

European Union (Notification of Withdrawal) Bill Second Reading 20 February 2017

The Society's Constitutional Law Subcommittee has considered the bill and has the following comments to make:

- a. The Judgement in the case of *Miller and Dos Santos v Secretary of State for Exiting the European Union* [2017] UKSC 5 was clear in requiring the Government to obtain Parliamentary authority for the notification of the UK's withdrawal from the EU under Article 50(2).
- b. The bill will achieve that policy objective. It is closely drawn and narrow in scope therefore there is limited capacity for amendment to the bill.
- c. The Government has published a White Paper *The United Kingdom's exit from and new partnership with the European Union* on its strategy for Brexit.
- d. We have asked the UK Government in its approach to the negotiations to bear in mind the proposals we made in our paper on *Negotiation Priorities on leaving the EU: Proposals by the Law Society of Scotland*.
<http://www.lawscot.org.uk/media/983776/proposal-uk-government-negotiation-priorities-on-leaving-the-eu-final-021216-.pdf>

In particular I would like to draw your attention to the sections which focus on the rules of law and the proper administration of justice (a) civil law (page 7) and (b) the legal profession (pages 13-15) .

Civil Law

We believe that civil law issues arising from the Withdrawal deserve high priority in the Government's negotiating stance. Citizens across Europe rely on the civil law for the enforcement of their obligations and the vindication of their rights not only in their personal lives but also in business and commerce.

There are 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. 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.

Preserving these items of EU law will ensure that the rule of law is maintained and the proper administration of justice is upheld not only in the UK but across the EU.

Trans European Legal services

We believe that the UK Government should negotiate the continuity of the EU law concerning the transnational practice of law and legal professional privilege in the Withdrawal Agreement. 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:

- a. Lawyers' Services Directive of 1977 (77/249)
- b. Lawyers' Establishment Directive of 1998 (98/5)
- c. 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

Legal professional privilege

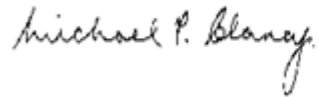
The CJEU decided the case of *AKZO NOBEL Ltd and AKCROS Chemicals Ltd the European Commission (C-550/07)* in September 2010. The judgement concerned the application of legal professional privileged communications between a client and in-house Counsel. The Court also decided to exclude all lawyers qualified outside the EU from the application of legal professional privilege. The case proceeded on the precedent of the ECJ in *AM&S Europe v the Commission* [1982] ECR 1575 paras 25-26 which also excluded non-EU lawyers from the application of legal professional privilege. The Court acknowledged that legal professional privilege applies to communications between a client and his independent lawyer but limited the definition of lawyer to "a lawyer entitled to practice his profession in one of the member states, regardless of the member state in which that client lives... but not beyond". The apparent basis of the exclusion of third countries from the benefit of legal professional privilege within the EU is the difficulty of the "Court being able to ensure that the third country in question has a sufficiently established Rule of Law tradition which would enable lawyers to exercise the profession in the independent manner required and they to perform their role as collaborators in the administration of justice".

Legal professional privilege and Confidentiality of Communications is a key aspect of the Rule of Law in the UK and is acknowledged by the Courts and Parliament as central to the administration of justice. The doctrine is upheld in UK legislation. The loss of legal professional privilege and confidentiality will have a negative impact on the rights of clients and on the ability of lawyers in the UK to provide a full service to their clients when acting in EU legal issues or on matters which relate to EU Law or business in the EU. The UK legal systems clearly meet the test which CJEU identified in respect of the Rule of Law and the independence of the lawyers and should therefore have legal professional privilege accorded to the lawyer/client

relationship when EU Law is an issue. This should be a priority for the UK Government in the negotiations in order to ensure that UK Lawyers can advise their clients properly when acting for British or EU clients and third country clients who wish their legal services and advice.

If you would like to discuss these issues further please let me know.

If you have any comments or questions please let me know.

A handwritten signature in cursive script that reads "Michael P. Clancy".

Michael P. Clancy O.B.E.
Director, Law Reform
The Law Society of Scotland