



## VIEWPOINT



**Danuta Hübner, Ph.D.**  
Chair of the  
Committee on  
Constitutional Affairs  
in the European  
Parliament, Member of  
European Parliament

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## Editorial - Looking back at 2016

For many of us, 2016 will be a year to remember. The political landscape in Europe and in the US has undergone a profound change that will have a lasting impact on the future of both continents. June's **decision of the UK to leave the EU** has shaken up the very foundations of the EU and raised many questions on the future of the EU and its policies.

Sadly, the referendum has also exposed deep divisions within the UK, increasing a strong anti-immigrant sentiment across a broad spectrum of society. The referendum result also exposed the enormity of the task of separating the two interconnected legal systems of the EU and the UK, culminating in the legal challenge of the Government's power to trigger Article 50 using its royal prerogative.

Another major shakeup of the political scene was the **victory of Donald Trump in the US Presidential elections** which shocked many around the world. It raised questions on the future role of the US and the possibility of it taking a step back from its involvement overseas, which would have significant geopolitical ramifications for the Eastern European countries which fear the ascent of Russia, long supported by Trump. Trump's victory also opens up debates on the future of the international trade and the Transatlantic Trade and Investment Partnership (TTIP).

It is no wonder, therefore, that **'Brexit' emerged as the word of the year** by the Collins dictionary. It overtook 'Trumpism', 'hygge' (Danish concept of cosiness and conviviality), 'JOMO' (Joy of missing out) or 'uberisation.' According to Collins publishers, 'Brexit' also has proven to be a very flexible word and led to many wordplays such as 'bremorse', 'bregret', 'brexodus', 'breturn', 'brexperits' or 'brexistential crisis.'

2016 is also the year of referenda in deciding on core questions of public policy, including external affairs and constitutional reform. Apart from the EU referendum in the UK, Italy voted no to the constitutional reform proposed by the Prime Minister Matteo Renzi (who subsequently resigned) and the Netherlands voted against the association agreement with Ukraine. Eurosceptic parties in several countries, such as Austria or Sweden, have also called for a referendum on EU membership, although whether the parties have the popular support of the people they claim to represent, remains to be seen.

Here in Brussels, Belgium became a target for a **major terrorist attack** leaving more than 30 people killed and over 300 injured. In March, the federal authorities introduced sweeping security measures and increased military presence across the city the sight of which have now become commonplace. Since the perpetrators of the Brussels and Paris attacks from last year were traced to Brussels, and more specifically its inner-city neighbourhood Molenbeek, the city received a prominent presence but negative publicity in major news outlets across the world. The then presidential candidate Donald Trump referred to Brussels as a 'hellhole', thus inviting the Belgian citizens to respond in their best possible manner – **with humour**.

It has been a difficult year for Panama, tax havens and tax planners too. The **Panama Papers leak**, amounting to over 11 million documents or 1.8 TB of data, exposed the complex web of legal arrangements to avoid taxation by the world richest and most powerful. The scandal has led to resignation of the Icelandic Prime Minister, a wave of criticism towards the then UK Prime Minister David Cameron whose father was involved in offshore financial structures and led to attempts to overhaul tax transparency and exchange mechanisms to fight tax evasion and tax avoidance.

Finally this was a tumultuous year for trade policy. One of the most recent trade agreements that came under public scrutiny was **Comprehensive Economic and Trade Agreement** (CETA) between the EU and Canada. In a surprise move, the Walloon Parliament, one of the Belgian provinces, announced it could not support the ratification of the agreement. The tension continued for three days when the Walloon region agreed to support the deal. It remains to be seen what lessons the EU will draw for concluding its future trade agreements and conducting trade negotiations.

The last issue of the Brussels Agenda in 2016 will therefore bring you an overview of the institutional hurdles and constitutional challenges faced by the EU. You will find features on the rise of populism and direct democracy, the constitutional future of Scotland, rule of law in Poland and the legal challenge concerning triggering of the Article 50 under the Treaty of the European Union. As usually, we also write about the recent



## **Danuta Hübner, Ph.D. Chair of the Committee on Constitutional Affairs in the European Parliament, Member of European Parliament**

During this year, AFCO was particularly busy discussing the future constitutional evolution of the EU with the aim of identifying the adaptations needed to improve the Union's capacity of acting efficiently and timely and to enhance the transparency and democratic accountability of its decision-making process in all domains. For this, we followed a two-track approach: exploring the still unused potentialities of the Lisbon treaty and trying to devise the modifications of the treaties that will be needed in the medium and long term to allow the Union to adapt itself to the fast changes our world is undergoing.

We did it in order to respond to the evident growing sentiment of dissatisfaction towards the Union expressed by many citizens. Initially, AFCO was mainly driven by the evidence that the economic and financial crisis had shown clearly the limits of the current institutional organisation of the Eurozone: lack of transparency; absence of clear definition of who decides on what; insufficient democratic scrutiny over the main decisions taken in that area which may affect the life of millions of European citizens. The recent events, like the crisis of the refugees, the problems of security posed by terrorism, the aggravation of political instability and the escalation of military conflicts in our neighbourhood added to the urgency of completing the necessary reforms and participating in the launch a new renaissance for Europe by the 60th anniversary of the signing of the Treaties of Rome, that will be celebrated next March.

Moreover during the current year, AFCO also fought to advance the negotiations with the Council and the Commission on its proposal for a regulation on the right of inquiry of the EP. For AFCO, this fundamental right of a Parliament must be solidly anchored in the existing legislation. Cases like the scandal of the emission of diesel cars or the Panama papers showed clearly the need to endow our committees of inquiry with the due powers to investigate these kind of problems, which, by its transnational nature, escape the capacities of national Parliaments.

In parallel, AFCO is driving the EP negotiations with the Council on the reform of the European electoral law, so badly needed to provide more visibility and transparency to the European elections, as well as enhancing its real "European" character and promote a wider participation of voters all over the Union. We want to bring Europe closer to the citizens. We need to regain their trust, confidence and faith in politicians, but also in European institutions.

AFCO also worked intensively in order to allow the entry into force of the new interinstitutional agreement on Better Law Making, always putting the emphasis on transparency, the defence of the prerogatives of the EP, notably in what concerns its role in setting the agenda of the Union and the reinforcement of participatory democracy. Our committee is now leading, together with JURI, the process of putting the agreement to implementation by all the institutions.

Transparency and accountability of holders of European public positions was also one of the priorities of our committee, which welcomes the recent presentation by the Commission of a proposal for a mandatory register of lobbyists. The interinstitutional negotiations are now starting and AFCO has a role in ensuring that the activity of lobbies be more transparent and submitted to public scrutiny, especially while taking into account the influence they might exercise on administrative and political agents participating in the legislative process.

On a different level, AFCO also conducted and concluded during this year a thorough general revision of the Rules of procedure of the EP, aiming at ensuring more coherence, efficiency and simplicity to its functioning while ensuring its necessary transparency and the protection of the rights of individual members.

Finally, 2016 was also a year of British referendum. On 23 June the British citizens decided to withdraw from the Union. Brexit would affect all the policy areas of the Union and may influence decisively its future evolution. As such, it became a central theme of our work, since AFCO is the committee responsible for preparing the position of the EP, which must give its consent to the possible withdrawal agreement to be concluded between the UK and the European Union.



**Danuta Hübner**, Poland's first-ever European Commissioner, is one of her country's foremost economists and policymakers and has played a key role in the enlargement of the EU.

Since July 2009 Ms. Hübner is a Member of the European Parliament. Currently she is the Chair of the Committee on Constitutional Affairs as well as member of the Committee on Economic and Monetary Affairs and the Delegation for relations with the United States. She was also a member of the two successive Special Committees on Tax Rulings and Other Measures Similar in Nature or Effect from February 2015 to July 2016. In addition she is a substitute member of the Parliament's Committee on International Trade, the Delegation to the EU-Mexico Joint Parliamentary Committee and the Delegation to the Euro-Latin American Parliamentary Assembly.

In 2004 Professor Hübner was entrusted as European Commissioner with the trade, then the regional policy portfolio. Earlier, during the past decade, her roles in Poland's Government have included Minister for European Affairs, Head of Office of the Committee for European Integration and Secretary of State for Poland's Ministry of Foreign Affairs, Deputy Minister for Industry and Trade and Minister Head of the Chancellery of the President of the Republic of Poland. In 2000-2001 Professor Hübner was Under-Secretary-General of the UN and Executive Secretary at the United Nations Economic Commission for Europe in Geneva. She studied at the Warsaw School of Economics where she obtained an MSc (1971) and a PhD (1974). In 1988-1990 Professor Hübner was a Fulbright scholar at the University of California, Berkeley.

In 1992 she was conferred with the scientific title of Professor of Economics by the President of the Republic of Poland. She has been awarded with five doctorates honoris causa by European universities.

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*In Focus*

## CHANGING EUROPEAN CONSTITUTIONS

### **Michael P. Clancy O.B.E. Director, Law Reform, The Law Society of Scotland The Scottish Constitutional Landscape and the EU Referendum Vote**

While the UK voted to leave the EU by 52% to 48%, in Scotland the vote to Remain was 62% to 38%. In the Scottish Parliament following the referendum, the First Minister Nicola Sturgeon MSP noted it was the UK Government's responsibility to restore stability and confidence and set out its plan for the way forward. She wanted the Scottish Government involved at every step.

When the Prime Minister, Theresa May MP visited Scotland she committed to Scotland being fully engaged in discussions on the future EU relationship and that she would not trigger Article 50 until the UK negotiation approach was established.

The First Minister stated that she wanted to defend:

- "the need to make sure Scotland's voice is heard and our wishes respected."
- "safeguarding free movement of labour, access to a single market of 500 million people and the funding that our farmers and universities depend on".
- "ensuring the continued protection of workers' and wider human rights".
- "the ability of independent nations to come together for the common good of all our citizens, to tackle crime and terrorism and deal with global challenges like climate change".
- "making sure that we don't just have to abide by the rules of the single market but also have a say in shaping them."

The Scottish legal system and constitutional arrangements raise specific constitutional issues.

Leaving the EU is a "Whole of Governance" matter which should include the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government.

A new Joint UK/Devolved Ministerial Committee on EU Negotiations is a step forward but cooperation between the UK Government and the Devolved Administrations must be embedded to ensure the success of the negotiations.

#### Miller & Dos Santos v Secretary of State for leaving the EU

The Scottish Government's intervention in this UK Supreme Court case highlights the Scottish constitutional issues. The Scottish Government's case is based upon UK Constitutional Law and the devolution arrangements for the Scottish Parliament and Government in the Scotland Act 1998. The Lord Advocate, the Scottish Law Officer, contends that withdrawal would have a significant impact on the constitution of the UK by depriving the EU Institutions of jurisdiction as regards the UK and by the effect on the devolved institutions.

The Lord Advocate argues that Article 50 notification requires legislation because withdrawal would change the Scottish Parliament and Government's competence and/or change devolved law. This is because The Scottish Parliament and Government must observe and implement EU law, limiting their legislative, executive and policy competence. Such a law would in the Lord Advocate's view need the consent of the Scottish Parliament. Furthermore the Claim of Right 1689 and the laws uniting Scotland and England prohibit the amendment or repeal of law by Executive action under the Royal Prerogative.

The Lord Advocate's case is that the operation of Article 50 and withdrawal from the EU would:

- (a) Change the legislative and executive competence of the Scottish Parliament and Government.
- (b) Disapply EU laws with direct effect applying in Scotland;
- (c) disapply domestic laws which depend on membership of the EU.

He argues that any changes should therefore be made by an Act of Parliament which as it would change the legislative and executive competence of the Scottish Parliament and Government, requires the consent of the Scottish Parliament.

The Supreme Court will publish its judgement in early 2017 and many of these issues will be settled. Whatever the Court decides, full engagement of all parts of the UK will be an essential part of the negotiation and withdrawal process and should take full account of the legal, constitutional, and (social?) differences that may exist.

## Biography



**Michael Clancy** graduated from the University of Glasgow in 1979 taking an LL.B degree and in 1985 taking an LL.M degree. In 1987 he graduated LL.B (Hons) from the University of London. He is a solicitor and Notary Public.

After qualification as a solicitor in private practice he attained a partnership with the Glasgow firm of Franchi Wright & Co. He resigned this partnership in 1988 to become a Deputy Secretary of the Law Society of Scotland. He is a Director of Law Reform at the Law Society of Scotland.

He has published widely on a range of legal topics. He is Chairman of the International Bar Association Credentials Committee and is Secretary of the United Kingdom Notarial Forum.

Mr. Clancy was awarded an O.B.E. in the Queen's Jubilee Birthday Honours List in June 2002.

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## **Emilio DE CAPITANI, Visiting Professor at Queen Mary's Law School, London, and Former Secretary of the European Parliament Civil Liberties Committee (LIBE 1998-2011)**

### **The EU, the EP and the so called "populist" wave**

There are numerous studies on the emerging in Europe, and the world, of grass-roots movements which are labelled as "populist", either of the far right or far left.

In my opinion, one of the possible interpretations of this trend, beyond the crisis of traditional political parties, is the wish to participate, to "make" politics in a way which is more direct and alternative to the

traditional ones.

So, we are not really confronted by revolutionary and nihilist movements, as some suggest, but by a new system of "democracy without intermediaries", through which citizens avoid the filter of political parties, like they have learned to do without travel agencies when buying a flight, or expert advice when they buy goods or services on internet.

In fact it is not the experts who define the success of a product or service, but the rating on Ebay, Facebook, Airbnb or other social networks. The higher the number of positive feedbacks, the more popular a product or a service.

The opinions of people who have bought that good or used that service are more credible because they are not considered a form of advertising, but the testimony of an experience, and therefore more reliable.

If you transfer this mechanism into politics, though, you run considerable risks because the verification system on "promises for the future" is not as reliable as on "present use"; therefore the need for transparency and objective and impartial information by media and social networks becomes crucial for political choices.

The European Union is particularly affected by this situation because, notwithstanding the various information campaigns, it remains a construction which is little understandable for ordinary citizens; until now they have kept to a sort of "benign neglect", but this can very easily turn into rejection, as it happened in the UK with the referendum on Brexit.

Unfortunately the way decisions are taken in the EU has very little transparency, and not really because of the complexity of the subjects or the specificity of the legal framework, but for a choice of the Member States, which for about 10 years now have consciously decided not to let their own citizens know how decisions are taken in Brussels and Strasbourg.

The European Parliament itself, which was a champion of transparency when it didn't have legislative power, has sadly aligned itself with the Council and the Commission opaque practices during the so called "trilogues", which cover now almost 80% of the inter-institutional negotiations.

The result is that ordinary citizens (but also "experts" and stakeholders) are never sure if a legislative choice is the result of the influence of a specific political group or of a specific country or group of countries; this seriously impairs the capacity of understanding the dynamics of the decisional process and of making an informed choice when the time of voting comes.

This practice of secret negotiations started to take hold in 2001, paradoxically after the adoption of rules which were supposed to foster legislative transparency, like the Regulation 1049/01 on access to the Union's documents. This Regulation, proposed by the LIBE Committee then chaired by Graham Watson, for the first time declared the need of full transparency of the legislative process, even in its delegated aspects. The same concept was then taken up in the proposal of the Constitutional Treaty and the Lisbon Treaty, but it has been subsequently neglected in every day practice.

Transparency of debates and votes in the EP and Council meetings is imposed by treaty, but it is daily denied during the "informal" trilogues which can go on for months and even years without citizens being able to know the different positions of the participants.

It is only thanks to the courage of alternative organisations like Statewatch that it is possible to come to know what the opinions of the parliamentary and national delegations were during a legislative trilogue, but these leaked documents only cover some sectors of the legislative activity and are only in English.

It is obvious that this opacity not only compromises the activity of the European Parliament, but also of the national parliaments which are not able to follow properly the legislative process either for linguistic reasons or because documents are accessible only to a limited number of civil servants of the Commission, EP and member States.

The practice of the "confidential" legislative negotiations has been queried by the European Ombudsman, but both Parliament and Council have declared that its role is to be a watchdog of good administration, not good legislation; on which, the European institutions have recently adopted an agreement on Better Law Making, which is as pompous as it is useless, since nothing has changed in the existent practices.

This situation is at the moment known only to insiders, but we shouldn't be surprised if it becomes common knowledge, risking a bursting of the "Brussels bubble"; if this happens. I suspect it will not be easy to accuse European citizens of populism, particularly by a European Parliament which, in the last years, has often offered itself as a smokescreen for the interests of national governments.

As the voices of populist movements grow in fervour throughout Europe it remains to be seen whether the EU will relax its inherent opacity, in an attempt to become more transparent and open to everyday people,

or whether matters will continue in the vein of "business as usual".

## Biography



**Emilio DE CAPITANI** teaches on issues linked with the European Area of Freedom Security and Justice related policies as well as the European Parliament internal dynamics, structure and evolution. Teaching Fellow for several years at Scuola Superiore S.Anna (PISA) on the same subject and visiting Professor at "L'Orientale" University in Naples. Former Secretary of the European Parliament Civil Liberties Committee (LIBE 1998-2011) and from 1985 to 1998 in charge of inter institutional relations and of the so-called "legislative Backbone" (connecting all the EP organizational Units in charge of legislative activities). From 1971 to 1985 head of the Service in charge of legislative coordination for the Regional Government of Lombardy (Giunta regionale). Author of several articles dealing with regional and European evolution.

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## What next for Poland's rule of law?

The rule of law in Poland has been disintegrating since the Law and Justice party took control last year however it remains to be seen what further action, if any, will be taken by the EU in response.

On 25 October 2015, the conservative **Law and Justice party** (PiS) became the largest party in the Polish parliament; it has been chipping away at the rule of law in Poland since. With the rule of law as one its fundamental values, all eyes are on the EU to see what steps it takes next in the wake of this "systematic threat to the rule of law".

Since coming to power, Jarosław Kaczyński, the founder and current leader of PiS, has been dismantling security services, the judiciary, public broadcasters, and the checks and balances of the Polish constitution.

Of particular concern, the Parliament has **annulled** the appointment of three judges nominated by the previous legislature to the Constitutional Court, which was established to interpret and defend the Polish constitution to guarantee the balance of powers, and taken the oath of judges which it appointed itself, contrary to a decision of the tribunal.

Additionally, on 22 December 2015, the Parliament passed a new law on the Constitutional Court regarding the attendance quorum, the voting majority, the handling of cases in chronological order and the minimum delay for hearings, which serves to undermine the effectiveness of the Constitutional Court as a guarantor of the Constitution. The law was declared by the Court as unconstitutional on 9 March; however this judgement as well as all its further judgements have not been implemented or published in the country's official journal.

With the rule of law set out in **Article 2** of the Treaty on European Union (TEU) as a fundamental value of the EU, the European Commission, Parliament and Council are tasked with protecting it in Member States.

The Commission, led by First Vice-President Frans Timmermans, therefore issued a **recommendation** to Poland on 27 July urging the country to appoint the previous Parliament's judges, recognise the judgements of the Constitutional Tribunal and review the new law. The recommendation followed extensive talks between the Commission and the Polish authorities and the Commission's adoption of an **opinion** on the situation on 1 June, which Poland failed to respond sufficiently to.

Likewise, the European Parliament has been debating the situation in Poland and adopted two **resolutions** calling on the Polish authorities to reinstall the powers of the tribunal.

Poland however refused to follow the recommendation, which is not binding, **describing** it as "incompatible with the interests of the Polish state and citizens". Whilst the Polish Parliament did adopt a new law on the Constitutional Tribunal following the Commission's opinion, this did not address its key concerns.

Now over three months since the publishing of the recommendation, during which time Poland should have communicated the steps it was taking to rectify the situation, the Commission can now go for the so called 'nuclear' option: **Article 7** TEU.

Under Article 7, the Council can suspend certain rights Poland in the EU, including its voting rights in the Council, after firstly issuing a warning to the country that there is a serious threat that it is in breach of one of the Union's fundamental values.

Such rights can however only be suspended if the Council agrees to do so unanimously, which is highly

unlikely. Hungarian Prime Minister, Viktor Orbán, has already **said** his country would block such a move and it is likely that other countries, potentially including the UK, which is looking for an ally in its upcoming Brexit negotiations, would do the same.

It therefore remains to be seen if the EU will be able to make a further move, or if its hands are tied.

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## Italian Constitution, to reform or not to reform, that was the question?

On 4 December 2016, Italian citizens voted on the much-debated "public consultation" on constitutional reform, a reform which has been in the offing since it was brought before the Italian Senate on 8 April 2014..

Italians at home and abroad had the chance to vote in a referendum to decide whether to accept a package of constitutional reforms which were designed to reduce the size and powers of the Senate and claw back power from Italy's 20 regional governments. Proponents of the changes argued that it would have made the passing of legislation easier, propelling Italy on the path to increased stability, with greater investor confidence and a possible economic recovery. Critics said it will place too much power in the hands of the governing party, posing a threat to democracy.

It was seemingly with this latter argument that almost 60% of the Italian population agreed.

The problem Mr Renzi's campaign faced is that the political landscape had changed somewhat since he rode to office upon a tide of public optimism, capitalising on the dissatisfaction felt by many due to years of economic stagnation. As with David Cameron, "Renzi the reformist's" early mistakes set him up for a potentially career-ending disaster. While still fairly popular, Mr Renzi made the vote about himself and, in a promise he now surely regrets, he said that he would resign if the no vote prevailed and never return to politics.

Mr Renzi had not anticipated that voters might lose faith in him, and as the results of the referendum seeped through into 5 December 2016, the emphatic message from the Italian people was clear. The popularity that Mr Renzi once enjoyed had been ebbed away, by an electorate angry at the slow progress of the economy and disenchanted by the government's handling of four bank rescues in late 2015.

In the run up to the election, Mr Renzi had also faced similar problems to that of the British government prior to Brexit - in trying to explain an extremely complex matter of constitutional law to a largely non-cognisant general public.

"It takes Renzi five minutes to explain it, whereas if you are [Five Star Movement leader] Beppe Grillo all you say is, 'It's about Renzi,'" said Wolfango Piccoli, co-president of political risk advisory firm Teneo Intelligence.

Many fear that, as Mr Renzi becomes the next victim of the anti-establishment sentiment sweeping the West, new elections could open the door to the populist but inexperienced Five Star Movement, which has pledged to call another referendum if it gets into office, this time on leaving the Euro.

At a time when Italy has estimated debts of 132.7% GDP and a banking sector struggling with sluggish growth it is feared that the populist party's election could mean another Greek style crisis, and further social turmoil for citizens of Europe.

Whatever the long term political consequences of the failed referendum may be change is certainly on the cards for Italy, but it may be some time until we are able to ascertain the implications of the vote, and what part the country will play in the wider political soap opera of Europe and the West.

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## Increasing Europe's border security

November has seen decisive action being taken by the EU over internal and external border security; with the decision being taken to prolong internal border checks of 5 member states and also the introduction of a new European Travel Information and Authorisation System .

On 11 November 2016, the EU Council confirmed that it would continue extending internal border checks for three months in Austria, Denmark, Germany, Norway, and Sweden. All five are part of the Schengen border-free zone, which spans 26 countries throughout Europe.

The closed border along the Western Balkan route earlier this year, and a migrant swap deal with Turkey, was the consequence of the increasing migration crisis, which had caused "a serious threat to public policy and internal security."

The internal checks have seen flows of immigrants into central Europe drop, and despite the Commission previously stating that all internal controls would be removed before the end of the year, to restore "a normally functioning Schengen", fears still prevail and all five states sought to maintain the controls initially imposed in May.

News of the three month extension was followed by the new European Travel Information and Authorisation System (ETIAS), which was unveiled on 16 November 2016.

The ETIAS scheme to tighten European borders, which requires a 5 euro application fee, gathers information on all individuals travelling visa-free to the European Union, to allow monitoring of irregular migration and also to enhance security checks.

The ETIAS will automatically process each application received via a website (or a mobile application) against other EU information systems with authorisation being granted in a matter of minutes. The authorisation, will be valid for a period of five years and for multiple travels.

The scheme is set to be managed by the European Border and Coast Guard in close cooperation with the competent authorities of the Member States and Europol. The ETIAS will also facilitate the crossing of the external border by visa-exempt third country nationals. Travellers will have a reliable early indication of entry into the Schengen area which is aimed at reducing the number of refusals of entry.

Of the new system, Frans Timmermans, First Vice-President **said**, "ETIAS will close an information gap by cross-checking visa exempt applicants' information against all our other systems. At the same time, the future ETIAS will be easy, quick, cheap and effective,"

Protecting the citizens of Europe and securing its borders are a main priority of the Commission this year, as set out by Jean-Claude Juncker in his State of Union Address, and in taking these decisive steps so quickly it appears the EU is doing everything in its power to ensure it fulfils its promise to the people of Europe.

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## Consumer Rights in Europe: an update

After the summer break the Consumer agenda has been hotting up in the European Parliament.

The IMCO and JURI Committees have been busy examining the raft of proposals presented by the Commission earlier in the year.

On 29 November MEPs in the JURI Committee approved new rules to enable EU citizens subscribing to services that give access to online music, games, films or sporting events, to enjoy this content while abroad in another EU country.

The provision of copyright-protected online content services is still largely characterised by territorial and exclusive licensing practices, which result in a lack of cross-border portability in the EU. This will change with this proposal. As long as Europeans have submitted proof of permanent residence in their member state of residence when subscribing to an online content service, they will have access to the proposed content whatever device they use and whatever member state they are travelling in, for whatever reason, be it professional, private or for studies.

To verify the member state of residence, strong verification measures will be put in place, such as random checks via the subscriber's IP address, but always guaranteeing user privacy and the proper application of relevant copyright rules. This provision is all the more advantageous as it excludes any tracing or geolocation and ensures the protection of personal data.

Committee members also voted to grant a mandate to the rapporteur Jean Marie Cavada to enter into negotiations with the Council with a view to reaching a compromise on the proposed law.

You can find the report on the proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market [here](#).

Again on 29 November, the IMCO Committee held a meeting to discuss the draft Report on the proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods. The meeting began with the rapporteur Pascal Arimont pointing out that the proposal was based on two main principles: the harmonisation of rules and the focus on small companies. In the MEPs interventions concerns emerged on the perceived reduction of consumers' rights that the proposal would bring about, and how that would not be easily understandable by citizens. Another issue that saw some disagreement among MEPs was the proposed scrapping of minor defects.

You can find the proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods [here](#).

and the report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods [here](#).

On the same day, the JURI and IMCO Committees in a joint meeting looked into the report on contracts for the supply of digital content. The report, jointly presented by two rapporteurs, Axel Voss (JURI) and Evelyne Gebhardt (IMCO) seeks to, amongst other things, clarify the scope of the proposed directive vis-à-vis the online sales of goods proposal, and address data protection concerns. During the discussion MEPs shared their views that further clarification of concepts and legal frameworks was fundamental for the application of the proposed Directive. Finally, concerns were raised on the proposal to consider the possibility to pay for online services with data as similar to paying with money.

You can find the proposal for a directive on certain aspects concerning contracts for the supply of digital content [here](#).

and the report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content [here](#).

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## Confirming the 2017 EU Budget

On 17 November 2016 the Council and European Parliament reached an agreement on the 2017 EU budget which strongly reflects the EU's main policy priorities. Total commitments are set at €157.88 billion and payments at €134.49 billion.

The budget coincides with the [European Semester Autumn Package](#) which sets out the EU's economic and social priorities, building on the guidance from President Juncker's 2016 State of the Union address and the latest economic data from the [Commission's Autumn 2016 Forecast](#).

"The strength of the 2017 EU budget lies in its focus on priority measures such as addressing migration, including by tackling its root causes, and encouraging investment as a way to help stimulate growth and create jobs. This maximises the budget's impact to the benefit of EU taxpayers, European citizens and companies. And it respects member states' continued efforts to consolidate their public finance", [said](#) Ivan Lesay, State secretary for finance of Slovakia and President of the Council.

The EU will be committing €5.91 billion to tackling the migration crisis and reinforcing security, meaning that approximately 11.3% more will be available for aiding member states with these issues and also allowing for greater security measures to be provided for than those previously in 2016. More funds will also be available in 2017 for the resettlement of refugees, the support for integration measures, the creation of reception centres and the returns of those who have no right to stay in member states.

The EU's commitment of €21.3 billion to boost economic growth and create new jobs is increased by around 12% on 2016, and this includes significant improved investment in areas such as the European fund for strategic investments (which raises by 25% to €2.7 billion) and the youth employment initiative (which receives a fiscal boost of €500.00 million).

The fiscal stimulus comes as a response to those who feel let down by the establishment, [said](#) Mr Pierre Moscovici, the EU's commissioner for Economic Affairs, who presented the new policy. The unveiling of the shift to a more expansionist economic outlook was couple with a 'pardon' for Spain and Portugal who were both reprimanded for breaching EU fiscal rules last summer, in a move which could be seen by the EU as an attempt to rally a united Europe for the tough year ahead which is likely to see the triggering of Article 50 and national elections in both Germany and France.

The budget may come at a bad time for Teresa May, as the UK's net contribution to the EU budget is set to rise by upwards of £700 million due to a drop in sterling, increasing tension with European partners who already have to make up a 1.7 billion gap from the UK this year.

The arrival of the budget has also stirred conversation among EU member states as they look to the future, and a post-Brexit Europe. Germany's deputy finance minister has stated this month that he does not believe that the EU's budget should automatically remain at its current level once the UK (one of the EU's largest net contributors) leaves the bloc.

How the EU will be able to tackle the future problem of a well financed, post-brexit Europe is a problem which looms on the horizon, but in the meantime it appears that the EU is putting its money where its mouth is in order to deliver a safer and more secure Europe for its citizens.

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## Proposal on business insolvency published by Commission

On Tuesday 22 November, the Commission finally published its long-awaited proposal on business insolvency, as foreseen by the Capital Markets Union initiative. The **proposal** presents a set of European rules on business insolvency aimed at promoting early restructuring to promote growth and protect jobs.

The proposed Directive focuses on three **key elements**:

1. Common principles on the use of early restructuring frameworks, which will help companies continue their activity and preserve jobs.
2. Rules to allow entrepreneurs to benefit from a second chance, as they will be fully discharged of their debt after a maximum period of 3 years. Currently, half of Europeans say they would not start a business because of fear of failure.
3. Targeted measures for Member States to increase the efficiency of insolvency, restructuring and discharge procedures. This will reduce the excessive length and costs of procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates of unpaid debts.

The initiative seeks to increase the opportunities for companies in financial difficulties to restructure early on to prevent bankruptcy and avoid laying off staff. It also aims to ensure entrepreneurs get a second chance at doing business after a bankruptcy. Together, this should lead to more effective and efficient insolvency procedures throughout the EU. This **fact sheet** provides background information and answers to potential FAQs.

Commissioner Vera Jourova said: "Every year in the EU, 200,000 firms go bankrupt; which results in 1.7 million job losses. This could often be avoided if we had more efficient insolvency and restructuring procedures. It is high time to give entrepreneurs a second chance to restart a business through a full discharge of their debts within a maximum three years."

The proposal will now be allocated to a European Parliament Committee, which will appoint a Rapporteur who will report on proceedings. Separately, a Council Working Party will also begin working on the dossier. The Law Societies will be closely monitoring the ongoing developments and reporting on them as they progress.

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## UK opts-in to Europol - for now...

The UK government has decided to opt-in to a new **regulation on Europol**, meaning that the country will remain part of the European law enforcement agency after May 2017.

Whilst the UK is permitted to opt-out of any European legislation on freedom, security and justice matters, in the UK's first major opt-in/out decision since the referendum on Britain's membership of the EU, the Home Office decided to **opt-in** to a new regulation on Europol, thereby continuing its membership of the agency after 1 May 2017, when the regulation comes into force, and most likely until Brexit.

Europol was **established** in 1998 in order to bring together criminal intelligence and share this between police and security forces across EU member states, as well as non-EU partners including Australia, Canada and the US. The agency deals with terrorism and international crime such as cybercrime, drug smuggling and people trafficking. Europol's officers however have no executive powers, for example to conduct investigations or make arrests.

Following the terrorist attacks in Paris last year and **reports** suggesting that there were 211 failed, foiled or

completed terrorist attacks last year in the EU, there have been calls for the agency's powers to be increased.

A new regulation on the agency was therefore passed on 11 May 2016 to enhance Europol's mandate. In particular, the regulation makes it easier for Europol to set up specialised units to respond immediately to emerging terrorist threats and other forms of serious and organised crime. Europol will also be able to exchange information on online terrorist propaganda with private entities, for instance Facebook, directly to speed up the process of removing such propaganda. Additionally, EU member states will be required to provide Europol with any data it needs and Europol will report annually to the Council, Commission and the European and national parliaments on the information provided by individual member states.

The UK has been a member of Europol since its creation however, **fearing** it would reduce the operational independence of UK policing and increase the obligation to share intelligence data, the UK initially did not sign up to the new regulation, meaning that the country's collaboration in Europol would have expired in May 2017.

Despite these concerns and the UK's proposed exit from the EU however, Policing Minister Brandon Lewis notified the UK Parliament on 14 November that the government intends to opt-in to the new regulation, stating that Europol "provides a valuable service to the UK and opting in would enable us to maintain our current access to the agency, until we leave the EU, helping keep the people of Britain safe".

The move follows **calls** by the UK's National Crime Agency to ensure that cross-border crime prevention measures are not jeopardised by the UK's proposed exit from the EU and warnings from, Rob Wainwright, the Director of Europol and a British national, that Brexit "has the potential to harm the UK's ability to fight terrorism and crime", if it means that the UK can no longer cooperate in Europol and other European resources.

It is perhaps unsurprising then that Lewis stated that "the government is exploring options for cooperation with Europol once the UK has left the EU".

The intention to opt-in will now be scrutinised by Parliament and, if it agrees to this, the government will then notify the Commission of its position.

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## Anti-dumping and anti-subsidy review

On Wednesday 9 November, the Commission adopted a proposal to change the EU's anti-dumping and anti-subsidy legislation.

Following a broad public consultation, the **proposal** adopted outlines a new method of calculating dumping on imports from countries where there are significant market distortions, or where the state has a pervasive influence on the economy.

The **purpose** of the proposals is to try and ensure that Europe's trade defence instruments (TDIs) are able to deal with current realities, such as overcapacities, in the international trading environment, whilst complying fully with the EU's obligations under the WTO's legal framework.

The **current approach** used to calculate dumping is a comparison of the export price of a product to the EU with the domestic prices or costs of the product in the exporting country. This will be kept with the addition of the new methodology alongside it which will be country-neutral. It will **apply equally** to all WTO members taking into account significant distortions in certain countries due to state influence on the economy. This will overcome the **problem** of domestic prices and costs not providing a proper basis from which to determine the comparison with the export price. Instead, when such distortions exist, other benchmarks reflecting undistorted costs of production and sale will be used.

The "analogue country" methodology will be reserved for non-market economy countries; WTO members will no longer be subject to this approach. The **criteria** used to identify distortions include: state policies and influence, the widespread presence of state-owned enterprises, discrimination in favour of domestic companies and the independence of the financial sector.

There will be a transition period where ongoing cases will remain subject to the existing laws but then the new anti-dumping methodology would apply to all cases initiated once the amended rules come into force.

EU Trade Commissioner Cecilia Malmstrom **said** "the proposal is important because it means that the EU is living up to its WTO commitments", noting the new method is country neutral and does not grant market economy status to any country, including China.

Beijing has **urged** Brussels to strictly fulfill its WTO obligation without any additional condition by due time.

The Chinese Commerce Ministry earlier cautioned that Brussels' new anti-dumping rules should not exceed the current standards under the WTO on market distortion, and should not become an excuse for enforcing anti-dumping measures that were against WTO rules. The ministry also expressed hope that Brussels would avoid sending the wrong signals on trade protectionism.

The Parliament and Council will now decide on the proposal through the ordinary legislative procedure which the LSBO will monitor closely and report on when the decision is announced.

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## Bleak forecast for European Environmental Policy?

In the middle of November 2016 politicians and diplomats from the EU, and around the world, arrived in Marrakesh with a simple aim: to discuss the Paris climate accord (the Paris Agreement) and to detail the controls needed to curb the industrial emissions responsible for heating the planet.

Instead, the Marrakech Climate Change Conference found itself reeling in the aftershock of a seismic presidential election in the United States, the outcome of which has seen the rise to office of a man who had previously threatened to withdraw from the Paris Agreement and who had also once called climate change a hoax created by the Chinese.

In the face of the chasmal problem before it, negotiators and diplomats turned from talking of rising seas and climbing temperatures toward how it could be possible to reprimand the United States if Mr Trump makes good on his threats to leave the Paris Agreement.

Mexico has advocated the possibility of a carbon-pollution tax on imports of American-made goods; however, Germany and the European Commission have already rejected calls by former French President Nicolas Sarkozy to impose this type of tax, should President-elect Donald Trump quit the global agreement for fighting climate change.

Speaking after the Marrakesh Conference, German Environment Minister Barbara Hendricks stated that Germany and the EU have decided to opt for emissions trading, a stance which was also confirmed by Climate Commissioner Miguel Arias Cañete.

"We have always said we didn't like carbon taxes – both before the US election and after. The European Commission is not thinking of any proposal on a carbon tax," Mr Cañete **told reporters**.

The European Union penalises greenhouse gases via a market which has traded at, roughly this month, 5.4 euros (\$5.79) a tonne of carbon dioxide emitted, as part of efforts to limit emissions blamed for stoking heat waves, droughts, storms and rising sea.

The EU's reluctance to confirm any concerted action in the event of the US leaving the Paris Agreement could be seen as another blow to environmentalists who are looking for the EU to step up to the plate in the wake of the Dieselgate Scandal. Further bad news came to European environmentalists this month in the form of a **report** released confirming that a similar emissions scandal looms in the legislation on tractors and trucks which is not being addressed, and the unveiling of a Winter Package which has been **criticised** by ten of Europe's biggest companies for perceived weaknesses of the EU's renewable energy plan.

Despite all this, and whilst the implications of the US Presidential Election rumbles on for politicians and diplomats, the mood in the business community is said to be considerably calmer.

In his encouraging speech at the Marrakesh climate conference on 16 November 2016, United States Secretary of State John Kerry sought to reassure the international community that the US could still meet the objectives it agreed to in Paris.

"Today our emissions are being driven down because market-based forces are taking hold all over the world," Kerry **said**. "Most business people have come to understand: investing in clean energy simply makes good economic sense," he added, even if the private sector is "demanding even stronger signals" from governments.

While then the wait may continue for EU and global officials to maintain their environmental outlook, in line with commitments made in the Paris Agreement, the private sector appears to be the current guardian for an area of immense public importance.



## Professional Practice

### Nine Countries told to remove Obstacles to the Freedom of Services

The Commission has urged nine Member States to remove excessive and unjustified obstacles to cross-border activities.

As part of its **November infringements' package**, nine countries, including Belgium, Germany and Italy, were requested by the European Commission to remove excessive and unjustified obstacles to the provision of services, which are contrary to the **Services Directive**.

The objective of the Directive is to realise the full potential of services markets in Europe by removing legal and administrative barriers to trade.

Contrary to the Directive however, Spain was found to have minimum compulsory tariffs and multidisciplinary restrictions for the legal profession of "Procuradores", ie land and business registrars and legal representatives. Likewise, action has been taken against Germany for its minimum and maximum tariffs for architects and engineers and against Denmark for its authorisation/compulsory certification requirement for certain construction services.

Cyprus, Germany and Hungary have been referred to the European Court of Justice after failing to remove their respective barriers to the provision of services despite receiving a formal notice followed by a formal request to comply with EU law (otherwise known as a 'reasoned opinion') from the Commission.

The nine Member States now have two months to notify the Commission of measures taken to remedy the situation.

### Reforming Professions - Calls for proportional Regulation

The High Level Working Group on Competitiveness and Growth has been asked to comment of the Commission's proposals to ensure that the regulation of professions across the EU is proportionate.

With 22% of the EU's labour force working in a regulated profession, of which there are 5,500 in the EU, the European Commission is looking to modernise professional regulation to promote mobility of labour between Member States and competition as part of its **Single Market Strategy**.

The Commission has proposed introducing a **proportionality test** in the form of either a directive or a communication, which would set out minimum criteria to be used by Member States to analyse the proportionality of any new regulations for professions to ensure that no new disproportionate measures are adopted.

Additionally, the Commission is due to publish "**Guidance on reform needs in regulations of professional services**" by the end of the year. This guidance will assist Member States with addressing any regulations that impede competition or create unnecessary obstacles to the mobility of professionals.

The proposals come following the completion of a public consultation this year on the proportionality of professional regulation (which the Law Societies Joint Brussels Office responded to and the results of which will be published shortly) and a 'mutual evaluation and transparency' exercise by Member States, as required by **Directive 2013/55/EU**, which amended **Directive 2005/36/EC** on the recognition of professional qualifications. As part of the latter exercise, 23 Member States, including the **UK**, reviewed their legislation and policies on professional regulation and set out actions that need to be taken to address unfit regulation.

During these assessments, it was found that the level of restrictions imposed on professions varies significantly between Member States and that there are many regulations which were introduced decades ago and are therefore no longer relevant. It was also commented that some countries had not effectively

assessed the proportionality of regulations during the exercise, for example the need to increase business reliability was quoted as a justification for the regulation of clothes launderers and the risk of wrist injury and small explosions was given to justify the regulation of watchmakers.

In line with its role to monitor single market integration, provide guidance on competitiveness and growth and promote the exchange of information and best practice, the Presidency of the Council **asked** the **High Level Working Group on Competitiveness and Growth** (HLG), which is composed of two high level representatives per Member State, for their assistance with the proposed modernisation of professional regulation.

In particular, the HLG was asked for its views on the work of the Commission, how it can support Member States to apply the guidance on reform needs and how Ministers can be supported to oversee regulations of professional services.

The Commission should take the HLG's views into account when pursuing its modernisation of professional regulation.

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## The Brussels Office of the three Law Societies successful hosting of the "EEA and Swiss Arrangements" roundtable event - 1 December

The UK Law Societies held a roundtable event on EEA and Swiss arrangements with panellists which included:

- *Sven Norberg*, Senior Adviser, KREAB, one of the negotiators of the EEA Treaty
- *Carsten Zatschler*, Director Legal and Executive Affairs, EFTA Surveillance Authority
- *Georges Baur*, Assistant Secretary General, EFTA
- *Hannes Boner*, General Counsel, Sappi Europe (SEU)

The roundtable provided an opportunity to explore the workings of the EEA and the Swiss arrangements with a set of highly distinguished panellists with the aim of outlining the operation of these frameworks and highlighting some crucial differences between them and the EU arrangements.

In the light of recent political developments in the UK, and current debates surrounding the UK's ability to leave the EEA, there has been an increasing appetite to learn more about alternative European models. The event provided attendees with expert insight into these issues and also highlighted areas of future concern, in our future political climate.

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## Exciting opportunity in Brussels for trainee solicitors at The Brussels Office of the three Law Societies

The Brussels Office of the three Law Societies (England & Wales, Scotland and Northern Ireland) acts as the voice of the Solicitors' profession in Europe. Situated in the heart of the EU district we are well placed to represent the interests and views of the legal profession to key decision makers and legislators.

We currently have offered two trainee solicitors from the UK a unique opportunity to undertake a six-month secondment in the Brussels Office commencing in March 2017 and we are happy to confirm that we still welcome applications from UK Trainees for our March or September 2017 intake.

There has never been a better time to be in Brussels; you will be at the centre of the biggest political change of this century, which has momentous constitutional and legal implications.

As a trainee in the office you will assist the Brussels team in actively monitoring EU legal developments that range from competition law to criminal justice, public procurement to private international law. Specific tasks will include: preparing and writing the Brussels Agenda as well as drafting legislative updates highlighting developments in the corporate client and private client areas. You will also attend European Parliament

hearings and high level conferences offering the opportunity to develop contacts with MEPs, key Commission officials and UK Government departments.

Trainees interested in applying will need to provide a letter from their firm/employer confirming that it will continue to pay their salary during the secondment.

Trainees are invited to send their application, which should comprise a CV and covering letter and confirmation from your firm/employer of consent to the secondment to Antonella Verde, [antonella.verde@lawsociety.org.uk](mailto:antonella.verde@lawsociety.org.uk).

If you require an information note or would like to discuss the secondment, please contact [antonella.verde@lawsociety.org.uk](mailto:antonella.verde@lawsociety.org.uk).

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## The Law Society of Northern Ireland hosted Sports Law Conference 2016

Law Society House in Belfast was the venue for the annual Sports Law Conference 2016.

Now in its fifth year the conference has gone from strength to strength with more members from the legal, medical, sporting and academic professions attending the conference.

This year the theme of the conference was Good Governance and Equality and attendees had an opportunity to hear from speakers including:

- Keith McGarry, SportsLaw NI and Conn & Fenton Solicitors;
- Michael McKillop, Paralympic gold medallist;
- Erin Stephens, Principal In-House Solicitor, Sport England;
- Andrew Nixon, Head of Sport, Sheridans, London;
- Jonny Madill, Sheridans, London;
- Feargal Logan, Logan & Corry Solicitors and Tyrone Under 21 GAA manager
- Professor Jack Anderson, Court of Arbitration for Sport,
- Angela Platt, Chairperson Female Sports Forum
- Andrew Johnston, Managing Director, NI Football League.

The Conference which is organised by the Law Society of Northern Ireland in association with the Northern Ireland Sports Forum provided attendees with a comprehensive update on Sports Law.

In addition attendees heard from prominent speakers in the Sports Law field, with contributions from academic and judiciary who took the opportunity to provide an overview of the challenges lawyers face in advising their clients - whether they be governing bodies, clubs, managers, coaches, players or officials.

Topics discussed at the conference included transparency, diversity, integrity, leadership and decision-making, financial probity and the future of the sports industry in a digital world.

The Conference drew on the expertise of an experienced panel for questions and discussion.

This year's Conference was of particular interest to Governing Bodies, their members and advisors, as issues of good governance and equality in sport were discussed.

The Law Society thanks NI Sport Forum for their continuing support and partnership of the conference.

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## The Law Society of Northern Ireland raises £15,000 in aid of CLIC Sargent

A packed year of fundraising activities by members of the Law Society of Northern Ireland has raised more than £15,000 for CLIC Sargent, the cancer charity supporting children and young people.

The Society, which represents solicitors throughout Northern Ireland, has over the course of the last year been supporting and fundraising on behalf of CLIC Sargent its chosen charity of the year.

Perhaps the most successful fundraising event was the CLIC-athon challenge in June 2016, which saw members of the legal profession in Northern Ireland battle it out in front of the High Court on 'spin bikes' to

secure the furthest distances traveled in an hour.

Twenty five teams of solicitors, barristers and members of the Judiciary including Lord Chief Justice, Sir Declan Morgan gave their time and energy to raise money for CLIC Sargent.

Other fundraising activities have included a golf day and charity raffles all of which have contributed to the final amount raised.

Commenting the President of the Law Society of Northern Ireland, John Guerin said:

"We are delighted to have supported CLIC Sargent and to have raised over £15,000 which will go towards supporting the invaluable work which CLIC Sargent provide in support of children and young people with cancer. The Society is grateful to the members of the legal profession and judiciary who been so supportive".

Nadine Campbell, Fundraising Manager with CLIC Sargent said:

"We would like to thank the Law Society of Northern Ireland and its President John Guerin for their commitment and dedication in raising this fantastic amount of money in support for CLIC Sargent. The money raised can support four families to stay in our Homes for four months".

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## NEW - Booklet of Criminal Offences in Northern Ireland published



The Law Society of Northern Ireland's, Library and information Centre is delighted to publish:

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## Graham Matthews nominated to be next Law Society of Scotland President

Graham Matthews has been nominated to become president of the Law Society of Scotland next year.

Current vice president, Graham Matthews was the sole nominee for the post and will succeed current president Eilidh Wiseman in May 2017.

Mr Matthews, a partner at north east law firm Peterkins, has served as the Council member representing Aberdeenshire solicitors for over 10 years and has been a member of a number of committees including the Society's Professional Practice and Regulatory Committees.

There were two nominations for vice president on Friday 25 November. The Society's Council members will vote for Alison Attack or John Mulholland to take up the role of vice president.

Law Society President Eilidh Wiseman, said: "I'm very pleased to congratulate Graham on his nomination today to take up the role of president and Alison and John on their nominations.

"Graham has been terrific to work with as vice president and I know he will bring his experience, energy and enthusiasm to the presidency next year.

"Graham is one of our longest serving Council members. From his previous roles as convener of the Professional Practice Committee and member of the Regulatory Committee, he has a deep understanding of the high professional standards which solicitors are expected to attain to ensure they provide the advice and service their clients need.

"With long standing experience of the high street sector, Graham also understands the issues facing solicitors across Scotland. As vice-president, he has been touring round local faculties and listening to our members.

In these uncertain political and economic times, Scottish solicitors need a powerful voice to represent their interests. I know Graham will be that powerful voice as president next year."

The new vice president-elect will be confirmed at the Society's December Council meeting.

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## Law Society of Scotland launches Christmas charity campaign - 24 November

The Law Society of Scotland has launched its Christmas campaign for new charity, the Lawscot Foundation, on Thursday 24 November.

For every #Baublefest donation made through the Lawscot Foundation Just Giving website or at the Law Society's Edinburgh office, a new bauble featuring the names of generous individuals or organisations will be added to the Law Society's Christmas tree

The Foundation was established earlier this year, following the Law Society's review of fair access and potential barriers to entering the legal profession in 2014. It will offer financial assistance and mentoring support to students from less advantaged backgrounds to help them as they study at university for a law degree and the Diploma in Professional Legal Practice.

Heather McKendrick, head of careers and outreach at the Law Society, said: "Visitors to the Law Society's office may be taken aback by our rather bare looking Christmas tree but we hope that won't last too long! We're asking people to help us to support the next generation of Scottish solicitors by sponsoring a bauble on our Christmas tree. The money donated will go towards funding the legal education of students from disadvantaged backgrounds.

"We want to offer bursaries to as many people as possible within the first year of launching our charity. There has been a great deal of enthusiasm within the profession and we hope that our members will continue to help us ensure there is a lasting legacy for the next generation of Scottish solicitors."

Get the bauble rolling by visiting our [website](#) and tweeting using #Baublefest @LawscotCharity

Find out more about the [Lawscot Foundation](#) or follow us on Twitter @LawscotCharity Like us on Facebook Lawscot Foundation.

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## Development opportunity for experienced solicitors from the Law Society of Scotland

Experienced members of the legal profession are being invited to sign up as mentors to offer guidance and support to trainee solicitors.

Our TCPD mentoring programme is currently recruiting experienced solicitors to take part, with free training available to those who sign up as mentors.

Mentoring a trainee is the opportunity to impart professional wisdom to maximise someone else's learning and development at the start of their legal career. As well as a chance to give something back to the industry, solicitors who participate as mentors have a chance to hone skills in certain areas of their own professional lives.

One former mentor said that the scheme "has allowed me to develop new skills and fresh thinking about my own career as well as helping other solicitors".

Being a mentor to a trainee undergoing the TCPD programme is a chance to provide someone with a support that perhaps you would have appreciated whilst at the same stage.

Independent and objective guidance from a more senior solicitor offers significant benefits to the trainee being mentored. Key areas of development that mentors will provide to a mentee are:

Taking on feedback constructively, particularly on writing and drafting skills

Developing good professional judgement by blending knowledge, skills and ethics

In turn, mentors will cultivate crucial skills in:

Self-awareness and awareness of impact on others

Developing open and trusting relationships

Collaborating with others with a patient and positive attitude

Facilitating and championing the learning and development of others

The TCPD mentoring programme involves a mentor working with a trainee over 12 months. Over this period, the mentor will review written work completed by the trainee in relation to their modules.

To compliment this, mentor and mentee are recommended to have three one-hour face-to-face meetings spread across the year. The total time commitment across the 12 months would be a maximum of 12 hours.

At the end of the year, a mentor will complete a written report for the Law Society commenting on the mentee's progress.

The next mentor training day is Wednesday 14th December from 10am-4pm at Atria One, Morrison Street, Edinburgh.

If you would like to register your interest in becoming a mentor, please complete this short questionnaire and return it to [updatetcpd@lawscot.org.uk](mailto:updatetcpd@lawscot.org.uk).

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## Scottish pupils to debate banning referendums in national competition by Law Society of Scotland

Pupils from schools across Scotland are preparing to debate the pros and cons of holding referendums when they take to the floor for the opening rounds of the Law Society of Scotland's annual debating tournament.

The 2016/17 Donald Dewar Memorial Debating Tournament will see 128 teams from 85 Scottish schools put their powers of persuasion to the test when they debate the motion 'This House would ban referendums'. Now in its 17th year, the competition is the biggest school debating tournament in Scotland and 10 schools will be competing for the first time this year.

Heather McKendrick, head of careers and outreach at the Law Society, said: "Young people in Scotland have shown great democratic awareness and interest over the past few years, particularly during the Scottish independence and EU referendums. We've set our teams a real challenge by asking about the benefits and drawbacks of holding referendums and I'm looking forward to hearing the arguments they put forward.

"Debating can be hugely rewarding for the pupils taking part. As well as being good fun, it helps young people gain confidence, find their voice and learn skills that could help to open up future opportunities. It's great to see so many schools entering teams in tournament and we're delighted to have 14 schools taking part for the first time.

"Last year's tournament came to exciting finish in the Scottish Parliament's debating chamber in June, with outstanding performances from some very talented young people as they debated the right to be forgotten online – I'm sure that this year's competitors will prove to be just as impressive."

The opening rounds take place on 17, 24 and 29 November with further heats early next year and semi-finals in the spring. The winning team will win £1,000 for their school from the Law Society of Scotland and the top two teams will share educational books to the value of £500 donated by the event sponsor, Hodder Gibson.

Further information about judging in the tournament can be found at our [website](#).

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## Consolidating hate crime legislation would bring clarity report the Law Society of Scotland- 9 November

In advance of a Scottish Parliament debate on eradicating hate crime and prejudice, the Law Society of Scotland has said that legislation on hate crime offences and offences aggravated by prejudice should be consolidated.

Michael Clancy, Director of Law Reform at the Law Society of Scotland, said: "Tackling hate crimes taking place in communities across Scotland is essential and it is important to ensure that there is clarity in our law to be able to identify these types of crimes.

"There is a significant amount of legislation passed by both the Scottish and UK Parliaments aimed at preventing and eradicating hate crime and prejudice and we think there would be considerable benefit in bringing them together within a single piece of legislation which would provide clarity, assist with easy identification of the relevant offences and protections afforded, and improve access to justice."

The Law Society has also said that evaluation of the impact of existing hate crime legislation would be welcome.

Mr Clancy said: "Currently there are several pieces of legislation on prejudice relating to race, religion, disability, sexual orientation and transgender identity. However there is no statutory aggravation for offences which may be aggravated by prejudice on the grounds of age or gender. In addition to consolidating offences, any review of the law could consider the option of having one piece of legislation on aggravated offences and could also include aspects that aren't currently covered.

"Consolidation would assist with post-legislative scrutiny. It would be useful to know where cases were reported and prosecuted under the legislation, and also if alternative charges were used instead, under the common law, as this would give us an indication of how the legislation is being used in practice. It would be useful to know how many cases have been successful and the decisions taken by the courts on whether the accused was sentenced to serve a prison sentence, put on probation, given a community payback order or a fine, or any other disposals."

The Law Society of Scotland's comments on Working Together to Prevent and Eradicate Hate Crime and Prejudice is available to read on the website.

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## 30 key projects highlighted in Law Society of Scotland 2016/17 annual plan

The Law Society of Scotland has published its annual plan for 2016/17 featuring 30 key projects aimed at delivering year two of the Law Society's five year strategy, Leading Legal Excellence. The plan outlines projects within each of the Law Society's five strategic goals to assure, serve, excel, influence and grow, including:

Introducing new services for members, concentrating on areas of business support, career growth, professional support and wellbeing.

Providing a leading voice as the UK's withdrawal from the European Union moves forward.

Launching the work of a new public policy committee which will focus on proactive policy development as well as responding to policy proposals of most relevance to the legal sector, including plans for new British Bill of Rights.

Continuing to press for modern and flexible legislation which protects the public and meets the needs of a modern legal profession.

Preparing for the launch of new membership categories in 2017/18

Lorna Jack, Chief Executive of the Law Society of Scotland, said: "I am excited to share our annual plan and the projects which will set us up to achieve year two of our ambitious five year strategy, Leading Legal Excellence. Each of the projects will be delivered by our skilled and committed staff team with support and expert guidance from almost 500 volunteers from across the legal profession and other sectors.

"The annual plan helps to explain how we will assure the public, serve our members, excel as an organisation, influence society around us and grow our membership and income. We are focused on being a world-class professional body and we want our programme of support to meet the ambitions of our members working within and outwith the legal sector, no matter if they are based in Scotland, elsewhere in the UK or overseas."

The projects for 2016/17 also include considering alternative routes to qualification as a Scottish solicitor and seeking to grow the numbers of law and diploma students from low income backgrounds by issuing the first bursaries from the Lawscot Foundation, the Society's new registered charity.

Ms Jack added: "Following our review of fair access and potential barriers to entering the profession, we launched the Lawscot Foundation earlier this year. The Foundation will offer financial assistance and mentoring support to students from less advantaged backgrounds to help them as they study at university for a law degree or the Diploma in Professional Legal Practice. I'm delighted that we will be able to offer bursaries within the first year of launching our charity. There has been a great deal of enthusiasm within the profession and we hope that our members will continue to help us ensure there is a lasting legacy for the next generation of Scottish solicitors."

The Law Society's full annual plan of activity and objectives is available on the [website](#).

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## Law Society of Scotland launches Brexit seminar series - 3 November

The Law Society hosted the first of a series of Brexit-themed seminars on Thursday 3 November with an expert panel from the Scottish legal profession and academic community.

Thursday's sold out event combined keynote speeches and roundtable discussions on broad constitutional issues including constitutional reform, Scotland's place in Brexit, Article 50, implications of 'hard' or 'soft' Brexit, independence and the Scotland Act. The panel of speakers includes Christine O'Neill, Chair at Brodies LLP; Professor Stephen Tierney, Professor of Constitutional Theory and Director of the Edinburgh Centre for Constitutional Law; and Dr Andrew Tickell, Lecturer of Law at Glasgow Caledonian University.

The first half of the evening was live broadcast on the Society's [Facebook page](#) and the recording available shortly afterwards for those unable to attend.

Eilidh Wiseman, President of the Law Society of Scotland, said: "We want to provide a leading voice as the UK's withdrawal from the European Union moves forward and ensure the interests of our members and their clients are heard as decisions are taken on a new relationship with Europe.

"The vote to leave the EU raises a number of legal issues and questions that are important for us all to consider – whether as a solicitor or as a client in Scotland, the UK and across the EU. 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."

In addition to hosting the series of seminars, the Law Society has published a discussion paper on the issues surrounding EU membership and has been responding to consultations from the UK and Scottish Parliaments. There is also a [Brexit survey for Law Society members](#) which, together with outcomes from the series of events, will inform a set of proposals for the UK Government's negotiations.

For more information about the Law Society's international work, visit the Law Society [website](#).

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## Law Society of England and Wales report on The Investigatory Powers Bill and legal professional privilege - 7 November

Alexandra Cardenas discusses the third reading of the Investigatory Powers Bill and the strengthening of legal professional privilege.

This week, the High Court ruled that the government does not have power to trigger article 50 without parliamentary approval and a vote from MPs. The government said that it would appeal this decision. Some commentators have suggested that the prime minister may be forced to call a general election next year to ensure she has enough support in parliament if the government loses this appeal.

In parliament, the third reading of the Investigatory Powers Bill was approved and the amendments tabled by the government to strengthen protection of legal professional privilege were accepted by Labour, Lib Dem and crossbench peers. The changes give greater protection to legally privileged material accidentally caught in a legitimate search, ensuring its retention is subject to a public interest test.

Over the last year, we have worked closely with the government to ensure that adequate safeguards to legal professional privilege were included in the bill. During third reading, the Law Society was praised for the 'invaluable work' done on behalf of lawyers and their clients by both Baroness Hamwee and Lord Pannick.

The bill is now back in the House of Commons for consideration of Lords amendments, as part of the so-called 'ping pong' stage. The bill is likely to receive royal assent over the next few weeks, certainly before the end of the year.

Oral justice questions also took place this week. The key topics discussed were the review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), court reform, and human rights and the armed forces. There was also a specific question on legal aid deserts. The public affairs team briefed a number of MPs ahead of the session and our legal aid deserts campaign was mentioned by courts and justice minister, Sir Oliver Heald MP.

The House of Commons elected two new members of the Justice Select Committee, Keith Vaz MP (Lab) and Kate Green MP (Lab) in replacement of Andy McDonald MP and Dr Rupa Huq MP who were appointed shadow secretary of state for transport and shadow home office minister respectively after the shadow cabinet reshuffle.

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## Pro bono initiatives boost access to justice report the Law Society of England and Wales - 7 November

The solicitor profession's contribution to access to justice will be boosted from 7 November 2016, with the launch of the Law Society's Pro Bono Charter and Manual. Working pro bono publico - for the public good - has been fundamental to the profession for generations, and these two new tools will help amplify the enormous social contribution that is made every year.

By signing the Pro Bono Charter, law firms and other organisations commit to improve access to justice for those who cannot afford to pay for legal services or access legal aid. The Pro Bono Manual provides comprehensive practical support for solicitors in-house and in private practice, as well as firms, to develop sustainable, reliable and effective pro bono programmes.

'The Pro Bono Charter offers a framework to unite the solicitor profession's pro bono strategies, policies and learning and further enhance the impact of the pro bono work carried out by our members,' said president of the Law Society Robert Bourne.

'Solicitors do a huge amount of unsung pro bono work providing voluntary, free legal services to those who cannot afford them. This ranges from larger firms supporting law centres or providing pro bono legal advice to charities, through to smaller firms giving free advice to clients who are unable to pay.

'Pro bono must never be viewed as a substitute for a properly funded legal aid system. The Law Society will continue to underscore the importance of appropriate levels of investment in the justice system, which is a key public service like the NHS and education, in order to protect access to justice for all. To this end we also promote public legal education, a regulatory objective.'

Membership of the Charter will also give signatories access to a range of resources and training in secondary specialisation through a three-month trial membership of LawWorks, the Solicitors' Pro Bono Group.

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### ONGOING CONSULTATIONS

**Internal Market:**

**Public Consultation on the mid-term evaluation of the Connecting Europe Facility (CEF)**

28.11.2016 – 27.02.2017

**Competition:**

**Consultation on the Code of Best Practice on the conduct of State aid control proceedings**

25.11.2016 – 25.02.2017

**Humanitarian Aid:**

**Public Consultation on the Interim Evaluation of the Union Civil Protection Mechanism**

24.11.2016 – 23.02.2017

**Public Health:**

**Mid-term evaluation of the 3rd Health Programme 2014-2020**

23.11.2016 – 23.02.2017

**Trade:**

**Deep and Comprehensive Free Trade Agreement with Tunisia**

21.11.2016 – 22.02.2017

**Taxation:**

**Public consultation - Excise duties applied to manufactured tobacco**

17.11.2016 – 16.02.2017

**Taxation:**

**Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes**

10.11.2016 – 16.02.2017

**Public consultation on the functioning of mutual assistance between EU Member States for the recovery of taxes**

30/11/2016 to 08/03/2017

**COMING INTO FORCE THIS MONTH**

*Immigration*

**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**

**COUNCIL IMPLEMENTING DECISION (EU) 2016/1989 of 11 November 2016 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk**

**REGULATION (EU) 2016/1624 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC**

*Regulation/ Access to Services*

**COMMISSION DELEGATED REGULATION (EU) 2016/2022 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards concerning the information for registration of third-country firms and the format of information to be provided to the clients**

## CASE LAW CORNER

### Environmental and Access to documents

#### Cases C-673/13 P and C-442/14 - *Commission v Stichting Greenpeace*

*Nederland and PAN Europe and Bayer CropScience and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden* respectively on 23 November 2016

- The Court has stated that when a person requests access to environmental documents, the concept of 'information on emissions into the environment' must be interpreted as covering not only information on emissions as such (that is to say information relating to the nature, composition, quantity, date and place of those emissions) but also information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, as well as the data relating to the medium or long-term effects of those emissions on the environment.

### Criminal

#### Case C-554/14 - *Atanas Ognyanov v Sofiyska gradska prokuratura* on 8 November 2016

- The Court concludes that EU law precludes a national rule that permits the executing Member State to grant to the sentenced person a reduction in sentence by reason of work carried out in the period of his detention in the issuing Member State, although no such reduction in sentence was granted by the competent authorities of the issuing State, in accordance with the law of that State

### Banking

#### Case C-41/15 - *Gerard Dowling and Others v Minister for Finance* on 8 November 2016

- The Court concludes that EU Law does not preclude an increase in the share capital of a bank without the agreement of the general meeting of shareholders in a situation where there is a serious disturbance of the economy and financial system of a Member State, with the objective of preventing a systemic risk and ensuring the financial stability of the EU.
- Although there is a clear public interest in ensuring, throughout the EU, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by the EU Treaties.

### Consumer

#### Case C-42/15 - *Home Credit Slovakia, a.s. v Klára Bíróová* on 9 November 2016

- The Court holds that failure by a lender to include in the credit agreement all the information which, under the EU's Directive on Credit Agreements for Consumers, must necessarily be included in such an agreement may be penalised by Member States by forfeiture of entitlement to interest and charges where failure to provide such information may compromise the ability of a consumer to assess the extent of his liability.

### Employment/Discrimination

#### Case C-258/15 - *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias* on 15 November 2016

- The Court held that the Directive for Equal Treatment in Employment and Occupation does not preclude national legislation that candidates for police force posts responsible for performing operational duties must be under 35 years of age.

### Access to Services

#### Case C-316/15 - *Timothy Martin Hemming, trading as 'Simply Pleasure Ltd' and Others v Westminster City Council* on 16 November 2016

- Under the Services Directive, applicants for a licence cannot be required to pay costs relating to the management and enforcement of the licencing regime when submitting their application.

The aim of facilitating access to service activities would not be served by such a requirement, even if the payment is refundable if the application is refused.

### Non-discrimination

**Case C-443/15** - *David L. Parris v Trinity College Dublin Higher Education Authority Department of Public Expenditure and Reform Department of Education and Skills* on 24 November 2016

- The Court concludes that a rule of a pension scheme, which makes entitlement to a survivor's pension conditional on the member having married or entered into a civil partnership before the age of 60, does not constitute discrimination on the grounds of sexual orientation, age, or as a combined effect of both.

### Upcoming Court decisions in December

#### Free Movement of Services and Gibraltar

**Case C-591/15** - *The Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty's Revenue and Customs, Her Majesty's Treasury Advocate General Szpunar* on 15 December 2016

Questions referred by High Court of Justice Queen's Bench Division:

For the purposes of Article 56 TFEU and in the light of the constitutional relationship between Gibraltar and the United Kingdom:

- Are Gibraltar and the UK to be treated as if they were part of a single Member State for the purposes of EU law and so that Article 56 TFEU does not apply, save to the extent that it can apply to an internal measure? Alternatively,
- Having regard to Article 355(3) TFEU, does Gibraltar have the constitutional status of a separate territory to the UK within the EU such that the provision of services between Gibraltar and the UK is to be treated as intra-EU trade for the purposes of Article 56 TFEU? Alternatively,
- Is Gibraltar to be treated as a third country or territory with the effect that EU law is only engaged in respect of trade between the two in circumstances where EU law has effect between a Member State and a non-Member State? Alternatively,
- Is the constitutional relationship between Gibraltar and the UK to be treated in some other way for the purposes of Article 56 TFEU?
- Do national measures of taxation that have features such as those found in the New Tax Regime constitute a restriction on the right to the free movement of services for the purposes of Article 56 TFEU?
- If so, are the aims, which the referring Court has found domestic measures (such as the New Tax Regime) to pursue, legitimate aims, which are capable of justifying the restriction on the right to free movement of services under Article 56 TFEU?

### Employment

**Case C-201/15** - *Anonimi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ipourgos Ergasias, Kinonikis Asfalisis kai Kinonikis Allilengis* on 21 December 2016

Questions referred by Greek Court:

- Is a national provision, such as Article 5(3) of Law No 1387/1983, which lays down as a condition in order for collective redundancies to be effected in a specific undertaking that the administrative authorities must authorise the redundancies in question on the basis of criteria as to (a) the conditions in the labour market, (b) the situation of the undertaking and (c) the interests of the national economy compatible with Directive 98/59/EC (1) in particular and, more generally, Articles 49 TFEU and 63 TFEU?
- If the answer to the first question is in the negative, is a national provision with the aforementioned content compatible with Directive 98/59/EC in particular and, more generally, Articles 49 TFEU and 63 TFEU if there are serious social reasons, such as an acute economic crisis and very high unemployment?

### Non-Discrimination

**Case C-395/15** - *Mohamed Daouidi v Bootes Plus S.L.* on 1 December 2016

Questions referred by the Spanish Court:

- Must the general prohibition of discrimination affirmed in Article 21.1 of the Charter of

Fundamental Rights of the European Union (1) be interpreted as including, within the ambit of its prohibition and protection, the decision of an employer to dismiss a worker, previously well regarded professionally, merely because of his finding himself in a situation of temporary incapacity for work — of uncertain duration — as a result of an accident at work, when he was receiving health assistance and financial benefits from Social Security?

- Must Article 30 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the protection that must be afforded a worker who has been the subject of a manifestly arbitrary and groundless dismissal must be the protection provided for in national legislation for every dismissal which infringes a fundamental right?
- Would a decision of an employer to dismiss a worker previously well regarded professionally merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, fall within the ambit and/or protection of Articles 3, 15, 31, 34(1) and 35(1) of the Charter of Fundamental Rights of the European Union (or any one or more of them)?
- If the three foregoing questions (or any of them) are answered in the affirmative and the decision to dismiss the worker, previously professionally well regarded, merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, is to be interpreted as falling within the ambit and/or protection of one or more articles of the Charter of Fundamental Rights of the European Union, may those articles be applied by the national court in order to settle a dispute between private individuals, either on the view that — depending on whether a 'right' or 'principle' is at issue — that they enjoy horizontal effect or by virtue of application of the 'principle that national law is to be interpreted in conformity with an EU directive'?

If the four foregoing questions should be answered in the negative, a fourth question is referred:

- Would the decision of an employer to dismiss a worker, previously well regarded professionally, merely because he was subject to temporary incapacity — of uncertain duration — by reason of an accident at work, be caught by the term 'direct discrimination ... on grounds of disability' as one of the grounds of discrimination envisaged in Articles 1, 2 and 3 of Directive 2000/78 (2)?

### Consumer Law

**Case C-119/15** - *Biuro podróży 'Partner' Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów* on 21 December 2016

Questions referred by Polish Court:

- In the light of Articles 6(1) and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (1), in conjunction with Articles 1 and 2 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (2), can the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in the register of unlawful standard contract terms be regarded, in relation to another undertaking which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act which, under national law, constitutes a practice which harms the collective interests of consumers and for that reason forms the basis for imposing a fine in national administrative proceedings?
- In the light of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, is a court of second instance, against the judgment of which on appeal it is possible to bring an appeal on a point of law, as provided for in the Polish Code of Civil Procedure, a court or tribunal against whose decisions there is no judicial remedy under national law, or is the Sąd Najwyższy (Polish Supreme Court), which has jurisdiction to hear appeals on a point of law, such a court?

### Non-Discrimination

**Case C-401/15** - *Noémie Depesme, Saïd Kerrou v Ministre de l'Enseignement supérieur et de la recherche* on 15 December 2016

Questions referred from Luxembourgian court:

- In order properly to meet the requirements of non-discrimination under Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 (1) on freedom of movement for workers within the Union, together with Article 45(2) TFEU, when taking into account the actual degree of attachment of a non-resident student, who has applied for financial aid for higher-education studies, with the society and with the labour market of Luxembourg, the Member State in which a frontier worker has been employed or has carried out his activity in the conditions referred to in Article 2 *bis* of the Law of 22 June 2000 on State financial aid for higher-education studies, as added by the Law of 19 July 2013 in direct consequence of the judgment of the Court of Justice of the European Union of 20 June 2013 (Case C-20/12) (2),
- should the requirement that the student be the 'child' of that frontier worker be taken to mean that the student must be the frontier worker's 'direct descendant in the first degree whose relationship with his parent is legally established', with the emphasis being placed on the child-parent relationship established between the student and the frontier worker, which is supposed to underlie the abovementioned attachment, or
- should the emphasis be placed on the fact that the frontier worker 'continues to provide for the student's maintenance' without necessarily being connected to the student through a legal child-parent relationship, in particular where a sufficient link of communal life can be identified, of such a kind as to establish a connection between the frontier worker and one of the parents of the student with whom the child-parent relationship is legally established?

### Personal Injury/ Approximation of Laws

**Case C-558/15** - *Alberto José Vieira de Azevedo and Others v CED Portugal Unipessoal, Lda, Instituto de Seguros de Portugal — Fundo de Garantia Automóvel* on 15 December 2016

Questions referred by Portuguese court:

- Do recital 16A and Article 4 of the Fourth Motor Insurance Directive (Directive 2000/26/EC (1) of the European Parliament and of the Council of 16 May 2000, as amended by Directive 2005/14/EC (2) of the European Parliament and of the Council of 11 May 2005), in the light of paragraphs 4, 5 and 8 of Article 4 (transposed into Portuguese law by Article 43 of Decree Law No 522/85 of 31 December 1985, as amended by Decree Law No 72-A/2003 of 14 April 2003), permit a writ to be served on the representative of an insurance company which does not operate in the country in which an action was brought seeking damages as a result of a road traffic accident, on the basis of compulsory insurance against civil liability in respect of the use of motor vehicles taken out in another European Union Member State?
- If the first question is answered in the affirmative, does the question whether such a writ may be served depend on the specific terms of the representation agreement between the representative and the insurer?

### Third country nationals

**Case C-652/15** - *Furkan Tedemir, legally represented by his parents Derya Tekdemir and Nedim Tekdemir v Kreis Bergstraße* on 15 December 2016

Questions referred by German court:

- Does the aim of efficient management of migration flows constitute an overriding reason in the public interest capable of denying exemption for a Turkish national born in federal territory from the requirement for a residence permit which he could claim by virtue of the standstill clause of Article 13 of Decision No 1/80 of the EEC/Turkey Association Council of 19 September 1980 on the Development of the Association?
- If the Court of Justice of the European Union answers the above question in the affirmative: What are the qualitative requirements for the existence of an 'overriding reason in the public interest' in relation to the aim of efficient management of migration flows?

### Public Procurement

**Case C-171/15** - *Connexion Taxi Services BV v Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport) and Others* on 14 December 2016

Questions referred by Dutch court:

- Does EU law, in particular Article 45(2) of Directive 2004/18/EC (1) on the coordination

of procedures for the award of public works contracts, public supply contracts and public service contracts, preclude national law from obliging a contracting authority to assess, by application of the principle of proportionality, whether a tenderer which is guilty of grave professional misconduct must indeed be excluded?

- Is it significant in this regard that a contracting authority has stated in the tender conditions that a tender to which a ground for exclusion applies must be set aside and is not to be eligible for further substantive assessment?
- If the answer to Question 1(a) is in the negative: does EU law preclude a situation in which the national courts fail to carry out an 'unrestricted' judicial review of an assessment conducted on the basis of the principle of proportionality, such as the assessment conducted by a contracting authority in the present case, but merely carry out a ('marginal') review as to whether the contracting authority could reasonably have come to the decision not to exclude a tenderer notwithstanding the fact that that tenderer was guilty of grave professional misconduct within the meaning of the first subparagraph of Article 45(2) of Directive 2004/18/EC?

### **Consumer law**

**Case C-127/15** - *Verein für Konsumenteninformation v INKO, Inkasso GmbH* on 8 December 2016

Questions referred by Dutch court:

- Is a debt collection agency that offers instalment agreements in connection with the professional recovery of debts on behalf of its client and that charges fees for this service that are ultimately to be borne by the debtors operating as a 'credit intermediary' within the meaning of Article 3(f) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (1)?

If Question 1 is answered in the affirmative:

- Is an instalment agreement entered into between a debtor and his creditor through the intermediation of a debt collection agency a 'deferred payment, free of charge' within the meaning of Article 2(2)(j) of Directive 2008/48 if the debtor only undertakes therein to pay the outstanding debt and such interest and costs as he would have incurred by law in any case as a result of his default — in other words, even in the absence of such an agreement?

### **Opinions of the Advocate General**

#### **Discrimination/Community Law**

**Case C-668/15** - *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic* Advocate General Wahl on 1 December 2016

Questions referred by the Danish Court :

- Must the prohibition on direct discrimination on grounds of ethnic origin in Article 2(2)(a) of Council Directive 2000/43/EC (1) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin be interpreted as precluding a practice such as the one in the present case, by which persons in an equivalent situation who are born outside the Nordic countries, a Member State, Switzerland and Liechtenstein are treated less favourably than persons born in the Nordic countries, a Member State, Switzerland and Liechtenstein?
- If the first question is answered in the negative: does such a practice thus give rise to indirect discrimination on grounds of ethnic origin within the meaning of Article 2(2)(b) of Council Directive 2000/43/EC — unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary?
- If the second question is answered in the affirmative, can such a practice in principle be justified as an appropriate and necessary means for safeguarding the enhanced customer due diligence measures provided for in Article 13 of Directive 2005/60/EC (2) of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing?

### **Freedom of movement of persons**

**Case C-690/15** - *Wencelas de Lobkowicz v Ministère des Finances et des Comptes publics* Advocate General Mengozzi 6 December 2016

Question referred by the French court:

- Is there any principle of EU law which precludes an official of the European Commission being subject to the *contribution sociale généralisée* (general social contribution), the *prélèvement social* (social levy), and additional contributions to that levy at the rate of 0.3 % and 1.1 % on income from real estate received in a Member State of the European Union?

### European Arrest Warrant and Surrender Procedures between States

**Case C-579/15** - *Openbaar Ministerie v Daniel Adam Popławski* Advocate General Bot on 7 December 2016

Questions referred by Dutch court:

May a Member State transpose Article 4(6) of Framework Decision 2002/584/JHA in its national law in such a way that:

- its executing judicial authority is, without more, obliged to refuse surrender, for purposes of executing a sentence, of a national or resident of the executing Member State,
- by operation of law, that refusal gives rise to the willingness to take over the execution of the custodial sentence imposed on the national or resident,
- but the decision to take over execution of the sentence is taken only after refusal of surrender for purposes of executing the sentence, and a positive decision is dependent on (1) a basis for the decision in a treaty or convention which is in force between the issuing Member State and the executing Member State, (2) the conditions set by that treaty or convention, and (3) the cooperation of the issuing Member State by, for example, making a request to that effect,
- with the result that there is a risk that, following refusal of surrender for purposes of executing the sentence, the executing Member State cannot take over execution of that sentence, while that risk does not affect the obligation to refuse surrender for purposes of executing the sentence?

If the answer to Question 1 is in the negative:

- Can the national courts apply the provisions of Framework Decision 2002/584/JHA directly even though, under Article 9 of Protocol (No 36) on transitional provisions, the legal effects of that Framework Decision are preserved after the entry into force of the Treaty of Lisbon until that Framework Decision is repealed, annulled or amended?
- If so, is Article 4(6) of Framework Decision 2002/584/JHA sufficiently precise and unconditional to be applied by the national courts?

If the answers to Questions 1 and 2(b) are in the negative: may a Member State whose national law requires that the taking-over of the execution of the foreign custodial sentence must be based on an appropriate treaty or convention transpose Article 4(6) of Framework Decision 2002/584/JHA in its national law in such a way that Article 4(6) of Framework Decision 2002/584/JHA itself provides the required conventional basis, in order to avoid the risk of impunity associated with the national requirement of a conventional basis (see Question 1)?

If the answers to Questions 1 and 2(b) are in the negative: may a Member State transpose Article 4(6) of Framework Decision 2002/584/JHA in its national law in such a way that:

- for refusal of surrender for purposes of executing a sentence in respect of a resident of the executing Member State who is a national of another Member State, it sets the condition that the executing Member State must have jurisdiction in respect of the offences cited in the EAW [European arrest warrant] and that there must be no actual obstacles in the way of a (possible) criminal prosecution in the executing Member State of that resident in respect of those offences (such as the refusal by the issuing Member State to hand over the case-file to the executing Member State), whereas it does not set such a condition for refusal of surrender for purposes of executing a sentence in respect of a national of the executing Member State?

### Third country nationals

**Case C-652/15** - *Furkan Tedemir, legally represented by his parents Derya Tekdemir and Nedim Tekdemir v Kreis Bergstraße* Advocate General Mengozzi on 15 December 2016

Questions referred by German court:

- Does the aim of efficient management of migration flows constitute an overriding reason in the public interest capable of denying exemption for a Turkish national born in federal territory from the requirement for a residence permit which he could claim by virtue of the standstill clause of Article 13 of Decision No 1/80 of the EEC/Turkey Association Council of 19 September 1980 on the Development of the Association?
- If the Court of Justice of the European Union answers the above question in the affirmative: What are the qualitative requirements for the existence of an 'overriding reason in the public interest' in relation to the aim of efficient management of migration flows?

**Case C-508/15** - *Sidika Ucar v Land Berlin* Advocate General Mengozzi on 21 December 2016

Questions referred by German Court

- Is the first indent of the first paragraph of Article 7 of EEC-Turkey Association Council Decision No 1/80 of 19 September 1980 to be interpreted as meaning that the conditions governing application of that provision are also met in the case where the three years of legal residence of the member of the family of the Turkish worker duly registered as belonging to the labour force were preceded by a period in which the principal person entitled, after having been joined by the family member authorised to do so in accordance with that provision, was no longer duly registered as belonging to the labour force of that Member State?
- Is the first paragraph of Article 7 of Decision No 1/80 to be interpreted as meaning that the extension of a residence permit is to be regarded as constituting the authorisation specified in that provision to join a Turkish worker duly registered as belonging to the labour force in the case where the family member concerned has lived continuously, since being authorised to join the Turkish worker within the meaning of that provision, together with that person but the latter, following a period of temporary absence therefrom, is duly registered as belonging afresh to the labour force of the Member State only at the date on which the residence permit is extended?

### December infringements package

The European Commission issues each month a monthly package of infringement decisions, pursuing legal action against Member States for failing to comply with their obligations under EU law.

This month key decisions taken by the Commission has made 7 letters of formal notice, 77 reasoned opinions, 3 referrals to the Court of Justice of the European Union, and 4 closures.

For more information on the EU infringement procedure, see the full [MEMO/12/12](#). For more detail on all decisions taken, consult the [infringement decisions' register](#).

Some areas of note are:

#### 1. Environment

##### Referrals to the Court of Justice of the European Union

##### Waste: Commission takes ITALY back to the Court and proposes fines

The European Commission is taking Italy back to the Court of Justice of the EU for its failure to fully and completely comply with the Court's judgment of 2012. The Italian authorities have still to ensure that urban waste water is adequately collected and treated in 80 agglomerations across the country out of the 109 covered by the first judgment to prevent serious risks to human health and the environment. On 19 July 2012, the Court of Justice of the EU ruled (case [C-565/10](#)) that the Italian authorities were violating EU law ([Council Directive 91/271/EEC](#)) by not adequately collecting and treating the [urban waste water](#) discharged by 109 agglomerations (towns, cities, settlements). Four years later, this issueremains unaddressed in 80 agglomerations, covering more than six million people. These include areas in seven Italian regions: Abruzzo (one agglomeration), Calabria (13 agglomerations), Campania (seven agglomerations), Friuli-Venezia Giulia (two agglomerations), Liguria (three agglomerations), Puglia (three agglomerations), and Sicilia (51 agglomerations). The lack of adequate collection and treatment systems for these 80 agglomerations poses significant risks to human health, inland waters and the marine environment. The Commission is calling on the Court of Justice of the EU to impose a lump sum payment of €62,699,421.40. The Commission is also proposing a daily penalty payment

of €346,922.40 if full compliance is not achieved by the date when the Court issues its ruling. The final decision on the penalties rests with the Court of Justice of the EU. For more information, please refer to the full [press release](#).

## 2. Financial Stability, Financial Services and Capital Markets Union

### Letters of formal notice

Car emissions: Commission opens infringement procedures against 7 Member States for breach of EU rules

The Commission is taking action against 7 Member States for failing to set up penalties systems to deter car manufacturers from violating car emissions legislation, or not applying such sanctions where a breach of law has occurred. The European Commission decided today to act against the Czech Republic, Germany, Greece, Lithuania, Luxembourg, Spain and the United Kingdom on the grounds that they have disregarded EU vehicle type approval rules. In accordance with Article 46 of [Directive 2007/46](#) and more specifically Article 13 of [Regulation \(EC\) 715/2007](#), which is directly applicable, Member States must have effective, proportionate and dissuasive penalties systems in place to deter car manufacturers from breaking the law. Where such a breach of law takes place, for example by using defeat devices to reduce the effectiveness of emission control systems, these penalties must be applied. Today, the Commission is addressing letters of formal notice to the Czech Republic, Lithuania and Greece because they have failed to introduce such penalties systems into their national law. The Commission is also opening infringements against Germany, Luxembourg, Spain and the United Kingdom – the Member States that issued type approvals for Volkswagen Group AG in the EU – for not applying their national provisions on penalties despite the company's use of illegal defeat device software. Additionally, the Commission takes the view that Germany and the United Kingdom broke the law by refusing to disclose, when requested by the Commission, all the technical information gathered in their national investigations regarding potential nitrogen oxide (NOx) emissions irregularities in cars by Volkswagen Group AG and other car manufacturers on their territories. The Member States now have two months to respond to the arguments put forward by the Commission; otherwise, the Commission may decide to send a reasoned opinion. For more information, please refer to the full [press release](#).

## 3. Migration, Home Affairs and Citizenship

### Reasoned opinions and closures

Security Union - EU cybercrime directive: Commission requests 3 Member States to ensure full implementation and closes 2 cases

The European Commission has addressed reasoned opinions to Belgium, Bulgaria and Ireland concerning the non-communication of national measures taken to transpose the Directive on attacks against information systems into national law (the EU cybercrime directive, [Directive 2013/40/EU](#)). The Directive, adopted on 12 August 2013, should have been transposed by the Member States by 4 September 2015. The Directive on Attacks against information systems criminalises the use of tools used in cyberattacks, such as malicious software, strengthens the framework for information exchange when attacks happen and provides a common European criminal law framework in this area. The Commission considers that the measures notified by Belgium, Bulgaria and Ireland are still not fully transposing all the provisions of the Directive into their national legislation. Belgium, Bulgaria and Ireland now have two months to notify the Commission of all measures taken to ensure full implementation of the Directive; otherwise, the Commission may refer these cases to the Court of Justice of the EU. In addition, after having examined measures notified by the Greek and Slovenian authorities, the Commission has decided to close the infringement procedures against Greece and Slovenia.

### Closures

Migration: Closure of infringement proceedings on the implementation in GREECE and in ITALY of recast Eurodac Regulation

The Commission has decided to close the infringement proceedings against Greece and Italy as they have correctly implemented the Eurodac Regulation ([Regulation \(EU\) No 603/2013](#)). The Eurodac database, which was established in 2003, is an EU asylum fingerprint database which provides fingerprint evidence to assist in the application of the Dublin Regulation, which determines the Member State responsible for examining an asylum application made in the EU. In December 2015, the Commission sent letters of formal notice

to **Greece** and **Italy** raising concerns that these Member States were failing to fulfil their obligations under the Eurodac Regulation by not taking and transmitting to the Eurodac database the fingerprints of all third-country nationals who had entered the EU irregularly at their external borders. The Commission sent administrative letters to both countries in October 2015 and has since then continued to assist the Greek and Italian authorities to improve border and migration management and increase the fingerprinting rates at the external borders, in particular through the hotspot approach, and has regularly reported on improvements made by both countries in its regular reports on relocation and resettlement. Given the significant improvements in the fingerprinting activities since the beginning of 2016, the Commission is satisfied that both Greece and Italy are fingerprinting third country nationals in accordance with the Eurodac Regulation and has decided to close the infringement proceedings.

## 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](mailto:brussels@lawsociety.org.uk)

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## Editorial Team

### Mickaël Laurans

Head of the Joint Brussels Office of the Law Societies

[mickael.laurans@lawsociety.org.uk](mailto:mickael.laurans@lawsociety.org.uk)

### Anna Drozd

EU Policy Advisor (Professional Practice)

[anna.drozd@lawsociety.org.uk](mailto:anna.drozd@lawsociety.org.uk)

### Helena Raulus

EU Policy Advisor (Internal Market)

[helena.raulus@lawsociety.org.uk](mailto:helena.raulus@lawsociety.org.uk)

### Rita Giannini

EU Policy Advisor (Justice)

[rita.giannini@lawsociety.org.uk](mailto:rita.giannini@lawsociety.org.uk)

### David Harry

Trainee Solicitor

[david.harry@lawsociety.org.uk](mailto:david.harry@lawsociety.org.uk)

### Madeleine Lamond

Trainee Solicitor

[madeleine.lamond@lawsociety.org.uk](mailto:madeleine.lamond@lawsociety.org.uk)

### Frances Shipsey

Trainee Solicitor

[frances.shipsey@lawsociety.org.uk](mailto:frances.shipsey@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](mailto:brussels@lawsociety.org.uk)

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