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Reportage

Responding to the Crunch

Events in the financial markets over recent weeks have been astonishing. At the time of writing a number of financial giants had fallen by the wayside and it was still unclear whether others would follow.

A number of interesting legal developments have arisen in the UK as a result. For instance the Financial Services Authority used emergency powers to ban the short selling of publicly traded shares in UK banks and insurers.

It was also announced that the UK Government will take advantage of special powers in the Enterprise Act 2002 to intervene in the competition authorities' investigation of the merger of Lloyds TSB and HBOS, in order to ensure that the merger is not prevented by competition rules. Currently, such public interest interventions can only be made on grounds related to national security, newspapers and the media. As such the Government intends to introduce a further ground, relating to the stability of the UK financial system once the UK Parliament returns from its summer recess.

It is also clear that these developments are having a considerable impact on the work of lawyers and law firms. Whereas those dealing with conveyancing work have experienced a significant downturn in work, for example, the work of litigators is on the increase. The financial situation also appears to be having effects in other ways. The numbers of providers of professional indemnity insurance for solicitors has decreased slightly, although at the moment it is said that the levels of premiums has remained reasonably stable.

At the EU level, the European parliamentarians did not pull their punches when criticising the perceived failures of the EU, its officials and its regulatory framework to prevent or manage this crisis. On Tuesday 23 September MEPs agreed two resolutions calling for the European Commission to bring forward legislative proposals – some by the end of this year – to regulate the perceived problems surrounding hedge funds and private equity, particularly in relation to the transparency of these businesses and their dealings.

Parliament has called for the Commission to propose a directive, or directives, which would cover numerous matters such as: risk-based capital requirements for investment funds; an oversight regime for EU credit rating agencies; a legislative framework for venture capital and private equity; a European regime for private placement with principles on the disclosures to be made to investors; the disclosure of material information by private equity and hedge funds to the companies whose shares they own and other market participants; and the disclosure by them of investment policies, of shareholdings (with a new 3% threshold), and of the voting policies of hedge funds.

The following day MEPs continued to express their dissatisfaction. The French Minister representing the EU Council Presidency also commented that the laissez-faire approach to matters such as hedge funds should end.

The Commission did, however, make it clear that in its view the existing 2007 roadmap of forthcoming initiatives, endorsed by Member States, did address the key points of concern. For instance, it envisages measures: to improve transparency for investors, the markets and regulators; on capital requirements for banks; and on the supervision of credit rating agencies. Legislative proposals on capital requirements and credit rating agencies are expected soon.

While the EU's banking and insurance regulators remain publicly confident about the ability of European financial institutions to weather the storm, 30 recommendations have been made to the Commission on the responsibilities of financial institutions, their boards and supervisors in relation to internal risk management strategies.

The Commission is due to debate the financial situation at its next weekly meeting and EU finance ministers are due to meet the following Tuesday (7 October). It might then become clear whether MEPs' concerns about the EU's reaction to the financial crisis are shared in all national capitals.



WEBLINKS

- **[Parliament resolution on the transparency of institutional investors](#)**
- **[Parliament resolution on hedge funds and private equity](#)**



Professional Practice

LEGAL EXPENSE INSURANCE

Austrian court seeks advice on freedom of choice of lawyers

On 2 August, a question posed by the Austrian national court to the European Court of Justice concerning the Directive on legal expenses insurance was published in the EU's Official Journal. The Austrian court asked whether this Directive should be interpreted as precluding a clause entitling the insurer to select the legal representative for insurance claims concerning losses suffered by a large number of insured persons from the same event. Such a clause would restrict the right of the individual to choose his own lawyer. Freedom of choice of legal representative is intended to protect the interests of the insured and to preclude any conflict of interest arising, for example, from the fact that the insurer is covering another person. The Directive provides that freedom of choice must apply from the moment the insured has the right to claim from his insurer under the insurance policy. The extent to which freedom of choice is applied to pre-action procedures instead of incorrectly restricting it to when actual court proceedings are commenced, however, remains an issue. The Law Society of England and Wales intends to take this at EU level in the coming weeks.



WEBLINKS

- [Council Directive 87/344 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance](#)
- [Reference for a preliminary ruling from the Oberster Gerichtshof \(Austria\) in Dr. Erhard Eschig v UNIQA Sachversicherung AG](#)

PROFESSIONAL QUALIFICATIONS

Members States hauled before court

It is almost a year since national governments were bound to implement the Directive on the recognition of professional qualifications into national law. This consolidates the provisions of fifteen different directives and simplifies the mechanism for the recognition of professional qualifications in the EU. The last 12 months have however seen the European Commission take action against a number of Member States for failure to do this. Having previously issued a reasoned opinion, one of the key stages in the infringement procedure, the Commission has now stepped things up, having announced on 18 September its intention to take eight Member States to the European Court of Justice: Austria, Belgium, Cyprus, France, Greece, Ireland, Portugal and Spain. Other Member States including the UK are also the subject of infringement proceedings in relation to a similar instrument dealing with Bulgaria and Romania.



WEBLINKS

- [Directive 2005/36 on the recognition of professional qualifications](#)
- [Directive 2006/100 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania](#)

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TAX

Commission to plug loopholes in savings tax regime

On 15 September the European Commission published a review of Directive 2003/48 (the Savings Tax Directive), identifying certain failures in the scheme of the Directive. In particular it states that it is possible to circumvent the Directive's provisions and that these loopholes should be closed to improve the Directive's effectiveness. The Savings Tax Directive establishes duties concerning the exchange of information between Member States on interest paid to individual savers resident in another Member State. Certain Member States have been granted a transition period within which a withholding tax is applied to such interest payments instead. The report proposes a number of amendments to the legislation, such as an extension of scope to include interest payments made to legal persons, such as companies and trusts, and a clarification of the definition of paying agent. It would also appear that the Directive could be amended to cover a broader range of financial instruments. The findings of the review are scheduled to be discussed by EU finance ministers before the end of the year, with legislative proposals from the Commission expected sometime thereafter.



WEBLINKS

- [Report from the Commission in accordance with Article 18 of Directive 2003/48 on taxation of savings income in the form of interest payments](#)
- [Directive 2003/48 on taxation of savings income in the form of interest payments](#)

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*Law Societies'
News*

Law Society of Scotland welcomes announcement of Legal Profession Bill

The Law Society of Scotland has welcomed the Scottish Government's announcement that there will be a Legal Professional Bill in its programme for the 2008/2009 parliamentary session. It is the hope of the Society that provision will be made in the Bill for the creation of alternative business structures for law firms. It is believed this will improve the competitiveness of the Scottish legal profession and ensure that solicitors in Scotland can provide a comprehensive service for their clients.



WEBLINKS

- [The Law Society of Scotland Policy Paper on Alternative Business Structures](#)
- [Press release of the Law Society of Scotland](#)

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Brussels Office: Open for your business

Regular business in Brussels? Scoping visit to the EU institutions? The Law Societies' Joint Brussels Office offers conferencing and hot-desking facilities at our modern offices situated in the heart of the EU district. The conference rooms can accommodate up to 40 people and are equipped with video-conferencing facilities, a data projector and WiFi access.

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Safeguarding the use of expert evidence in the EU

A conference examining issues surrounding the use of expert evidence both in the UK and around the EU, held by the Law Society of England and Wales on 23 September, was a great success. The conference marked the final stage of a two-year project funded by the European Commission and included a wide range of significant and thought-provoking contributions. Highlights of the conference included Lord Goldsmith QC's speech emphasising the 3 i's (independence, impartiality and integrity) and the 3 r's (to retain, record and reveal work), and the importance of comprehensive standards for experts. This was a key theme for Andrew Rennison, the Forensic Science Regulator, who highlighted the work towards a comprehensive standards framework to secure confidence in forensic science. A confidence much needed, it seems, as Mr Justice Fulford, member of the High Court and International Criminal Court Judge, cautioned that science, if not carefully controlled, has the capacity to become a forensic Frankenstein.



WEBLINKS

- [Criminal Justice Conference: Safeguarding the use of expert evidence in the EU](#)

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Northern Ireland sees increase in those training to be solicitors

According to figures released by the Law Society of Northern Ireland, more students than ever before have

been admitted to train as solicitors in Northern Ireland. Following close co-operation with the Institute of Professional Legal Studies at Queen's University and the Graduate School of Professional Legal Education at the University of Ulster to develop increased training opportunities for apprentices, the Society is pleased to announce that places for the vocational training course have increased by nearly 50% since last year's figure. This increase reflects the Society's ongoing commitment and investment in education within the profession.

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Law Reform

FAMILY LAW

MEPs continue to call for EU divorce rules

MEPs are continuing to call for a Regulation on applicable law and jurisdiction in matrimonial matters (Rome III), despite the decision of EU Justice Ministers on 5 to 6 June that it would not be possible to get the unanimity needed to adopt the proposal. The Regulation would afford parties a degree of choice regarding the competent court or the law applicable in divorce cases, followed by conflict of law rules to ensure that Member States' courts would normally apply the same substantive law to avoid forum shopping. MEPs are expected to vote on the matter on 11 October, having considered in committee on 9 September that the proposal should also be amended to provide more information to couples on the repercussions of their choices. In the meantime, nine countries, France, Italy, Spain, Romania, Austria, Hungary, Greece, Slovenia and Luxembourg, have agreed to use the enhanced cooperation procedure. This procedure allows a legislative instrument to be negotiated and adopted by a group of eight or more Member States. Any enhanced cooperation agreement would in principle only affect the Member States that sign up to it.



WEBLINKS

- [Proposal for a Council Regulation amending Regulation 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters](#)
- [Parliament draft Report on the proposal for a Council Regulation amending Regulation 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters](#)

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CRIMINAL LAW

Protection of personal data in criminal matters

On 23 September the European Parliament voted to strengthen the data protection provisions in the proposed Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. The Parliament's revisions intend to address its concern that the Council had reduced the proposal to the lowest common denominator. In particular, the amendments apply data protection provisions to data processed at national level and not merely to exchanges of data among

Member States. They also impose data protection requirements on private operators doing public service tasks and impose requirements on transfers to third countries.



WEBLINKS

- [Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters](#)
- [Parliament legislative resolution on the draft Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters](#)

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CRIMINAL LAW

Enforcement of decisions rendered *in absentia*

On 2 September the European Parliament adopted by an overwhelming majority the proposal for a Framework Decision on the enforcement of decisions rendered *in absentia* with amendments. This proposal, which seeks to standardise procedural rules in relation to trials *in absentia*, was proposed by the EU's Slovenian Presidency and co-sponsored by the UK, among others. The Law Society of England and Wales has expressed serious concerns about the proposal, including that it could result in a "tick-box" exercise where an executing Member State will not consider the circumstances of trial in absence. It also had concerns as to the lack of clarity over the essential criteria for a retrial – something that Parliament's amendments have sought to clarify. The Council will now consider whether to take on board Parliament's amendments although is not bound to do so.

For a copy of the response of the Law Society of England and Wales to the UK Government consultation on *in absentia* judgments please contact: brussels@lawsociety.org.uk



WEBLINKS

- [Proposal for a Council Framework Decision on the enforcement of decisions rendered *in absentia*](#)
- [Parliament resolution on the proposal for a Framework Decision on the enforcement of decisions rendered in absentia with amendments](#)

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JUSTICE AND HOME AFFAIRS

What next for EU Justice and Home Affairs?

On 25 September the European Commission launched a public consultation on defining the priorities for the future EU Justice and Home Affairs Programme from 2010 to 2014. This follows on from the work of national government-led High-Level Advisory Groups, (the Future Group on Justice and the Future Group on Home Affairs), which were set up to provide ideas for the next phase of action in this area. The groups are informal

and comprise Justice and Home Affairs Ministers from various Member States. They presented their wide-ranging reports dealing with everything from e-justice to extradition in July 2008. A European Pact on Immigration and Asylum is also scheduled for November 2008. The Commission will consider these reports when it presents its own strategy and vision early in 2009. The Law Society of England and Wales is making representations on the future Programme. The deadline for contributions to the consultation is 20 November 2008.



WEBLINKS

- **Commission "Freedom, Security and Justice: What will be the future?" consultation on priorities for the next five years (2010-2014)**
- **Freedom, Security, Privacy - European Home Affairs in an open world - Report of the Informal High-Level Advisory Group on the Future of European Home Affairs Policy**
- **High-Level Advisory Group on the Future of European Justice Policy - Proposed Solutions for the Future EU Justice Programme**

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COMPETITION LAW

Parliament discusses antitrust litigation

On 8 and 9 September, MEPs discussed the European Commission's White Paper on damages actions for breach of EC antitrust rules. In the Economic and Monetary Affairs Committee, MEP Klaus-Heiner Lehne emphasised the importance of leaving untouched certain aspects of domestic civil procedure, such as rules on the disclosure of evidence and legal costs. There appeared to be consensus that collective-redress mechanisms (or class actions) are necessary where there are a large number of claimants with nominal value, individual claims. An opt-in approach for such actions was said to be favoured over an opt-out approach but Sharon Bowles MEP highlighted certain drawbacks to this approach experienced in the UK. There will be a discussion of the report drafted by Mr Lehne in committee in November.



WEBLINKS

- **Commission White Paper on damages actions for breach of EC antitrust rules**
- **Response of the Law Society and England and Wales to the White Paper**
- **Response of the Law Society of Scotland to the White Paper**

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TAX

EU tax base proposal put on hold

In a speech given at the end of August, Commissioner Kovács has declared that proposals for a Common Consolidated Corporate Tax Base (CCCTB), due in September, had been delayed. A CCCTB would provide a

common mechanism for the calculation of profits and losses of companies established in more than one Member State, leaving Member States free to set tax rates. It is believed that this would tackle various cross-border problems experienced by companies in Europe and decrease compliance costs. It would eliminate the expensive process of determining arms-length transfer prices for dealings within a group and make it easier to offset foreign profits and losses within a company. The Commissioner made clear that he was not willing to present an incomplete or flawed proposal, preferring to wait until it is ready. While there may be more technical work to be done on the proposals, it has been speculated that the uncertainty caused by Ireland's vote against the Treaty of Lisbon has played its part in these delays. Given the importance this issue played in Ireland's recent referendum discussions, a legislative proposal might not appear before the future of the Treaty is clear.



- **Keynote speech of Commissioner Kovács at the Congress of the International Fiscal Association**

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Viewpoint

Legal Services in Emerging India

The British relationship with India has historically always been one based upon economics and an element of romance and mystery. The opportunities that came with what had been discovered and the mystery and intrigue with what remained as yet undiscovered. These days it is trade agreements which venture out, from both sides, into the unknown to help "discover" the opportunities.

With the impasse in reaching a World Trade Organisation free trade deal, the world of bilateral and regional agreements entered into a frenzy of activity from 2006 onwards.

This in itself does not take away from a commitment to multilateralism. Bilateral free trade agreements (FTAs), if approached with care, can build on WTO and other international rules. By going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation, FTAs can be made complementary to multilateral rules and more importantly, mutually beneficial in real terms.

Analysis undertaken by CEPII, Copenhagen Economics and other research institutes shows huge potential benefits to India and the EU following the successful conclusion of an FTA and importantly, also confirms that the EU - India FTA would give a valuable boost to global trade, especially in services, including legal services.

At present, there are nearly one million lawyers in India. The global legal services market has been estimated at 155 billion euro while India's share stands at 210 million euro. Within our era of globalisation and a globalised legal profession, there is growing pressure to open up the legal sector in India, which will drive up standards in the profession ultimately allowing consumers a better standard of service.

The Indian legal market, in spite of the country's accession to the WTO, remains resolutely closed to outsiders, as yet "undiscovered". Foreign law firms are not allowed to open offices in India and, under the Indian Advocates Act of 1961, they are prohibited from giving any legal advice that could constitute practising Indian law. On the other hand, Indian law firms are not permitted to have more than 20 partners, they are prohibited from engaging in any form of advertising, and they are not allowed to obtain any form of financial assistance by way of bank loans.

Recently under a Law Society of England and Wales initiative, the president of the Society Andrew Holroyd and I met with the Indian Law Minister Shri H. R. Bharwaj, who spoke about his Government's commitment to liberalise the Indian legal market and to pave the way for foreign law firms.

I strongly support these initiatives. They are in line with the Indian Government's commitment to openness in many other sectors also. However the pace of reform towards the opening of these markets remains far too slow.

A final ruling by Mumbai's High Court regarding foreign law firms in India will, I hope, help take our relationship with India's legal market from one of mystery and intrigue to one based upon solid progress and economics.

The opening of the legal sector will unlock great opportunities for Indian lawyers. Foreign law firms, with real capacity and expertise in international law, can then play their part in opening avenues internationally for Indian enterprises wishing to reach out. We have already witnessed "big players" in India move outwards. It is now time the same opportunities were made available to all levels and sectors. Mergers and acquisitions, increased exports, joint ventures, establishing operations in the EU and raising capital overseas are a small example of the areas of expertise which remain largely closed off to many Indian entrepreneurs in India.

It is therefore vital that an EU - India FTA addresses the issue of legal market liberalisation. It will significantly improve legal services through competition and the introduction of international expertise. That is what India needs. India is not going to make its mark by protecting the monopolies of the few at the great expense of the many.

Foreign law firms should be subject to the same regulatory regime as Indian law firms and therefore amendments to the Advocates Act and Limited Liability Partnership Act, along with the evolution of a regulatory mechanism to ensure there is a level playing field for the foreign firms stepping in, are required. India has a booming economy, a strong legal system and a deep well of talented lawyers. To global law firms India remains one of the last "undiscovered" market places on the international legal scene.

Biography



Sajjad Karim is the Conservative Legal Affairs Spokesman in the European Parliament and the Rapporteur on the EU - India Free Trade Agreement. He qualified as a solicitor of the Supreme Court of England and Wales in 1997. He was elected Member of the European Parliament for the North West of England in June 2004.



Just published

- **Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Prüm Decision)**
- **Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings**
- **Communication from the Commission to the European Parliament amending Directive 2003/88 concerning certain aspects of the organisation of working time**
- **Common Position adopted by the Council with a view to the adoption of a Directive amending Directive 2003/88 concerning certain aspects of the organisation of working time**
- **European Parliament draft Report on the proposal for a Council decision on the establishment of a European Criminal Records Information System (ECRIS)**

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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