



REPORTAGE

Anti-discrimination – more steps forward

PROFESSIONAL PRACTICE

MONEY LAUNDERING
Risk-based approach - legal professionals make their voices heard

LEGAL SERVICES
Government and stakeholders discuss Services Directive implementation

COMPETITION
Direct settlement procedure for cartels finalised

LAW SOCIETIES' NEWS

LAW REFORM

COMPANY LAW
European Private Company offers new possibilities for business

INVESTMENT FUNDS
Improved framework for UCITS

EMPLOYMENT
Role of European Works Councils to be improved

ENVIRONMENT
Public procurement goes green

INTELLECTUAL PROPERTY
Initiatives to boost the "knowledge economy"

HEALTH
Commission acts to improve patients' rights

VIEWPOINT



Andrew Duff MEP
Why the Irish 'No' is different

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Subscriptions/ Documents/ Updates

About us

LINKS

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[Back to Contents](#)

[Next Item](#)

Reportage

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)



Reportage

Anti-discrimination – more steps forward

The development of EU law on equal treatment never ceases to surprise.

At the time of writing the European Court of Justice had not long ruled that a worker – Mrs Coleman - could make a disability discrimination claim based on the disability of her son. The Court ruled that a worker claiming disability discrimination need not be disabled herself. The claim was based on the fact that Mrs Coleman was the primary carer of her son – the person with the disability – and that she suffered unfavourable treatment because of this. The same rationale applies to harassment.

This undoubtedly marks an extremely important milestone in the Court's jurisprudence. The Court's judgment does not, however, provide guidance on the extent to which EU rules outlaw discrimination based on other associated persons. In other words, could they apply to discrimination based on the ethnicity of a spouse? Were Mrs Coleman's caring obligations material to the Court's finding? Undoubtedly, further references to the Court will seek to expand the scope of EU rules.

On 2 July the European Commission itself decided to push the boundaries of anti-discrimination law further. It proposed a Directive, based on Article 13 of the EC Treaty, which would outlaw discrimination based on age, sexual orientation, disability and religion and belief outside the context of the workplace. Since Article 13 was inserted into the EC Treaty by the Treaty of Amsterdam (1997), advocates of equal treatment and Members of the European Parliament have called for wide-ranging anti-discrimination rules. As recently as May this year, the Parliament called again for the scope of existing legislation to be extended.

The proposal relates to access to and supply of goods and services; education; and social services, such as healthcare and social security. In this sense, it mirrors closely the EU legislation that already outlaws such discrimination when based on racial or ethnic origin – Directive 2000/43. As well as outlawing direct and indirect discrimination, it prohibits harassment and instructions to discriminate. It also provides for the principle of reasonable accommodation, when it comes to the treatment of people with disabilities, and allows for positive action measures by Member States.

The documentation accompanying the proposal emphasises, however, that the rules respect the principle of subsidiarity. They will not cover matters relating to the way in which Member States organise their education system or the relationships between church and state. Nor would they, for instance, oblige Member States to recognise legally registered same-sex partnerships, end free public transport for the elderly or stop restricting the sale of goods, such as alcohol, to those under a certain age.

Meanwhile in June, the UK Government announced a new Equality Bill, which would tackle many of the same problems. In that proposal, however, the Government dropped plans to extend the prohibition of harassment on the grounds of religion or belief in relation to the provision of goods and services. It had been argued that such a provision could have the result of prohibiting the display of any material that could be considered offensive on religious grounds, such as a poster, and have serious detrimental consequences for free speech.

It remains to be seen whether this and other concerns will be taken up at the EU level, particularly as twelve countries have joined the EU since the last equal treatment laws were adopted. Once the Parliament has given its opinion on the proposal, the 27 Member States will have to adopt the proposal by unanimity.



WEBLINKS

- **Case C-303/06, Coleman v Attridge Law and Steve Law**
- **Communication on non-discrimination and equal opportunities: A renewed commitment**
- **Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**



Professional Practice

MONEY LAUNDERING

Risk-based approach - legal professionals make their voices heard

The Financial Action Task Force (FATF), the inter-governmental body responsible for developing and promoting policies to combat money laundering and terrorist financing, is in the process of developing guidelines on a risk-based approach to the fight against money laundering. During this process it has consulted with legal professionals and bar associations to determine how the legal profession should apply the risk-based approach, looking in particular at risk indicators and internal controls. A text composed of high-level principles has been submitted to the FATF, which will be circulated to all FATF member countries and presented for adoption at the plenary session in September. A recent survey launched by the Law Society of England and Wales has revealed that solicitors have been swift to update their policies and procedures following the implementation of the new regulations implementing the third Money Laundering Directive. They are, however, labouring under the increased regulatory burden. Further research will be conducted in September and solicitors can register now to have their views heard.



WEBLINKS

- [Financial Action Task Force](#)
- [Register to take part in the Law Society of England and Wales anti-money laundering research](#)

LEGAL SERVICES

Government and stakeholders discuss Services Directive implementation

Following the public consultation on the Services Directive, the UK Department of Business, Enterprise and Regulatory Reform (BERR) recently published an analysis of the contributions received and set out its response. In addition a stakeholder workshop was hosted by the Minister for Trade and Consumer Affairs, Gareth Thomas MP, at the end of June. It was reported that a number of provisions of the Directive are still under consideration, namely those on the quality of service and mutual assistance between competent authorities. Moreover, key questions still remain as to the design and implementation of the "Points of Single Contact" - the information portal through which a service provider should be able to get all the relevant information it needs about providing services in another Member State. The Law Societies and the Solicitors Regulation Authority are working closely with BERR to ensure the legal profession's concerns about implementation relating to the supply of legal services are heard. Further meetings will be held with BERR and the Ministry of Justice in the autumn. The deadline for implementation of the Directive is December 2009.



- [Government response to the consultation on implementing the EU Services Directive in the UK](#)
- [Directive 2006/123 on services in the internal market](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)

COMPETITION

Direct settlement procedure for cartels finalised

A settlement procedure for cartels has been introduced by the European Commission to allow it to deal more speedily with cartel cases under investigation. By virtue of this procedure, set out in a Regulation and explanatory Notice, cartelists can opt to recognise their involvement and liability at an early stage of the process and consequently be granted a ten per cent reduction in fine. Parties will be entitled to review the evidence gathered by the Commission during its investigations and allowed to voice their opinions on the case against them, concluding ultimately whether or not to settle. Parties will thereafter be invited to introduce a settlement submission, acknowledging each of the elements of the case against them. The Commission has emphasised that this is not a process of plea bargaining but it is still hoped that it will reduce the burden of current procedural formalities and reduce the number of appeals against Commission decisions. It should be noted that where settled cases also involve leniency applicants, the reduction of the imposed fine will be cumulative.



- [Commission Regulation 622/2008 amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases](#)
- [Commission notice on the conduct of settlement procedures in cartel cases](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)



Safeguarding the use of expert evidence: The EU & UK Perspective

As part of a project co-financed by the European Commission under the AGIS funding programme the Law Society of England and Wales is holding a conference on safeguarding expert evidence on 23 September in London. The conference will examine the issues surrounding the use of expert evidence both in the UK and the EU. Former Attorney General, Lord Goldsmith QC, will launch the discussions and alongside him, defence practitioners, prosecutors, and judges will discuss questions in relation to gathering, handling, analysing, interpreting and presenting expert evidence. The Forensic Regulator and a number of other experts will offer

their experience and examine the use of scientific quality standards in the criminal justice system. Cross-border evidence gathering, mutual legal assistance and the future European Evidence Warrant will also be discussed. A networking dinner will be held on 22 September at the Law Society. The event attracts 5 CPD hours and costs £250 + VAT.

For more information see [here](#).

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)

Brussels: the venue of choice for the ABA SIL Fall conference 2008

The American Bar Association's Section of International Law will hold its 2008 Fall Conference in Brussels from 24-27 September. The conference will cover an impressive range of issues from specific discussions on antitrust, cross-border mergers, and electronic discovery to broad themes centred on the rule of law and global justice. The Law Society of England and Wales' International Division will be hosting an event with the UK's Ambassador to the EU. The Attorney General, Baroness Scotland, will be the guest of honour.

For more information see [here](#).

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)

Alternative business structures - Solicitors vote for change in Scotland

At the Law Society of Scotland's recent AGM, solicitors voted overwhelmingly for the introduction of alternative business structures (ABSs) for law firms. This could lead to external ownership or capital for law firms; partnerships between solicitors and non-solicitors; or organisations such as banks or supermarkets providing legal services. The vote opens the way for a Bill to be introduced by the Scottish Government to provide a suitable legislative framework for the proposed changes. There is ongoing in-depth consideration of the safeguards and changes in the Law Society's rules which will be required in order to facilitate ABSs. Rules will have to ensure proper regulation and professional standards, as well as compliance with EU law, and in particular the Services Directive.



WEBLINKS

- [The public interest: Delivering Scottish legal services, policy paper on alternative business structures](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)



Law
Reform

COMPANY LAW

European Private Company offers new possibilities for business

As part of the Small Business Act for Europe, the European Commission has unveiled a proposal for a Regulation on the Statute for the European Private Company (SPE). Similar to the European Company in concept, this would allow a business to operate under a single legal form throughout the EU. The SPE, however, will be a private company with a minimum capital requirement of €1. The company founders should have considerable freedom to shape the company given that the many aspects of the organisation of the SPE are to be left to the company's articles of association, as listed in the annex to the Regulation. Importantly, the SPE could be established either from scratch or through the transformation of an existing company or companies (including divisions and mergers). Given the legal base of the proposal, Member States must adopt it unanimously but the European Parliament will only be consulted on it. The French Presidency of the EU has made the SPE one of its priorities and has organised a large number of meetings on it, in the hope of making significant progress by the end of the year.



WEBLINKS

- [Proposal for a Regulation for a Statute for the European Private Company](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)

INVESTMENT FUNDS

Improved framework for UCITS

The European Commission published proposals on 16 July to recast the EU legislation on UCITS investment funds (undertakings for collective investment in transferable securities). The proposal seeks to make notification procedures less burdensome. It would allow funds to merge; would harmonise the approval process for this; and would allow the use of master-feeder structures, whereby one UCITS fund could invest its assets into another. The existing simplified prospectus, used by UCITS to inform investors, will be replaced by a short document containing 'key investor information'. Publication of the proposal had been delayed for a number of months due to concerns over the idea to create a management company passport. This would have allowed a fund to be authorised in one EU country and administered elsewhere in the EU. This is not included in the proposal. The Commission has instead asked the Committee of European Securities Regulators to provide advice by 1 November on its concerns about supervision and investor protection.



WEBLINKS

- [Proposal for a Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\)](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)

EMPLOYMENT

Role of European Works Councils to be improved

On 2 July, the European Commission published a legislative proposal to amend Directive 94/45 on the establishment of a European Works Council (EWC). This aims to improve the role of EWCs, the bodies facilitating social dialogue within trans-national companies. According to the EC Treaty, the social partners may be responsible for the negotiation of new rules in this field, which can then be incorporated into legislation. In this instance, however, there was disagreement between the EU social partners and proposals have been brought forward by the Commission instead. The proposal aims to rectify certain problems associated with the Directive including clarification of the role of employees' representatives as well as the concepts of 'information' and 'consultation'. The proposal also seeks to improve the Directive's coherence with other Community legislation by clarifying the respective competences of EWCs and national level bodies. The proposal is now to be examined by the European Parliament and the Council under the co-decision procedure.



WEBLINKS

- [Proposal for a Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)

ENVIRONMENT

Public procurement goes green

On 16 July, the European Commission published a Communication on green public procurement (GPP). This was part of a larger package of measures entitled the Sustainable Production and Consumption and Sustainable Industrial Policy Action Plan. The Communication proposes that by 2010 half of all public procurement procedures should be green. The Commission seeks to develop a set of common criteria, which public authorities would be able to use to ensure the goods and service they buy are the least damaging to the environment. This would also bring greater coherence to the practices being developed in different Member States. The expert group agreeing the criteria are to draw on existing standards, such as eco-labels, and a consultation on them will take place. The criteria will concentrate on ten sectors of procurement, such as construction, office equipment and transport, and should eventually be incorporated into the national action plans and guidance on GPP.



WEBLINKS

- [Communication on public procurement for a better environment](#)
- [Communication on Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan](#)
- [Directive 92/75 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances](#)

INTELLECTUAL PROPERTY

Initiatives to boost the “knowledge economy”

On 16 July, the European Commission outlined various initiatives in the field of intellectual property. This includes a legislative proposal to extend copyright protection for performers and producers from 50 to 95 years. A Green Paper on copyright in the knowledge economy was also published. This seeks views until the end of November about the accessibility of research, educational and other material, in particular on the internet. It reviews the exceptions that exist in Directive 2001/29 on copyright and related rights in the information society and how they are applied by Member States. It also asks whether there is a need for guidance on contractual arrangements implementing certain exceptions or a need to make certain exceptions mandatory. Last, a new industrial property rights strategy was published. Actions proposed include studies on the quality of patents and on trademark systems, with a possible review of the legislation on the latter foreseen, and initiatives to improve enforcement, alternative dispute resolution and the availability of these rights to small and medium-sized enterprises.



WEBLINKS

- [Proposal for a Directive amending Directive 2006/116 on the term of protection of copyright and certain related rights](#)
- [Green Paper - Copyright in the Knowledge Economy](#)
- [Communication on an Industrial Property Rights Strategy for Europe](#)

HEALTH

Commission acts to improve patients' rights

The European Commission has published a proposal for a Directive on cross-border healthcare which clarifies the rights of patients seeking healthcare in other Member States. Several rulings from the European Court of Justice and the decision by the European Parliament to exclude healthcare from the Services Directive led to calls for a specific initiative on this area. The proposal provides that patients may seek healthcare in any EU country and will be reimbursed for the cost as long as the treatment would be covered under their national system. There is no requirement for prior authorisation, except for in certain cases of hospital or specialised care. The overall aims of the proposal are to establish a framework for the provision of safe, high quality and efficient cross-border healthcare, and to promote cooperation between Member States. These will be achieved through the development of European reference networks, the establishment of national contact centres and the strengthening of 'e-health' activities, as well as in defining the responsibilities of the Member States involved.



- [Proposal for a Directive on the application of patients' rights in cross-border healthcare](#)
- [Communication on a Community framework on the application of patients' rights in cross-border healthcare](#)

[Previous Item](#)

[Back to Contents](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just Published](#)



Viewpoint

Why the Irish 'No' is different

As the whole European Union knows, to its cost, nothing in the EU treaties can be changed without the unanimous consent of all its governments followed by ratification according to the domestic constitutional processes of each Member State. For an emerging federal union, the survival of the *liberum veto* is, of course, a nonsense. Yet government leaders have never had the skill and courage to tackle a radical revision of Article 48 of the EU Treaty to render the EU constitutional amendment procedures more democratic.

Retention of the unilateral veto would only be tolerable if all Member States had made an effort to bring their own constitution in line with the reality of EU membership and to adapt their domestic rules so as not to impede the momentum of European integration. Ireland, significantly, has made no effort to modernise its constitution in this respect. It seems still to be encumbered by a post-colonial psychosis in which the pooling of sovereignty is tantamount to treason against the Republic.

The letter of the constitution is made worse by some dotty decisions of the Irish Supreme Court which have made the fighting of any referendum campaign wholly asymmetrical, with the Government and parliamentary parties severely disadvantaged against non-parliamentary and, in most cases, mendacious 'civil society'.

So the Irish 'No' is different. In 2005, France and the Netherlands (by virtue of ill-conceived and badly executed referenda) and the UK (even more pathetically) refused to ratify the constitutional treaty they had all signed up to in 2004. As at least two of those three countries were indispensable to the survival of the EU, there had to be a renegotiation and there was. In return, all three ditched their previous, cowardly dalliance with populism and returned to the prudence of parliamentary democracy.

Ireland, however, is not indispensable to the future of the Union. If Ireland really means to wield its legal veto against the building of a stronger Union, it can of course do so. Constitutionally speaking, all member states are equal. But politics is another matter. The fact is that Ireland, all things being now considered, turns out to have neither the moral authority nor the political clout to stop the Lisbon process from being continued. In other words, the context in which Article 48 is now interpreted has changed hopefully for good.

Ireland's twenty-six partners will shortly have ratified Lisbon. Ireland is being asked to change its mind. Its unavoidable second referendum will take on the character of a plebiscite. The question put, which must be

drafted by politicians rather than lawyers, will need to tie in acceptance of Lisbon with continued membership of the Union. The consequences of a second 'no' must be laid bare. And the campaign must be run by campaign professionals rather than the Irish political parties.

There will be no renegotiation of the Treaty of Lisbon to satisfy the Irish. Ireland already has all the opt-outs from key elements of Lisbon including both internal and external security policy that it could reasonably expect. There can be helpful interpretative declarations. There is scope and much to be said in any case for Ireland to opt out of the European Defence Agency. There could also be a decision of the European Council to postpone the reduction of the size of the European Commission until 2019.

The Dublin government appears to want a long time to back-pedal before holding the second referendum. This means that the European Parliament will be elected next June under the terms of the wretched Treaty of Nice. But Nice will not work for the appointment of the next Commission, so Mr Barroso and his present team will probably have to stay on until January 2010. Again, lawyers will squeal. It is time to do some real politics.

There remains the disaster scenario, in which the Irish voters again reject Lisbon in 2009 but then also choose to reject, in 2010, the consequential decision to secede from the Union. In that perspective, Britain's position would be critical.

Would a Tory Britain decide it belonged to the mainland core of Europe or to the Celtic periphery? Mr Blair copied France and Holland in rejecting the constitutional treaty in 2005. Mr Brown has followed France and Holland again in eventually accepting the Lisbon treaty, thereby leaving Ireland isolated. What would Mr Cameron do?

President Sarkozy was not just being polite when he told the Parliament on 10 July to be nice to the British. 'Europe needs the United Kingdom' he said. 'If Britain has one foot in and one foot out, Europe is weakened'.

Biography



Andrew Duff MEP is spokesman on constitutional affairs for the Alliance of Liberals and Democrats for Europe (ALDE).

[Previous Item](#)

[Back to Contents](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

[Just published](#)



Just published

- **Regulation 593/2008 on the law applicable to contractual obligations (Rome I)**
- **Commission Regulation on the application of Articles 87 and 88 of the Treaty declaring certain categories of aid compatible with the common market (General block exemption regulation)**
- **Directive 2008/50 on ambient air quality and cleaner air for Europe**
- **Proposal for a Council Directive amending Directive 2006/112 as regards reduced rates of value added tax**
- **Communication on “Think Small First” - A “Small Business Act” for Europe**
- **Report on implementation of the Hague programme for 2007**

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

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