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Reportage

New package to improve procedural rights in criminal proceedings

The European Commission has published a wide-ranging package of measures designed to improve further the provision of minimum procedural rights in criminal proceedings across the EU. The package contains five legal measures, consisting of three proposed directives and two Commission recommendations.

The three proposals for directives concern the presumption of innocence and the right to be present at trial; special safeguards for children; and the right to provisional legal aid. These proposals follow the agreement earlier in the year on **the right to interpretation and translation; the right to information; and the right of access to a lawyer.**

The proposed Directive concerning the presumption of innocence and of the right to be present at trial lays down minimum rules. The proposal includes associated fundamental principles of criminal law relating to evidence, including the right not to incriminate one-self, the right not to cooperate and the right to remain silent. Many of the provisions, such as the burden and standard of proof, are already broadly recognised international standards, which lie at the heart of the notion of a fair trial under Article 6 of the European Convention on Human Rights (ECHR).

The United Kingdom is already broadly compliant with the minimum standards proposed. Nevertheless certain areas, such as the right to silence, are likely to be looked at with interest. The proposal seeks to prevent negative inferences being drawn from the accused exercising the right to silence, save in very exceptional cases where the use of such evidence will not prejudice the overall fairness of the proceedings.

The second proposal concerns procedural safeguards for children suspected or accused in criminal proceedings. There are a number of proposed safeguards including; mandatory access to a lawyer; audio-visually recorded police interviews; the use of detention as a last resort; timely and diligent treatment of cases; and the right to privacy, i.e. measures taken in criminal proceedings to protect the privacy of the child, including their name

and image. Interestingly children would be unable to waive the right to access to a lawyer.

The last proposal Directive relates to the right and access to provisional legal aid. The proposal defines 'provisional legal aid' as legal aid that is given to a person deprived of liberty until the decision on legal aid has been taken. The proposal is closely linked to the Directive on the right of access to a lawyer but operates as a stand-alone proposal. The proposal considers right to effective access to legal representation, particularly at the early stages of proceedings, as considered paramount to ensure the respect of the presumption of innocence and the rights of the accused person.

The three legislative proposals are accompanied by two non-binding recommendations encouraging Member States to take further action on procedural safeguards for vulnerable people and the right to legal aid. The provisions proposed in the recommendation regarding vulnerable people include: promptly identifying vulnerable persons; the provision of an appropriate adult if required; detention as a last resort; and provision of training for law enforcement and judicial authorities regarding vulnerable persons. The second recommendation builds upon the proposed Directive on provisional legal aid and the Directive on access to a lawyer. The recommendation, although it does not remove the Member States' autonomy to decide who qualifies for legal aid, does set out the criteria to be applied when assessing the right to legal aid (via a merits test and/or a means test).



WEBLINKS

- [Commission webpage on procedural rights in criminal hearings](#)
- [Communication - Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice](#)
- [Proposal for a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings](#)
- [Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings](#)
- [Proposal for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings](#)
- [Commission recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings](#)
- [Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings](#)
- [Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#)

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Professional Practice

Parliament outlines its position on anti-money laundering

The two MEPs responsible for drawing up the European Parliament's position on the fourth anti-money laundering Directive have published their first draft report focusing on the issues of beneficial ownership and data protection.

According to the report, companies will be required to supply up-to-date information on their beneficial ownership to a central registry in the Member State they are based in. These registries will be accessible to competent authorities and obliged entities across the Member States. The decision as to whether these registers are publicly accessible will be left to individual Member States.

The other main new issue dealt with in the draft is the relation between anti-money laundering obligations and data protection. One of the amendments introduced to prevent disproportionate monitoring and processing of personal data may however have significant negative consequences for solicitors' ability to properly comply with the Directive.

The issue of the removal of assurances around the ability of financial institutions to apply simplified customer due diligence to Pooled Client Accounts, as taken up by the Law Society of England and Wales and the Law Society of Scotland, alongside other European Bars and Law Societies, has not been addressed in the draft report.

The report was debated in the LIBE (Civil Liberties, Justice and Home Affairs) Committee and ECON (Economic and Monetary Affairs) Committee on 28 November and the deadline for further changes was 5 December.



- [Draft report on the proposed anti-money laundering Directive](#)

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DG Markt discusses future of the lawyers' directives

Internal Market Commissioner Michel Barnier, opened a well-attended conference on the future of the lawyers' directives on Monday 28 October. The directives, which set out a framework for applying the treaty principles of free movement of services and free establishment to legal services, are generally considered to be working well but are not without any problems. Specific difficulties have particularly arisen in the context of double deontology - the fact that one can be subject to more than one code of ethics - as well as the provision of professional indemnity insurance on a cross-border basis.

The directives also date back to 1977 and 1998 and so it is unsurprising that they are now facing a range of new challenges, including technological developments and the advent of non-lawyer involvement in law firms in several Member States. Michel Barnier stated from the outset that this would be an issue for the next Commission to decide upon and that non-legislative solutions could be as suitable as and indeed sometimes preferable to a recast of the directives. However, he put the ball in the court of lawyers, law societies and bar associations to come up with solutions acceptable to the new Commission that would be able to meet twenty-first century challenges while respecting the fundamental freedoms enshrined in the treaties and the case law of the Court of Justice of the European Union.



- [Conference "A Single Market for Lawyers: valuing achievements, tackling remaining challenges"](#)

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Former Law Society of Scotland President to take leadership role in Europe

Scottish solicitor and former Law Society of Scotland President, Ruthven Gemmill has been elected as a new vice-president of the Council of Bars and Law Societies of Europe (CCBE). He is now set to become the first UK solicitor to preside over the body which represents over 1 million lawyers across Europe. Currently the Head of the UK delegation to the CCBE, he will take up the role of vice-president from January 2014, working with new President Aldo Bulgarelli from Italy and other vice presidents from Poland and France.

As third vice-president, Ruthven Gemmill is likely to assume the CCBE Presidency on 1 January 2017, more than 10 years after the last Scot to hold this function, Lord Colin Tyre, was elected.

Ruthven cites his priorities for the Presidency as dealing with EU cross border issues affecting the legal profession; promoting the rule of law, ethics and the freedoms and rights of all EU citizens; and protecting the interests of clients and lawyers in relation to the delivery of legal services.

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Scottish Government's White Paper on Scottish independence

On 26 November 2013, the Scottish Government launched the white paper '[Scotland's Future - your guide to an independent Scotland](#).' The paper outlines the Scottish Government's vision for an independent

Scotland and its proposed route to continued EU membership.

The Law Society of Scotland will be looking closely at the considerable amount of information contained within the White Paper and will be providing a detailed written response to the Scottish Government in due course. You can also view the Law Society of Scotland's paper '[Scotland's Constitutional Future, views, opinions and questions](#)', which aims to inform and add value to the current discussion on independence and constitutional reform.

Read the Law Society of Scotland's [press release](#) responding to the white paper.

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Capital markets in the 21st century: register now

Following the success of the first two joint ABA International and Law Society of England and Wales' capital markets events, planning is underway for a third conference to be held in February 2014. This annual conference will bring together members of the global capital markets legal community for a full day of programming, including social and networking opportunities and informative, substantive sessions presented by world-class experts. This practical, interactive one-day conference will provide capital markets practitioners with insight from leading private practice lawyers, in-house counsel, bankers and regulators on how deals have recently evolved.

Please see [here](#) for details.

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Spanish Breakfast briefing: a whirlwind tour around Spanish Law

Register now for this Law Society of England and Wales' event focused on the key issues and concerns that lawyers encounter when practising at the interface of these two very different legal systems in the area of private international law, and introductory core information about Spanish company law. The event takes place at the Law Society's London office on 18 December.

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FINANCIAL SERVICES Regulation of Money Market Funds

The Commission proposal on Money Market Funds (MMFs), published on 4 September, with the aim of improving MMFs' liquidity and stability. The most controversial aspect of the proposal is the requirement for constant net asset value (CNAV) MMFs to maintain a 3% capital buffer. On 2 December the European Parliament's Economic and Monetary Affairs Committee discussed the draft report which in addition to the 3% buffer requirement for CNAVs, proposes the mandatory conversion of CNAVs into variable net asset value funds by 2019. Some welcomed this further change whilst others felt banning CNAVs was unnecessary and could shift the capital onto banks, other less regulated products or relocating out of Europe.

The deadline for amendments was 10 December and the Committee is expected to vote on the dossier in February 2014.



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- [ECON Committee draft report](#)

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FINANCIAL SERVICES

Progress on MiFID and II-MiFIR

In ongoing inter-institutional negotiations, on the revision of the markets in financial services rules, the European Parliament, the Commission, and the Lithuanian Presidency have found common ground on rules for the new organised trading facility (OTF) and on limiting exemptions from pre-trade transparency rules applying to equity markets. The parties were also in agreement on limiting waivers from pre-trade transparency rules and, in particular, have agreed to cap such waivers as proposed by the Council.

Issues remain regarding the type of financial instruments that will be traded in OTFs though the parties appear to be leaning towards the exclusion of shares. Provisions for over-the-counter (OTC) trading also still need to be addressed.



WEBLINKS

- [Draft Directive on markets in financial instruments \(MiFID\)](#)
- [Draft Regulation on markets in financial instruments \(MiFIR\)](#)
- [Proposal for a regulation on market abuse \(MAR\)](#)
- [Proposal for a directive on market abuse \(MAD\)](#)

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FINANCIAL SERVICES

Council sets out its position on UCITS

On 4 December, the Member State representatives agreed Council's position on the revision of the directive on undertakings for collective investment in transferable securities (UCITS V).

Some isolated concerns remain in relation to sanctions, depositary liability and eligibility of entities to perform depositary functions, but Member States remain in a position to support the general approach proposed.

The agreement allows negotiations with the European Parliament to begin with the aim of adopting the directive at first reading. The member states then have two years to transpose the directive into national law.



WEBLINKS

- [Proposal for amending the Directive - Updated](#)
- [Council Press Release - 04.12.13](#)

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FINANCIAL SERVICES

KIDs

On 20 November, the European Parliament gave its backing to draft EU rules on key information documents (KIDs) for retail investors. This provides a mandate for discussions with Member States to finalise the legislation.

MEPs supported the proposals which state that small scale investors should be given a standard, two-page document enabling them to understand and compare investment products and their total cost. MEPs also stated that they should inform investors whether the products contribute to any social or environmental projects.

Parliament voted to accept the amendments and the vote on the legislative resolution was postponed to allow for discussions to take place with the Member States. These meetings will take place in the new year.



WEBLINKS

- [KIDs Proposal](#)
- [Outcome of the European Parliament's first reading](#)

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DATA PROTECTION

Parliament adopts position on data protection

In October, Parliament's LIBE (Civil Liberties and Human Rights) Committee adopted its position on the **proposal for a new data protection regulation**. Following months of negotiations, the draftsman achieved a broad majority behind the compromises which in their main elements support the Commission proposal. The LIBE text also strengthens certain provisions, in particular as regards consent and the right to erasure. Further, the text has taken on board concerns expressed by the legal profession in relation to protecting legal professional privilege. In the Commission proposal, the confidentiality of a lawyer-client relationship had not been taken sufficiently into account in provisions on disclosure of, and access to information held on a data subject.

Progress in Council has been significantly slower than in Parliament and discussions this autumn have focussed entirely on the issue of a one stop shop mechanism to manage cross-border data protection cases. While the Commission and Parliament have continuously been pushing for an agreement to be reached by the European Parliament elections in May next year, the European Council in October changed their target date to 2015. Parliament has therefore scheduled a plenary vote in March leaving it for the new Parliament to reach a second reading agreement with Council.



WEBLINKS

- [The European Parliament Report](#)

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INTELLECTUAL PROPERTY

Reform of collective copyright management

Negotiators from Parliament and Council have reached an agreement to modernise the collective management of copyright. The main innovations are new transparency requirements on collecting societies and common rules for multi-territorial licensing for music.

The new Directive will impose new governance and transparency requirements on the management of collective societies including on how they collect and distribute royalties on behalf of the right holders. Right holders are for instance to be paid no later than 9 months from the end of the financial year.

The new rules on multi-territorial licensing for music aims to increase availability of online music services. Collective management societies will now be able to represent each others' repertoires across borders and in cases of smaller and niche repertoires may be obliged to.

The Parliament and Council are expected to adopt the agreed text in the coming months.



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CORPORATE GOVERNANCE

Large majority approves women on boards proposal

The European Parliament gave its green light to the **proposed Directive on improving the gender balance on company boards** at its November plenary session with 459 MEPs voting in favour.

The Parliament report makes some important changes to the Commission's text. In particular, it intends to clarify that the Directive should be without prejudice to national law governing the appointment of listed companies' boards members. The report also says that sanctions should only be applied for failure to comply with the selection procedure and not failure to reach the 40 % target. At the same time, however, other changes aim to strengthen the text and limit exemptions.

The future of the proposal remains uncertain as work in Council has been subject to a blocking minority of Member States who feel that the proposal does not comply with the principle of subsidiarity. One of these Member States, Germany, has, however, just agreed as part of their new coalition agreement to introduce a 30 % target for women on boards.

The provision European Parliament report is available [here](#).

CIVIL JUSTICE

Changes proposed to the European small claims procedure

The European Commission has issued a proposal to amend the European Small Claims Procedure. This procedure designed for small claims litigation, is designed to simplify the process for making a small claim in cross-border cases. The changes proposed to the current Regulation include: increasing the threshold from €2,000 to €10, 000 (or equivalent amount); broadening the scope of claims classified as 'cross-border'; and limiting court fees.

The Law Societies will scrutinise these proposals carefully.



WEBLINKS

- [Proposal to amend the Regulation on the European small claims procedure](#)

INTELLECTUAL PROPERTY

Stronger EU-wide protection for trade secrets

On 28 November 2013, the Commission announced its proposal to strengthen the protection of trade secrets to encourage higher level of investment in research, development and innovation. Trade secrets represents commercially valuable information or know-how but the protection of such secrets is highly fragmented within the internal market. The proposed Directive therefore first and foremost seeks to introduce a common definition of a 'trade secret' and what constitutes the unlawful acquisition, disclosure and use hereof. The Commission also proposes minimum rules and standards on the measures, procedures and remedies that should be made available to the holder of a trade secret for the purpose of civil law redress in case of breaches of trade secrets.

The proposal is based on the internal market legal basis and is therefore subject to the co-decision procedure by Parliament and Council.



WEBLINKS

- [Proposal for a Directive on the protection of undisclosed know-how and business information \(trade secrets\) against their unlawful acquisition, use and disclosure](#)



Edward Pitt

Right to the root of Human Rights

The proposed referendum on continued membership of the European Union after the next election in the United Kingdom has focused the minds of many members of the Law Society of England and Wales to ensure that the Society makes full responses to the government's ongoing Balance of Competences consultations, looking at 32 areas of EU competence.

With some 166,000 members the Society cannot reflect the individual views of each of them. What it can do, however, is to help educate and explain how, based on members' experience, the current EU treaties work, and have worked since the UK joined the then EEC in 1973, so that the debate on continued EU membership is at least well informed.

Public misconceptions about the EU treaties (and "Europe" and "Brussels") are common. A typical mistake is confusing the roles of the European Convention on Human Rights, the Charter of Fundamental Rights in the EU, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The European Court of Human Rights (ECtHR) and EU courts are often mixed up too.

These are other wide misunderstandings of how the treaties work: the economic reasons for legislation (directives or regulations) made under the TFEU to harmonise standards for goods and services to ensure their easy flow between the EU countries; the role of the Common Custom Tariff and the precise rights which an individual enjoys to go to other EU Members States to work.

The efforts of the EU in setting common standards for both goods and services over the last 40 years has been impressive; great impetus was given by the 1992 programme. For many goods (such as toys, cars and electronic products) the EU now works as a well-integrated single market. In other areas – such as consumer financial services – there is much still to do.

Many members of the Law Society may see "EU legal issues" as the narrow preserve of lawyers who practice in the field of competition/anti-trust law, international trade law (anti-dumping, etc.) and public procurement. Yet EU law impacts in many other areas. Much of the law which governs our day-to-day commercial dealings, whether buying or selling goods or services, is directly impacted by legislation originating at EU level, for example: standards for slaughtering meat, farming practices; use of fertilisers; electronic products and their packaging.

Harmonising consumer protection legislation makes it easier for businesses, especially SMEs, to sell into other EU countries. Further, the EU system of mutual recognition for a product or service approved in one particular Member State works: for example, broadcasts approved in one Member State, meeting the standards of the Audio Visual Services Directive, can be freely broadcast throughout the Community. Some sectors of the economy have especially benefitted from a detailed EU wide approach; for example a series of EU directives has set EU wide structures for telecoms services, which has led to better telecoms services for EU citizens and has helped the emergence of strong EU based businesses, which can compete on a world stage.

Some participants in the EU debate, from across the Member States, advocate a Member State being able to limit its membership to some form of Free Trade Area – similar to the EEA, or to having an association agreement with the EU, as Turkey does. There needs to be full explanation of how these systems work - and their deficiencies: lack of an effective enforcement machinery (such as the power the EU Commission does have to enforce the TFEU against Member States); the fact that individuals cannot enforce Treaty rights directly before the Courts; an incomplete system of harmonisation of standards, meaning that the flow of goods and services within the Free Trade Area is not as free as within the EU. Further an Association Agreement is just that: it gives a country no further negotiating clout on the international stage.

Debate on EU membership need not be a question of "in or out", but a more balanced debate as to the areas where the EU treaty structure may need streamlining – a debate which is increasingly being held in other EU countries besides the United Kingdom.

Perhaps curiously, the Balance of Competences consultation does not extend to an assessment of the law-making process itself. For example: is the EU system for passing legislation too slow – are too many cooks spoiling the broth? Does the EU Parliament truly represent the views of all EU citizens? Does the Commission need to carry out more thorough research before putting forward legislative proposals? (The EU Commission's proposed Common European Sales Law, it seems to me, is a good example of where too little research has been done as to what is actually needed by businesses and time was thus wasted discussing a proposal before working out first precisely what the problem is). Does the dividing line between EU and Member State competence need clarifying? Have we lost sight of the principle of "subsidiarity", which is meant to assure all Member States of the right to self-determine their internal affairs? How the treaties work in practice is an issue on which the Law Society urges all its members not to sit back but to contribute their own direct experience, based on cases in their practices, to the UK government's review.

The Law Society of England and Wales and the Law Society of Scotland are responding to a number of the current consultations in the Balance of Competences Review. If members of either Law Society are interested in providing input, please [contact the Brussels Office](#) as soon as possible.

Biography



Edward Pitt works as a solicitor in the field of competition, international trade and commercial law. He first worked in Brussels in 1977, soon after the UK acceded to the EEC. In addition to anti-trust work, he also focuses on utility regulation and advises UK regulatory bodies. He is now a consultant with the City of London firm, Bates Wells Braithwaite. He is Chairman of the EU Committee of the Law Society of England and Wales.



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- **Communication - Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice**
- **Proposal for a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings**
- **Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings**
- **Proposal for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings**
- **Commission recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings**
- **Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings**
- **Proposal for a regulation amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure**
- **Commission consultation on the authenticity leather labelling system**
- **Commission implementing decision on the adjustments to Member States' annual emission allocations for the period from 2013 to 2020 pursuant to Decision No 406/2009/EC**
- **Commission consultation on the review of the EU copyright rules**
- **Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff**
- **European Commission Communication: Towards the elimination of female genital mutilation**

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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