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# Reportage

## Collective redress – next steps

At a recent high-level EU Presidency conference in Lisbon, both Commissioner Kroes for competition policy and Commissioner Kuneva for consumer affairs took the opportunity to outline their plans for initiatives in the area of collective redress. The message from both Commissioners was loud and clear – that they would be collaborating closely in the name of enforcing consumer rights and providing effective remedies. A number of consumer protection organisations and business representatives outlined their views on what an EU collective redress system should look like. There was consensus on one issue - the EU should not adopt a class action system like the United States. Any EU level action should be based squarely on European legal and cultural traditions.

Commissioner Kroes stated that the Commission is convinced that the EU needs to do far more to empower consumers to play their own part in the Internal Market process. Consumers have so far been slow to exercise fully their right to seek damages arising from harm caused by competition breaches. This is principally due to the costs of bringing a damages claim in relation to a competition infringement, and the uncertainties of the

outcome. Even in Member States where private enforcement of competition law is more developed, few consumers ever go to court. Moreover the Commission pointed out that public enforcement, undertaken by it and other competition authorities, is aimed at punishing and deterring unlawful behaviour, whereas it cannot make amends for the damage caused to consumers.

Commissioner Kuneva bolstered her colleague's comments by emphasising her own commitment to improving collective redress in the field of consumer policy. She highlighted the differences in national legislation and underlined the fact that only half of the Member States have collective redress systems at present. Indeed, assessing the current state of play in each Member State before embarking on an EU-wide initiative is one of the key points in Kuneva's plan of action.

The Commission has set out a number of "benchmarks" to assess the effectiveness of Member States' legal systems in terms of collective redress. These include: the mechanism should allow for satisfactory redress to be achieved in circumstances where a claim cannot adequately be pursued by an individual; the costs incurred by both parties should be proportionate to the damage suffered/benefits achieved; collective redress should have a preventative effect and should discourage the bringing of unmeritorious claims; there should be opportunity for out-of-court settlement; the management of collective redress actions should allow for "bundling" of actions; a solution should be achievable within a reasonable timeframe; and, it should allow for appropriate distribution of proceeds amongst the plaintiffs. These "benchmarks" are to be discussed with stakeholders in a consultation to be launched early next year.

Commissioner Kuneva also emphasised the need to put collective redress in the context of other EU consumer initiatives, including alternative dispute resolution. She reported that any future EU initiative may not necessarily involve a legislative proposal and that the Commission may consider alternative approaches, such as out-of-court schemes or an extension of current national schemes to consumers from other Member States. Following the forthcoming consultation, Commissioner Kuneva will report on these findings in a Communication to be presented by the end of 2008. Alongside this Commissioner Kroes will present a White Paper early in 2008, accompanied by an economic and social impact assessment, on damages actions in the antitrust field. With both Commissioners setting out their stall in 2008, it remains to be seen whether this will be a case of competing policy initiatives or a twin-track approach to bringing about effective remedies and consumer empowerment.



#### **WEBLINKS**

- [European Commission website on consumer collective redress](#)
- [European Commission website on damages actions for breach of EC antitrust rules](#)
- [EU Portuguese Presidency website](#)

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## FREE MOVEMENT

### UK Government consults on Services Directive

The Services Directive (2006/123) aims to break down barriers to trade and make it easier for service providers from one Member State to set up business and offer their services elsewhere in the EU. The Directive will apply in relation to lawyers' services to the extent that it does not conflict with the provisions of the Services of Lawyers Directive (77/249), which gives an EU lawyer the right to practise on a visiting or temporary basis in a Member State other than that in which the lawyer qualified, and the Lawyers' Establishment Directive (98/5), which gives an EU lawyer the right to practise on a permanent (established) basis under the lawyer's home state title in a Member State other than that in which the lawyer qualified. In practice, this means that the provisions of the new Services Directive will supplement the provisions of the two lawyers' Directives. The Directive needs to be implemented in domestic law by the end of 2009. To that end, the Department for Business, Enterprise & Regulatory Reform (BERR) has issued a consultation inviting responses from stakeholders by 11 February 2008.



#### WEBLINKS

- [Directive 2006/123 on services in the internal market](#)
- [BERR consultation paper on implementing the EU Services Directive](#)

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## MONEY LAUNDERING

### Lawyers prepare for new Money Laundering Regulations

Law firms in the UK are preparing for the entry into force of the Money Laundering Regulations on 15 December 2007. The Regulations implement the third Money Laundering Directive under which firms are required to have procedures in place to identify any beneficial owners when they take on a new client and to apply a risk-based approach towards anti-money laundering compliance. The Law Society of England and Wales campaigned successfully to amend aspects of the draft Regulations dealing with beneficial ownership. In the last few months the Law Society has also been in dialogue with the UK Government about changes to the "tipping off" offence in the Proceeds of Crime Act 2002, which threatened the ability of lawyers to give impartial and informed advice to their clients.



#### WEBLINKS

- [Law Society of England and Wales website on anti-money laundering](#)
- [Law Society of England and Wales practice note on anti-money laundering](#)
- [Law Society of Scotland anti-money laundering guidance](#)

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## FREEDOM OF ESTABLISHMENT

## Parliament highlights barriers to cross-border legal services

Free movement of the legal professions within the EU was the subject of a seminar in the European Parliament on 8 November. A number of experts were brought together to address concerns raised by lawyers who have encountered difficulties in practising in another Member State. Delegates debated the effectiveness of the current European law framework in this area and, in particular, the provisions of the Lawyers' Establishment Directive (98/5). As explained above, under the Directive, a European lawyer may establish himself in another Member State and practise under the local title, without the need for further registration, provided that he can demonstrate that he has been practising the local law for three years. At the seminar, lawyers from Italy, France and Spain spoke of the difficulties encountered in exercising these rights in practice, largely due to more strict criteria being applied in some Member States such as aptitude and language tests. The European Commission confirmed that it will look into the concerns brought to its attention. The Commission is set to review the Establishment Directive in 2008.



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- [Seminar programme "Free Movement of legal professions within the EU"](#)

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*Law Societies'  
News*

## NEW PREMISES FOR THE BRUSSELS OFFICE Brussels Office Move

The Law Societies' Joint Brussels Office has re-located to the heart of the EU district. Sharing premises with the German Federal Bar, the Austrian Bar Association, the French and German-speaking Order of the Belgian Bar and the German Architects' Association, the new premises are situated at Avenue des Nerviens 85, 1040 Brussels. For more information on the services of the office, including meeting room and hot-desking facilities please contact: [brussels@lawsociety.org.uk](mailto:brussels@lawsociety.org.uk)

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## Liberalising the legal professions in the UK

The Legal Services Act 2007 revising the regulatory framework for the provision of legal services in England and Wales received Royal Assent in October. This marked the final stage of a long and detailed process of reform and heated parliamentary debate. The Act has its basis in the Clementi Report and its provisions include the introduction of a Legal Services Board for the supervision of the regulatory structure of the profession, as well as the possibility to operate through alternative business structures (ABSs). This will enable new practice models with enhanced involvement for non-lawyers in practice management and possible non-lawyer ownership of law firms. The focus on liberalising the legal profession has now shifted to Scotland where the Law Society of Scotland has recently launched a consultation paper on ABSs. This consultation

explores whether the rules governing law firms in Scotland should be relaxed to allow for the possibility of ABSs, thus opening up the legal services market to other providers, such as banks or supermarkets. The deadline for responses is 31 January 2008.



#### WEBLINKS

- [Legal Service Act 2007](#)
- [Law Society of England and Wales: response to Legal Services Act gaining royal assent](#)
- [Law Society of Scotland consultation on alternative business structures "The Public Interest: Delivering Scottish Legal Services"](#)

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## National Pro Bono Week launched in England and Wales

On 12 November, at the start of the sixth National Pro Bono Week, the Law Society of England and Wales launched a campaign to celebrate pro bono work among the legal profession. Surveys conducted by the Law Society demonstrate that more solicitors are becoming involved in pro bono work in England and Wales. This year's campaign aimed at raising awareness by focussing on international pro bono work and the involvement of law students in such activities. The programme of events for the week included a reception at Mansion House on 15 November, hosted by the Lord Mayor, and the first Joint Pro Bono Conference, which took place in London on 17 November. The latter brought together members of the Law Society, Bar Council and Institute of Legal Executives to discuss opportunities in this area at national and international level.



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- [National Pro Bono Week website](#)

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## CIVIL LITIGATION

### Rome I: parliamentary progress

The European Parliament took an important step in the adoption of the proposed Regulation on the law applicable to contractual obligations (Rome I) by adopting its report at the plenary session on the 29 November. This proposal is designed to convert the Rome Convention into a single Community instrument directly applicable in national courts. The draft Regulation seeks to find a new balance between the principle of freedom of parties to choose the applicable law and a detailed set of rules to determine the applicable law in the absence of choice. This issue was the subject of much debate by MEPs, particularly in relation to consumer contracts, contracts of employment and insurance contracts. Various amendments were tabled

before agreement was finally reached. The Portuguese EU Presidency hopes that the Council of Ministers can reach a final agreement on the proposal following Parliament's first reading. Although the UK Government has decided not to opt in to this proposal, it is participating in the negotiations and will have another opportunity to opt in to the Regulation at the end of the process.



#### **WEBLINKS**

- [Proposal for a Regulation on the law applicable to contractual obligations](#)
- [European Parliament legislative resolution on the proposal for a Regulation on the law applicable to contractual obligations](#)

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## **COMPETITION LAW**

### **Commission encourages co-operation by cartelists**

The European Commission has launched a consultation on its latest initiative in the field of competition law: proposals to allow direct settlements in cartel cases. This proposal, following on from other reforms, has the aim of encouraging competition law infringers to co-operate with the Commission's investigation so that a conclusion can be reached more quickly. In this proposal, before the Commission issues a statement of objections, and after discussions with the Commission services, suspected cartelists could make a "written settlement submission". This would include an express acknowledgement of involvement in the cartel plus an estimate of potential fines. The Commission hopes that a prior agreement on the facts of the cartel, parties' liability and fines should allow it to move swiftly to adopt a final decision and ultimately reduce the number of appeals brought before the Court of First Instance against its decisions, thus freeing up resources. Following the consultation, adoption of an amendment to Commission Regulation 773/2004 and of a Commission Notice on the conduct of settlement proceedings is expected to take place in 2008.



#### **WEBLINKS**

- [European Commission consultation on direct settlement package](#)
- [European Parliament report on the Green Paper](#)

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## **CONSUMER LAW**

### **European Commission sets out its stall on review**

At the end of a day-long stakeholder conference in November, Commissioner Kuneva gave an insight into one of the priority measures of her portfolio. A proposal for a directive, aiming to create a framework for EU consumer protection legislation, should be tabled by the end of 2008. Adopting an approach of "full, targeted harmonisation", the measure would aim for a high level of protection. It would set down some basic definitions - such as that of consumer - and substantive provisions governing EU business to consumer transactions. Basic provisions could cover a general right of withdrawal, information requirements and grey

and black lists of unfair contract terms. The measure would continue to be flanked by “vertical” directives, such as those already setting specific rules for distance or doorstep selling, which are also under review. Although not all conference participants favoured the idea of full harmonisation, which limits the ability of Member States to afford consumers stronger protection, there is a clear need to clarify the EU’s legal landscape for consumers, business and legal practitioners.



#### **WEBLINKS**

- [European Commission website on the review of consumer protection rules](#)
- [Law Society of England and Wales response to the Green Paper on the review of the consumer \*acquis\*](#)

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## **DATA PROTECTION**

### **Police and judicial co-operation – data protection issues resolved**

The Justice and Home Affairs Council has succeeded in agreeing a common approach on a proposed Framework Decision which will set common standards for the processing of personal data in the context of police and judicial co-operation in criminal matters. The purpose of the draft is to ensure that all Member States keep data according to the same rules, so as to protect the rights of individuals. This Framework Decision underpins all of the other work that the European Commission is carrying out in the areas of exchange of information on previous convictions and sharing of information about potential criminals. Importantly, the text defines the right of access to the data, the right to rectification, erasure or blocking, the right to compensation if the rules are breached and the right to seek judicial remedies. This measure is a priority for the EU’s Portuguese Presidency, which hopes to secure political agreement by the end of the year.



#### **WEBLINKS**

- [Commission proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters](#)
- [Results of the Portuguese Presidency at the Council of Ministers for Justice on 8 and 9 November](#)

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## **EU WORK PROGRAMME**

### **Commission sets next year’s priorities**

The European Commission has published its Legislative and Work Programme for 2008. Every year the Commission issues its work programme in order to set out its political priorities for the coming year, with an indication of the legislative acts and other initiatives it proposes to present. The work programme for 2008 is based around several key priority areas including sustainability, jobs and growth, migration and Europe’s

position in the world. Each of these priority areas is broken down further into specific areas where the Commission intends to legislate – the strategic and priority initiatives. In 2008 the Commission intends to put forward measures on a wide variety of issues, including matters such as consumer contractual rights, e-justice, equality, and the European Private Company Statute. Also contained in the 2008 work programme is a list of initiatives aimed at simplifying existing EU legislation.



- [Commission Legislative and Work Programme 2008](#)

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## WILLS AND SUCCESSION

### Lords examine European proposal on wills and succession

The Law Society of England and Wales, together with the Society of Trust and Estate Practitioners, has successfully lobbied the UK Parliament for a public hearing to examine the European Commission's proposal on wills and succession, which aims to harmonise rules on jurisdiction and applicable law in this area. A hearing took place in the House of Lords on 10 October 2007, at which the Lords heard evidence from representatives of the Ministry of Justice on the preparation of a paper which will outline the content of a proposal that would, the Law Society argues, protect the UK's interests. Their evidence showed support for a regulation with a narrow scope and a system of unitary choice of law. Various proposals remain under discussion, including European certificates of inheritance and a possible system of compulsory registration of wills. The Commission is expected to produce a draft regulation in this area in late 2008.



- [Transcript of the House of Lords' hearing](#)
- [Joint Response of the Law Society of England and Wales and the Society of Trust and Estate Practitioners to the European Commission's Green Paper on succession and wills](#)

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## Implementing the Third Money Laundering Directive

The provisions of the Third Money Laundering Directive will be implemented in the UK in December 2007 when the Money Laundering Regulations 2007 ("the Regulations") are brought into force. The Third Directive and the Regulations raise a number of practical concerns for solicitors.

The Third Directive broadens the scope of applicability of the Second Directive, which was introduced in 2001.



In 2001 the anti-money laundering regime was applied for the first time to “gatekeepers”. It has now been extended to cover all traders in goods for transactions in cash of €15,000 or more. It also applies to more entrants to the regulated sector, including trust and company service providers and insurance intermediaries. This is one area of the Third Directive which may cause practical issues. Trust and company service providers are often consulted for privacy reasons and they may have the new customer due diligence and supervision requirements. They are currently grappling with the issues presented by this.

The Third Directive is more prescriptive than the Second Directive in that it has mandatory provisions for customer due diligence (“CDD”) requirements. Most solicitors practising in England and Wales are well versed in the process of verifying their clients’ identities but in a more flexible regime. However, the Third Directive does encourage a risk-based approach.

Article 8 of the Third Directive adds the requirement to identify, where applicable, the ultimate beneficial owner, including, for legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer. Those covered by the Third Directive will also now be required to obtain information on the intended nature and purpose of the business relationship and to monitor that relationship.

Obligations to identify the beneficial owner and understand the ownership and control structure of legal entities are new and difficulties are expected. Legal entities often have companies as shareholders or directors, making it hard to identify the beneficial owner. The issue is also a problem with customers/ clients domiciled in countries with no trade registry.

The Third Directive does on the one hand introduce a detailed regime for CDD but it also introduces a risk-based approach, which the regulated sector in the UK has applied for many years. This allows organisations to tailor their efforts more efficiently to their own business needs. Reduced CDD measures can be applied when the client is a credit or financial institution situated in a non-EU member state, which imposes requirements similar to the Directive. The reduced system can also be used in certain designated cases. Conversely, enhanced CDD measures must be taken in cases where there is a higher risk of money laundering or terrorist financing. This includes those cases where a customer is not physically present for identification purposes and special measures for PEPs (politically exposed persons). In these circumstances there is a requirement to take specific and adequate measures to compensate for the higher risk by requesting more documents or information.

It is likely that lawyers, in order to save time, rely on others to comply with the CDD requirements. The Third Directive now specifically states that a person may rely on a third party for CDD, but the ultimate responsibility for compliance remains with the institution covered by the Directive. This is part of a risk-based approach and should be carefully documented.

The Regulations will also introduce a new scheme of supervisors for each of the sectors not currently supervised or monitored for money laundering purposes. Solicitors will continue to be regulated by the Solicitors Regulation Authority.



**Louise Delahunty**, partner, and Cherie Spinks, associate, Corporate Crime Department, Simmons & Simmons.

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- [European Council's Common Position on credit agreements for consumers](#)
- [Directive on mergers and acquisitions in the financial services sector](#)

## 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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