming decisions and Advocate General opinions in March

Please note that the Court of Justice of the European Union will have a break from 6th to 24th April 2017.

Freedom to provide services

Case C-320/16 *Criminal proceedings against Uber France SAS* to be decided on 24 April 2017

Questions referred by Tribunal de Grande Instance de Lille, France for a hearing:

Does Article L.3124-13 of the Code des transports, imposed by Law No 2014-1104 of 1 October 2014 on taxis and private hire vehicles, constitute the latest technical regulation which is not implied, and which relates to information society services, within the meaning of Directive 98/34/EC of 22 June 1998, such that, in accordance to Article 8 of that directive, it had to be notified to the European Commission in advance? Alternatively, whether it falls within the scope of Directive 2006/123/EC of 12 December 2006 on services, of which Article 2(d) excludes transport? In the event that the above question is answered in the affirmative, does a failure to satisfy the notification requirement laid down in Article 8 of the directive mean that Article L.3124-13 of the Code des transports is unenforceable against individuals?

Employment Law

Case C-174/16 *H. v Land Berlin* opinion of Advocate General Mengozzi to be delivered on 26 April 2017

Questions referred by Verwaltungsgericht Berlin, Germany:

- Are the provisions of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC and the provisions of the Framework Agreement on parental leave published in the annex to be interpreted as preventing national law rules under which the probationary period, during which an executive post has been assigned to a person with the status of a civil servant on probation, ends by operation of law and with no possibility of extension even in the case where the male or female civil servant has been, and still is, on parental leave for most of that probationary period?
- Are the provisions of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, in particular Article 14(1)(a) or (c), Article 15 or Article 16 thereof, to be interpreted as meaning that national law, with the content referred to in Question 1, constitutes indirect discrimination on grounds of sex in the case where a very much higher number of women than men are affected by those laws?
- If the answers to Questions 1 or 2 are affirmative, does the interpretation of the abovementioned provisions prevent national law, even in the case where the latter are justified by the objective, of being able to assess during the probationary period, the probation for an executive post to be assigned permanently only if the duties are actually performed continuously over a lengthy period?
- If the answer to Question 3 is affirmative, does the interpretation of EU law allow a legal consequence other than continuation of the probationary period immediately following the end of the parental leave for the duration of the period not yet elapsed at the beginning of the parental leave, for the same or a comparable official position, in the case where such a position is no longer available?
- Does the interpretation of EU law require, for the purpose of filling another official position, that a new selection procedure including other candidates in accordance with the provisions of national law should not be held?

Joined cases C-680/15 C-681/15 *Asklepios Kliniken Langen-Seligenstadt GmbH v Ivan Felja* to be decided on 27 April 2017

Questions referred by the Bundesarbeitsgericht, Germany:

- Does Article 3 of Council Directive 2001/23/EC of 12 March 2001 prevent provisions of national law which provide conditions of employment agreed between the transferor and the employee, in the exercise of their freedom of contract of employment, as if he had himself agreed in an individual contract with the employee, where national law affords for both consensual and individual changes by the transferee?
- If Question 1 is answered affirmatively, either generally or for a defined group of individually agreed conditions in the employment contract between the transferor and employee, then does the application of Article 3 of Directive 2001/23/EC have the effect that terms of the contract of employment which have been agreed in the exercise of freedom of contract are to be excluded from being transferred unaltered to the transferee?
- If, according to the answers to Questions 1 and 2, a provision which has been agreed in an individual contract, with certain provisions in a collective agreement is, in the exercise of freedom of contract, incorporated into the employment contract, and not transferred unaltered to the transferee:
- Does this apply where neither the transferor nor the transferee is party to a collective agreement where, prior to the transfer of the undertaking, the provisions in the collective agreement would not have been applicable to the employment relationship with the transferor in the absence of the term referring to them in the agreement made, in the exercise of freedom of contract in the contract of employment?
- If the answer to that question is in the affirmative, then
- does this apply also if the transferor and the transferee are undertakings within the same group?
- Does Article 16 of the Charter of Fundamental Rights of the European Union preclude a national provision enacted to implement Directive 77/187/EEC or Directive 2001/23/EC providing that in the event of a transfer of an undertaking or a business, the transferee is bound by the conditions of employment agreed individually and in the exercise of their freedom of contract by the transferor with the employee as if he had agreed them himself. Even if those conditions incorporate certain provisions of a collective agreement, which would not otherwise apply to the employment contract, into the contract, in so far as national law provides for both consensual and unilateral adjustments by the transferee?

Free movements of goods

Case C-672/15 *Procureur de la République v Noria Distribution SARL*, Advocate General Bobek to be delivered on 27 April 2017

Questions referred by Tribunal de Grande Instance de Perpignan, France:

- Do Directive 2002/46/EC, and EU principles of free movement of goods and of mutual recognition, prohibit the laying down of national legislation such as the order of 9 May 2006, which refuses any mutual recognition procedure concerning food supplements based on vitamins and minerals from another Member State, by not allowing the application of a streamlined procedure in respect of products lawfully marketed in another Member State, which exceed the maximum dose?
- Does Directive 2002/46, in particular Article 5, which includes the principles resulting from EU case law on provisions concerning the free movement of goods, allow for the maximum daily doses of vitamins to be set in accordance with the recommended daily allowances, by adopting a value three times the recommended daily allowances exhibiting the least risk?
- Does Directive 2002/46, including the principles resulting from EU case law on provisions relating to the free movement of goods, permit all the doses to be set by national scientific opinions only, even though recent international scientific opinions conclude in favour of higher doses?

Freedom of Establishment

Case C-304/16 *American Express Co. v The Lords Commissioners of Her Majesty's Treasury* to be decided on 27 April 2017

Questions referred by High Court of Justice Queen's Bench Division, England & Wales, United Kingdom for a hearing:

Does the requirement in Articles 1(5) and 2(18) of Regulation (EU) 2015/751 ('the IFR') that a three party payment card scheme issuing card based payment instruments through an agent is considered to be a four party payment card scheme, apply only to the extent that the agent acts as the 'issuer' within the meaning of Article 2(2) and recital (29) of the IFR, in particular where that agent has a contractual relationship with the payer, pursuant to which it contracts to provide the payer with a payment instrument to initiate and process the card-

based payment transactions?
If the answer to that question is negative, are Articles 1(5) and 2(18) of the IFR invalid as they provide that such arrangements are considered to be four party payment card schemes, on the following grounds:

- failure to provide reasons in accordance with Article 296 TFEU;
- manifest error of assessment; and/or
- breach of the principle of proportionality?

Free movement of people
Case C-184/16 *Ovidiu-Mihaita Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis (Ministry of Interior and Administrative Reconstruction)* to be decided on 27 April 2017
Questions referred by the Dioikitiko Protodikeio Thessalonikis, Greece:

- Are Articles 27 and 32 of Directive 2004/38/EC to be interpreted, in light of Articles 45 and 49 TFEU, and considering the autonomy of Member States and principles of protection of legitimate expectations, as meaning that a withdrawal of a certificate of registration as a European Union citizen, previously granted under Article 8(1) of [Greek] Decree 106/2007 to a national of another Member State, and the imposition on him of a measure for his removal from the host Member State, is required or permitted in circumstances where, although he had been registered in the national list of undesirable aliens and was the subject of an exclusion order on grounds of public policy and public security, that person again entered the Member State concerned and conducted a business, while failing to observe the procedure laid down in Article 32 of Directive 2004/38 for the submission of an application for the lifting of that exclusion order, when the exclusion order was imposed on the self-sufficient ground of public policy which justifies the withdrawal of the certificate of registration of a citizen of a Member State?
- If affirmatively answered, are such circumstances to be treated in the same way as where an EU citizen is illegally staying in the territory of the host Member State, so that it is permissible, pursuant to Article 6(1) of Directive 2008/115/EC, for the competent body to withdraw the certificate of registration as an EU citizen to issue a return order, given that (i) the registration certificate does not constitute evidence of a right of legal residence in Greece, and (ii) only third county nationals fall within the scope *ratione personae* of Directive 2008/115/EC?
- If the first question is answered in the negative, if the competent national authorities, acting within the framework of the procedural autonomy of the host Member State, withdrew on grounds of public policy and security the registration certificate of a citizen of another Member State, which does not constitute evidence of a right of legal residence in Greece or impose on that citizen a return order, could that be considered to involve the same administrative act concerning administrative expulsion under Articles 27 and 28 of Directive 2004/38 subject to judicial review under the conditions in those provisions, on what is possibly the sole means of administrative removal of EU citizens from the territory of the host Member State?
- If the answers to the first and second questions are either affirmative or negative, is national legal practice compatible with the principle of effectiveness if that practice excludes administrative authorities and courts with jurisdiction from undertaking an examination of the withdrawal of a certificate of registration of an EU citizen or the imposition of a measure for the removal from the host Member State on the grounds of the continuing validity of an order excluding the national of another Member State from the Member State concerned to which the procedural safeguards of the provisions in Articles 30 and 31 of Directive 2004/38 were observed in the issue of the exclusion order?
- If the fourth question is affirmative, does Article 32 of Directive 2004/38 follow that the administrative authorities of the Member State are obliged to notify the national of another Member State concerned of the decision ordering his removal in a language he understands, so that he is able to exercise the legal rights which he derives from the provisions concerned of the directive, irrespective of whether the relevant application has been submitted by him?

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

Subscriptions/Documents/Updates

For those wishing to subscribe for free to the Brussels Agenda electronically and/or obtain documents referred to in the articles, please contact **Antonella Verde**. The Brussels Office also produces regular EU updates

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**

covering: Civil Justice; Family Law; Criminal Justice; Employment Law; Environmental Law; Company Law and Financial Services; Tax Law; Intellectual Property; and Consumer Law as well as updates on the case-law of the European Court of Justice. To receive any of these, contact **Antonella Verde** stating which update(s) you would like.

Editorial Team

Helena Raulus
Head of the Brussels Office Ad Interim
helena.raulus@lawsociety.org.uk
Anna Drozd
EU Policy Advisor (Professional Practice)
anna.drozd@lawsociety.org.uk
Rita Giannini
EU Policy Advisor (Justice)
rita.giannini@lawsociety.org.uk
Stuart Brown
Trainee Solicitor
stuart.brown@lawsociety.org.uk
Arfah Chaudry
Intern
arfah.chaudry@lawsociety.org.uk
Peter Boyle
Intern
peter.boyle@lawsociety.org.uk

Joint Brussels Office
85 Avenue des Nerviens - B-1040 Brussels
Tel.: (+32-2-) 743 85 85 - Fax: (+32-2-) 743 85 86 - **brussels@lawsociety.org.uk**