The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

July / August 2015

The Law Societies' monthly publication with the latest EU news

Editorial

This year we are celebrating the 25th anniversary of our Brussels office which has been representing the voice of UK solicitors in the European Union.

Coincidentally, 2015 also marks the 800th anniversary of Magna Carta. The charter, signed in 1215 which originally concerned the relationship between the monarch and the barons, remains an important symbol of liberty and rule of law today and it is held in great esteem by English and American legal communities.

2015 is also a year that has put the core principles of the EU to a tough test. The Conservative party victory in the UK general election has brought the EU Referendum Bill forcing the EU to reassess its relationship with national governments. The ongoing Eurozone crisis has seen dramatic developments in recent months after the Greek 'No' vote in the referendum on the bailout conditions imposed by the Troika and the painful route to the agreement which unveiled very divergent views on the principle of European solidarity.

This anniversary issue will offer you a wider collection of articles and essays. In his viewpoint, Sir Francis Jacobs reflects on the significance and legacy of Magna Carta today. In our reportage, we will tell you more about the 25th anniversary celebrations on 16 June in Brussels and share some photos from the event. This issue will also introduce a thematic section – the first in the series. This month, we will focus on the recent developments in the field of data protection, privacy and technology.
We hope that you will enjoy this issue.

The Brussels Office editorial team

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Sir Francis Jacobs QC

Sir Francis Jacobs on the relevance of Magna Carta today

I was very pleased to take part in the recent event arranged by the office of the Law Societies in Brussels to mark the 25th anniversary of the Brussels office. It was a seminar on the rule of law, both at EU and national level; and reference was made of course to another historic event, the sealing of Magna Carta in 1215.

It is difficult to exaggerate the importance of the rule of law in the EU. The EU is a unique organisation of States, in which disputes are resolved by law, rather than by other methods which have been used throughout human history, and which have had the terrible consequences we know too well.

The EU Treaty and its predecessors provide for disputes to be settled peacefully, in accordance with the law, and they establish an independent court for this purpose. The European Court of Justice in Luxembourg is given a very wide jurisdiction, to control the other institutions and to control the Member States, where they act unlawfully. As the Court stated in the *Les Verts* case, almost thirty years ago:
"The European Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."

The notion of the rule of law is taken up in the Lisbon Treaty, where it is recognised as a fundamental value. Article 2 of the Treaty solemnly proclaims that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.
In the field of human rights, the Strasbourg Court, the European Court of Human Rights, is responsible for interpreting the European Convention on Human Rights in the wider Council of Europe (covering all European States except Belarus). The Strasbourg Court too has proclaimed the rule of law as a key value. In the case of *Golder* v. *UK*, 40 years ago, it relied upon the rule of law, as proclaimed in the preamble to the Convention, as establishing that Article 6(1) of the Convention guarantees, in civil matters, the right of access to the courts. So any limitation or restriction of the right of access requires to be justified – a point which is of particular importance today.

Yet access to the Strasbourg Court itself is today under threat: in the UK, there is talk of withdrawing from the Convention, and from the jurisdiction of the Court. Such a step is cause for consternation: the only precedent for withdrawal was the regime of the Greek colonels 50 years ago, under threat of expulsion from the Council of Europe after conviction of, inter alia, systematic torture: not the best company for the UK to keep.

The Convention was drawn up in 1950, but acceptance of the jurisdiction of the Court was initially voluntary. Almost 50 years ago, in January 1966, the United Kingdom took the historic step, still at that time unusual, of accepting the jurisdiction of the Court of Human Rights (and the then Commission of Human Rights). Today the jurisdiction of the Court is obligatory for all States parties to the Convention, and every European State, from Iceland to Russia, is party to the Convention, with the sole exception of Belarus.
How then does it come about that there is currently talk in the UK, apparently encouraged by the new Government, of withdrawing from the Convention?

The ostensible concern is discontent with particular recent judgments of the Strasbourg Court: notably, judgments limiting the power of the UK to expel certain foreign nationals; and judgments condemning the blanket UK ban on voting by prisoners in parliamentary elections.

The UK Government has taken a stand on this latter issue, with statements that it will not comply with the

Court's judgments. That raises of course a fundamental issue of the rule of law. A government cannot comply with the rule of law if it considers itself free to disregard judgments which it does not like. It cannot pick and choose. That is the antithesis of the rule of law.

The present Government threatens to go further and to limit the jurisdiction of the Strasbourg Court, adopting instead a so-called British Bill of Rights. This would seem to entail, inevitably, withdrawal from the Convention and from the Council of Europe, and might raise issues about the UK's membership of the EU. Perhaps for that reason, the suggestion is now heard that the issue will be postponed until after the renegotiation of the UK's membership of the EU. But perhaps the UK will face some serious questioning about its intentions with regard to human rights.

I fully agree with the views of Christine McLintock, incoming President of the Law Society of Scotland, in her "Viewpoint" (Brussels Agenda June 2015) that withdrawing from the ECHR and repealing the Human Rights Act could damage the UK's standing in the international community, leaving the UK alone with Belarus as the only two European states not signatories to ECHR.

Rejection of the Convention would also damage the protection of basic rights in Britain; although relatively few judgments have been given against the UK, it seems incontestable that they have been of great value as a long stop.

Moreover, the threatened UK approach to the ECHR sets an unfortunate example to other European countries. Supporters of that approach are probably not always aware of the effects in other countries including even Russia, nor perhaps aware of the value to the UK itself of a Europe in which human rights are subject to an effective system of protection.

There are other serious issues in the UK on compliance with the rule of law. To mention only one range of issues, there are those affecting access to the English courts, including severe reductions in legal aid, and imposing arguably disproportionate charges, and other hurdles, for those seeking judicial review.
Nor of course are the threats to the rule of law limited to the UK. But one does feel an inevitable regret that a country which has led the way on the rule of law should now be the focus of such concerns. The current celebrations of the 800th anniversary of Magna Carta, on which the Government is setting some store, seem in the circumstances ironic.

What therefore, to return to the EU's role, should the priorities of the EU be, in promoting the rule of law? It has been suggested that the EU should seek to promote the idea of the rule of law beyond Europe, but it seems difficult to focus primarily on promoting the rule of law elsewhere, when there are serious threats to the rule of law within the Member States. We should first put our own house in order. And we can include even the EU institutions: it is not a topic I can cover in this brief viewpoint, but it will be known to many practitioners and observers that the EU institutions, also, can do more, in their own activities, to respect the rule of law. Let us by all means promote the idea of the rule of law widely, but let us take seriously respect for the rule of law at home.

Biography

Sir Francis Jacobs QC (born 8 June 1939), is a British jurist who served as Advocate General at the Court of Justice of the European Communities from October 1988 to January 2006.
Before his appointment to the European Court of Justice in 1988, Sir Francis combined an academic career as Professor of European Law in the University of London (1974-1988) with a practice at Fountain Court Chambers, where he specialised in European Law. He was called to the bar in 1964 and took silk in 1984. He appeared in many prominent cases in the English courts and in the European Court of Justice, where he represented individuals, corporations, Governments and the European Institutions). He also appeared in leading cases before the European Commission and Court of Human Rights.
He now advises on European and International law, including EU law and the European Convention on Human Rights.
Sir Francis Jacobs was knighted in 2006 and in 2007 was elected President of **Missing Children Europe**, the European Federation for Missing and Sexually Exploited Children. He was also elected President of the European Law Institute on 31 May 2011.

'The Rule of Law - where do we go from here?' Joint Brussels Office 25th Anniversary

On 16 June to celebrate the 25th anniversary of the Brussels office, and to mark 800 years since the Magna Carta, the Law Society of England and Wales hosted a seminar focusing on today's protection of the rule of law, both at EU and national level.

The seminar took the form of a panel discussion moderated by Andrew Caplen, President of the Law Society of England and Wales. Guest speakers Sir Francis Jacobs QC, Timothy Kirkhope MEP (ECR, England), Nicolaas Bel (European Commission, DG Justice) and Fergal Anthony O'Regan (Office of EU Ombudsman) addressed a range of issues relating to the rule of law including human rights, transparency and data protection. The panel discussion was followed by a lively Q & A and closing remarks were given by Christine McLintock, President of the Law Society of Scotland.

The seminar was followed by a beautiful reception held in the courtyard of the Cercle de Lorraine with a fantastic range of edible delights and refreshing beverages. This gave guests the opportunity to mingle and relax in the warmth of the evening sun.

After weeks of hard work, the event was a complete success. But don't just take our word for it, check out some of the pictures below. Roll on another 25 years!

Timothy Kirkhope MEP

Timothy Kirkhope MEP engages with guests

Timothy Kirkhope MEP, Andrew Caplen, President of the Law Society of England & Wales, Nicolaas Bel, European Commission, DG Justice

A full house for the rule of law seminar

Helena Raulus, EU Policy Advisor, Internal Market

Sir Francis Jacobs QC

Guests mingle over food and drinks

Sir Francis Jacobs QC, Nicolaas Bel European Commission, DG Justice, Malcolm Fowler, Dennings LLP, Christine McLintock, President of the Law Society of Scotland

Edward Pitt, Bates Wells Braithwaite LLP

Eugene McQuaid, Trainee Solicitor Law Societies' Joint Brussels Office

Christine McLintock, President of the Law Society of Scotland, Fergal Anthony O'Regan, office of the EU Ombudsman

Enjoying the beautiful evening in the Cercle de Lorraine

Andrew Caplen introduces guest speakers Nicolaas Bel, European Commission, DG Justice, Timothy Kirkhope MEP, Sir Francis Jacobs QC and Fergal Anthony O'Regan, office of the EU Ombudsman

Andrew Caplen, President of the Law Society of England & Wales and Christine McLintock, President of the Law Society of Scotland

Andrej Skulec, Law Society of England & Wales, Zampia Vernadaki - JURI Committee, Eugene McQuaid, Trainee Solicitor, Law Societies' Joint Brussels Office, Francisco Manuel Ruiz Risueno- JURI Committee, Alexander Keys - JURI Committee

Commission publishes the roadmap on the new lobbying register

The Commission published its highly anticipated roadmap for the new lobbying register in Brussels. The register, called the Transparency Register (TR), is to be extended to cover the Council, alongside the

Parliament and the Commission. The existing system is to be overhauled to create more incentives for the lobbyists to register. The new register would also cover the wider group of stakeholders and thereby provide a level playing field in the interest representation community.

The Commission proposed an inter-institutional agreement (IIA) as the basis for the operation of the new register. The proposal is expected to be published at the end of the year.

Among the underlying reasons to improve the current registration system was the exclusion of the Council from the previous register and the fact that there was still a number of organisations or companies that had not been registered. The new lobbying register is to be more effectively enforced to ensure the quality of data submitted and a sufficient level of precision and legal certainty. The wide definition of lobbying, i.e. direct and indirect interest representation, will be maintained in the new register.

The choice of legal instrument still remains the IIA rather than a regulation or a directive. In its analysis, the Commission points out that enacting binding legislation would be a substantial burden for the Member States and the EU institutions. Instead, it prefers to keep the IIA as a 'lighter' instrument.

The preparation of the proposal for the IIA will be accompanied by a public consultation to be carried out in the third quarter of the year which will be followed by a large stakeholder event. There will be no further impact assessments and instead the Commission will use the submissions made in 2012 and 2013 (before the revamping of the 2011 register). However, the negotiations on the IIA are likely to bring more consultations by the institutions involved.

Stakeholder engagement and lobbying are featuring prominently in the Commission's Better Regulation Package. Wide consultation is seen as contributing to developing effective policies and assessing their performance.

- **Full text of the roadmap**

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European Commission's Trade Policy Day

On 23 June the European Commission held its Trade Policy Day. The purpose of the event was to provide a platform from which a range of stakeholders could put across their views on the future of trade policy in the EU and in turn afford the Commission the opportunity to hear from those who are directly affected by the EU's trade policy.

The event began with a key note speech from Commissioner Malmström. In her speech the Commissioner recalled the key benefits of trade policy and the changes introduced by her office over the past seven months. Additionally the Commissioner highlighted that the Commission would be publishing a communication, 'Trade and Investment Strategy for Jobs and Growth', on trade policy in October of this year.

Commissioner Malmström discussed the need to consider the way in which trade policy is made, ensuring that the EU's core values are not compromised and that the trade negotiations agenda is kept up to date. In this regard she highlighted the challenges ahead such as booming e-commerce and the free movement of persons as well as affirming that the EU had a responsibility to the multilateral system of the World Trade Organisation.

There were six separate sessions carried out throughout the day with some of the issues discussed including: how trade policy affects people's lives, how to design trade policy for the 21st century economy, how to make trade work for sustainable development and a discussion surrounding the Doha world trade negotiations.

Amidst these discussions a pattern of key topics frequently arose. Many participants stressed the need for regulations and standards to follow the developments in international trade. In particular, due to the increase in trade flows owing to globalisation it was felt that there was a need to adopt common set of global standards and regulations. There was some discussion as to whether these standards should be set via a multilateral system or a bilateral/plurilateral system. While the multilateral system had its obvious drawbacks, the bilateral/ plurilateral systems, in the opinion of some, risked entrenching existing trade and geo-political blocks.

Other topics which arose throughout the discussions included the importance of openness and transparency in trade negotiations as well as the need to respect the democratic process. This was down to the fact that the

outcomes of trade negotiations will effect the lives of everyday citizens in the EU and therefore transparency and democracy was an integral part in trade policy.

On the whole, it was a very interesting and well attended event which allowed for a fantastic insight into how different sectors perceive the best way forward for the EU's trade policy. It is unclear, however, whether the Commission will launch a more official consultation on its trade policy priorities.

As part of our 25th anniversary celebrations we have asked some our key partners in Brussels to share their thoughts on the Brussels Office.

Scottish Government EU Office, Brussels

The Scottish Government would like to offer our sincere congratulations to the Law Societies' Joint Office in Brussels on reaching their 25th anniversary.

As a constructive and engaged partner in the EU, the Scottish Government works with the UK Permanent Representation and other EU partners in Brussels, including the EU institutions, to ensure that Scotland has a strong voice in the EU process and to deliver mutually beneficial outcomes.

In that pursuit we have been fortunate to develop and maintain a close working relationship with the Law Societies in Brussels. One that we have always valued. Not just because we have a separate Scottish legal system. Not just because of the breadth and depth of our devolved responsibilities in areas such as civil and criminal justice. Not just because of our common desire to ensure that the Scottish legal profession is fully represented here in Brussels. But also because we appreciate the expertise that the Law Societies can bring to bear in relation to emerging EU policy and dossiers of common interest. We are equally always grateful for the opportunity to attend the excellent events that are consistently offered. The most recent event examining the rule of law and where we go from here is a perfect example – a rich and timely discussion followed by a fabulous networking reception. A very fitting way to celebrate the anniversary.
We look forward to continuing to work with Mickaël and the team in the future.

Timothy Kirkhope, Member of the European Parliament, European Conservatives and Reformists

Many areas of my work as spokesman and coordinator on Justice and Home Affairs issues for the European Conservatives and Reformists in the European Parliament have both direct and indirect legal implications not only for EU citizens as a whole but also for my constituents in Yorkshire and the Humber. As a solicitor as well as an MEP, I remain at all times conscious of the impact of EU legislation, both Directives and Regulations, on citizens but also on those in the legal profession who have to work with the decisions that we make. Receiving the input of the Law Society into these deliberations is important and I welcome the presence of its representatives in Brussels. There are many different legal systems in Europe, some based on common law traditions and some on Roman law, but there are some common issues such as access to a lawyer and the conditions in which suspects or those detained in the criminal system are held. It is always good to exchange experiences and good practice and to clarify how procedures in England and Wales compare with those of our continental colleagues. I hope this relationship will continue to be productive.

Timothy Kirkhope, Member of the European Parliament

Legal section of the UK Permanent Representation in Brussels

We are delighted to have the opportunity to contribute a few lines on the relationship between the UK Permanent Representation to the EU and the Law Societies' Joint Office in Brussels, and to have the opportunity to express our many congratulations to the Brussels office on its 25th anniversary.

The UK Representation is tasked primarily with engaging with all the EU Institutions and more specifically representing the UK in the Council and its working groups and on the negotiation of EU legislation. As such both the Permanent Representation and the Law Society share a common goal in ensuring that the interests of the UK legal community are represented in Brussels, and UKREP values the strong voice that the Brussels Joint Office gives to those interests in the wider Brussels legal community and within the EU institutions. Over the years we have developed a close working relationship covering a broad sweep of EU business including, inter alia, civil and criminal justice. The Law Societies' considered and professional insights into draft EU legislation highlighting its potential impact for the UK legal system from the private sector legal perspective and identifying possible amendments are influential.

In addition we regularly attend the events that the Law Society runs either in its own right or as part of the wider CCBE Grouping. We are constantly impressed with the quality of the discussions and their contribution to the wider Brussels discourse on important matter of EU policy.

It's a relationship we appreciate hugely, both personally and professionally, and we look forward to continuing our work together.

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THE BRUSSELS OFFICE EXPERIENCE
Julia Bateman, Policy Advisor, Brussels Office 2003-2011

When I joined the Brussels Office in 2003, the focus of our work was on trade matters and free movement. Core areas of the internal market impacting on the UK legal profession and their clients. Yet at the same time a new area of European policy and law was developing -the so-called area of freedom, security and justice. Suddenly criminal law, asylum and immigration, family law and civil justice were under the spotlight. Politically controversial then as now!

I was privileged to be the first person to be the Justice and Home Affairs advisor and take the lead on representing the views of the profession in shaping this new and exciting area. The commitment to law reform and best practice of the practitioner committees of the Law Societies meant that the European Commission officials listened to our views as they developed legislation. In criminal justice the values of the profession – procedural rights, equality of arms – were hammered home in the development of instruments such as the European Arrest Warrant and European Evidence Warrant. In civil justice the UK experience of alternative dispute resolution in civil matter and collaborative justice in family law were all important contributions to the debate.

Having a seat at the table was particularly important in ensuring that the common law perspective was represented. Working closely with Members of the European Parliament and the UK Representation to the EU at an early stage meant that we could influence and shape the legislation as it happened. I am pleased that this important policy area remains a key priority for the Brussels Office today.

Julia Bateman, Professional Support Lawyer, Kingsley Napley LLP

Cath Howdle, Policy Advisor, Brussels Office 2011-2012

I was the Internal Market Policy Advisor for the Brussels Office during 2011 and 2012. This wide-ranging role encompassed all aspects of Internal Market law and policy – from company law to environment. My knowledge of EU institutional law, and in particular my background at the CJEU, were also put to good use in the Brussels Office's work on the rights of in-house lawyers and reforms to the Court of Justice.

My daily work entailed finding out about the latest (and upcoming) EU law developments in areas falling within my portfolio, and analysing these developments for relevance to the UK legal profession. I would then pass the relevant information to interested parties in London, Edinburgh and Belfast, participating in committee meetings and drafting updates such as the Brussels Office Trackers. Feedback on this information would then serve as a basis for me to convey the profession's views to relevant parties in Brussels.

Working at the Brussels Office helped me develop a great all-round understanding of the EU institutions; something which I am still finding useful in my present work as a public sector lawyer. It was also an honour to be able to promote an organisation which makes a strong practical – and ideological – contribution to the development of law in the EU. And of course, the friendships and working relationships which I made during my time at the Brussels Office are still going strong!

Cath Howdle, Officer, EFTA Surveillance Authority

Paul Henty, Trainee Solicitor, Brussels Office 2003

I had the privilege of working as a stagiaire at the Brussels Office of the UK Law Societies in 2003. The experience there stood me in good stead for my chosen career path as an EU Law specialist. It was also a great life experience. The office is at the forefront of reporting on legal developments in the EU to the rest of the profession. Developments in Brussels, Luxembourg and Strasbourg impact upon many areas of the law: not only competition and public procurement, but also company law, property, criminal law and private client. For a trainee required to assist in the reporting of these developments, one becomes far better informed of developments which have a direct impact on lawyers across the continent. This not only makes for a more rounded practitioner, but also one who is better equipped to assist their clients. The greater level of information provides a competitive edge.

Few lawyers are aware of the valuable service the Office performs in protecting the interests of the profession. During my time there I was fortunate to see the laudable work it carried out in relation to proposals to require a register of EU lobbyists. The early proposals of this initiative went too far and the Office was influential in reining in the scope of the project so that it did not restrict the ability of lawyers to represent their clients effectively before the Parliament.

This is in part a reflection of the excellent relations the Law Societies have with the EU institutions. The Office keeps its finger on the pulse of developments within the EU Commission, the Parliament and the Court of Justice. As part of my brief, I was required to attend meetings of various specialist committees of the EU Parliament. This was an invaluable assistance in understanding the work of that institution. It has helped me since in assisting clients who were required to influence the development of proposed laws or revisions of existing Directives or Regulations of the European Union. I also organised a trip to the EU Courts in Luxembourg for trainees of UK Law Societies working in Brussels at the time. We were warmly welcomed by senior judges at the General Court (then the Court of First Instance) and their referendaires who were generous in providing a unique insight into the work of this Court.

The publications of the Office are authoritative and well respected. I saw this while co-ordinating with UK Law Societies staff and leading practitioners to assist in producing its response to the proposals to codify the Rome Regulation on choice of applicable laws in conflict situations into an EU Regulation. This provided a very useful grounding into private international law and the knowledge I gained of the workings of that regulation assisted me greatly in conflict of law questions which have since arisen in my career.

Paul Henty, Partner, Charles Russell Speechlys LLP

Carolyn Thurston Smith, Trainee Solicitor, Brussels Office 2012

I joined the Brussels Office team on secondment for the last seat of my traineeship. Coming straight from a financial services regulatory role, I already knew something of the EU system but within the first few weeks of life in Brussels my learning curve had pretty much taken off and done a loop-the-loop. I was lucky enough to be working with more senior members of staff who had first-hand knowledge of the institutions and the sometimes dry undergraduate lessons on the EU framework suddenly fell into place. By the end of my six months, among (many) other things, I had been to conferences at the Commission, lobbied MEPs and organised a trip to the CJEU for fellow UK trainees in Brussels.

By this point I had decided that I wanted to gain some more experience in lawmaking and legal policy. I was lucky enough to be able stay on with the Brussels team, working alongside colleagues throughout the UK on all sorts of EU issues from the 2014 Justice and Home Affairs Opt-out decision to a Commission-driven project looking at insurance law. Much of my time taken up leading on the responses to the Government's Balance of

Competences Review Consultation. I was also introduced to the world of international trade negotiations which quickly became one of my favourite dossiers.

For me, the best part was the people I met along the way. I worked with great colleagues in the Brussels team and all three of the UK Law Societies and enjoyed life in the Brussels Office where we shared the floor with a number of other European bar associations. I also had the chance to work with, and learn from, a whole host of experts – both legal and otherwise –across a broad range of subjects. In this regard the wonderful members of the Law Society of England and Wales' EU Committee deserve a special mention. Finally, no appraisal of Brussels would be complete without referring to the famous (or infamous) "List" of email addresses which brings together the rotations of trainees and young lawyers who pass through the Brussels offices of UK firms. Belgian beer, waffles and "*frites* with mayo" in the summer 2012 sunshine just wouldn't have been the same without them.

Carolyn Thurston Smith, Policy Advisor, Law Society of England and Wales

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Trainee Solicitors visit CJEU

On 7 July ten Brussels-based trainee solicitors visited the Court of Justice of the European Union in Luxembourg. The Joint Brussels Office runs the trip to Luxembourg twice a year to allow seconded Brussels trainees an insight into the workings of the CJEU. The group of trainees were briefed on a case that is currently before the General Court and then attended the hearing. After the hearing Advocate General Eleanor Sharpston gave a detailed and interesting presentation on the EU's accession to the ECHR.
The trainees then had the opportunity to speak to Mr Christopher Vajda, President of Chamber, Mr Nicolas Forwood, Judge at the General Court and Mr George Gryllos, Legal Secretary, Chamber of Judge Forwood, and ask them questions ranging from their opinions on intricate legal matters to their greatest anecdotes of their time in the Court. The visit was wrapped up by a tour of the buildings and a beautiful view over Luxembourg.

The trip was held by the trainees to be 'in compliance with the principles and standards' of a fantastic experience.

The Joint Brussels Office would like to thank the Court for taking the time to meet with the trainees and for arranging such a packed and exciting tour.

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Attend the European Circuit Annual Conference in Berlin, 20-21 September

The European Circuit, in collaboration with the Berlin Bar Association and the American Counsel Association, is pleased to invite you to its Annual Conference taking place in Berlin on 20th and 21st September 2015.

Find out more

CIVIL JUSTICE
Big Change for Small Claims

On 29 June the Permanent Representatives Committee (Coreper) approved, on behalf of the Council, a compromise reached with the European Parliament on a regulation amending the European Small Claims Regulation and the European Order for Payment Regulation, which have been in force since 1 January 2009. On July 14 the Legal Affairs Committee adopted the **text** by a unanimous vote.

The objective of the amending regulation is to make the European Small Claims Procedure more efficient, reflecting the technological progress made in the justice systems in the Member States, and to make the procedure accessible in a larger number of cases, in particular for businesses.

The threshold for a small claim will increase from €2,000 to €5,000, reflecting the need for a wider application of the procedure, particularly for SMEs; this amount may be increased further subject to a later review. The application of the Small Claims Procedure to remuneration in case of cross-border employment will also be considered in the same review.

The Member States will have to ensure that the court fees charged for the European Small Claims Procedure are not disproportionate or higher than the court fees for national simplified court procedures. Member States will also be obliged to offer remote means of payment for these court fees.

Although the procedure is normally a written one, the court can hold oral hearings. This will only happen, however, in cases where the court feels its not possible to render the judgment on the basis of written submissions or where a party requests one. The court may also refuse such a request, by giving reasons in writing, if it feels that an oral hearing is not necessary for the fair conduct of proceedings. Where there is an oral hearing, distance communication technology will normally be used and evidence will be taken via the simplest and least burdensome method. However if a party expresses their wish to be physically present at the oral hearing they will always be entitled to appear before the court.

The translation requirements (and related costs) for the certificate of enforcement of a judgment given in the European Small Claims Procedure are minimised by limiting the compulsory translation only to the part which contains the judgement itself; claimants are able to use the European Small Claims Procedure when a statement of opposition has been lodged against a European Order for Payment.

For the purpose of serving documents, postal service and electronic means are considered equal.
The judgments delivered under this procedure will be recognised and enforceable in other Member States without the need for a declaration of enforceability. The procedure is optional, offered as an alternative to the possibilities existing under the national laws of the Member States.

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INTERNATIONAL TRADE
"ISDS lite" at the end of the tunnel

On 8 July the European Parliament adopted its recommendations to the European Commission on the Trans-Atlantic Trade Investment Partnership (TTIP) with a vote of 436 votes in favour, 241 against and 32 abstentions.

This vote had originally been scheduled for the 10 June plenary session but was postponed by the European Parliament's President Martin Schulz and referred back for reconsideration due to **tensions** in the Parliament's S&D group surrounding the amendment relating to the investor state dispute settlement (ISDS) mechanism.

Following this referral for reconsideration, on 29 June, the International Trade (INTA) committee of the European Parliament held a vote and decided to retable the resolution to go before plenary on 8 July. The

decision was taken with two separate votes, one on the retabling of the plenary amendments and the other to retable requests for split or separate votes.

The retabled resolution contained a new **compromise amendment** relating to the ISDS mechanism in TTIP which was proposed by President Schulz and has been described as **"ISDS lite"**. This amendment replaced original ISDS amendment which was supposed to go before Parliament at the 10 June plenary session. In the new amendment the Parliament acknowledges the need for investor protection stating that any new mechanism must "*ensure that foreign investors are treated in a non-discriminatory fashion while benefitting from no greater rights than domestic investors."* However it also calls for the current ISDS-system to be replaced with *"a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism."* As a result, the adoption of the report by the European Parliament on the 8 July can now be stated as paving the way for a new form of ISDS in the TTIP agreement. In this regard shadow rapporteur Godelieve Quisthoudt-Rowohl (EPP, Germany) praised the Parliament's decision stating that "investments will only be made if they are protected and the opportunity is now for the EU and the US to negotiate a promising future model... we see parliament's resolution not only as a message to the negotiators, but also as a positive signal to our citizens."

The 10th round of TTIP negotiations between the EU and USA took place in Brussels on 13 -17 July.

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CRIMINAL JUSTICE
Strengthening the Principle of the Presumption of Innocence

As part of the agenda of Judicial Cooperation in Criminal Matters, the LIBE Committee of the European Parliament has finalised the text of the directive on the strengthening of the principle of presumption of innocence, at its second reading. The ball is now in the Council's court, and trilogues will commence. The text presented by the Commission was heavily amended by the Committee.

MEPs agreed that allowing presumptions that shift the burden of proof from the prosecution to suspects or accused persons is “unacceptable”, and they deleted this proposal from the Commission’s initial text. This could be an issue for countries, such as Scotland, where a reverse burden of proof exists for some offences. MEPs also removed a provision that would have made it possible in limited cases to “compel” a suspect or accused person to provide information relating to charges against them.

The right to remain silent, the right not to incriminate oneself and the right not to cooperate were strengthened, making clear that any interference made by a judge, which would impinge on the exercise of these rights, would not be acceptable. This might create a problem for some countries, like England, where silence can be questioned in a later phase of the trial, if a fact which was not disclosed is used as defence. MEPs also specified to whom the Directive applies (the Directive must also apply to legal persons – as criminal proceedings conducted against legal persons must benefit from the same approach as proceedings against physical persons – and to persons summoned or questioned as witnesses who become, or are liable to become, suspects during the course of questioning); when it applies (the Directive must apply from the time a person becomes a suspect or an accused person, at all stages in the proceedings and up until the final conclusion of those proceedings); and the cases to which it applies (the Directive must apply to proceedings in ‘criminal matters’ as defined in the ECHR).

The protection afforded by the right to be present at one's own trial was strengthened, keeping the cases where proceedings can be conducted in absentia at a strict minimum. As suggested by many stakeholders during consultation, the persons and authorities to whom the ban on making public statements prior to conviction should apply has been clarified, and the need to ensure that the Member States adopt appropriate legislation to prevent the media and the press riding roughshod over the right to the presumption of innocence has been stressed.

Of particular interest (see the recent LSEW guidance for solicitors on **vulnerable clients**, and the opinion expressed by LSS in their answers to the consultation) is the addition of an article 9a, which states: "Member States shall ensure that in the implementation of this Directive the particular needs of vulnerable persons who become suspects or accused persons are taken into account."

COURT OF JUSTICE OF THE EUROPEAN UNION
Court of Justice Reform: upcoming JURI vote

The European Parliament Legal Affairs Committee (JURI) held an exchange of views with rapporteur António Marinho e Pinto (ALDE/ Portugal) on the Court of Justice reform on 14 July 2015. The debate centred around the political/ legal motivations of the reform and the need to balance efficiency with cost. The debate follows the rather unprecedented public fight surrounding what is normally a very discreet institution. Antonio Marinho e Pinto, a former President of the Portuguese Bar Association, has been ruffling feathers by questioning the Member States' **decision** to add 28 judges to the General Court, rather than the 9 previously agreed. He has invited judges to JURI hearings and presented evidence how the General Court has generally become more efficient with its case load. The Court President Skouris has sent a letter to the European Parliament declaring his amazement at the process, and complaining how the rapporteur dares to openly **criticise** the staff of the institution responsible for the legislative proposal. This was followed by a meeting with President Schultz, who has since been busy repairing the relations with Judge Skouris. Furthermore, Judge Skouris has asked his colleague, Guido Berardis, the Italian judge, to explain himself over the documents which were allegedly leaked by his office, something which may **potentially** lead to a disciplinary procedure.

The time frame for the vote was adopted by the JURI Committee on 14 July and is as follows: The rapporteur will present his report to the committee on 14 September. The report will be voted on in the JURI Committee meeting on 13 October and then will be voted for in plenary session in the last week of October.

TAXATION
Commission tax action plan: all roads lead to the CCCTB

On 17 June, the Commission adopted an Action Plan for fair and efficient corporate taxation. The Action Plan is set to reform the corporate tax framework in the EU in order to tackle tax abuse, to ensure sustainable revenues and support a better business environment. The Commission's action plan contains five detailed proposals, all of which will contribute to the gradual development of a mandatory Common Consolidated Corporate Tax Base (CCCTB) and ensure that taxation takes place where profits are generated.

The Commission has opted for a mandatory CCCTB, at least in the case of multinationals. It argues that an optional CCCTB would limit the effectiveness of the CCCTB as a tool to prevent profit shifting, as multinational enterprises that engage in aggressive tax planning would be unlikely to opt in to the CCCTB.

Consolidation has been the most divisive aspect of Member States' negotiations on the CCCTB. Therefore, the Commission proposes that the primary focus should be on securing the common tax base. In particular, the Commission will consider whether the beneficial treatment of Research and Development expenses should be further developed and whether it should address the corporate equity bias in order to strengthen the capital markets union. The work on consolidation has been postponed until after the common base has been agreed and implemented.

The Commission promises to present a new legislative proposal in 2016, which will provide for a step by step approach for the CCCTB, and will include the adjusted base and the introduction of the mandatory element. The Commission proposes that, until full CCCTB consolidation is introduced, group entities should be able to offset profits and losses they make in different Member States. To ensure that one Member State does not definitively carry the burden of losses incurred in another Member State, there should be a mechanism to recapture those losses once the group entity turns a profit.

The Commission will also propose improvements to the current mechanisms to resolve double taxation disputes in the EU by summer 2016. It will review whether the scope of the Arbitration Convention should be extended within the Union and whether turning it into an EU instrument would be more efficient for improving the functioning of the Single Market.

In the Action Plan the Commission also recognises that there has been a growing demand from the European Parliament, Member States and stakeholders to ensure that profits generated in the EU are taxed in the area where the actual activities take place. This echoes the on-going discussions at international level in the

context of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profits Shifting (BEPs) project.

The Commission will bring forth the following concrete steps to ensure effective taxation where profits are generated. Firstly, they will adjust the definition of "permanent establishment" so that companies cannot artificially avoid having a taxable presence in Member States in which they have economic activity, and improve the Controlled Foreign Capital Corporation rules, which ensure that profits parked in low or zero tax countries are effectively taxed. Consensus on these elements should be achieved in the Council within 12 months, and should be made legally binding before an agreement is reached on CCCTB. Secondly, the Commission will explore the concrete measures that can be achieved within the Code of Conduct for Business Taxation. Thirdly, the Commission will consider how to ensure that EU corporate tax legislation aimed at preventing double taxation does not inadvertently lead to double non-taxation. On the basis of the outcome of the Interest and Royalties Directive negotiations, the Commission could align the Parent Subsidiary Directive with the recast Interest and Royalties Directive. Fourthly, the Commission will also work with Member States and businesses to build rules on improving the transfer pricing framework and develop coordinated and more concrete implementation of the OECD BEPs within the EU.

Furthermore, the Commission will continue to provide guidance to the Member States on how to implement patent box regimes in line with the modified nexus approach agreed by the Code of Conduct for Business Taxation Group in 2014. According to this approach there must be a direct link between the tax benefits and the underlying research and development activities. If, within 12 months, the Commission finds that Member States are not applying this new approach consistently, it will prepare binding legislative measures to ensure its proper implementation.

Finally, the Commission will launch a discussion with the Member States, within the Platform on Tax Good Governance, to determine how to develop a more strategic approach to controlling and auditing cross-border companies.

Consultation on further corporate tax transparency

The Commission has also promised to continue its work on tax transparency in the Action Plan. It will put forward a common approach to non-cooperative tax jurisdictions and will carry out an impact assessment on any measures, following the March 2015 proposal (on the automatic exchange of information on cross-border tax rulings), which are aimed at developing tax transparency.

With this in mind, the Commission has also opened a consultation on further corporate tax transparency. This is to support the abovementioned aim to build a system where the country in which a business' profits are generated is also the country of taxation.

The Commission wants to gather views from stakeholders, particularly on the following questions:

Transparency by whom? Transparency could be required from different kinds of companies, varying in size, location and extent of cross-border business. A key question is whether the non-EU multinational enterprises operating through branches or subsidiaries in the EU should be covered by any EU attempt to extend corporate tax transparency. In view of this, the consultation aims to examine the risks implied by a distorted level playing field between EU and non-EU enterprises.

Transparency towards whom? Enhanced transparency could be vis-à-vis tax authorities or include the wider public.

Transparency of what type of information? The type of information to be disclosed might concern tax rulings, country by country reporting, statements or other types of information given by enterprises - there is a range of possibilities in terms of the degree of detail and scope of information that could be sought.

The consultation consists of 26 questions and responses are to be uploaded on the consultation website. It is possible to upload additional comments. The **consultation** closes on 9 September 2015.

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JUSTICE AND HOME AFFAIRS
Luxembourg Presidency Priorities

On 1 July Luxembourg began its 12th Presidency of the Council as the final Member State of the Italian, Latvian and Luxembourg presidency trio. It is a position that Luxembourg last held in 2005.

During their presidency the Grand Duchy are championing the idea of a Union for the people with an open approach of listening to the citizens, supporting business and cooperating with its partners and other institutions to act in the best interests of the EU. They have listed their priorities for the presidency which are based on **seven pillars** including: Stimulating investment to boost growth and employment, Deepening the European Union's social dimension, Managing migration, combining freedom, justice and security, Revitalising the single market by focusing on its digital dimension, Placing European competitiveness in a global and transparent framework, Promoting sustainable development and Strengthening the European Union's presence on the global stage.

On 8 July, the Luxembourg Prime Minister, Xavier Bettel presented these priorities to the European Parliament at plenary. During the meeting Bettel specifically listed youth unemployment, migration and the Greek crisis as the main challenges facing the EU. He stated that Luxembourg are taking over the presidency at a **critical point** for the Union and the challenges they are facing are serious.

In relation to the policy areas which the Joint Brussels Office is monitoring the Luxembourg presidency has outlined a number of priority areas such as data protection, better regulation, family law and criminal law. In particular, with regard to criminal law they indicated that they are focusing on the European Public Prosecutor's office, the procedural guarantees package and presumption of innocence. They have also indicated that in the area of civil justice, they hope to make headway in the reform of the European small claims procedure. With regard to the Common European Sales law, the Presidency does not expect it to be discussed until the end of this year as it will only be proposed in November.

Transparency of what type of information? The type of information to be disclosed might concern tax rulings, country by country reporting, statements or other types of information given by enterprises - there is a range of possibilities in terms of the degree of detail and scope of information that could be sought.

The consultation consists of 26 questions and responses are to be uploaded on the consultation website. It is possible to upload additional comments. The **consultation** closes on 9 September 2015.

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CIVIL JUSTICE
Online contracts sales law

Following the 'do less, do it better' approach of the new European Commission, the rather grand plans for a Common European Sales Law (CESL) have been dropped for the moment, replaced by a more modest plan for an online contracts sales law. A consultation questionnaire has been circulated to stakeholders and the deadline for responses is 3 September 2015.

This plan responds to both the Digital Single Market agenda and the access to justice theme, encouraging the growth of e-commerce and providing remedies in case of problems arising from the contract; it should have two parts, one referring to the sale of digital content and one to the sale of tangible goods, and would include both business to consumer and business to business contracts.
The rationale behind the plan is that if digital content products markets are growing rapidly and online retail sales of tangible goods reached a share of 7% of total retail in the EU-28 in 2014, it is necessary to increase consumers' trust and legal certainty for businesses, and if some aspects of contract law for online commerce are already covered by the Consumer Rights Directive, the Unfair Contract Terms Directive and the Consumer Sales and Guarantees Directive, there are no specific remedies at EU level in case of defective products, particularly in the case of digital content.

Main points of the consultation are:

- Is there a real need for an initiative on contract rules for online trading, and is there a need for both digital content and tangible goods?
- Should it cover both business-to-consumers and business-to-business transactions, and what type of products?
- What remedies should be provided in case of defective products?

Anyone interested in participating in the consultation or simply to know more about it, can find the questionnaire and all relevant documents **here**.

Changing technology is easy - changing culture is what's hard

In my role as project manager of the Law Society of Scotland's smartcard development and deployment I have learned more than I care to know about the technology and legislation underpinning digital signatures. If I'm not careful I may find myself more geek than guru.

The simple truth however is that the technology is not difficult and as it turns out all surprisingly familiar. It appears we are all blissfully unaware that for many years using our chip and pin bank cards involved digitally signing authorisations for the transfers of money -- from the ATM to your wallet or from your account to the restaurant's bank account -- it all depends on digital signatures. This is when technology is at its best, when essentially it's invisible and we don't think about what we're doing, we just use it because it works.

The Society's digital signature is exactly the same in operation as a bank card and perhaps the toughest thing about the technology is that it's one more PIN to remember. It enables you to sign documents in Word, PDF, Excel, Outlook and many other systems many of which have had the technology built into them for over a decade -- we just didn't have signatures we could use.

It turns out that what is actually difficult is getting your head round doing things differently and making the culture shift from the reverence with which we treat "wet signatures" to digital signatures. Several key conversations with members of the profession reflect this cultural issue.

How can I trust or interrogate the authenticity of a digital signature? The real question is -- on what basis have you been trusting or interrogating the authenticity of wet signatures? The reality is that rarely are wet signatures verified in any meaningful way. We trust them because they are presented to us in a context that causes us to believe that they are what they are -- we spent three months negotiating terms we agreed on the telephone, confirmed by e-mail and followed up with a paper document which reflect those terms -- naturally we are reasonably entitled to trust the document bears appropriate wet signatures. The same is true of the digital signature but because it's new that automatic faith is not there yet but shortly it will be as familiar as relying on e-mail which in the past was challenged for exactly the same reasons.

Is it right that anyone in possession of a digitally signed document can create more self-proving originals even if they're not a signatory? In a word -- yes. Provided that the document is not edited in any way and its filename is not changed using "save as" every copy is a self-proving original so when the lawyer forwards a copy of the digitally signed document to the client the lawyer has a self-proving original and so does the client. If the client forwards it to their spouse another self-proving original is created. This concept is anathema to many classically trained lawyers but it is the legal position and it certainly makes it harder to lose the original!

What happens if I print a copy of the digitally signed document for my file? A print of a digitally signed document has a value similar to that of a copy. It certainly has no self-proving authority anymore. Moving away from our dependence and reverence for paper is perhaps is one of the biggest cultural shifts of all. The paperless office has been coming for 30 years but was impossible without digital signatures. Finally we are moving to an environment where the digital copy in the case management system is actually the only copy that matters because it's the real self-proving original.

The Scottish legislation has been amended to permit digital signatures for all purposes except the signature of a will. Unfortunately changing organisational processes and systems such as those at courts does not happen overnight irrespective of legal obligations and there is little to be gained by sending digitally signed documentation to a recipient who isn't expecting it, doesn't understand it and may be incapable of processing/acting upon it. There is a need for courtesy in this transition stage as we change culture and when using digital signatures it is prudent and practical to work with others rather than against them. The Scottish courts for example are working to facilitate the use of digital signatures as part of the Scottish Government's Digital Justice Strategy.

The Law Society of Scotland is currently tendering for a transaction platform to allow lawyers in Scotland to collaboratively work on contracts and documents in a secure workspace accessed by their digital signature cards and PINs rather than the less secure password and user name.

E-mail became the ubiquitous means of communication amongst lawyers and their clients not because it was fantastic technology or supremely secure but because everyone came to realise that it was efficient, quick, reliable, beneficial and saved money and time. Digital signatures will become equally ubiquitous and the shift in culture will take place only if those similar drivers are there.

At the time of writing 4200 lawyers in Scotland have digital signature Smartcards and we have over 3000 printed cards for lawyers who have completed the application process.
Six months ago the question from members was "What are these cards for?" Today it is "When can I get my Smartcard?" The cultural shift is already underway.

James Ness,
Deputy Registrar and Data Protection Officer, The Law Society of Scotland

Biography

James Ness is Deputy Registrar and Data Protection Officer for the Law Society of Scotland. He is project manager for the Society's **Smartcard** project, having previously led other major IT projects such as the introduction of a member management system and online membership voting and renewal.
He was born in South Africa and educated there and in Scotland, graduating with a Law degree from Edinburgh University in 1978. He spent 25 years with Messrs Austins solicitors in Dalbeattie (Scotland) holding roles as Senior Partner, Managing Partner, Cashroom Partner, Complaints Partner, Financial Services Partner. He was a member of the Council of the Law Society representing Dumfries and Galloway from 1991 till 2000, before joining the staff team in 2004.

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Standing up against the new surveillance law

We have recently learnt that the US intelligence services eavesdropped on three French presidents. The French Parliament has expressed its outrage over this scandalous act.

Ironically, during the same week, a majority in the French Parliament voted in favour of the surveillance law which, contrary to what we were made to believe, not only covers terrorism but also allows for mass surveillance without appropriate judicial supervision. As such, we consider the law as a serious attempt to undermine civil liberties of all citizens.

From an international perspective, this led to a paradoxical situation as the discussion on the legislative proposal, now in the second reading before the Senate, has taken place at exactly the same time as the Patriot Act was suspended in the United States. Indeed, while the French senators were getting ready to vote on a very controversial provision of the new law, authorising the installation of black boxes to analyse the metadata of the French Internet traffic, the American senators adopted the Freedom Act which amends the Patriot Act to curb the powers of the surveillance services.

Admittedly, this parallel is astounding. While the events of 11 September 2001 led to the adoption of the Patriot Act in the US, 11 January 2015 brought the surveillance law in France, which had long been in preparation. Fortunately, this will only be a temporary measure, since our Western democracies, once the push toward more security measures fades away, cannot give in to terrorism and give up layers of civil liberties and throw themselves in the arms of Big Brother.

We also have to take into account the **resolution** of the Parliamentary Assembly of the Council of Europe of 21 April this year:
'(...) mass surveillance does not appear to have contributed to the prevention of terrorist attacks, contrary to earlier assertions made by senior intelligence officials. Instead, resources that might prevent attacks are diverted to mass surveillance, leaving potentially dangerous persons free to act.'
If our democracy has to equip itself with the necessary and proportionate means to face the threats, and particularly terrorism, it has to put in place appropriate safeguards in order to guarantee the respect for everyone's rights.

This is why the Paris Bar has decided to take part in the preparation of the appeal to the Constitutional Council, submitted by the President of the Republic.

Pierre-Olivier Sur

President of the Paris Bar / Bâtonnier de l'Ordre des avocats de Paris

Explanatory note: On 24 June 2015, the French National Assembly voted in favour of the bill creating a general legislative framework for intelligence activities. The bill provides for, among others, substantial investigatory powers for intelligence services. It also defines public interest in a broad manner which, as is feared by many, could justify the widespread use of intelligence-gathering methods. On 25 June, the bill was referred to the Constitutional Council which will examine whether the provisions of the proposed legislation do not violate the French Constitution.

Biography

Pierre-Olivier Sur has been the President of the Paris Bar since January 2014. He started practising law in 1985 when he took the oath. In 1989, he was appointed "Sécretaire de la Conférence" (distinction of eloquence) and was elected Member of the Bar in 1997. He did his internship at the well-known Olivier Schnerb criminal law firm and then became partner in the firm founded by his father in 1946 which originally defended architects.
As from January 2000, he became partner of the French firm Fischer, Tandeau de Marsac, Sur & Associés specialised in business law. Pierre-Olivier Sur deals exclusively with criminal law including financial and political criminal law both in domestic and international proceedings.

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Tapping lawyer-client communications must stop, says Dutch court

In The Hague on 1 July the District Court ruled that surveillance of lawyers by State security authorities was unlawful. It ordered the Dutch State to introduce adequate and stringent safeguards with regard to the surveillance of lawyers by security agencies within six months.

The verdict follows a motion for interim measures filed by the law firm Prakken d'Oliveira (the firm under surveillance), Council of Bars and Law Societies of Europe (CCBE), and the Dutch Association of Criminal Lawyers (NVSA) against the Dutch State.

The judge recognised that the ability to confer confidentially with a lawyer is a fundamental right which is currently not respected by the Dutch surveillance law. The law allows the Dutch security services to transmit the information from the intercepted lawyer-client communications to the public prosecutor. The judge found this practice unlawful as these communications are privileged (subject to professional secrecy). The judge also held that the current safeguards in the Dutch legislation are inadequate in light of the case law of the European Court of Human Rights (ECtHR). In particular, the court stated that an independent body should be given power to prevent the interception of lawyer-client communications. The court also ruled that the security services may only release information obtained to the public prosecutor if an independent body has examined the conditions under which the services were permitted to obtain the information.

In April 2014, law firm Prakken d'Oliveira filed a complaint with the Ministry of Interior stating that their firm was under surveillance by the Dutch security agency (AIVD) and that this extended to privileged communications with clients of the firm. The complaint was examined by the Supervisory Committee of the Security Services which upheld it. In response to the complaint the State explained that the main targets of the security agency were actually the clients of the law firm and that the communications with their lawyers were caught in the process.

In their submissions, Prakken d'Oliveira and CCBE argued that all communications between a lawyer and their client are privileged. This right is protected under Articles 6 and 8 of the European Convention on Human Rights (ECHR) and there exists a body of case law that deals specifically with data surveillance in the Netherlands. In *Telegraaf vs Netherlands*, the European Court concluded that the Dutch law did not provide sufficient safeguards to protect journalists from revealing their sources when requested to do so by the security services. The lawyers representing the CCBE argued the same principles should apply to the tapping of lawyers and their communications with clients.

Moreover, the decision to tap the communications of the law firm's clients was taken by the Minister of the Interior without any possibility of the decision being reviewed by an independent body. This is because the guidelines, used by the State to determine whether tapping is allowed, are not shared with any other institution or with the public, thereby making it difficult for an independent body to make an assessment of the lawfulness of the surveillance measures taken.

The Dutch State has indicated its willingness to appeal against the ruling. It has until 29 July to lodge the appeal and is yet to announce it officially.

More information:
CCBE wins case against the Dutch State on surveillance of lawyers, 02/07/2015
Transcript of the judgement (in Dutch)
Dutch Intelligence Service (AIVD) taps Prakken d'Oliveira lawyers

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'Exceptional access' will do Internet and its users no good, say experts

Over the past several years, many politicians on both sides of the Atlantic have argued that the increasing use of encryption was reducing their powers to investigate and prevent criminal activity. To this end, they are calling for Internet systems to be redesigned to ensure 'exceptional access' to secure communications for law enforcement agencies.

However, according to experts, such proposals are unworkable and raise serious legal and ethical issues. In a recently published report, 14 experts in the field of computer science and cryptography expressed their concerns over the political shift towards regulating the Internet for the benefit of law enforcement.
The proposals also do not take into account the complexity of the current Internet systems and the fact that any redesign risks undermining the progress on Internet security.

More specifically, the report points out three general problems. First of all, providing exceptional access would mean backtracking on the progress that has been made so far in relation to security (such as encrypting messages with a temporary key). Secondly, exceptional access would increase the system complexity of what are already complex systems. Since we are more and more reliant on secure communications, the security threats that accompany the proposed 'law enforcement backdoor' solutions may easily outweigh the benefits. Finally, the experts stress that the credentials to unlock the data (encryption keys) would have to be held in an extra-secure environment which would be more susceptible to security threats.

The debate on the regulation of secure communications will continue between those advocating for more 'invasive' measures to prevent crime or terrorism and those wanting to protect privacy and security of communications.

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European Parliament takes a panoramic view on Copyright

The European Parliament adopted the copyright report on 9 July. The Parliament was voting on its own initiative **report**, drafted by Julia Reda, German MEP from the Pirate Party. The Parliament held it important that the Union will "**make copyright rules fit for the digital age**". This means that the Commission should be carefully assessing how to ensure fair and appropriate remuneration for all categories of rights holders and improving access to cross-border services. Accordingly, the new copyright regime should not only strengthen the rights of the holders but also tackle geoblocking and take into account the public libraries and the role of the research.

Importantly, the Parliament voted down two amendments that would have had a restrictive impact on the copyright. The first issue relates to the right of panorama, i.e. right to take pictures of public buildings and art works. The amendment advocated for restricting the freedom of panorama for commercial users. This is controversial as the commercial use would have to be very clearly defined or otherwise even posting pictures on Facebook might be caught by the provision. On basis of this, Julia Reda herself **advocated** to vote against this amendment. In the end, the Parliament decided to uphold the status quo, whereby it is possible for member states to insert or not to insert a so-called freedom of panorama clause in their copyright legislation. Second, the Parliament rejected the **ancillary** copyright for press publishers, the issue that has been dubbed as the "Google tax".

The Parliament's report is out just in time to influence the Commission. The Commission is due to publish its proposal on copyright in autumn 2015.

Two-thirds of Europeans do not feel they have control over their data, a new Eurobarometer report shows

In June, the Commission published its Eurobarometer report on the results of a survey of 28,000 citizens' views on the protection of their personal data.

The results have shown that only 15% feel they have complete control over the information they provide online while 31% do not feel they have any control at all. Over half of respondents are concerned with what is happening to the data collected via online payments or mobile phones.

While 57% respondents feel that disclosing personal information is an issue for them, 71% acknowledge that such a disclosure has become an increasing part of their lives and add that there are no alternatives if one would like to obtain a product or a service.

Half of the respondents mentioned the fear of fraud as a potential risk to their personal information. The risk of online identity being used for fraudulent purposes was mentioned by 40%.

When asked whether they heard about the Snowden revelations, 50% of respondents had heard about them and 46% mentioned that it had a negative impact on their level of trust in how their data are used.

69% of respondents were clear that they would like to be asked for their explicit consent before any of their data is collected and processed. Around 70% are concerned about their data being used for a different purpose from the one it was collected for. At the same time, however, only 18% of the respondents read fully the privacy statements.

This survey was carried out by the TNS Opinion & Social network in the 28 Member States of the EU on behalf of the DG Justice and Consumers.

More information from Eurobarometer:
Factsheet
Summary of the report
Full report

Rethinking consent? A handful of thoughts on the General Data Protection Regulation

June was an important month in the European data protection law calendar as it marked the beginning of the long-awaited trilogue negotiations on the General Data Protection Regulation. Described as one of the most important and also one of the most heavily lobbied pieces of EU legislation, the draft regulation has become a top priority of the European Parliament and the Luxemburgish Presidency.

The regulation will replace the 1995 directive which, until now, has been the basis for the data protection laws in 28 EU member states. While many recognise that the directive has withstood the test of time, others stress that the legislative framework needs upgrading in light of the omnipresence of Internet-based services, rise of big data and intensified security efforts to combat cross-border crime and terrorism.

The substantial change in circumstances since 1995, when the current Data Protection Directive was agreed, raises questions as to the validity of the main concepts that underpin the data protection legislation. One such concept is that consent and its practical application in the new law which undoubtedly poses many problems for legal practitioners in this field.

Consent remains a fundamental ground for the legality of processing personal data. It also remains a dominant part of academic discussions on data protection. However, while the role of consent in data protection law is recognised, the interpretation of its practical implications may differ substantially from one context to another. As noted by the Article 29 Working Party '[i]f incorrectly used, the data subject's control becomes illusory and consent constitutes an inappropriate basis for processing.'

The current data protection legislation refers to 'unambiguous, 'explicit', 'freely given' and 'informed' consent.

Each of these terms carries several practical implications as to how the data subjects exercise their rights and how the data controller can obtain and then rely on such consent.

Indeed, consent depends, among others, on the relationship between the data controller and data subject. This concerns particular situations where the data subject is under the influence of a data controller, for example in the field of employment. In this situation, would giving consent be considered 'free' when withholding it may carry adverse consequences? Additionally what are the limits of a freely given consent? The majority of the debate on consent is related to the online context and the fact that, due to current practice, one cannot withhold consent and continue to use the service. This has been evidenced by the recent Eurobarometer survey where 71% respondents admitted that disclosure of personal data has become an integral part of modern lives but there are no alternatives if one wants to obtain a product or a service. Moreover, using services such as Facebook or Google, even after consenting to privacy policies, does not always equate to freely given consent. This is because in many cases these service providers tend to change their privacy policies unilaterally which means, in practice, a data subject withholding their consent would no longer be able to use the service. Some commentators have raised the question on the validity of consent as a basis for data processing in such contexts: is this enough? Others ask: does consent in an online context need rethinking?

The questions above illustrate the background against which many of the changes in the Parliament's and Council's text of the draft regulation have been made. The texts adds the words 'unambiguous' and 'explicit' to further specify the type of consent needed for certain types of processing. While it is without a doubt that in some situations explicit consent is needed from the data subject, where do we put a limit on what can realistically be implemented by the data controller?

With the proliferation of online services, such as payments, shops, wifi, email or social media to name but a few, consumers are increasingly faced with the need to give consent to privacy policies. A 2013 documentary 'Terms and Conditions May Apply' put that into perspective: it would take an average user about a month to read all information in the user agreements. Again, the abovementioned Eurobarometer survey sheds more light on that issue: only 18% of the respondents fully read the privacy statements. Although this may seem a lot, 82% of them do not. Would this suggest that consumers have faith in the regulators and expect that appropriate safeguards are in place? The Eurobarometer survey puts that trust into question with 46% respondents stating the Snowden revelations undermined their trust in how their data is used.

This poses yet another challenge: how to ensure that what data subjects are consenting to can be relied upon as 'informed'?

Although many of these questions cannot be answered in just several months, these could provide a useful background for the upcoming negotiations.

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Start of the trilogue negotiations on the General Data Protection Regulation

The Parliament, Commission and Council are bracing themselves for what may become an extremely hectic five months of negotiations on one of the most important pieces of European legislation, the General Data Protection Regulation.

The negotiations, which started on 24 June, will follow a strict and tight schedule of consultations which is, as stressed by the heads of negotiating teams, in flux and subject to many changes depending on the progress of negotiations.

Beginning in July, the negotiations will focus on territorial scope and transnational data flows. Some documents, **leaked by Statewatch**, already suggest where the compromise may be sought. After the summer recess, the negotiators will look at data protection principles, such as grounds for processing and the conditions for consent, as well as the rights of individuals. Depending on how the negotiations progress, the autumn meetings will focus, among others, on the one-stop-shop principle, remedies and sanctions. It is expected that other issues will be dealt with once the substantive and the most controversial topics have been agreed on.

Although all parties to the negotiations express their willingness to reach the compromise by the end of the year, it remains to be seen whether that goal will be achieved.

EU Telecoms package: Net neutrality and abolition of roaming fees

On 30 June, the final day of Latvian Presidency, the **Commission** and the **Council** announced that a compromise had been reached on two proposals for the telecoms single market: net neutrality and abolition of roaming charges.

The deal creates the first EU-wide open internet rules, where operators will have to treat all traffic equally when providing internet access services. A number of commentators have expressed **scepticism** with the compromise text and its ability to form an open internet. There are several permitted exceptions to net neutrality for reasonable traffic management purposes, for example to counter cyber attacks or prevent traffic congestion. The fear is that these exceptions may give national regulators too much room for **interpretation** and reduce net neutrality to a concept rather than an actuality.

Roaming charges will be abolished as of 15 June 2017. From 30 April 2016 there will be an interim period when the roaming charges will be capped at €0.02 for SMSs and €0.05 for SMSs and €0,05 per megabyte for data. The abolition of the roaming charges will not, however, grant full access to the telecoms markets. Fair usage policy forms part of the deal, which is designed to prevent abusive use of roaming. The telecoms companies can apply roaming charges when their services are used in another EU Member State for purposes other than periodic travel.

Forgive but Don't Forget! - UK Supreme Court rules on Data Retention of Offenders

In the summer of 2014 the controversial Data Retention and Investigatory Powers Act (DRIPA) was introduced as emergency legislation and passed after only four days of deliberations. DRIPA was a response to a **judgment** of the CJEU in April 2014, which invalidated **Data Retention Directive 2006/24/EC** (DRD). The DRD required Member States to implement national legislation mandating the retention of communication data for the purposes of investigating, detecting and prosecuting serious crime. This directive conferred a wide discretion upon Member States to decide on the retention periods and the definition of serious crime. The judgment of the Court related to joined references for preliminary rulings by the Irish and Austrian courts. The applicants sought clarification on the compatibility of the national implementing measures for DRD with the protections afforded by the Charter of Fundamental Rights. In its analysis the Court also focused on Art 8 of the European Convention on Human Rights (ECHR). The Court held that the Directive was invalid because it **"exceeded the limits imposed by compliance with the principle of proportionality"** and the interference with the right to privacy and protection of data was not justified.
The legislation enacted by the UK in light of the DRD, **Data Retention Regulations 2009**, remained in force following the CJEU judgement but its lawfulness was called into question by the ruling. DRIPA replaces the 2009 Regulations and largely mirrors its' provisions. Critics of DRIPA argue that, whilst it does include some additional safeguards, it does not address many of the concerns identified by the CJEU in its judgment such as a widespread and indiscriminate data retention regime. S21 of the **Counter Terrorism and Security Act 2015** amends DRIPA by **widening** the requirement for retention of "relevant internet data".
It is this widespread and indiscriminate retention of personal data for the purposes of law enforcement and its infringement on privacy rights that is at the centre of the recent UK Supreme Court ruling of ***Gaughran v Chief Constable of the Police Service of Northern Ireland.***

In *Gaughran* the appellant was arrested and found guilty of driving with excess alcohol contrary to article 16(1) (a) of the **Road Traffic (Northern Ireland) Order 1995**. This offence is defined as a recordable offence. During his arrest the following data was lawfully taken: fingerprints; a photograph; and a non-intimate DNA sample. A DNA profile (digitised information containing small details of a person's DNA) was taken from the DNA sample. Two months after the appellant pleaded guilty his solicitor wrote to the Police Service Northern Ireland (PSNI) claiming that the indefinite retention of the appellant's fingerprints, photograph and DNA sample was unlawful. It was agreed, in line with ECtHR jurisprudence, that the article 8(1) ECHR right to privacy was engaged and so the question before the court for determination was: was the interference justifiable under article 8(2) ECHR?

The Supreme Court dismissed the appeal by a ratio of four to one, with Lord Kerr dissenting.
The majority relied heavily on the ECtHR judgment in ***S and Marper v United Kingdom***. In *S and Marper* the Strasbourg court addressed the question of whether the continuous retention of fingerprints and DNA data of persons who had once been suspected, but was not convicted of criminal offences, was in accordance with Article 8 ECHR. The Court recognised law enforcement as a legitimate aim for the interference but also stated that the margin of appreciation granted to Member States when enacting data retention legislation must be reduced when coming into conflict with fundamental rights such as those in article 8. The court criticised the **"blanket and indiscriminate nature of the power of retention in England and Wales"** and emphasised that principle of proportionality must be respected. For this reason the Court found that there must be a limited period of storage as well as an effective deletion policy. Furthermore, the age of the suspected person and the nature/gravity of the offence must be considered. The presumption of innocence and the risk of stigmatisation, the Court argued, demanded a different treatment of data of convicted and unconvicted persons.

These fundamental principles, developed by the ECtHR in *S and Marper* and others are to be considered for **any type of data retention** including that data covered by DRIPA and the Counter Terrorism and Security Act 2015.

The majority in *Gaughran* argued that, because *S and Marper* was focused **"solely and entirely on the issue of unconvicted persons",** it was not an authority for the lawfulness of a blanket policy of retaining the data of convicted persons. In concluding that the indefinite retention of data of convicted persons is proportionate, the majority reasoned that it has a legitimate aim in countering crime and deterring future offending, that differentiation had been made between convicted and unconvicted persons as well as between types of offences, that the use of the data was clearly limited, that the exceptional case procedure provided for the removal of data and that use of time limits would be both arbitrary and burdensome.
In his dissenting judgment Lord Kerr focused on an evidence based approach to establish a rational connection between the indefinite retention of data and the goal of law enforcement. He also considered it necessary to question whether the measures employed in this case were no more than necessary to accomplish the objective. He argued that **"the ECtHR has consistently condemned...measures which interfere with a Convention right on an indefinite...basis"** and that **"clearly, a more nuanced, more sensibly targeted policy can be devised"**.

One of the most interesting arguments made by Lord Kerr reflects those made in *S and Marper* regarding the presumption of innocence. In *Gaughran* he made the point that, under the **Rehabilitation of Offenders (NI) Order 1978**, **"a person who has become rehabilitated...is to be...treated for all purposes in law as a person who has not committed an offence"**. He continued that **"if the principle of rehabilitation is to have any meaning, ex-offenders cannot be defined by the fact of their former offending"**. In balancing the data subject's rights with those of the community as a whole, he felt that an equilibrium had not been found. A convicted person is entitled to be presumed innocent of future crime, notwithstanding their conviction.

The UK Supreme Court judgement in *Gaughran* could have troubling consequences especially for youth offenders and anyone seeking to challenge DRIPA. As Lord Kerr noted, under the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989, the range of recordable offences is very wide and includes those found in s167 of the Belfast Improvement Act 1845 such as "ringing any doorbell or knocking at any door without lawful excuse". If such offences were successfully prosecuted then the police service would be justified in retaining the data of a large portion of the population. One cannot imagine that this would be considered justified or proportionate, even for the purposes of law enforcement.

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Legislation coming into force this month

- Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments
- Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European

Parliament and of the Council on online dispute resolution for consumer disputes

- Commission Delegated Regulation (EU) 2015/1076 of 28 April 2015 laying down, pursuant to Regulation (EU) No 1303/2013 of the European Parliament and of the Council, additional rules on the replacement of a beneficiary and on the related responsibilities, and minimum requirements to be included in Public Private Partnership agreements funded by the European Structural and Investment Funds
- Commission Decision (EU) 2015/1097 of 8 April 2015 on the compatibility with Union law of the measures to be taken by Denmark pursuant to Article 14 of Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)
- Council Decision (EU) 2015/1098 of 19 June 2015 establishing that no effective action has been taken by the United Kingdom in response to the Council Recommendation of 2 December 2009
- Commission Delegated Regulation (EU) 2015/1113 of 6 May 2015 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

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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