The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

July-August 2017

The Law Societies' monthly publication with the latest EU news

Editorial

Following the publication of the UK's Bill on the European Union (Notification of Withdrawal) Act 2017 and with the EU calling for clarity from the UK after the second round of negotiations, we have an article by Sajjad Karim MEP on Brexit and devolution.

An article on the current state of play with Brexit negotiations is included to help clarify the UK's withdrawal position in comparison to the EU.

We have a report on a seminar which took place at the European Parliament on acquired rights which also discusses the Law Societies' Joint Brussels Office position on acquired rights.

The beginning of July saw that the Japan-EU Free Trade Agreement is very close to being agreed, as such we have an analysis of the agreement, including some aspects that still need to be resolved before the final deal is concluded. An article on the issue of transparency in free trade agreements in the EU has also been written by Giorgia Sangiuolo.

A suggested summer reading list has been provided which includes suggestions for podcasts, blogs, TV shows, and also suggested Twitter accounts to follow over the summer for our readership to enjoy.

Our usual updates on the EU policy developments, legislation and case law are included.

In particular, this month's case law corner includes a summary of the Opinion on the Canada-EU Passenger Name Records Agreement by the Court of Justice of the European Union and an Advocate General opinion on an exam transcript being personal data.

Sajjad Karim MEP
Brexit & Devolution - Unchartered Territory

The Brexit result last year came as a shock to a great many people, with the result broadly expected to go in favour of Remain. The legal implications raised reach far and wide, but the reality is that nobody knows exactly how the next few years are going to play out - we truly are in uncharted territory.

What we do know, however, is that Brexit negotiations should be concluded by the end of March 2019, unless an extension is sought and agreed unanimously by all 27 EU Member States.

Of course, the European Parliament will also have a vote at the end of the negotiations by deciding whether or not to grant consent to the agreement, which should take place shortly before the next European Elections in 2019 - something many domestic politicians keep forgetting.

Yet there is no certainty of a deal being reached. If this is to be the case, then Britain faces a Brexit cliff edge - a legislative black hole that would dramatically appear as the UK leaves the European Union - a wholly undesirable situation.

Anything beyond this is pure speculation, but looking at the potential fallout from leaving the European Union is still a useful exercise in its own right.

The fact that the majority of voters in Scotland (62%) and Northern Ireland (55.8%) voted to remain, will clearly have implications in Brexit negotiations. The Sewel Convention may well be employed, which would require the consent of Holyrood as a pre-condition to Westminster legislating on devolved matters.

Theresa May has repeatedly stressed that she intends to keep the devolved administrations fully engaged in the negotiations, which will now be more important than ever - following the General Election and the first ministers of Scotland and Wales having called the EU Repeal Bill a "naked power grab" and threatening to block the legislation, after it was confirmed that the devolved administrations will not automatically receive any new powers.

However, the Scottish Secretary, David Mundell, has rejected these claims, maintaining it would lead to a "power bonanza" for Scotland & Wales, with Ministers able to amend UK laws without consulting Parliament through so-called "Henry VIII" powers under the legislation, so laws will essentially be transferred to the devolved assemblies after passage of the bill.

Whilst Scotland's First Minister, Nicola Sturgeon, has essentially conceded that a Scottish Independence Referendum is unlikely until at least after Brexit, the powers of the Scottish Parliament look increasingly likely to change regardless of the developments following the Repeal Bill, with property issues, family and criminal law all likely to remain distinct from the UK.

At a recent hearing in the European Parliament's Legal Affairs Committee, the Lord Advocate of Scotland, James Wolffe, spoke about the specific effect Brexit will have on Scotland, due to the UK's several different legal systems, stressing that the body of EU law applicable to Scotland would need to be assessed once Britain leaves the EU.

In relation to Wales, of course, there will be huge funding implications as a result of Brexit. Despite the country receiving £680 million of EU funds every year, on account of the European Regional Development Fund, Wales still voted in favour of leaving the EU (52.5%). Consequently, Westminster will very likely be required to fill this hole.

Perhaps one of the most concerning aspects of Britain's exit from the European Union is that of the Irish border. How will this be dealt with? Will it be a hard or soft border? Does the Conservatives deal with the DUP threaten the stability of the Good Friday Agreement? Only time will tell.

Peace in Ireland though is one of the greatest European achievements of the past few decades and this must not be threatened by Brexit negotiations.

These issues are really only the tip of the iceberg - there are so many unanswered questions left in our minds when it comes to Brexit. The nature and scale of it is completely unprecedented and as a result we find

ourselves in the unusual position of being unable to answer everyone's questions.

This feeling of being in unchartered territory has become all too familiar over the past year, so we must seek to capitalise on this by taking the time to carefully think through the negotiations every step of the way and do what is best for the whole of the UK. Maintaining the integrity of Britain is also an added challenge as we exit the EU. Without it, our standing in a host of multilateral fora - not least our UN Security Council seat - comes into question.

Biography

Sajjad Karim MEP became MEP for in 2004 and was re-elected in June 2009 and in 2014 representing North West England for the Conservative Party. He is a solicitor by profession as he qualified as a solicitor of the Supreme Court of England and Wales in 1997 and rose to becoming an equity partner very quickly specialising in cases of serious fraud defence work. Sajjad has been the Legal Affairs Spokesman for the Conservatives in the European Parliament in 2009. He was reappointed to this front bench position in June 2014 following the European Elections in May and he serves as a full member of the Legal Affairs Committee (JURI). As well as having been a Spokesman to the WTO, Karim Chairs the European Parliament South Asia Trade Monitoring Board; South Caucases Delegation and is rotating chair of the powerful Parliamentary Conduct Committee.

SUMMER EDITION

UK Withdrawal Negotiations: State of Play and the Position Papers

Although Article 50 was officially triggered on the 29th of March, four months on, the withdrawal arrangements envisioned by that Article remain elusive. Despite promising the '***row of the summer'*** over the timetabling of the discussions before the negotiations began in June, David Davis, Secretary of State for Exiting the European Union, seems to have let earlier points of contention evaporate in the July heat.

Firstly, although the Foreign Secretary Boris Johnson recently agreed with a Tory backbencher that the EU could ***'go whistle'*** for a financial settlement, the UK Government has now agreed that a financial settlement will form part of the final agreement; a recent statement from Davis confirmed that; ***"The government recognizes that the UK has obligations to the EU, and the EU obligations to the UK, that will survive the UK's withdrawal -- and that these need to be resolved."***

That is not to say that the EU and UK negotiating terms have reached consensus; Politico quoted an unnamed EU official as saying that while the EU had provided a *"detailed legal analysis underpinning a list of obligations which need to be included in the financial settlement",* as it stood ***"the UK was not in a position to present its legal analyses"***. No numbers are therefore on the table, but this is quite possibly the most difficult point of the final settlement; as can be seen from comments above and below the line in the UK press, payment of any kind to the EU, regardless if it would be to honour past commitments or for future market access, is a toxic concept to Brexiteers. Add to the equation the insecure grip that Prime Minister Theresa May is now acknowledged to have over her own cabinet, let alone Parliament, and there is every possibility that any number agreed will prove to be too much to command majority support in Westminster.

Another red line, which has apparently faded in the negotiations, concerns a transitional period between the end of the 2 year negotiation period laid down by Article 50 and the final exit of the EU from EU structures. The form – and duration – of this is still unknown, but lack of knowledge has not prevented UKIP from claiming that ***"the Chancellor plans Brexit betrayal"***.

Acceptance, in principle, of a transition agreement may not, however be sufficient to replicate all the institutional and physical structures – replacement of the European Medicines Agency, increasing customs capacity at Dover – that would be needed in time to prepare for an eventual exit from the Single Market **an outcome that appears to be growing in cross party support.** More damning is that there has been little

clarification on what the EU-UK relationship would be transitioning to; in the absence of even an outline of this, critical business decisions concerning investment and continued operations in the UK will have to made, long before the 2019 exit deadline approaches.

Jurisdiction of the Court of Justice of the European Union

One area where the position of the UK is rather more clear is in the entrenched opposition to a continuing role for the Court of Justice (CJEU) after Brexit; as paragraph 10 of the UK position paper on ***Ongoing Judicial and Administrative Positions*** states unequivocally;

"The UK has made clear that leaving the EU will end the jurisdiction of the CJEU in the UK, a position consistent with international legal precedent, placing the UK in the same position as all other third countries, including those with which the EU has deep and close relationships"

The rest of the paper then details the issues to be discussed, such as how to identify and deal with cases pending at the time of exit, what would be the status of judgments of the CJEU etc. Much reference is made to 'certainty', as well as 'fairness', but little detail is offered on the substantive detail as to how this will be achieved, rather the paper ends by noting that *"[f]urther discussions with the EU are required to identify the full scope …and the appropriate approach..."*.

The EU papers, assert equally robustly that the CJEU needs to have competence firstly *"to adjudicate in proceedings which are pending on the withdrawal date"*, secondly, *"to adjudicate in preliminary references submitted by courts in the United Kingdom after the withdrawal date relating to facts that occurred before the withdrawal date"* and lastly asserting that

"Judgements of the Court of Justice given before the withdrawal date as well as judgements given in proceedings mentioned [above]… have binding force in the United Kingdom after the withdrawal date and are enforceable there under the same conditions as those laid down in Article 299 TFEU". It is hard to see how this continuing role for the CJEU, even if restricted to consideration of facts which occurred before the date of withdrawal could be deemed compatible with the UK's stated insistence to end the jurisdiction of the CJEU in the UK.

Citizens' Rights

The next issue in which a doctrinally different approach between the UK and the EU is evident concerns citizens' rights. Specifically, the EU has taken the view that existing rights of EU citizens in the UK should be **protected to the same level** as now, and that *"The United Kingdom should ensure compliance…including as regards the required powers of judicial and administrative authorities, through a legislative act. ".*

The UK, by contrast, proposed a "generous" offer on citizenship to EU nationals continuing to reside in the UK post- Brexit, to include a "**settled status**" allowing them to remain and apply for citizenship.

This, at EU level, was not considered to be acceptable. A **technical note** prepared after the most recent joint discussions in Brussels illustrates the gap between the two parties; of the 47 items on citizens' rights discussed, 13 are listed as being subject to divergent positions, including critical elements such as future family members, the right to vote, and legal status of permanent residence holders.

Conclusion

Considering that a limited amount of time remains before the negotiated agreement needs to be placed in front of the EU and UK Parliaments, progress has been limited. In particular, the issue of the Northern Irish border has yet to be properly addressed – and resolution is not likely to come quickly. Likewise, either Parliament could end up effectively vetoing the agreement- in the UK case by voting down the European Union (Withdrawal) Bill, and preventing 'domestication' of EU law, which would presumably render a Withdrawal Agreement between the UK and EU null. While the broad and general agreement of the two negotiating teams thus far is relieving, any one of the points of detail outlined above has the possibility to push the negotiators out of time, thus setting the UK almost certainly on the road to a chaotic hard Brexit.

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Japan-EU FTA; Ambitious, but work still to do

Had the Trans-Pacific Partnership agreement (TPP) gone ahead, it would have built on earlier multi-lateral agreements in the area to create a free trade area circling the Pacific Rim. Linking together the free flow of goods from Brunei to Canada, and from Peru to Vietnam was always an ambitious task, but had it succeeded, free trade in goods would have moved closer to being the global norm.

As it is, TPP seems likely to be remembered more as the first step in a Trump-lead retreat into protectionism

and national preference on the part of the USA. Whereas a year ago, with TTIP, CETA and TTP beset with difficulties but still alive, it was still possible to talk of 'omnilateralism' in trade. On the other side of the Atlantic, activity – if any – now however seems far more likely to be focused around renewing NAFTA, which came into force 23 years ago.

For the EU, however, this slowdown may prove to be beneficial; in this context, it is possible to see the recent understanding reached on a Japanese- EU Economic Partnership Agreement ('JEEPA') as having been spurred on by this *volte-face* on the part of Washington. As Japan no longer had to consider, at least in the short term, that difficult concessions to the EU in the agricultural market would need to be replicated in a deal with other TPP partners, a window of flexibility opened which allowed the agreement to be made.

The early reactions to the announcement of an agreement-in-principle earlier this month were not slow to claim that, following four years of negotiations, this agreement would **"send a powerful signal that two of the world's biggest economies reject protectionism"**, and that it was a reflection of the **"shared values"** of the EU and Japan. On further examination, it may be premature to call for the (DOP) Champagne quite yet; although agreeing to slash barriers to trade between two of the most advanced and wealthy economies in the world is undoubtedly a remarkable achievement, there are several aspects of the agreement which are yet to be satisfactorily resolved before a final deal can be struck.

Data Flows & Adequacy

Free flow of data is one such sticking point; while Japanese negotiators are apparently keen to include data transfers (one unnamed source in Politico described the issue as being *"**sine qua non**"* for the Japanese), the Commission does not yet consider Japan's privacy laws to be sufficient to ensure protection of data at the same level as consumer's enjoy in the EU. Accordingly, resistance from the Parliament was clear. In the words of Dutch MEP Marietje Schaake, ***"The European Parliament will not ratify an agreement that undermines data protection in the EU and the Commission knows this"***. Likewise, some commentators have criticised **the lack of enforcement** in data protection issues in Japan, although changes have **recently been introduced**.

A decision on adequacy may be on the horizon however; In March Vera Jourová – Commissioner for Justice, Consumers and Gender Equality – released a joint press statement with her Japanese counterparts announcing that **"[they were] now working to bridge our data protection laws and will work together towards an adequacy decision"**. This was followed by a further press release on the 4th of July, confirming the intention of both parties to reach an agreement on adequate levels of protection **by early 2018**. Convincing Parliament that that level of protection is indeed sufficient to assuage concerns of data protection and consumer rights may prove to be an arduous task before the final deal is ratified.

Professional Services

Although trade in services is addressed in Chapter III of the draft text of the **Agreement**, little has been revealed in terms of sector specific changes. Instead, a fact sheet from DG Trade on the 1st of July focused on reaffirming the EU's commitment to the precautionary principle, and protecting public services and '*sensitive economic sectors'*, a lack of information described as *"disappointing"* by Pascal Kerneis, Managing Director of the European Services Forum (ESF).

The Multilateral Investment Court

Few observers will forget that that the inclusion of clauses allowing foreign investors to seek recourse to arbitration almost jeopardised the CETA treaty, with political fallout manifesting in Germany and Belgium. Nor has opinion 2/15 of the Court of Justice, effectively splitting direct and non-direct investment into exclusive and shared competencies, nullified the issue. In this light, the Commission's desire to include recourse to a Multilateral Investment Court (MIC) may prove to be a considerable stumbling block, as it would require the final text to depart from recent trends, and specifically exclude non-direct – i.e. portfolio – investment in order for final agreement to be within the EU's exclusive competence. Furthermore, the opinion also appears to say that the bare inclusion of an investor-state dispute settlement (ISDS) mechanism leads to the agreement requiring ratification by individual member states (and therefore, in some cases, ratification by their regional governments as well). Even if the member states did ratify such an agreement, there is little evidence that Japan is interested in accepting the MIC as opposed to established ISDS procedures such as ad-hoc tribunals convened under UNCITRAL rules. On the contrary, *Borderlex* claimed **in December** that;

> *"Japan has indicated that the ICS proposal as it stands now contains several shortcomings, such as the danger of a pro-state biased court and the proliferation of bilateral investment courts in the various FTAs that would increase inconsistency rather than improve uniformity of the investment law jurisprudence. These shortcomings would first have to be remedied before it could support the proposal of creating a multilateral investment court system."*

The Commission is thus far reticent on the issue, merely stating in its **6th of July** press release that it *"will reach out to all our partners, including Japan, to work towards the setting up of a Multilateral Investment*

Court."

In conclusion, the annual value of exports from the EU to Japan – estimated at circa €58billion in goods and circa €28billion in services – mean that even modest reduction of tariffs translate into significant gains in value for exporters, and ultimately consumers. Similarly, the steps taken to open up the previously unassailable Japanese agricultural market should not be understated, and likewise neither should the political signals sent by visible, tangible evidence of the EU taking the lead in continued commitment to globalisation be dismissed. To fully build on the climate of good will generated by July's Agreement however, the Commission must deal fully and deeply with the issues outlined in this article.

Giorgia Sangiuolo

Transparency in the EU FTAs: Do You Really Want To Know?

The high level of openness adopted in both the Brexit and TTIP negotiations show that the European Union (EU) takes transparency in its external relations seriously. Arguably, transparency constitutes a necessary pre-requisite for the proper deployment of the multi-level system of governance of the Union. Despite the positive impact that transparency has on the legitimacy and accountability of such system of governance, confidentiality is to some extent still necessary. Indeed, the secrecy in the negotiations for the Japan-EU Free Trade Agreement (JEUFTA) demonstrates that a full-transparency approach to the international agreements of the EU may not be always practicable or even advisable. This creates the issue of ascertaining "how much" transparency we should be requiring from the EU for legitimate decision making to take place.

Key issues addressed and findings

Transparency - Generally speaking, the concept of transparency is a tricky one. It lacks clear boundaries and it is strictly interconnected to the evolution of society. Intuitively, we associate transparency to the Greek model of democracy, in which full disclosure of information allows collective decision making. Such an ideal is however outdated in modern society, where numbers and distances rule out the possibility that everyone may directly have a saying on the future of the community.

A general trend towards transparency - The trend towards enhanced transparency has a global and horizontal dimension. It is sufficient here to recall the **UNCITRAL Rules on Transparency in Investor-State Arbitration**. Such a phenomenon is, *inter alia*, connected to some changes in international law, which create an unresolved contradiction at the heart of the Modern State: A growing number of non-State entities performing quasi-constitutional functions (e.g. NGOs, International Organizations) find legitimacy in the trust they manage to gain from their constituencies. Transparency is key to this aim, allowing control of such non-State entities on both the levels of goals-setting (input level) and accountability of their activity (output level). Transparency thus allows a shift towards a **new global system of governance in which non-State entities, individuals and States work together**.

Transparency and the EU. The minefield of the FTAs - The EU is an early example of the previously mentioned changing dynamics of the global system of multi-level governance. As from ***Van Gend en Loos*** the Union has been building the legitimacy of its "new legal order" on two pillars: the Member States and individuals. Thus, transparency is increasingly more important for the Union to gain trust from its citizens. Arguably, after The Lisbon Treaty, transparency is embedded in the constitutional structure of the EU, both in its internal and external relations. Transparency is, for instance, key to fulfil the constitutional aims of the Union such as **democracy and rule of law**. Indeed, it allows the necessary level of individual involvement necessary to ensure the healthy functioning of a democratic system.

Transparency also permits to make the Institutions accountable for their work before both its citizens and Member States.

Transparency is however not an aim in itself and it must be balanced with other concurring values and interests (as acknowledged, for instance, in the **EU Regulation on public access to the Institutions' documents**) Indeed, if some transparency is instrumental to building trust in the Union's action, too much transparency may reach the opposite result (eg. the unjustified release of personal data).

The "new generation" EU FTAs creates a particularly strong "transparency dilemma". Due to their increasingly broader scope such agreements are bound to have a very strong impact on individuals' lives. Thus, despite the commitment in favour of more transparency being a global trend, the EU has gone far beyond the international standards in the field. For instance, by introducing the "good practice" of public consultations.

At the same time, EU FTAs require space and time for diplomacy. Arguably transparency comes at a particularly high price in the external relations of the EU. Indeed, the economic costs of enhanced transparency (e.g. length of the public consultations), need to be added to a number of political costs (e.g.

transparency may be a stumbling block trading partners).

The EU position on transparency in the Brexit negotiations - If both parties to the Brexit negotiations committed to transparency in the **Terms of Reference**, the EU transparency regime greatly oversteps the **position adopted by the UK Government**.

Does such a different position derive from the particular value that transparency plays in the Union's legal order? Arguably not. The political relevance of the Brexit negotiations suggests that the Union, like the UK is doing, may rightly claim a reasonable margin of secrecy. Too much transparency may even have a counterproductive effect for the Union, with the general public potentially perceiving any change in the Union's position as a "betrayal". Contrarily, the position of the EU seems **rather dictated by practical and political considerations**.

In search of a balancing point - Arguably, the balancing point to ascertain the right amount of transparency in the international relations of the EU should be the concept of "interest". Thus, interest carriers should be given at least some access to negotiating documents. However, this leads to the further issue of deciding who can be considered an interest-carrier and the degree of interest necessary to this aim.

On July 14, 2017 the King's College London Centre of European Law hosted a talk on transparency in the European Union's Free Trade Agreements.

The speaker was Ms Maria Laura Marceddu, Ms Giorgia Sangiuolo was discussant and Prof. Andrea Biondi, Director of the Centre, chaired.

The PowerPoint from the talk is available on the LawTTIP website.

Biography

Giorgia is a Ph.D. Researcher at King's College London Centre of European Law. Her research focuses on the mechanisms of dispute resolution in the field of international investment law, with specific regard to their interaction with EU law. Giorgia is a qualified lawyer (Rome Bar Association) associated with Amministrativisti Europei Associati Law Firm and practices in the fields of Administrative and EU law, having gained a specific expertise in Public Procurement, Energy Law and Constitutional EU Law both in specialised law firms and at the Italian Council of State. After graduating cum laude from Federico II University of Naples, Giorgia completed with distinction both a Postgraduate course in International Energy Law at LUISS Guido Carli, University of Rome, and an LLM in EU Law at King's College London, where she was awarded as best student.

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Summer Reading List

The summer is here and the Brussels Office have compiled a list of reading, listening and watching suggestions for our readership. We also include what some people in the Brussels bubble will be reading.

Podcasts:

Dave Keating, an American journalist based in Brussels, and **Tyson Barker**, an American policy analyst based in Berlin, discuss the events of the week starting 17 July in their latest **podcast**.

In '***My Parents Voted Brexit*' podcast** three friends, among whom our alumni **Eugene McQuaid** of Freshfields, discuss the latest developments in the UK and EU politics.

POLITICO has recently launched its '***EU Confidential*' podcast** which deals with the EU and current affairs.

Reading:

Lukasz Klejnowski, Assistant of Róza Thun MEP, will be reading '***On Tyranny***' by Timothy Snyder.

Bernardo Rodrigues, Senior EU Policy Officer at London's European Office, will be reading '***Economics of Good and Evil***' by Tomas Sedlacek.

Anna Drozd, Policy advisor will be reading the '*Homo Sapiens*' and '*Homo Deus*' by Yuval Noah Harari and '*Drone theory*' by Gregoire Chamayou.

Meanwhile, intern, **Peter Boyle,** hopes to finish '*The Wealth of Nations*', on the grounds that despite having

been published 240 years ago, it is better written than most economics treatises published today.

Arfah Chaudry, intern at the Joint Brussels Office, will be catching up on legal innovation, in particular, the **IBA's work on blockchains**.

Gilles Dubochet, Founder of Ideas Belong, a research and innovation consultancy in Brussels, and European research policy veteran: 'I finished reading '*LAB-FAB-APP*', the report by the (industry-dominated) group on maximising the impact of EU Research & Innovation. The latest in a long line of reports exploring solutions to Europe's innovation problem. It is good to see that this challenge stays up high on the EU agenda. But solutions are not easy to come by, and behind the optimism and buzzwords, the report ultimately proposes more of the same: channel money into close-to-market technologies, a short-term strategy that cannot deliver the economic and social boost that Europe needs. So, as a reminder of the promises of innovation, I've also been catching up with my *Scientific American* magazines, reading about how smart cars could paradoxically take most cars out of cities (July 2017), and about AIs going to school to learn creativity (June 2017). But technology isn't just a future promise. To (try) to stay on top of it, I count on the excellent '*Note to Self*' podcast, which has kept its promise to help preserve my humanity in the age of digital technology by asking all the hard questions about what our phones, computers and smart appliances do to us.

Anouk Winkel, FCMO Analyst, SMBC Brussels recommends *'The Sympathizer'*, by Viet Thanh Nguyen, winner of last year's Pulitzer Prize, this is the story of divided loyalties, betrayal and consequences in the aftermath of the Vietnam War. Described as "a fierce novel", and "bold, artful", Anouk picked the book up by chance, but now says she "has to know how it ends".

The ***MEP Library Lovers*** is a website with a list of books that have been recommended for reading by MEPs across the EU.

For those of you who are interested in, or would like a good source on IP law developments, then the ***IPKat*** is a fun source for all the latest developments.

If reading and podcasts are too much, then watching can also be an option.

Recommended TV shows include:

'*Black Mirror'* – a great show that explores how technology has changed our lives, relationships and how it influences basic social interactions. Although it is entirely fictional, its plot builds on any elements of our current lives that we will notice is all around us, which makes the series relatable to even the legal profession.

'How to Get Away with Murder' – Viola Davis stars as a criminal law professor at a prestigious university who, with four of her law students, becomes entwined in a murder plot.

'*The Handmaid's Tale'* – a modern adaptation of Margaret Atwood's classic, made terrifyingly relatable to our current socio-political realities.

'*Game of Thrones'* – which does not need any further explanation.

Our suggestions on who to follow on Twitter:

- **Secret Barrister**
- **David Allen Green**
- **Joshua Rozenberg**
- **Shona Jolly QC**
- **Jo Maugham QC**
- **Steve Peers**
- **Larry the Cat**
- **The IPKat**
- **Eleonora Rosati**

Tweets from the Brussels bubble:

- **Berlaymonster** (play on words on Berlaymont, one of the Commission's buildings)
- Jennifer Baker's '**Tweets of the week**'
- **Jon Worth**

Martini Seltzermayr (play on words on Martin Selmayr, chief of cabinet of Commission's President Juncker).

Law Societies' position on citizens' acquired rights

Following the publication of proposals on acquired rights from the EU and the UK, the regimes governing the rights of citizens and businesses appear even more complex than previously envisaged. In particular, the issue of right of residence for EU nationals in the UK, and UK nationals in the EU, have come under heavy scrutiny.

The Law Societies' Joint Brussels Office has published a briefing paper which sets out the position of the UK Law Societies in relation to citizens' acquired rights. The full paper can be found **here**.

The briefing discusses citizens' required rights in the context of the negotiations of the UK's withdrawal from the EU, and welcomes the priority given to the rights of EU citizens in the UK, and of UK citizens in the EU post-Brexit.

In respect of legal services, there are several key issues which the Law Societies believe should be addressed in the negotiations. These include:

- Continued access to legal services for citizens;
- Continued ability to engage in cross-border business;
- Continued ability to provide legal services and represent clients across the UK and in the EU; and
- The protection of legal professional privilege.

On Thursday 13 July, the Law Societies' Joint Brussels Office also hosted a seminar in the European Parliament to discuss the important issues surrounding acquired rights. The event was sponsored by Alyn Smith MEP who also chaired the panel discussion. The panellists were:

- Professor Andrea Biondi (King's College London);
- Jane Golding (Chair of British in Europe – a group of UK citizens across the EU working towards ensuring the rights of effected citizens);
- David Greene (Chair of the Legal Affairs and Policy Board at the Law Society of England and Wales, and partner at Edwin Coe LLP); and
- Helena Raulus (Head of the Law Societies' Joint Brussels Office).

The panellists discussed a broad range of issues in relation to matters of citizenship, as well as the freedom of establishment, and the freedom to provide services across the EU.

It was widely agreed that ensuring the right of residence is not sufficient, and that a full complex of "indivisible rights" is needed. Those rights include (but are not limited to) access to healthcare and the mutual recognition of qualifications.

The discussion also addressed the fact that there is no clear or comprehensive legal basis for ensuring that these rights are enforced. It is clear that the doctrine of acquired rights under international public law is not sufficient, and the Vienna Convention offers no enforceable basis. Whilst the European Convention on Human Rights helps to some extent, it does not address all of the issues at hand. Additionally, it does not cover all of the rights that EU citizens receive from the EU Charter of Fundamental Rights.

In addition to the rights mentioned above, it is important to address the right of establishment and the right to work. Additionally, lawyers have specific rights that are picked out in the Lawyers Directives; it is important to retain those rights and to have them pushed up the negotiations agenda.

The discussion also highlighted the differences between the opposing negotiating positions. The key areas of contention include the cut-off date to be applied to the final deal on acquired rights, the different approaches of the UK and the EU in relation to family reunification, and the ever present debate as to the jurisdiction of the Court of Justice of the European Union post-Brexit or an appropriate alternative method of dispute resolution.

It is clear that it is important that EU citizens in the UK and UK citizens in the EU are able to have continued access to lawyers, and the issues raised above are paramount to ensuring legal certainty, whilst ensuring the continued access to legal services for effected citizens.

The Law Societies' Joint Brussels Office, along with the respective Law Societies of the United Kingdom, are

continuing their work in this area and we will keep you updated of further developments.

Law Societies' News

The Law Societies' Joint Brussels Office visit to the Court of Justice of the European Union

On 12 July the Law Societies' Joint Brussels Office arranged a visit to the Court of Justice of the European Union. Stuart Brown, a seconded trainee solicitor, Peter Boyle and Arfah Chaudry, interns at the Joint Brussels Office, were joined by 10 other trainees from UK and international law firms with a presence in Brussels.

The group arrived at 8.15am sharp, for a guided tour, courtesy of Mr Rumpf, who took us around the court buildings, including the Grand Chamber and the Salle de Conference.

The tour included a quick briefing on case C-191/16 *Pisciotti*, which we then heard in the Grand Chamber. The panel was made up of 15 judges, one Judge-Rapporteur and one Advocate General. The case was a preliminary reference from a regional court in Berlin concerning Article 18(1) TFEU on non-discrimination on compensation on EU infringement law.

This was followed by a highly informative meeting with Advocate General Sharpston, who told us how she came to the decision to become an Advocate General. The group was then joined at lunch by Judge Ian Forrester from the General Court. Again, this was educational and enlightening, as the group were able to see the differences between how Advocates General and judges not only operate but how their work also differs. For example, Advocates General write their opinions in their mother tongue (with the exception of urgent procedures which are required to be written in French) and will write the opinion alone. Judges must give a judgment together and do not have the need to look at any other potential possibilities or repercussions that do not relate to the immediate case facts or judgment.

The visit received high praise and great reviews by everyone who attended. The Law Societies' Joint Brussels Office would like to thank the Court of Justice of the European Union, Advocate General Sharpston and Judge Forrester in particular for welcoming us.

Doing legal business in the Visegrad Group states - 5 September, London

The Law Society is hosting a seminar on how to do legal business in several countries within Central and Eastern Europe (CEE). Experts from the region will provide insight into investment opportunities in Poland, the largest domestic market in CEE and one of Europe's fastest growing, as well as in the neighbouring countries of the Czech Republic, Slovakia and Hungary.

Find out more and how to register

EU Justice Portal Showcases Local Solicitors

The Law Society of Northern Ireland has announced that it has successfully joined the European

Commission's **E-Justice programme.**

The Society which represents and regulates over 2,500 local solicitors confirmed that it has built the EU '***Find a Lawyer'*** search engine into its website.

The search engine, which is administered by the European Commission links up electronic lawyer directories allowing users to search online for lawyers in specific jurisdictions.

The 'Find a Lawyer' project has been operating successfully for some years, covering nearly all of the EU and is available in all EU languages.

As of June 2017, the Law Society of Northern Ireland and Law Society of Scotland are the only two legal representative bodies in the United Kingdom to have successfully joined the e-justice programme.

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

"We are delighted to have secured European Commission funding which has allowed us to build the Find a Lawyer search engine into our website.

The e-justice programme allows local solicitors to showcase their services to a European audience through a centralised website.

It is also of practical benefit to the public who can seek an approved lawyer in other EU jurisdictions."

Access to the e-justice portal is available **here**.

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

Law Society of Northern Ireland in Brussels as Part of Joint Brexit Strategy

President, **Ian Huddleston** and Chief Executive, **Alan Hunter** were in Brussels in late June to meet with officials and representatives from a number of key organisations on issues surrounding Brexit.

They were joined by the Presidents and Chief Executives of the Law Society of England and Wales and the Law Society of Scotland as part of a joint Brexit engagement strategy.

During their visit they met with:

- **George Baur** the Assistant Secretary-General Secretaries-General and EEA Co-ordination Division, the European Free Trade Association. EFTA is an intergovernmental organisation set up promote the free trade and economic integration of Iceland, Liechtenstein, Norway and Switzerland.
- **Robert Strauss** the Head of Services Policy Unit, Internal Market, Industry, Entrepreneurship and SMEs. This European Commission Department is responsible for EU policy on the single market, industry, entrepreneurship and small businesses.
- **Officials and representatives** from the Northern Ireland Office and the Joint Law Societies Brussels Office.
- **UK Members of the European Parliament (MEPs)** to raise with them issues around Brexit.

The joint Brexit engagement strategy reflects the commitment of each Law Society to meet with key decision makers, Government officials and organisations regarding issues surrounding Brexit.

Independent judiciary underpins rule of law in Poland

An independent judiciary is fundamental to democracy and the rule of law, the Law Society of England and Wales said in response to legislation being adopted in Poland to bring the judiciary under the direct control of government.

"An independent judiciary, stable legal institutions and a government accountable to the people are fundamental elements of a nation rooted in the rule of law," noted Law Society president Joe Egan.

"These characteristics are intrinsically linked to the prosperity of a country and to its international standing."

Highlighting the dangers of a compromised judiciary, Joe Egan continued: "Eroding the independence of the legal profession - whether judges or lawyers - undermines the rule of law which protects and holds every single citizen accountable, from the most powerful to the most vulnerable. The consequences are likely to be a society that becomes less safe, less stable and less fair.

"An independent and incorruptible judiciary is the cornerstone of the rule of law and of access to justice. Any moves to politicise this vital branch of the legal system in Poland should be reversed."

Supreme Court strikes a victory for access to justice

Striking down employment tribunal fees is a victory for the tens of thousands of people denied their rights at work, the Law Society of England and Wales said today.

The fees, which required people with a claim such as bullying or discrimination at work to pay up to £1,200 to have their case heard by the employment tribunal, were today declared unlawful by the UK Supreme Court.

"This decision is a triumph for access to justice, and a resounding blow against attempts to treat justice as a commodity rather than the right it is," declared Law Society president Joe Egan.

"We argued against the hike in tribunal fees before it was implemented and – like so many others - warned that they would deny people the chance to uphold their basic rights at work. Today the Supreme Court has vindicated that view, and restored access to justice for those mistreated in the workplace."

The Law Society has previously highlighted the massive drop in cases coming to the tribunal in the wake of the fees being introduced. It has also pointed to figures – contained in the Ministry of Justice's own review of the fees – showing at least 14,000 people every year are unable to afford to go to the tribunal to resolve their claims, as well as tens of thousands of missing cases.

Commenting on the wider implications of the case, Joe Egan added: "As the Supreme Court identified, these fees placed an insurmountable barrier in the way of tens of thousands of people.

"Access to justice is a fundamental right – if you can't enforce your rights then it renders them meaningless. Today's decision will serve as an urgently needed wake-up call - justice must never be a luxury for those who can afford it, it is a right we all share."

The Law Society has consistently opposed the employment tribunal fees, highlighting the barrier to accessing justice they represent. Read **more information, including analysis of the Ministry of Justice's review of the effect of the fees**.

ONGOING CONSULTATIONS

Civil Justice:
Public consultation - Call for evidence on the operation of collective redress arrangements in the Member States of the European Union
22.05.2017 – 15.08.2017

Digital economy and society:
Public consultation on the database directive: application and impact
24.05.2017 – 30.08.2017

Institutional affairs:
Public consultation on the European citizens´ initiative
24.05.2017 – 16.08.2017

Public health:
Stakeholder consultation for the evaluation of EU legislation on blood, tissues and cells
29.05.2017 – 31.08.2017

Migration and Asylum:
Consultation on the European Union's (EU) legislation on the legal migration of non-EU citizens (Fitness Check on EU legal migration legislation)
19.06.2017 – 18.09.2017

Energy:
Consultation on the mid-term evaluation of the Nuclear Decommissioning Assistance Programme
23.06.2017 – 29.09.2017

Environment:
Public consultation investigating options for reducing releases to the environment of microplastics
26.06.2017 – 16.10.2017

Maritime affairs and fisheries:
Public consultation on the implementation of the Atlantic action plan
29.06.2017 – 22.09.2017

Consumers, Single market:
Public consultation on the targeted revision of EU consumer law directives
30.06.2017 – 08.10.2017

Mobility and transport:
Evaluation of Regulation 996/2010 on investigating aviation accidents in the EU
05.07.2017 – 04.10.2017

Maritime affairs and fisheries:
Fishing opportunities for 2018 under the common fisheries policy
06.07.2017 – 15.09.2017

Single market, Energy, Business and industry:
Public consultation on potential measures for regulating the environmental impact of enterprise servers and data storage products
10.07.2017 – 23.10.2017

Banking and financial services:
Public consultation on the development of secondary markets for non-performing loans and distressed assets and protection of secured creditors from borrowers' default
10.07.2017 – 20.10.2017

Environment, Climate action:
Public consultation to support the evaluation of the European Environment Agency and its European Environment Information and Observation Network
17.07.2017 – 23.10.2017

Customs or Taxation:
Public consultation on the exchange of customs related information with third countries
18.07.2017 – 16.10.2017

Single market, Business and industry:
Public consultation on retail regulations in a multi-channel environment
17.07.2017 – 08.10.2017

Justice and fundamental rights:
Public Consultation on the Evaluation of the EU Framework for National Roma Integration Strategies up to 2020
19.09.2017 – 25.10.2017

Digital economy and society, Public health, Research and innovation:
Public consultation on Transformation of Health and Care in the Digital Single Market
20.07.2017 – 12.10.2017

Banking and financial services:
Public consultation on transparency and fees in cross-border transactions in the EU
24.07.2017 – 30.10.2017

COMING INTO FORCE THIS MONTH

Public procurement
Commission Implementing Decision (EU) 2017/1358 of 20 July 2017 on the identification of ICT Technical Specifications for referencing in public procurement (Text with EEA relevance.)

Environment
Commission Regulation (EU) 2017/1347 of 13 July 2017 correcting Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EU) No 582/2011 and Commission Regulation (EU) 2017/1151 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation (EC) No 692/2008 (Text with EEA relevance.)

Commission Implementing Regulation (EU) 2017/1375 of 25 July 2017 amending Implementing Regulation (EU) No 1191/2014 determining the format and means for submitting the report referred to in Article 19 of Regulation (EU) No 517/2014 of the European Parliament and of the Council on fluorinated greenhouse gases

Restrictive measures
Council Implementing Regulation (EU) 2017/1374 of 25 July 2017 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

CASE LAW CORNER

Decided cases

Data protection

Opinion 1/15 Canada PNR Agreement

The Court of Justice of the European Union (CJEU), in its' opinion, stated that the agreement envisaged between the European Union and Canada on the transfer of Passenger Name Record data may not be concluded in its current form due to several provisions which are incompatible with fundamental rights recognised by the EU. The particular provisions which are incompatible relate to the right to a private life and the protection of personal data.

A PNR data-sharing agreement was already in existence between the EU and Canada before the signing of the Treaty of Lisbon. However, after the Treaty came into force, it was decided that all of the EU's PNR agreements should be renegotiated in light of the new Treaty. The PNR agreement with Canada was proposed by the Commission in 2014 and was in the process of being concluded by the Council of the European Union with Parliament's approval. Parliament decided to ask the CJEU for its opinion on the legality of the agreement.

The agreement would have permitted the transfer of all air passenger PNR data, with the data being used

and retained – possibly transferred to other authorities and non-member countries – for the purpose to fight terrorism and serious transnational crimes. The data would be stored for 5 years. The PNR taken as a whole, has the potential to reveal a passenger's complete travel itinerary, travel habits, relationships between passengers, dietary habits, state of health and could provide sensitive data about the individual.

Although the CJEU found that the interferences to a right to a private life and the protection of personal data was justified by an objective of general interest (ensuring public security against terrorism and serious transnational crime) the necessity of those interferences were not seen to be strictly necessary and there were no clear and precise rules laid down.

Parliament also requested to know whether the legal basis for the PNR agreement should be based on Article 82 TFEU and Article 87 TFEU (judicial cooperation in criminal matters and police cooperation) or Article 16 TFEU (protection of personal data). In this context, the CJEU states that the agreement must be concluded both on the basis of Article 16 TFEU and Article 87 TFEU as it covers the protection of personal data and the fight against terrorism and serious transnational crime.

Opinion in Case C-434/16 Nowak

The Supreme Court of Ireland asked the Court of Justice of the European Union (CJEU) whether an examination script can be seen as personal data for the purposes of EU law (Directive 95/46/EEC) and, if so, what factors are relevant in determining whether in any given case such script is personal data. In Advocate General (AG) Kokott's opinion, the handwritten examination paper which is capable of being attributed to a candidate, constitutes personal data in EU law.

A candidate's performance – which is strictly individual and personal – what is written in the exam transcript is in a sense, a collection of personal data. The exam transcript is sufficient enough as personal data, to be able to identify the data subject indirectly. Furthermore, any corrections made by an examiner on an exam transcript are also seen in AG Kokott's view to be personal data as the comments on the data subject's performance on the exam can be linked back to that data subject.

Free movement of people

Judgment in **Case C-89/16 - Radoslaw Szoja v Sociálna poistovna**

This request for a preliminary ruling concerned the interpretation of Article 13(3) and Article 72 of Regulation (EC) 883/2004 on the coordination of social security systems, as amended by Regulation (EU) 465/2012 (the "Basic Regulation") and Articles 14 and 16 of Regulation (EC) 987/2009 laying down the procedure for implementing the Basic Regulation (the "Implementing Regulation") and Article 34(1) and (2) of the Charter of Fundamental Rights of the European Union.

The request has been made in proceedings between Mr Radoslaw Szoja, a Polish national, pursuing activity as a self-employed person in the Republic of Poland and an activity as an employed person in the Slovak Republic and the Sociálna poistovna (Social Insurance Institute) concerning his failure to affiliate to the health insurance, pension insurance and unemployment benefit insurance scheme.

The referring court essentially asked whether Article 13(3) of the Basic Regulation, read in the light of Article 34(1) and (2) of the Charter, may be interpreted without taking into account Articles 14 and 16 of the Implementing Regulation.

The Court found as follows:

Article 14(5b) of the Implementing Regulation provides that marginal activities are to be disregarded for the purposes of determining the applicable legislation under Article 13 of the Basic Regulation.

It was apparent from the order for reference that, according to the decision of the Polish social insurance institution, the activity which Mr Szoja pursues in Slovakia is marginal and that the determination of the applicable legislation has become final in the light of Article 16(3) of the Implementing Regulation.

Therefore, the legislation applicable to which Mr Szoja, who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, is subject under Article 13(3) of the Basic Regulation must be determined taking account of Article 14(5b) of the Implementing Regulation, which excludes the consideration of marginal activities.

Accordingly, Article 13(3) of the Basic Regulation must be interpreted as meaning that, in order to determine the national legislation applicable under that provision to a person, such as the applicant in the main proceedings, who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, the requirements laid down in Article 14(5b) and Article 16 of the Implementing Regulation must be taken into account.

Employment

Judgment in **Case C-566/15 - Konrad Erzberger v TUI AG**

This was a request for a preliminary ruling concerning the interpretation of Articles 18 and 45 TFEU.

The national court asked the CJEU whether it is compatible with Article 18 TFEU, and Article 45 TFEU, for a Member State to grant the right to vote and to stand as a candidate for election as the workers' representatives in the supervisory body of a company only to those workers who are employed in establishments of the company or in affiliated companies that are within the national territory.

The Court held that Article 45 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the workers employed in the establishments of a group located in the territory of that Member State are deprived of the right to vote and to stand as a candidate in elections of workers' representatives to the supervisory board of the parent company of that group, which is established in that Member State, and as the case may be, of the right to act or to continue to act as representative on that board, where those workers leave their employment in such an establishment and are employed by a subsidiary belonging to the same group established in another Member State.

Access to Justice

In **Case C-670/15,** Request for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 5 November 2015, received at the Court on 15 December 2015, in the proceedings brought by **Jan Šalplachta.**

The applicant, domiciled in the Czech Republic, sought legal aid to pursue proceedings in the Labour Court (Arbeitsgericht) in Zwickau, Germany. He later requested that the legal aid be extended to cover translation into German of the documents relating to his income and capital circumstances, carried out by a commercial translation agency based in Dresden. The *Arbeitsgericht* granted the first request for legal aid, but refused to extend that aid to cover the costs of translation requested.

On appeal, the Higher Labour Court (*Landesarbeitsgericht*) in Chemnitz found that, in accordance with Directive 2003/8, assistance with the costs of translation of the supporting documents for a legal aid application is to be granted only when that application is lodged with the competent authority of the Member State in which the applicant is domiciled or habitually resident, and not, as in the present case, when lodged with the competent authority of the Member State of the court hearing the case or in which the decision is to be enforced.

On appeal, the Federal Labour Court (*Bundesarbeitsgericht*) took the view that it was impossible to tell with the requisite clarity from Directive 2003/8 whether, and to what extent, the Member State of the court hearing the case must cover the costs of translation of the supporting documents relating to a legal aid application when, as in the main proceedings in the present case, the legal aid applicant has himself arranged for those documents to be translated and has lodged his application directly with the court having jurisdiction as to the substance of the dispute, which also has jurisdiction in respect of that application in its capacity as the receiving authority within the meaning of Article 13(1)(b) of that directive. The *Bundesarbeitsgericht* also noted that the refusal to extend legal aid to cover the costs of translation of those documents, assuming that this constitutes a restriction on the effective access to justice, pursues a legitimate objective, namely to relieve the public purse of the Member State of the court hearing the case of costs which should instead be borne by the Member State in which the applicant is domiciled or habitually resident. In those circumstances, the *Bundesarbeitsgericht* decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the right of a natural person to effective access to justice in a cross-border dispute within the meaning of Articles 1 and 2 of Directive 2003/8 require that legal aid granted by the Federal Republic of Germany must extend to the costs incurred by the applicant for the translation of the declaration and supporting documents annexed to the legal aid application, where the applicant, at the same time as bringing the action, applies for legal aid to the court hearing the case, which is also the competent receiving authority within the meaning of Article 13(1)(b) of [that] directive, and he has himself arranged for the translation to be made?'

Following the view of the Advocate General, the Court noted that **i**f the costs connected with the translation of the supporting documents necessary for the processing of a legal aid application were covered only when the legal aid applicant addresses them to the competent authorities in the Member State in which he is domiciled or habitually resident, that would incorrectly make securing legal aid in respect of those costs dependent on the procedural option chosen by the applicant and would render meaningless Article 13(1)(b) of Directive 2003/8, which offers the possibility of presenting the legal aid application directly to the receiving authority. Furthermore, this would likely lead to a more onerous procedural solution for the legal aid applicant. Instead of submitting his legal aid application directly to the court with jurisdiction to hear the substantive dispute, that applicant would be obliged to open two separate sets of proceedings, the first being before the competent court of the Member State of the court

hearing the case in order to ensure compliance with time limits, and the second being before the authorities in the Member State in which he is domiciled or habitually resident in order to obtain reimbursement of the costs incurred in connection with the legal aid application. Such a situation would thus constitute an impediment to the exercise of the right to effective access to justice on the part of a litigant in a cross-border dispute who does not have at his disposal the resources necessary to meet the costs of the proceedings and who finds himself in a more difficult situation by reason of the cross-border dimension of that dispute.

Therefore, the reply to the question referred is that Articles 3, 8 and 12 of Directive 2003/8, read together, must be interpreted as meaning that legal aid granted by the Member State of the court hearing the particular case, in which a natural person domiciled or resident in another Member State has submitted a legal aid application in the context of a cross-border dispute, also covers the costs paid by that person for the translation of the supporting documents necessary for the processing of that application.

Consumer Rights

In **Case C-357/16**, request for a preliminary ruling under Article 267 TFEU from the *Lietuvos vyriausiasis administracinis teismas* (the Supreme Administrative Court of Lithuania), made by decision of 20 June 2016, received at the Court on 28 June 2016, in the proceedings *UAB 'Gelvora' v Valstybine vartotoju teisiu apsaugos tarnyba* (State Consumer Rights Protection Authority) ('The Authority')

Following a decision from the Authortity that Gelvora (a private debt collection agency), had breached the national provisions relating to the prohibition on commercial practices deemed unfair. Following an appeal to the Supreme Administrative Court *(Lietuvos vyriausiasis administracinis teismas),* a decision was made to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Does the legal relationship between a company that has acquired the right to a debt under an assignment of claim agreement and a natural person whose indebtedness arose under a consumer credit agreement, where the company carries out acts of debt recovery, fall within the scope of [the Unfair Commercial Practices Directive]?
2. If the answer to the first question is in the affirmative, does the term 'product' used in Article 2(c) of the [Unfair Commercial Practices Directive] cover acts performed in exercising the right to the debt acquired under the assignment of claim agreement in the context of debt recovery from a natural person whose indebtedness arose under a consumer credit agreement entered into with the original creditor?
3. Does the legal relationship between a company that has acquired the right to a debt under an assignment of claim agreement and a natural person whose indebtedness arose under a consumer credit agreement and has already been established by a final judicial decision and passed to the bailiff for enforcement, where the company is carrying out parallel acts of debt recovery, fall within the scope of the [Unfair Commercial Practices Directive]?
4. If the answer to the third question is in the affirmative, does the term 'product' used in Article 2(c) of the [Unfair Commercial Practices Directive] cover acts performed in exercising the right to the debt acquired under the assignment of claim agreement in the context of debt recovery from a natural person whose indebtedness arose under a consumer credit agreement entered into with the original creditor and has been established by a final judicial decision and passed to the bailiff for enforcement?'

The Court held that although a debt collection agency, such as Gelvora, does not provide the consumer with a consumer credit service as such, the fact remains that the activity in which it engages, namely the recovery of debts which have been assigned to it, falls under the concept of 'commercial practice' which may be unfair, within the meaning of the Unfair Commercial Practices Directive, since the measures which it adopts are liable to influence the consumer's decision in respect of the payment of the product. As such, the Commission, in the document entitled '*Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*' of 25 May 2016 indicates that debt collection activities should be considered as after-sales commercial practices, and that furthermore, it is clear from the examples cited by the Commission in that document that a number of national courts take the view that the activities of collection agencies fall within the scope of that directive.

Upcoming decisions and Advocate General opinions in August

August falls during the Court's judicial vacation period and, as such, the Court is not scheduled to sit until September. Accordingly, there are no judgments or opinions which are due to be handed down this month.

About us

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

Subscriptions/Documents/Updates

For those wishing to subscribe for free to the Brussels Agenda electronically and/or obtain documents referred to in the articles, please contact **Antonella Verde**. The Brussels Office also produces regular EU updates covering: Civil Justice; Family Law; Criminal Justice; Employment Law; Environmental Law; Company Law and Financial Services; Tax Law; Intellectual Property; and Consumer Law as well as updates on the case-law of the European Court of Justice. To receive any of these, contact **Antonella Verde** stating which update(s) you would like.

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