The Law Societies
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Brussels Agenda

May 08

The Law Societies' monthly publication with the latest EU news

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Shedding some light on lobbying

"Brussels" has always suffered from reputation problems in the eyes of the public. The gravy train perception persists in many Member States, not just the United Kingdom. Unfortunately, the negative stories are the ones that attract most media attention and that serve to stoke the flames of negative perception.

At the time of writing the European Parliament was being criticised anew in the press for not disclosing auditors' reports that concerned Members' expenses and pensions amongst other things. Every year the EU's accounts fail to get final sign off, although Member States are as much at fault as anyone. Decision-making within the Council of Ministers, where national governments adopt legislation, is opaque at best.

There have been repeated attempts to open things up. The Prodi Commission's White Paper on Governance led to a number of changes and much of the better regulation agenda stemmed from it. More recently Commissioner Kallas, the EU Commissioner for administrative affairs, has launched the European

Transparency Initiative. This aims to sort out the EU's problems surrounding budget accountability, to improve consultation processes and to put the work of lobbyists under some public scrutiny.

Brussels has not yet experienced a scandal of the magnitude of the Abramoff affair in Washington DC. Of course, there was the Cresson scandal and concerns about with whom various Commissioners holiday. The political system in Brussels, however, is arguably quite different to that in the US, where financial inducement is an accepted part of the system.

Better safe than sorry, the Commission and the Parliament wish to see those who "lobby" sign up to a public register. This would cover the full range of "interest representatives" from public affairs consultants and trade associations to non-governmental organisations and lawyers. They would have to declare their clients and the interests they represent; disclose financial information, such as turnover or financing related to lobbying; and observe a code of conduct.

The thought of declaring sensitive financial information has been of great concern to many businesses involved in lobbying, particularly when under the proposed voluntary system, not all competitors will choose to register.

For lawyers, the other essential question has been, and still is, when should a lawyer's activities be considered lobbying? Most EU lawyers are in regular contact with EU institutions on behalf of clients, in relation to a range of matters from competition law to trade or regulated sectors.

Lawyers, however, are not normally approached primarily to conduct lobbying work on behalf of a client. They represent clients to the EU institutions because a client has come to them seeking legal advice. The work and decisions of the EU institutions have direct and important effects on both businesses and citizens and on their legal rights and obligations. The ability to seek legal advice in confidence on such issues is a fundamental aspect of European legal systems, designed to safeguard the rights of the individual.

European decision-makers still have to strike the right balance between the public interest of disclosing such information and the public interest in maintaining the confidentiality of the lawyer-client relationship. It is not an easy task, but if the right balance is not found, lawyers might fear compromising their clients and simply feel unable to register.

WEBLINKS

- **Alexander Stubb MEP' s Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions**
- **Law Society of England and Wales Position Paper on the European Transparency Initiative**

INTERNAL MARKET
Professional qualifications: Member States still failing to implement key Directives

On 3 April the European Commission took measures against a total of eleven Member States for failing to implement two directives relating to professional qualifications. Belgium, Spain and the Czech Republic have not yet transposed the provisions of Directive 2005/36 on the recognition of professional qualifications. This consolidates the provisions of fifteen different directives and simplifies the mechanism for the recognition of professional qualifications in the EU. These Member States have been sent a reasoned opinion by the Commission. This represents a key stage in the infringement proceedings process where the Commission sets out the reasons why it considers there to have been an infringement of Community law and calls on the Member State to comply with Community law within a specified period. In addition, eight other Member States have failed to implement Directive 2006/100 adapting the directives on professional qualifications following the accession of Bulgaria and Romania to the EU in 2007. The Commission has referred the matter to the European Court of Justice.

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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MEDIATION
Cross-border mediation: agreement at last

After years of negotiation, a deal has finally been brokered on the draft Directive on mediation in cross-border legal disputes. The European Parliament and the Council arrived at a consensus last month as MEPs approved, without amendment, the Council's position. This instrument is designed to set in place an alternative dispute resolution system for use in cross-border cases. The Directive focuses on voluntary recourse to mediation, the assurance of confidentiality, voluntary codes of conduct and requirements for Member States to provide training for mediators. Mediation is promoted as being quicker and less expensive than pursuing court proceedings in relation to cross-border civil and commercial disputes and the proposal encourages the use of cost-effective mediation on a Europe-wide basis.

WEBLINKS

- **Legislative Resolution of the European Parliament on the Common Position for adopting a directive on certain aspects of mediation in civil and commercial matters**
- **Common Position for adopting a directive on certain aspects of mediation in civil and commercial matters**

CROSS-BORDER SUPPLY OF LEGAL SERVICES
Focus on Scotland

Following the public consultation on the Services Directive (2006/123) at the beginning of the year, the Department of Business, Enterprise and Regulatory Reform (BERR) is continuing to implement this legislation. BERR addressed a meeting with a number of Scottish stakeholders on the effects of the Directive at a meeting in Edinburgh last month. Following the event, the Law Society of Scotland held discussions with BERR and the Scottish Government on how the new regime will affect the legal profession in Scotland and on the importance of ensuring consistency with the process of domestic regulatory reform.

WEBLINKS

- **BERR Services Directive Implementation Updates**
- **Law Society of Scotland's response to the UK Government consultation on the Services Directive**
- **Services Directive 2006/123 on services in the internal market**

Chinese Lawyers and Judges visit EU institutions

The Law Society of England and Wales, in collaboration with the General Council of the Bar of England and Wales organised, a visit to the EU institutions for a delegation of Chinese lawyers currently on the Lord Chancellor's Training Scheme for Young Chinese Lawyers. They were joined by a group of judges hosted by the Great Britain China Centre. The delegation visited the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia in the Hague, the European Parliament and European Commission in Brussels and the European Court of Justice in Luxembourg. The delegation also met in separate instances HE Judge Liu Daqun, Diana Wallis MEP and a spokesperson for the European Commission. Their debates centred around the improvement of human rights law in both Europe and China, the work of the European Commission to strengthen the commercial relationship between the two areas and the protection of intellectual property rights in the two regions.

For more information please contact: **lorna.duhaney-riley@lawsociety.org.uk**

- **Law Society's International Division article on the Chinese lawyers' training project**

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India: Push for Liberalisation

The Law Society of England and Wales has invited a delegation from the Indian Bar Council to London to look at the experience of the city's legal profession in the practice of liberalisation of the legal market. The invitation comes in conjunction with the publishing of the Commonwealth Business Council report on the positive effects liberalisation could have on the Indian legal market. The President of the Law Society, Andrew Holroyd, welcomed the report and commented that liberalisation would bring enormous benefits both to the Indian economy as a whole and to lawyers, who fear it most. The Indian Bar Council has accepted the invitation and the visit is scheduled to take place in the summer.

For more information please contact: **alison.hook@lawsociety.org.uk**

- **Commonwealth Business Council website**

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Colombia: 100 lawyers needed to join international initiative

The Law Society of England and Wales has launched a call for lawyers who are prepared to take part in an international delegation to Colombia in August. The aim of the visit is to conduct a fact-finding exercise on the rule of law and human rights violations in the country. It will also be an opportunity to meet with lawyers, the judiciary and NGOs working for the promotion of human rights. The Law Society will hold a meeting in London on 10 May to discuss the delegation further.

For further information please contact: **courtenay.barklem@lawsociety.org.uk**

- **Law Society International Division call for Colombia Delegation**

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CRIMINAL LAW
Trials *in absentia*: tough negotiations ahead

When EU Justice Ministers met last month, one of key issues on the table was the proposal relating to mutual recognition and enforcement of judgments in absentia which is designed to enhance procedural rights of individuals in criminal proceedings where the defendant did not appear in person. The provisions therefore allow judicial authorities to refuse to recognise and enforce a judgment received from another Member State in these circumstances. On the other hand it establishes that judicial authorities in one Member State should recognise judgments rendered in the absence of the person concerned in another, where he or she has been given a right to a retrial. The proposal would not apply to domestic cases and would apply to cross-border situations only. This proposal is one of the Slovenian Presidency's top priorities and its ambition is to complete the negotiations by the end of June. However, with a number of Member States dragging their heels, it appears that the unanimous support needed to sign off this text may be a long way off.

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

- **Council text: Framework Decision on the enforcement of decisions rendered *in absentia***

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CONTRACT LAW
Rome I Regulation: UK Consultation

On 2 April the UK Government launched its consultation on the Rome I Regulation: 'Rome I: Should the UK opt in?' The Regulation outlines the rules determining which law applies to contracts that have links with multiple countries, as in the case of cross-border business or consumer contracts. When the proposals were initially announced in 2005, the UK Government chose not to opt in to the Regulation but intense negotiation has led to a largely revised version which, the UK argues, should allow cross-border trade to continue with confidence. The consultation paper discusses the advantages of the Rome I Regulation, comparing them against those of the antecedent 1980 Rome Convention. The paper also proposes that the UK should opt in to the revised version of the Regulation and to employ the same rules with regard to contractual obligations between England and Wales, Scotland and Northern Ireland.

WEBLINKS

- **Ministry of Justice Consultation Paper**

COMPETITION LAW AND THE CONSUMER
Commission publishes White Paper on antitrust damages

On 2 April the European Commission published a White Paper on the damages actions for breach of EC antitrust rules. This makes various recommendations for improving domestic litigation systems to ensure that victims of breaches of EC antitrust rules (such as price-fixing cartels), namely Articles 81 and 82 EC, are able effectively to seek compensation. It covers subjects such as: disclosure of evidence and discovery; the binding nature of decisions of foreign competition authorities; the quantification of damages (single damages only); the passing on of overcharges to consumers; costs; and the interaction with leniency programmes. The Paper also makes recommendations on collective actions by victims - on an opt in basis - and representative actions by certain qualified entities, such as consumer associations or trade associations – possibly on a restricted opt-out basis. A consultation on the White Paper runs until 15 July. The Law Societies of Scotland and of England and Wales intend to respond, as does the Joint Working Party of the UK Bars and Law Societies on Competition Law.

WEBLINKS

- **Commission's White Paper on the damages actions for breach of EC antitrust rules**

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COMMON FRAME OF REFERENCE
Ministers take a cautious approach to contract law proposal

The Common Frame of Reference (CFR) is a topic that will either generate great hope - that a coherent overarching framework for contract law in Europe is on the way - or great fear - that this is part of a harmonisation agenda and a nascent common European Civil Code. The draft version of the CFR was presented to the Justice and Home Affairs Council (JHA) last month. The CFR is an academic text developed over twenty five years which for the first time sets out rule-based common terminology in the area of contract law in Europe. The JHA Council examined this text last month and issued a number of broad conclusions. Shunning the idea that this would amount to codification of contract law in Europe, Ministers set out clearly that the CFR is a tool for better lawmaking, based on a series of non-binding guidelines for use on a “voluntary basis as a common source of inspiration or reference in the lawmaking process”. The final version of the CFR is scheduled to be presented to the Commission in 2009.

WEBLINKS

- **European Commission's website on Consumer Affairs and Common Frame of Reference**
- **Justice and Home Affairs Council Press Release**

HUMAN RIGHTS
Human rights: on the European Parliament's agenda

The European Parliament's Foreign Affairs Committee has adopted the annual report on human rights drafted by Italian Liberal MEP Marco Cappato. In his report, Mr Cappato stated that major progress had been made on a global scale in relation to reducing the use of the death penalty following the 2007 United Nations moratorium. However, the report also criticised the work of the EU institutions and it urged them to increase their efforts in creating a "coherent and hard-hitting policy" in promoting and protecting human rights globally. The United Nations Human Rights Council was also criticised for not improving the record of measures and actions for the protection of human rights taken by the UN. A debate will be held in the Plenary session on 7 May and a vote on the text the day after.

WEBLINKS

- **The Law Society of England and Wales Human Rights newsletter**
- **Annual report on human rights**

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TAX LAW
VAT Directives: Commission adopts new measures to tackle fraud

The Commission has submitted proposals for the amendment of the Directive 2006/112 on a common system of VAT combating tax evasion in intra-Community transactions and of the VAT Administrative Cooperation Regulation (1798/2003). The aim of the amendments to the Directive and Regulation is, with effect from 2010, to speed up the collection and exchange of information on Internal Market transactions. These measures will enable Member States to detect fiscal fraud quickly and effectively. The simplification of VAT declarations for Internal Market transactions should reduce the burden which these procedures impose on businesses. The Commission has submitted other instruments which can be easily implemented to the national governments for consideration. From 2009 for example it would be possible, through the Europa website, to obtain confirmation of the name and address of trading partners established in other Member States and it will also be possible to obtain personal consultation certificates.

WEBLINKS

- **Proposal for a Council Directive amending VAT Directive 2006/112**
- **Proposal for Council Regulation amending VAT Administrative Cooperation Regulation combating tax evasion in intra Community transactions**
- **European Commission's traders database**

Antitrust litigation: a White Paper tinged with green?

Interested observers have pithily remarked recently that the European Commission's *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (2 April 2008) is 'distinctly green-tinged'. It is to be hoped that its content regarding collective redress is not the last word on the topic.

The White Paper, and its accompanying Staff Working Paper (SWP), present 'two complementary mechanisms' by which victims of anti-competitive behaviour can seek to obtain monetary compensation. Paragraph 2.1 of the Paper states:

(a) by pro-actively opting into a single collective action; and

(b) by relying upon a 'qualified entity', an ideological representative claimant (such as a consumer, state or trade association, hereafter, Entity X) to bring the action on victims' behalf, where Entity X acts 'on behalf of identified or, in rather restricted cases, identifiable victims'.

Although the White Paper appears to dance around the term, 'opt out', this is seemingly what is connoted by Entity X acting on behalf of '*identifiable* victims', whereby *described* classes of victims — those, say, who purchased a brand of widget between dates x and y — could go forth as representative actions. The SWP also refers to the possibility of both aggregate assessment of damages that could be used to compensate 'all those represented in the action (eg, the harm suffered by the producers in a given industry)', and *cy-pres* distributions of damages of any unclaimed residue (paras 47 and 56). Thus, although the text is not explicit about opt-out rights, these indications, in combination, support a class-wide representative action.

The lacuna is that the directly affected consumer who alleges that he was overcharged due to cartel activity, and consequently feels sufficiently vexed as to want to prosecute the defendant on behalf of a class of similarly-situated victims, cannot do so on an opt-out basis. In rejecting an opt-out mechanism, the SWP asserts that:

[c]ombined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular, there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level (para 58).

This passage is perplexing. It fails to take account of the opportunity of drafting 'an opt-out regime with brakes' which places appropriate protections in place for all parties; the cultural and litigious differences between Member States and 'other jurisdictions' cannot be overstated; and the author's study, *Reform of Collective Redress in England and Wales: A Perspective of Need* (2008) indicates that opt-in actions are a rarity in England, whether constituted as follow-on individual actions (approx. 7 since 2003), or as follow-on representative actions by Which? (only one since 2003); or as stand-alone opt-in actions (none under the group litigation order since 2000). Notably, in the Commission's Impact Assessment, opt-out was referred to (under Policy Option 1) but in association with other devices, such as mandatory one-way costs-shifting and

long limitation periods; Policy Option 1 was not preferred (para 152ff).

The author's view (as expressed in the abovementioned study) is that reform of English civil procedure is urgently required, to allow for an opt-out action for the 'right case'. Cartel behaviour, alleged or proven, for which individual class members are seeking compensatory relief, is the paradigm opt-out case. It is unrealistic to expect the burden to prosecute to fall upon Entity X or to require often vast numbers of victims to opt-in. Directly affected claimants ought to have the procedural facility to institute such actions on an opt-out basis. It is to be hoped that the White Paper's conservatism does not deter law-makers in Member States from pursuing appropriate and measured reforms in this regard.

WEBLINKS

- **White Paper on Damages Actions for Breach of the EC Antitrust Rules**
- **Staff Working Paper**
- **Reform of Collective Redress in England and Wales: A Perspective of Need**

Biography

Rachael Mulheron is Professor at the Department of Law, Queen Mary University of London. She was previously a litigator in Brisbane, Australia, where she acted in group litigation disputes. Rachael has written extensively on class actions jurisprudence, including The Class Action in Common Law Legal Systems: A Comparative Perspective (2004) and The Modern Cy-Près Doctrine: Applications and Implications (2006). Rachael regularly advises private law firms, law reform commissions and other institutions, regarding issues arising out of collective redress.

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- **European Commission's Recommendations on enhanced administrative cooperation for the improvement of working conditions of posted workers**
- **European Commission's Consultation on The Insurance Block Exemption Regulation**

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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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