The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

August - September 2016

The Law Societies' monthly publication with the latest EU news

Editorial

When planning this Brussels Agenda earlier in the year, we could not have known what the outcome of the UK referendum on the question of whether or not to remain in the European Union would be. We therefore planned an edition to focus on the Digital Single Market (DSM) which is one of the current priorities for the Commission. Indeed this edition still focuses on the DSM and we are fortunate enough to have an interesting and insightful article from Commissioner Ansip who writes about several of the recent initiatives proposed by the Commission.

However, given the recent result of the UK referendum on EU membership, it would be remiss not to include a special section this month focusing on the result, the now well known Article 50 TFEU and some implications and/ or effects that any 'Brexit' may have on some areas of EU legislation in the UK. We also take a look at some of the key players involved in the exit negotiations.

Here in Brussels we will be monitoring these developments as they happen and will endeavour to keep you updated through the 'Brexit' negotiations. Our Head of Office Mickaël Laurans explains what we will be doing in the coming months to assist our members with the implications of Brexit.

As you can imagine it has been a busy month here in Brussels, but in the spirit of 'business as usual' we also present in this edition our usual updates on professional practice areas, law reform and news from the three Law Societies.

Andrus Ansip, European Commission Vice-President for the Digital Single Market
Creating a Digital Single Market is about Europe's future

While Europe is facing several crises, it is more important than ever to focus on our future and build the foundations of a better European Union.

I am convinced that this cannot be achieved without a Digital Single Market. The internet is part of our daily life: studying, working, buying, selling, watching films, listening to music online. New technologies are in all sectors, from health to transport and culture. And they know no borders.

This is why creating a Digital Single Market is and remains one of the priorities of the European Commission. Six months after taking office, we adopted in May 2015 an ambitious strategy including 16 initiatives. We have now presented more than half of them: they are on the table of the European Parliament and the Council of the EU. This is about modernising existing rules in key areas such as e-commerce, telecoms, audiovisual media, cybersecurity and copyright. We want to encourage innovation based on data which is the new fuel of the economy.

In this article, I will focus on the two packages of initiatives that we presented in May. The first will boost cross-border online trading across Europe: removing barriers, raising consumer confidence and ending discrimination. The second responds to new digital realities, with a modern policy approach to online platforms and broadcasting rules.

Let me begin with the e-commerce package.

We want to open up the e-commerce market so that it becomes truly pan-European, with fair conditions for consumers and business across the EU's internal borders. While more and more goods and services are traded over the internet, cross-border online sales within the EU are only growing slowly. This should change. Consumers as well as businesses deserve better. They should not be limited to their domestic markets. They should be able to make the best of the opportunities offered by Europe's single market in the digital age.

Our package addresses three main areas:

First: it will prevent unjustified discrimination, online as well as offline. In a true single market, you should not be discriminated against based on your nationality, residence or place of establishment. However, that does not mean making companies sell or deliver goods in every EU market. But if a consumer comes to their online store, they should be treated as if they were locals – not treated differently. But this would not include the obligation to deliver: traders would not be required to deliver cross-border but sell to them as to customers from their own country.

Second: it will increase transparency of parcel delivery prices, encourage competition, and make regulatory oversight of cross-border parcel delivery services more effective. This will help consumers get a better and affordable deal, also a wider choice. It will help small e-retailers to reach new customers. It will create more business for delivery providers. And to be clear: there is no intention of imposing a single price across Europe.

Third: our package will raise consumer and SME trust in e-commerce by clarifying the nature of unfair commercial practices and strengthening the enforcement of consumer rights across borders. It will also strengthen cooperation between national consumer protection authorities.

Together, these measures aim to remove the main barriers to e-commerce.

Online platforms are a new reality to which Europe should respond - and should embrace. In a short time, they have transformed our daily lives: how we sell, shop and travel; how we learn, create and are entertained. They bring many benefits to consumers, to wider society, to industry, business and SMEs. The guiding principle and objective is to create the right conditions for platforms to innovate, scale up and grow in the Digital Single Market. But they should do so in a fair and open atmosphere. That means equal conditions for fair and open competition. Everyone involved in the market – traditional and online service providers – should play by the same rules, with no discrimination. Our assessment has shown that platforms are innovative, have a positive impact on our economy, and increase competitiveness. It shows that the EU is quite good in areas such as the app economy, health, finance and the collaborative economy.

In order to thrive, all platforms – including European ones – need a legal environment that gives them certainty. This is why we are very clear in our communication: there will be no horizontal new regulation or regulator for platforms. We will not change the current e-commerce framework and its liability provisions. Of course, platforms – as well as all internet providers and online intermediaries – have to respect EU law and fundamental rights. They also have to act responsibly regarding content, and keep their activities transparent. These are important principles. This is why we are taking a problem-driven approach. It means that if we see an issue with platforms in relation to copyright, we solve it in our copyright rules. Our next proposals related to the modernisation of the EU copyright framework are foreseen in the autumn. If there is an issue related to telecoms, we solve it in our telecom package.

The first steps in this have already been taken, with our proposal on the audio-visual media services directive, where online platforms are a part of this instrument's new scope. The principles that I mentioned also apply to broadcasting, where the significant presence of online platforms and video-on-demand providers has transformed viewing habits and behaviour. EU rules need to change to reflect this new reality – and make sure that everyone follows the same rules. Since it has worked well, there is no need to change the 'country of origin' principle. Media service providers will continue to be subject to the rules of the country where they are based.

Our proposal will also bring more flexibility to advertising rules, and bolster our efforts to promote European creative work by raising its prominence. It will strengthen protection of minors who go online to view content. It will strengthen the role played by national media regulators.

I look forward to working closely with the European Parliament and EU Member States so that together, we can turn these two important packages of proposals, and the whole Digital Single Market strategy, into a reality.

It is essential to build the future that Europe needs: one where all Europeans will gain.

Biography

Andrus Ansip was appointed Vice-President of the European Commission with responsibility for the Digital Single Market in November 2014. Before moving to Brussels, he was a member of both the Estonian and European Parliaments. This followed almost nine years in Tallinn spent as Estonia's longest-serving Prime Minister, when Ansip worked with both centre-right and centre-left parties to lead three different coalition governments. During his time as Prime Minister, he also acted as chairman of Estonia's liberal Reform Party.
Ansip first entered national politics in September 2004 when he became Minister of the Economy. Up to this point, his career was spent in Estonia's second largest city of Tartu where he was born in 1956. Ansip was Mayor of Tartu for six years after working in banking and business. A chemistry graduate from the city's university, Andrus Ansip is married with three children.

DIGITAL SINGLE MARKET

Commission publishes its communications on online platforms and collaborative economy

On 25 May, the Commission published its **communication** on online platforms in the Digital Single Market. The document discusses the Commission's views on the regulatory approach to platforms, key challenges ahead and steps to be taken in the near future. The communication also uses the results from the public **consultation** held late last year.

Online platforms and the collaborative economy play a key role in innovation and growth of the Digital Single Market as they offer clear benefits in terms of innovation, offering new services and products, opening up markets to smaller operators and enabling forms of flexible employment. Examples of online platforms include search engines such as Google, online marketplaces such as eBay or Amazon. They all use digital technologies to facilitate interactions between different operators, such as buyers and sellers.

In connection with online platforms, on 2 June 2016 the Commission published a **Communication** on the Collaborative Economy. In this context the term collaborative economy is used in relation to business models which use collaborative platforms and create an open marketplace for the temporary usage of goods or services often provided by private individuals for example AirBnB and Uber.

This Communication provides guidance to ensure all parties can participate confidently in the collaborative economy. In particular it addresses several key issues being: market access requirements, liability regimes, protection of users, self employed and workers in the collaborative economy and taxation issues. The collaborative economy blurs lines between consumers and businesses as it allows individuals to provide services. Therefore there becomes a need to provide proportionate legislation to protect those where 'peer to peer' services are provided. The Communication provides guidance on those circumstances that point towards an individual operating in a more 'trader like' context. In this case factors such as frequency of the provision of services, a profit seeking motive and level of turnover should be looked at.

It is clear therefore that whilst online platforms and the collaborative economy bring significant benefits to the digital single market, there is difficulty in applying a 'one size fits all' approach to legislation in this respect. The guidance in both Communications aims to support and provide a proportionate and fair approach to both consumers and businesses.

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

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

Digital Single Market Update: Portability Proposal and e-commerce initiatives

On 25 May 2016, the European Commission tabled its draft proposal on the Portability Regulation together with its proposals and communications on e-commerce.

Portability Regulation Proposal

The aim of the draft Portability Regulation it to ensure the cross-border portability of online content services throughout the internal single market. The general approach of the Regulation has now been agreed by the European Council, who have stated that the provisions contained within the Regulation should be targeted directly toward online content services provided against the payment of money. The Council also emphasised that that free to air services, such as public broadcasters, should also be able to benefit from the provisions contained within the Regulation, if the so wish, provided that they are able to verify the country of residence of their subscribers.

The responsibility for the Proposal lies with the European Parliaments Legal Affairs Committee(JURI) and is headed by Rapporteur Mr Jean-Marie Cavada (ALDE, France). The draft Report written by Mr Cavada was submitted to the Committee on 5 July 2016 and is due to be adopted on 13 October 2016.

Commission proposal for a regulation on geo-blocking

The Commissions proposal on the Regulation of Geo-blocking aims to ensure that consumers seeking to buy products and services in another EU country, be it online or in person, are not discriminated against in terms of access to prices, sales or payment conditions, unless it can be proved that this can be objectively justified for reasons such as VAT or certain public interest provisions.

Commission proposal on revision of audio-visual media services directive

The Commissions proposal on the revision of the Audio-Visual Services Directive includes the following revisions:

- the simplification of the Country of Origin Principle and the rules which determine which Member State has jurisdiction over a provider. An obligation is also placed on the presiding Member State to inform all providers that fall under their jurisdiction that they do so;
- On commercial communications, the proposed modifications aim to reduce the burden on TV-broadcasters whilst maintaining and reinforcing the rules seeking to protect the most vulnerable;
- the strengthening of the promotion of European works;
- the prohibition of hate speech;
- the simplification of the rules on the obligation to protect minors;
- Video-sharing and platforms;
- the independence of audio-visual regulators and the role of the European Regulators Group for Audio-Visual Media Services;

Other Commission proposals and communications from 25 May 2016

The Commission also tabled two further proposals and two communications, which support the Commission's

proposals on opening e-commerce, namely:

- A proposal concerning co-operation between national authorities responsible for the enforcement of consumer protection laws;
- A proposal concerning cross-border parcel delivery;
- A communication on comprehensive approach to stimulating cross-border e-commerce for Europe's citizens and businesses;
- A communication on online platforms and digital single market - opportunities and challenges for Europe.

Consumers Rights and the Digital Single Market

"The Digital Single Market strategy aims to open up digital opportunities for people and business and enhance Europe's position as a world leader in the digital economy."

One of the three pillars on which The Digital Single Market Strategy, adopted by the Commission on 6 May 2015, is based, is to build better access for consumers and businesses to digital goods and services across Europe. Such an aim cannot be reached without a robust set of rules to ensure the rights of consumers are respected. For consumers to have confidence in the rules it is necessary that they are clear, consistent and easily enforceable.

The European Commission has acted in parallel, presenting two proposals for Directives, one on the online provision of goods, and one on the supply of digital content, and at the same time launching a REFIT of the entire European Consumer Law.

The proposed Directives attempt to regulate aspects of the relationship between traders and consumers based on the means of purchase (on line and distance) or on the content of the purchase (digital content), but not the type of contract, which is irrelevant. They also look at conformity, remedies and enforcement.

Regarding the REFIT of European Consumer Law, a public consultation has been launched as an exercise within the Fitness check to evaluate if the current directives are fit for purpose on the basis of the following criteria: effectiveness, efficiency, coherence, relevance and EU added value.

The following six directives are subject to this Fitness Check:

- Unfair Contract Terms Directive 93/13/EEC (UCPD);
- Consumer Sales and Guarantees Directive 1999/44/EC (CSGD);
- Unfair Commercial Practices Directive 2005/29/EC (UCPD);
- Price Indication Directive 98/6/EC (PID);
- Misleading and Comparative Advertising Directive 2006/114/EC (MCAD);
- Injunctions Directive 2009/22/EC (ID);
- In addition, this consultation covers also the Consumer Rights Directive 2011/83/EU (CRD) which is subject to a separate evaluation.

Essentially the Commissions is trying to: find out if and how the EU rules have been beneficial to consumers and businesses, identify problems in the protection of consumers rights and judge the effectiveness of redress and enforcement mechanisms in protecting consumers rights and identify areas for improvement.

There are however practical considerations around the timing of two proposed Directives, since it is not clear how these interact with the REFIT of the consumer acquis and the announced revision of the Consumer Rights Directive. The tangible goods proposal introduces different rights for consumers in online and offline sales without offering a valid justification for this discrepancy, and although the digital content proposal tackles previously uncharted territory, it still seems illogical to propose new legislation before the existing legislative framework has been properly reviewed. It would make more sense to introduce new legislation alongside amendments to the existing body of law to ensure consistency.

The proposals can be found here:
https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-635-EN-F1-1.PDF
https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-634-EN-F1-1.PDF

The consultation can be found here:
http://ec.europa.eu/justice/newsroom/consumer-marketing/opinion/160502_en.htm

Brexit
Business as usual for the Brussels office... and a little bit more

The 23 June UK Referendum decision to leave the European Union is not without challenges for the Joint Brussels Office of the UK Law Societies.

The day-to-day work of monitoring and seeking to influence the EU legislative process cannot simply be ignored. Even though the new UK Prime Minister Theresa May has declared that 'Brexit means Brexit', we will not know for a while what the new relationship between the UK and the EU will be and whether the UK (or parts of it) would still be bound by EU law and to what extent. In the meantime, it is therefore business as usual for the Brussels office and the summer period has been busy preparing, inter alia, our response to the DG Grow **consultation on the regulation of professions and proportionality in regulation** and our positions on the **review of the consumer acquis by DG Justice and the two directive proposals on consumer rights in the digital age**.

Influencing the legislative process through the two co-legislators of the European Parliament and the Council of the EU will certainly become more difficult as time goes on. We have had our first request for a meeting turned down on the basis that we are a UK organisation. Our 'natural' stakeholders in the UK MEPs and the UK Permanent Representation to the EU ('natural' in the sense that we do not need to spend the first ten minutes of a meeting explaining the differences between solicitors and barristers / advocates) will increasingly see their own influence eroding in the legislative process, up until the time they will leave their seats in Parliament and Council. More than ever, the linguistic skills of the Brussels office and our extensive networks of contacts from French neo-Gaullists to German Social-Democrats via Dutch liberals will come in handy to pass on our suggestions for better-law making based on the practical experience of our members or explain the unintended consequences of a given provision in a draft directive.

Focusing on our members' needs and responding to their queries, concerns and priorities will always remain at the top of our agenda. The last few weeks have seen a significant spike in members' inquiries. Practice rights and whether requalification in another EU legal profession is a fail-safe move is without doubt a major concern for members as well as trying to understand what the consequences of leaving the EU would be on individual practice areas, for example in competition law, family law, employment law, etc. All of these issues are very much a moving target at the moment but it is very much within our role to monitor the progress of negotiations over the withdrawal agreement and the new relationship between the UK and the EU and to ascertain what these would mean in practice for solicitors and their clients.

Last but not least, the Law Societies and their Brussels office are in an excellent position to advise the UK government and the EU institutions as to what has worked well in our 40-odd years of membership of the EU and whether there are policies or mechanisms, e.g. in the important areas of judicial co-operation in civil and commercial matters, family law or criminal matters, which would be worth seeking to preserve.

We are your Brussels office, so please do not hesitate to get in touch at **brussels@lawsociety.org.uk**

Biography

Mickaël Laurans is the Head of the Joint Brussels Office of the UK Law Societies

Brexit briefing
Everything you need to know about Article 50

Article 50 of the Treaty on European Union (TEU) sets out the process for a member state to withdraw from the EU. No country has left the EU before, although some territories - for example Greenland and Algeria - have done so. Until the Article 50 process is concluded, the withdrawing state remains an EU member with all the rights and obligations attached to all EU citizens, businesses and the member states themselves.

The Article 50 process is triggered by a state formally notifying the European Council of its intention to withdraw. The intention to withdraw must be set out clearly, with an explicit intention to initiate Article 50 TEU.

Negotiations for the terms of withdrawal then begin. At this stage the withdrawing state is excluded from the European Council and their discussions about negotiations to withdraw, as well as negotiations on the new agreement.

The Council, having obtained consent from the European Parliament, is responsible for concluding the agreement, acting on the basis of a qualified majority.

Article 50 foresees a two-year period in which to carry out the withdrawal process, although this can be extended if there is a unanimous decision by all remaining member states on the one hand, as well as the withdrawing state. Otherwise, the withdrawing state 'falls out' and the EU membership rights and obligations cease to apply. It is in the interests of all participants to ensure that this black hole is avoided.

Article 50 provides only for the process of withdrawal. The withdrawal negotiations and the negotiations for a new agreement on relations between the withdrawing state and the EU could be handled separately.

The purpose of the withdrawal negotiation is to ensure that the EU membership rights and obligations conclude in an orderly manner. They will need to cover matters such as the rights of citizens and businesses from the withdrawing state who are living or operating in other member states and vice versa.

The new agreement would set out the new legal rights and obligations between the withdrawing state and the EU when its membership ceases. These negotiations could take place in parallel but it might be that a withdrawal agreement could be concluded first and that the future framework would be settled at a later date.

Until the end of the Article 50 TEU procedure the withdrawing state remains a full member of the EU. This means that, for all other purposes, the withdrawing state will keep its voting rights, institutional privileges and personnel in place. It can still influence the EU legislation, passing through the Council and the Parliament, and its nationals working at the Commission will not be affected. All EU law will continue to apply, including EU legislation giving access to the internal market.

Questions have also been raised as to the possibility of reversing a decision to withdraw after Article 50 has been triggered. This question was addressed by the House of Lords' EU Committee in its report published in May. Both expert witnesses agreed that the decision to withdraw can be reversed before the withdrawal agreement has come into effect. The Lords Committee report also concluded that Article 50 is the only way of withdrawing from EU membership consistent with EU and international law.

*This article first appeared on the Law Society of England and Wales' **website** on 28 June 2016*

Brexit
Barnier: The EU man in charge of Brexit

The Commission named Michel Barnier, former French Foreign Minister and Commissioner as the Commission's lead negotiator on Brexit. The British media and some politicians did not react well to this appointment, dubbing him 'no friend of London', due to his reforms and regulation in the financial sector. Yet, in Brussels he is seen as above all a pragmatist, who understands very well the operation of financial markets both in theory and practice. So just who is Michel Barnier and what will he be doing?

He is an experienced European politician and one who oversaw the period after the financial crisis as the Commissioner for the single market amongst other notable ministerial posts in France and Foreign Minister of France. As he is now back working for the Commission, it is important to note that in his role as chief negotiator for Brexit he is representing and defending the EU's interests.

Mr Barnier's role is to prepare for and to conduct the formal exit talks which will begin once the UK has triggered the now infamous Article 50 TFEU. However, it will be interesting to follow just how much influence the Commission will have on the exit negotiations. Already Theresa May has made visits to several of the more dominant Member States during this current informal period. The exit negotiations will be complex and will involve both the EU and national parties.

The question of whether and to what extent it is possible to limit free movement of persons whilst retaining access to the single market is likely to be the sticking point in these negotiations. It will remain to be seen what deal can be struck and who will have the most influence.

Here at the Brussels office we will keep you updated on what is happening as events pan out.

Brexit
Immigration and employment law: Implications of Brexit

Our legal rights and obligations are unchanged in the immediate aftermath of the UK's vote to leave the European Union. The UK currently remains a member of the EU and EU law still applies.

The right of free movement of people also remains in effect.

For people who have already exercised their right of free movement - UK citizens living in other member states and other EU nationals living here - the long-term situation post-withdrawal is not yet clear.

There is precedent under international law that if a person has exercised a right under an international treaty, they may continue to enjoy the benefit of that right if the treaty ends. This idea of acquired rights, or vested rights, would suggest that people will not be 'sent home'.

Negotiations on the UK's future relationship with the EU's internal market will determine whether the UK will retain free movement for its own citizens and the citizens of other EU countries once it has fully withdrawn from the EU.

On employment legislation, much of UK statutory employment law has its origins in EU legislation. The implementation of EU legislation into domestic law means that employment law obligations and protections will not automatically fall away upon the UK's eventual withdrawal from the EU.

In theory, following withdrawal from the EU, the employment law protections which are guaranteed by the EU - such as minimum holiday allowances, parental leave and rights in the event of transfers of undertakings - could be removed from domestic legislation.

As for the Working Time Directive (WTD), the UK currently has a partial opt-out, meaning the effects on UK employers are different to those of their EU counterparts.

If, following full withdrawal from the EU, the UK were to become party to the EEA (European Economic Area) Agreement - 'the Norway option' - it would, in practical terms, remain subject to EU rules.

Under the terms of the agreement, EEA members agree to 'approximation of laws' relating to the internal market, meaning that EU labour law directives are effectively adopted. The same is true for health and safety legislation.

Both Norway and Switzerland (which are not EU members) have to observe the principle of free movement of people in return for participation in the EU's internal market. However, countries such as Chile or South Korea, with which the EU has a free trade agreement, do not.

The only way to ensure long-term certainty on these issues, as with many others, is for them to be addressed in the withdrawal agreement between the UK and the EU.

There is an enormous amount of work to do in the coming months and years to establish the terms of withdrawal from the EU and scope necessary changes to domestic law. Solicitors, who are experts in all areas of law, will play an essential part in this complex legal and constitutional process.

This article first appeared on the Law Society of England and Wales' website

Brexit
Why Brexit should not change your mind on the General Data Protection Regulation

The result of the EU referendum in the UK has taken many by surprise. The now real prospect of Brexit has raised many questions on its impact on the legal order in the UK. This especially applies to those pieces of legislation which were enacted as a result of the EU law, such as a directive or a regulation. That question gets even more complex when it comes to legislation that has just come into force but has not started to apply yet, such as the General Data Protection Regulation (GDPR).

While the immediate thought may be to abandon the preparations to the GDPR, this changes after just a few moments of deeper reflection.

First of all, many UK businesses will continue to provide services or sell goods in many countries across the EU even after Brexit. In such cases, they will have to comply with the GDPR or face fines of up to 4% of global turnover.

Secondly, the GDPR has vastly expanded the jurisdictional reach of the regulation by applying to those operators who offer goods or services to, or monitor, data subjects in the EU '*regardless of whether the processing takes place in the Union or not*' (Article 3). This means that any organisation or business carrying out the above activities will have to comply with the GDPR.

Thirdly, the UK will remain a full member of the EU until the negotiations on the country's withdrawal are completed. As such, it will enjoy all its rights as a member and will have to comply with the legislation in force. The UK has not yet invoked Article 50 of the Lisbon Treaty which allows the two-year withdrawal negotiations to start. Since the GDPR will start to apply in May 2018, there is a fair chance that the UK will still be a member of the EU and will have to fully comply with the new regime.

Fourthly, it is still unclear what the future relationship between the EU and UK would look like. If the UK chooses to join the European Free Trade Association, it will continue to participate in the single market and would continue to apply the vast body of the EU law. If it chooses a different solution, the UK will be free to set its own data protection laws. However, in case of data transfers between the EU and the UK, the UK will be treated as a third country under the GDPR and its data protection legislation would be assessed as to whether it provides adequate protection of personal data. This assessment is likely to be more positive when the UK maintains a high level of protection of personal data in line with the regime in force across the EU. Indeed, the spokesperson for the Information Commissioners Office **pointed out** that '*If the UK is not part of the EU, then upcoming EU reforms to data protection law would not directly apply to the UK. But if the UK wants to trade with the Single Market on equal terms we would have to prove 'adequacy' - in other words UK data protection standards would have to be equivalent to the EU's General Data Protection Regulation framework starting in 2018.*'

For all the above reasons, you should maintain your focus on getting ready for the new regime.

This article was first published on the Risk and Compliance website in July 2016.

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

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

Brexit
Anti-money laundering and Brexit

At present, the rules designed to combat money laundering and terrorist financing in the EU are set out in the 3rd Anti-Money Laundering Directive (3AMLD). Its provisions were transposed into the UK legislation during 2006 and 2007 by way of amendments made to the **Proceeds of Crime Act 2002** and the introduction of the Money Laundering Regulations 2007. In June 2015, the EU agreed the 4th Anti-Money Laundering Directive (4AMLD) which must be transposed into Member States' national legislation by June 2017.

The UK has not yet formally notified the EU of its intention to leave the Union and because of this the withdrawal negotiations cannot commence. Until the UK withdraws from the EU, it remains a Member State and is bound by EU law. The process of withdrawal will take the UK at least two years to complete so it is likely therefore, that the UK's transposition of the 4AMLD will continue as planned.

It would be a mistake to assume that after the UK leaves the EU, it would inherit wide-ranging powers in setting its own rules to combat money laundering. The UK is a member of the Financial Action Task Force (FATF) which sets the worldwide standards to combat money laundering and terrorist financing. Indeed, the 4AMLD was adopted to, *inter alia*, incorporate the revised 2012 FATF Recommendations. In addition, FATF will carry out its 'Mutual Evaluation' of the UK in 2017/18 where it will examine the legislation, policies and overall effectiveness of the UK's AML/CFT regime. It must also be remembered that the UK has chosen to make it's AML laws go further than the requirements of 3AMLD and effectively 'gold-plate' its requirements. It is a commonly held misconception that EU Money Laundering directives are the reason the UK has adopted a regime based on suspicion and an 'all-crimes approach' with no de-minimis level to avoid reporting matters of limited value to law enforcement. None of these aspects of the regime are required by 3AMLD or indeed by FATF.

Furthermore, if the UK wishes to maintain access to the common market it will have to maintain very similar rules to those in the EU. Norway, for example, is not an EU member but participates in the EU common market as a signatory of the European Economic Area (EEA). As a condition of access Norway is bound to implement EC legislation concerning financial services, such as 3AMLD. Again, we cannot yet be sure of the UK government's intentions regarding access to the common market or how successful or otherwise any subsequent negotiations will be. We can, however, be sure that if they want access, they will need to adhere to similar standards in financial services including money laundering.

Following the terrorist attacks in Paris and Brussels, the EU published an **Action Plan to combat terrorist financing**. Parts of that plan envisage revising certain aspects of the 4AMLD in areas such as high-risk third countries, virtual currencies, prepaid instruments and cooperation between the Financial Intelligence Units. Proposals to bring into force that part of the EU Action Plan (in the form of an amending directive to 4AMLD) were **put forward** by the Commission in July 2016.

While Brexit will affect vast swathes of UK law, it is unlikely to cause any dramatic change in UK AML/CFT legislation now or in the future.

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

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

Brexit
The Three Brexiteers

The result of the UK Referendum on EU membership on 23 June 2016 has already had vast ramifications, not least for the political landscape in the UK. Following the swift resignation of David Cameron and very short leadership campaign by the Conservative party, Theresa May was appointed UK Prime Minister on 13 July 2016.

Given events, a reshuffling of the Cabinet was therefore somewhat unsurprising, however what may have surprised some, is the appointment of 3 Leave campaigners to prominent positions when it comes to negotiating the terms of Brexit and the relationship of the non-EU UK with the rest of the world. David Davis was appointed as Secretary of State for Exiting the European Union, Boris Johnson was appointed as Foreign Secretary and thirdly Liam Fox was appointed International Trade Secretary.

These 3 "Brexiteers" will play a crucial role in developing a new relationship with the EU and face what is likely to be an uphill challenge of ensuring that the UK will remain a global player once it has left the EU. The fact that a new government department has been created to manage the UK's exit is representative of the amount of work that will be required to ensure that the UK's interests are protected.

We now take a closer look at the role each of the 3 Brexiteers will be playing:

Firstly David Davis will be the lead negotiator and will therefore be in charge of the way towards a new relationship with the EU. To date it appears that he is in no rush to trigger Article 50 but rather hold the negotiating cards to take a measured approach to Brexit. Unsurprisingly Davis's main focus is on trade and concluding trade deals with non EU countries. In terms of UK - EU trade Davis has stated ***"The ideal outcome, is continued tariff-free access. Once the European nations realise that we are not going to budge on control of our borders, they will want to talk, in their own interest".*** Whether he is able to achieve this remains to be seen over the coming months.

Secondly Boris Johnson, a somewhat controversial appointment to Foreign Secretary, will be key in preserving a good relationship with the EU and its Member States. He will need to further cement Britain's economic cooperation with non EU countries and to ***'project Britain as an internationalist and open country to a sceptical world'.*** However, arguably the role of Foreign Secretary will now be sidelined by the new 'Brexit' Minister and International Trade Secretary.

Thirdly Liam Fox must build and lead the trade negotiation team to pave the way towards free trade deals across the globe, a tough job as Britain has not negotiated any trade deals in an individual capacity since joining the EU. Given that the opportunity to form free trade agreements was one of the Pro Brexit supporters main campaign points, the pressure will be on Mr Fox to ensure these can be delivered. Time will be a critical element in this case given that historically international trade deals can take years to negotiate, although there is argument that single countries are able to be more flexible and therefore conclude agreements quicker.

It remains to be seen over the coming months and years whether the 3 Brexiteers are able to achieve their objectives on all policy areas and secure comprehensive trade deals alongside preserving EU relationships and securing a favourable exit from the EU.

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

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

Brexit
The new UK Commissioner

The United Kingdom currently remains a member of the European Union and has not yet triggered Article 50 TFEU which provides for the two-year withdrawal negotiations to start. As such the UK is still entitled to

send a Commissioner to the European Commissioner.

Following the resignation of Lord Hill after the results of the UK referendum, Sir Julian King will be appointed by the EU as the new Commissioner for the Security Union. Sir Julian is the former UK ambassador to France and has held a number of UK Representation posts including in Brussels.

The choice of the portfolio is the President of the Commission's prerogative under Article 17 of the TFEU and President Juncker announced this allocation on 2 August 2016. The new Commissioner's role will support the implementation of the **European Agenda on Security** and will assume responsibility for counter terrorism and for delivering an effective Security Union. This is a new portfolio and will complement the existing portfolios and responsibilities of the other Commissioners.

Procedurally, from the moment the Council formally consults the Parliament, Sir Julian will be a Commissioner-Designate. He will be able to rely on the relevant Commission services to prepare for his exchange of views with the Parliament. The Parliament will be consulted on the appointment and the Council will appoint Sir Julian by unanimous decision together with President Juncker. These steps are expected to take place in the autumn this year.

Privacy Shield is Adopted

Following the reservations in the opinion from the Article 29 Working Party (WP29) on 13 April 2016 and a resolution of the European Parliament demanding further negotiation on 26 May 2016, the Commission formally adopted the Privacy Shield on 12 July 2016. The formal adoption comes after a positive vote on the Privacy Shield from the article 31 Committee on 8 July 2016. This will enter into force immediately.

The article 31 committee held a number of additional meetings in June 2016 to further understand the implications of the Privacy Shield and whilst a qualified majority of Member States voted to approve the final text, representatives from Austria, Croatia, Slovenia and Bulgaria abstained from voting, having previously raised concerns that the Privacy Shield does not go far enough to protect their citizens' rights.

Indeed Commissioner Ansip **stated** *"We have approved the new EU-U.S. Privacy Shield today. It will protect the personal data of our people and provide clarity for businesses. We have worked hard with all our partners in Europe and in the US to get this deal right and to have it done as soon as possible. Data flows between our two continents are essential to our society and economy – we now have a robust framework ensuring these transfers take place in the best and safest conditions".*

Until October last year, organisations could transfer personal data to the US under the EU-US Safe Harbor scheme which allowed for self-certification as a proof of compliance with European data protection standards. However, in October 2015 the CJEU found the scheme invalid as it failed to protect EU citizens' data from mass surveillance by the US government and therefore violated the right to privacy.

Since the October ruling, the Commission has been negotiating with the US on a new framework for data transfers to the US known as the Privacy Shield. The negotiation process has not been smooth and the constant moving deadline for an agreement, has left companies in limbo for some time.

The Privacy Shield imposes **inter alia**:

- stronger obligations on companies handling data;
- safeguards and more transparency in relation to US government access to EU citizens' data;
- tightened conditions for onward transfer of data; and
- effective protection of European citizen's rights including the right of redress.

TechUK, which represents 900 firms in the UK, described Privacy Shield as a *"restoring a stable legal footing". "The coming months will see much discussion on future options for the UK's data environment in a post-Brexit world, today's agreement underlines the importance of data flows to transatlantic trade,"* said Charlotte Holloway, the group's associate director of policy. *"We urge policymakers to continue to keep front of mind that data and trade go hand in hand in today's global economy."*

However, criticisms of the Privacy Shield still linger as is shown by the **following statement** of Joe

McNamee, Executive Director of European Digital Rights: *"Sadly, for both privacy and for business, this agreement helps nobody at all. We now have to wait until the Court again rules that the deal is illegal and then, maybe, the EU and US can negotiate a credible arrangement that actually respects the law, engenders trust and protects our fundamental rights"*

Proposed Revision of the Brussels IIa Regulation

On 30 June 2016, the European Commission published its long awaited proposal for revision of the Brussels IIa Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

Regarding matrimonial matters, there are no changes proposed as " *only limited evidence of existing problems was available at this stage to allow for a precise indication of the need to intervene and the scale of the problems, and for a fully informed choice of any considered option ".* This will be a disappointment to many in all Member States, who hoped for some provision on the choice of court for divorce proceedings to avoid the need to "rush to court", fostering a culture of mutually agreed resolution of conflict.

Concerning parental responsibility, six main areas of concern were identified:

- Child return procedure
- Placement of the child in another member state
- Requirement of exequatur
- Hearing of the child
- Actual enforcement of decisions
- Co-operation between Central Authorities

Revised Rules

Changes to the procedures to settle cross-border parental child abduction faster

The deadlines applied to different stages of the child return procedure will be limited to a maximum period of eighteen weeks (six weeks for the processing of the application, six weeks for the first instance court, and six weeks for appeal). A decision on return will be appealable only once, and the judge will have to consider whether a judgment ordering the return of the child should be enforceable in the meantime.

Parental child abduction cases heard by a limited number of (specialised) courts so that judges develop the necessary expertise.

Ensuring the child is heard

A child who is capable of forming his or her own views will be guaranteed an opportunity to express these views in all proceedings concerning them. This will apply in particular to proceedings on custody and access, and on the return of children if they were abducted by one of their parents.

Ensuring enforcement of decisions in other Member States - abolition of the exequator

With the new rules, the exequatur will be abolished. If the enforcement has not occurred after six weeks, the court has a duty to inform the requesting Central Authority in the Member State of origin or directly the applicant about the reasons for the lack of enforcement. In addition, in order to speed up enforcement, the court that issued the judgment will be able to declare it provisionally enforceable.

Improving co-operation between Member States' authorities

The new rules will promote better co-operation between Central Authorities as they are the direct point of contact for parents and play a key role in supporting the judges in applying the rules; child welfare authorities will be better integrated in cross-border cooperation. The new rules will, for example, clarify the procedure for placing a child in a foster family or an institution abroad and ensure that such requests are handled quickly. It will be possible for courts and authorities to request reports on adults or siblings if these are of relevance in child-related proceedings. Child welfare authorities will be able to obtain the necessary information from other Member States through the Central Authorities: the new rule establishes minimum requirements for a request for a social report and an eight week time limit for the requested authority to respond.

The proposal is now going to be discussed by Council and the JURI Committee of the European Parliament.

The full proposal can be found **here**.

Adoption of the Anti Tax Avoidance Directive

On 12 July 2016 the Council **formally adopted** the anti tax avoidance directive (ATAD) and it will come into force on the 20th day after publication in the Official Journal of the EU. Member States will have until 31 December 2018 to transpose the majority of the ATAD's provisions into national law.

The ATAD forms part of the anti tax avoidance package which was presented by the Commission in January this year. In particular it aims to strengthen rules against corporate tax avoidance and to prevent companies taking advantage of disparities between tax systems to reduce their tax liability.

The ATAD contains rules in the following areas:

- Interest limitation rules
- Exit taxation rules
- Controlled foreign company rules
- Hybrid mismatches rules
- General anti abuse rules

We have explored these provisions in more detail in our **April Brussels Agenda**.

These rules will also build on the OECD's 2015 recommendations to address tax base erosion and profit shifting.

Proposed Amendments to the 4th Anti-Money Laundering Directive (4AMLD)

On 5 July 2016 the Commission adopted a **proposal** to amend the 4th Anti-Money Laundering Directive (4AMLD). This new proposal is one of the first action points in the Commission's Action Plan to strengthen the fight against terrorist financing. Its aim is to complement the existing AML framework by setting out further measures to ensure increased transparency of financial transactions and corporate entities.

The amendments proposed by the Commission include widening customer verification requirements applicable to prepaid instruments by lowering thresholds for identification from €250 to €150. It also proposed bringing virtual currency exchange platforms within the scope of the 4AMLD since there are no EU-level regulations in that field. Therefore, the exchange platforms will be likely to have to comply with stricter due diligence obligations when exchanging virtual currencies for real currencies.

Most importantly, however, the Commission also introduced several crucial amendments which concern high risk third country jurisdictions, access to information on payment accounts, enhanced access to beneficial ownership information and better standards for cooperation between the Financial Intelligence Units (FIUs).

Concerning beneficial ownership, the Commission proposes to provide public access to beneficial ownership information in relation to companies and those trusts that engage in economic activities with a view to making a profit. The proposal also calls for better cooperation between Member States' authorities which are responsible for their respective registers.

Most recently, Statewatch leaked the draft of the **Commission's delegated regulation on identifying high risk countries** and the **annex** identifying countries with deficient anti-money laundering and terrorist financing legislation.

In tandem with its proposed revisions to 4AMLD, the Commission published a **Communication** which sets out plans to make beneficial ownership information available to all Member State tax authorities.

The 4AMLD is due to be transposed into national law by June 2017, although the Commission has called on Member States to transpose it before the end of 2016.

European Parliament Inquiry into Panama Papers

On 8 June 2016 the European Parliament announced that it had agreed to set up an inquiry committee into the Panama Papers after a vote during the Plenary session in Strasbourg.

Werner Langen MEP (EPP, Germany) was elected as Chair of this committee on 12 July 2016. Shortly after the Panama Papers revelations, Members of the European Parliament (EP) requested that a committee be set up to investigate the allegations behind the Panama Papers and the alleged contraventions of EU Law in relation to anti money laundering and tax evasion.

On 4 April 2016, the consortium of investigative journalists published extracts from over 11 million documents, or 1.8 terabytes of data which were leaked by an anonymous source from the Panamanian law firm, Mossack Fonseca. The documents primarily revealed how shell companies and/or trusts had been used for aggressive tax planning and in some cases for tax evasion and money laundering. The papers have highlighted the need for more transparency in beneficial ownership across the EU and internationally. It has also drawn attention to the importance of the exchange of tax information between countries and the rising exploitation of tax havens.

The **mandate** of the Panama Paper Inquiry Committee (the "Committee") was decided by the EP Conference of Presidents on 2 June 2016. Accordingly, the Committee will have the power to investigate the alleged failures of the Commission and/or Member States to enforce and implement a number of **directives** relating to tax information and tax havens. It is expected that the Committee's work will tie in with the work previously carried out by special committees; TAXE 1 and TAXE2.

The Committee is however, limited to acts bound by EU law and therefore does not have the right to conduct investigations into the actions of third countries' authorities and nor can it examine general policy areas with a view to making proposals. The focus of inquiry committees' must be on inter alia abuses of power, incompetence, omissions, negligence and violations of EU law.

In order to collect evidence to verify the alleged allegations, the Committee will be able to invite witnesses and receive their written submissions as well as hold hearings with experts. Note however, that the Committee does not have the power to subpoena named individual witnesses and nor can it impose sanctions against authorities or persons refusing to appear before it. The Committee will also have the right to request such documents of Member States authorities that will aid its investigations. Again however there is a check on this power; Member States and the EU institutions can refuse to authorise collaboration and the provision of documents on the grounds of secrecy or public or national security arising out of EU law.

Whilst the Committee will not have any power to sanction individuals or authorities for refusals to appear or provide documents, it can ask the Commission to initiate infringement proceedings against a Member State who is refusing to cooperate (Article 4(3) TFEU) and can assert political pressure on EU bodies refusing to cooperate.

Generally, the hearings and testimony will take place in public unless otherwise requested by either: one quarter of the Members of the Committee, the EU or national authorities or where secret information is being reviewed.

The legal basis for the setting up of an inquiry committee is found in a **1995 inter -institutional agreement** and the **EP Rules of Procedure, in particular rule 198**. The main objective of an inquiry committee is to investigate alleged contraventions of Union law and alleged maladministration in the application of Union law which appear to be the act of the Commission, and public administrative bodies of Member States.

The Committee has 65 **members** and will have 12 months to carry out its investigations and submit a report in plenary although this period can be extended twice for three months by a majority vote in plenary. The report may contain a number of recommendations to Member States and/or EU institutions. The EP can subsequently instruct various standing committees to monitor follow up actions to those recommendations.

Timeline

- 14 April 2016 - The European Parliament Conference of Presidents backed the setting up of an inquiry committee to investigate the Panama Papers
- 5 May 2016 - Vote on the draft mandate of the Committee was postponed following recommendations from the EP's Legal Service
- 2 June 2016 - Mandate of the Committee was agreed

8 June 2016 - EP voted to set up the Committee
- 23 June 2016 – Committee members are appointed

"Leading Legal Excellence: Succeeding at the Heart of Society" 30th September 2016

Against a backdrop of shifting geopolitical landscapes, the Law Society of Scotland's flagship annual conference "Leading Legal Excellence: Succeeding at the Heart of Society" will bring leading experts together to offer their thoughts and opinions on the changing political landscape and potential opportunities for Scottish solicitors.

The conference will pull together relevant content encompassing the key strands of business, career and personal growth, as well as justice and rule of law issues. The day will include a vibrant mixture of keynote sessions, panel discussions with a range of streamed sessions to choose from.

The conference will be held on 30 September 2016 from 8:45 am - 5:30 pm at the Edinburgh International Conference Centre.

For more information and to book, please click **here**.

Q and A following UK vote to leave European Union

The Law Society of Scotland has published a Q and A following the UK's referendum result.

At this early stage there are more questions than there are answers about our future. This is because a lot of the detail concerning our future relationship with the EU and what it will mean for our professional and personal lives has still to be discussed and decided.

The Law Society of Scotland will be monitoring these developments closely and we will strive to represent the public interest and the interests of our members from the initial transitional period, throughout the negotiations and in the implementation of the withdrawal agreement.

To view the Q and A please click **here**.

Data protection seminar: prepare and protect your organisation

On 28 September 2016 the Law Society of England and Wales is hosting a seminar on the new General Data Protection Regulation. The seminar will be hosted at the Law Society in London.

The seminar will also address a number of questions resulting from the UK referendum and the implications of a 'Brexit' on the GDPR. These include:

- In these circumstances is there any scope for ignoring the provisions of the GDPR?
- Is there any prospect that the UK will become the first 'European' data haven with liberalised data handling laws or will post-Brexit UK law mirror the GDPR?
- Can your firm find a way to achieve competitive advantage and low cost data protection compliance against a backdrop of political turmoil and chronic uncertainty?

For more information and to register please click **here**.

Brussels Trainees' visit to the Court of Justice of the European Union - 5 July 2016

On 5 July 2016 the Joint Brussels Office of the Law Societies arranged a visit to the European Court of Justice in Luxembourg. Erica Williams and Harriet Hutchinson, trainee solicitors currently seconded to the Brussels Office, were joined by a number of trainees from UK and international law firms with a presence in Brussels.

After a case briefing from Mr J. Hankinson, trainee in the Chambers of Advocate General Sharpston, the group then attended a hearing in front of 15 judges in the Grand Chamber of the Court of Justice, case C-413/15 Farrell. The case was a reference for a preliminary ruling on criteria for establishing whether a body is an emanation of the State.

The group then had a tour of the ECJ buildings, including the Grand Chamber and its antechamber, the General Court and the judicial deliberation rooms.

The group enjoyed an informative lunch with Mr I. Forrester, Judge at the General Court, Advocate General Sharpston and Mr N. Cambien, Legal Secretary, of Judge Vajda whom all took the time to chat with the group and answer questions concerning, amongst other topics, the workings of the ECJ, the judicial appointment process and the level of UK engagement through staffing at the ECJ.

The visit was thoroughly enjoyed by all who attended, and the Law Societies' Joint Brussels Office would like to extend a huge thank you to the ECJ for welcoming us.

For more information please click **here**.

Law Society of England and Wales welcomes new president Robert Bourns

Partner of the national law firm TLT Solicitors, Robert Bourns, took office as the 172nd president of the Law Society of England and Wales on 14 July 2016.

A representative to the Law Society Council from the City of London, he succeeds outgoing president Jonathan Smithers.

'It is a tremendous privilege to take up the presidency of the Law Society,' said Robert Bourns.

'This is a time full of both opportunities and challenges for the solicitor profession and indeed for the country, and I'm focused on what we can contribute over the coming year.'

'The Law Society has an important role to play in advancing the English and Welsh solicitor profession, and legal jurisdiction, both at home and abroad. It is no accident that we are the jurisdiction of choice for international commercial disputes, and I will work tirelessly to promote the huge value our profession offers clients at home and aboard,' said Robert Bourns.

Two other priority issues he plans to focus on include improving equality and diversity in the legal profession, and solicitors acting with and upholding pride in their profession. 'We should be proud of our contributions to the communities we live in, in our professionalism and expertise, and our role in upholding the rule of law. A diverse profession that gives line of sight to people of all backgrounds - so they can see the possibility of a career as a solicitor if they want one even if their start in life is challenging,' said Robert Bourns.

ONGOING CONSULTATIONS

Enterprise, Internal Market:

Public consultation on Internal Market for Goods – Enforcement and Compliance
01.07.2016 – 31.10.2016

Public consultation on the possible revision of the Mutual Recognition Regulation (EC) No 764/2008
07.06.2016 – 30.09.2016

Public Consultation on Single Market Information Tool
02.08.2016 – 07.11.2016

Single Digital Gateway
26.07.2016 - 21.11.2016

Communications Networks - Content & Technology, Information Society:

Public consultation on the safety of apps and other non-embedded software not covered by sector-specific legislation (such as medical devices or radio equipment)
09.06.2016 – 15.09.2016

Justice and Fundamental Rights:

Public consultation for the Fitness Check of EU consumer and marketing law
12.05.2016 – 02.09.2016

COMING INTO FORCE THIS MONTH

Tax and Capital Markets

- **Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) No 596/2014 on market abuse and Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (Text with EEA relevance)**
- **Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 amending Directive 2014/65/EU on markets in financial instruments (Text with EEA relevance)**

Trade

- **Council Regulation (EU) 2016/1051 of 24 June 2016 amending Regulation (EU) No 1387/2013 suspending the autonomous Common Customs Tariff duties on certain agricultural and industrial products**

Free Movement

- **Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012**

CASE LAW CORNER

Decided Cases:

Case C-294/16 *PPU JZ v Prokuratura Rejonowa Łódź–Śródmieście,* Judgement of 28 July 2016

- The Member State that issued a European arrest warrant is required to consider, for the purposes of deducting the period of detention served in the executing Member State, whether the measures taken against the person concerned in the executing State have the effect of depriving a person of liberty. A nine hour daily curfew monitored by means of an electronic tag does not, in principle, have that effect.

Case C-15/15 *New Valmar BVBA v Global Pharmacies Partner Health Srl,* Judgement of 21 July 2016:

- The obligation to draw up cross-border invoices exclusively in a particular language, failing which they are null and void, infringes EU law. Parties must have the possibility of drawing up such invoices in another language they know and that is no less authentic than the required language.

Joined Cases C-203/15 *Tele2 Sverige AB v Post-och telestyrelsen and C-698/15 Secretary of State for Home Department v Tom Watson and Others* Advocate General's Opinion 19 July 2016

- According to Advocate General Saugmandsgaard Øe, a general obligation to retain data imposed by a Member State on providers of electronic communication services may be compatible with EU law. However, it is imperative that that obligation be circumscribed by strict safeguards.

Case C-188/15 *Bougnaoui and ADDH v Micropole SA,* Advocate General's Opinion 13 July 2016

- Advocate General Sharpston considers that a company policy requiring an employee to remove her Islamic headscarf when in contact with clients constitutes unlawful direct discrimination. An entirely neutral dress code policy may also constitute indirect discrimination which will be justified only if it is proportionate to the pursuance of a legitimate aim, including the interests of an employer's business.

Case C-486/14 *Piotr Kossowsk* Judgment of 29 June 2016:

- Fresh proceedings may be brought against a suspect in a Schengen State where previous criminal proceedings in another Schengen State were terminated without a detailed investigation. The fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation was carried out.

Upcoming decisions and Advocate General Opinions in September:

Citizenship of the Union

Case C-182/15 *Petruhhin* Judgment expected on 6 September 2016

Questions referred by the Latvian Court:

- Are the first paragraph of Article 18 and Article 21(1) of the Treaty on the Functioning of the European Union to be interpreted as meaning that, in the event of extradition of a citizen of any Member State of the European Union to a non-Member State under an extradition agreement concluded between a Member State and a third country, the same level of protection must be guaranteed as is guaranteed to a citizen of the Member State in question?
- In those circumstances, must the court of the Member State to which the request for extradition has been made apply the conditions for extradition of the EU State of which the person concerned is a citizen or of that in which he has his habitual residence?
- In cases in which extradition must be carried out without taking into consideration the specific level of protection established for the citizens of the State to which the request for extradition has been made, must the Member State to which the request for extradition has been made verify compliance with the safeguards established in Article 19 of the Charter of Fundamental Rights of the European Union, that is, that no one may be extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment? May such verification be limited to checking that the State requesting extradition is a party to the Convention against Torture or is it necessary to check the factual situation by taking into consideration the evaluation of that State carried out by

the bodies of the Council of Europe?

Case C-133/15 *Chavez-Vilchez and Others,* Advocate General Opinion expected on 8 September 2016

Questions referred by the Dutch Court:

- Must Article 20 of the TFEU be interpreted as precluding a Member State from depriving a third-country national who is responsible for the day to day and primary care of his/her minor child, who is a national of that Member State, of the right of residence in that Member State?
- In answering that question, is it relevant that the legal, financial and/or emotional burden does not rest entirely with that parent and, furthermore, that it cannot be excluded that the other parent, who is a national of the Member State, might in fact be able to care for the child? In that case, should the parent/third-country national have to make a plausible case that the other parent is not able to assume responsibility for the care of the child, so that the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?

Case C-304/14 *CS* Judgment expected on 13 September 2016

Questions referred by the UK Upper Tribunal (Immigration and Asylum Chamber)

- Does European Union law, and in particular Article 20 TFEU, preclude a Member State from expelling from its territory to a non-Union country, a non-Union national who is the parent and primary carer of a child who is a citizen of that Member State (and, consequently, a citizen of the Union), where to do so would deprive the Union citizen child of the genuine enjoyment of the substance of his or her rights as a European Union citizen?
- If the answer to Question (1) is 'No', in what circumstances would such an expulsion be permitted under European Union Law?
- If the answer to Question (1) is 'No', to what extent, if any, do Articles 27 and 28 of Directive 2004/38/EC (the 'Citizens Directive') inform the answer to Question (2)?

Case C-165/14 *Rendón Marín,* Judgment expected on 13 September 2016

Question referred by the Spanish Court:

- Is national legislation which excludes the possibility of granting a residence permit to the parent of a European Union citizen who is a child and dependent on that parent, because the parent has a criminal record in the country in which the request is made, compatible with Article 20 of the Treaty on the Functioning of the European Union, interpreted in the light of the decisions of 19 October 2004 and 8 March 2011 even if this results in the removal of the child from the territory of the European Union, as that child has to follow the parent?

Social Policy

Case C-596/14 *de Diego Porras,* Judgement expected on 14 September 2016

Questions referred by the Spanish Court:

- Is the compensation due on termination of a temporary contract covered by the employment conditions to which Clause 4(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP refers?
- If such compensation is covered by the employment conditions, must workers with an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions, such as reaching a specific date, completing a specific task or service, or the occurrence of a specific event, receive, on termination of the contract, the same compensation as that to which a comparable permanent worker is entitled when his contract is terminated for objective reasons?
- If a temporary worker is entitled to receive the same compensation as a permanent worker on termination of the contract for objective reasons, must Article 49(1)(c) of the Estatuto de los Trabajadores (Workers' Statute) be regarded as having correctly transposed Council Directive 1999/70/EC of 28 June 1999 or is it discriminatory and contrary to that directive in that it undermines its purpose and its effectiveness?
- If there are no objective reasons for excluding temporary replacement workers from the entitlement to receive compensation on termination of a temporary contract, is the

distinction which the Worker's Statute establishes between the employment conditions of those workers discriminatory, compared not only with the conditions of permanent workers but also with those of other temporary workers?

Cases C-184/15 and C-197/15 *Martínez Andrés and Castrejana López,* Judgement expected on 14 September 2016

Questions referred by the Spanish Court:

- Must clause 5(1) of the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP be interpreted as precluding national legislation which, in a situation of abuse arising from the use of fixed-term employment contracts, does not acknowledge that staff regulated under administrative law who are engaged on an occasional basis (personal estatutario temporal eventual) ('occasional regulated staff'), as opposed to staff who are in precisely the same position but who are employed by a public authority under contract, have a general right to remain in post on an indefinite but not permanent basis, in other words, to hold the temporary post until it is filled in the manner prescribed by law or eliminated in accordance with legally established procedures?
- If the previous question is answered in the negative, must the principle of equivalence be interpreted as meaning that the national court may regard the situation of staff who are employed by a public authority under a fixed-term contract and that of occasional regulated staff as similar in cases where there has been misuse of fixed-term employment contracts, or, when assessing similarity, must the national court consider factors other than the fact that the employer is the same, the services provided are the same or similar and the contract of employment has a fixed term, such as the precise nature of the employee's relationship, whether contractual or regulated, or the power of the public authorities to organise the way they function, which justify treating the two situations differently?

Referral to the CJEU

The UK Supreme Court has referred a question in the following case to the CJEU:

MB (Appellant) v Secretary of State for Work and Pensions (Respondent) [2016] UKSC 2014/0220

- The question referred is whether Council Directive 79/7 EEC precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension.

About us

The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: **brussels@lawsociety.org.uk**

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 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.

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