The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

December 2015

The Law Societies' monthly publication with the latest EU news

Editorial – Looking back at 2015

In addition to providing the usual updates on EU law and policy, our final Brussels Agenda of 2015 will cast an eye over the year and the events that have made it a memorable one.

To celebrate Human Rights Day and European Lawyers Day (10 December), we are featuring several articles on freedom of speech and human rights in our 'In Focus' section. We are particularly honoured to feature a Viewpoint by Vera Jourová, Commissioner for Justice, Consumers and Gender Equality.

This edition also features guest contributions from Joe McNamee, Director of European Digital Rights (EDRi) on the importance of freedom of expression online, and Ramute Remezaite (Legal Consultant at the European Human Rights Advocacy Centre - EHRAC) on freedom of expression for lawyers in more repressed countries, as well as from Madeleine Kelleher of the Council of Bars and Law Societies of Europe.

2015 is the year that will have a lasting impact on how Europe sees itself and its future. Several events put Europe's values to a tough test and exposed its deep-seated divisions that many thought were long gone.

The **attack on Charlie Hebdo** shocked France and the world, reigniting the debate on the place, and the limits of, free speech in modern multicultural societies. The unprecedented **surge in the numbers of**

refugees arriving in the EU has exposed the shortcomings of the current asylum system, reawakened anti-immigration sentiments.

The **Paris attacks** fuelled the debate surrounding European attitudes and perceptions towards its Muslim citizens and immigrants, as well as the risk of radicalisation among marginalised young people living in large European cities. The attacks were followed by an international manhunt that resulted in the raising of the **security alert to the highest level in Brussels** thus effectively locking down the city for 72 hours. The immediate reaction to the attacks was to tighten security measures, border controls and migration, and to monitor hate speech and illegal content on the Internet.

The **economic crisis in Greece**, resulting in the possibility that it may leave the Eurozone, left Europe divided over how to support those members who are unable to meet their financial obligations. It also showed that there is no common ground in Europe on how to address and manage economic shocks within the Eurozone, with its different economic models and levels of wealth.

The Conservative party victory in the UK was followed by the swift introduction of the **EU Referendum Bill** in the UK Parliament, contrasting with the length of time taken to present the UK's demands for negotiations on EU reform.

The relationship between the US and the EU entered a new phase following the landmark Court of Justice of the EU ruling declaring the **Safe Harbour decision invalid**. The ruling was welcomed by privacy activists and several political groups, but also reduced legal certainty of data transfers from the EU to the US, which are important for many businesses and organisations.

2015 was also the year of several scandals; one of which almost took down the government of a large country. The end of May saw 14 arrests over the alleged **racketeering, corruption and money laundering within FIFA** (International Association Football Federation). In March and April, thousands took to the streets of Brazil in protest against President Rousseff's alleged involvement in the **Petrobras corruption scandal** and demanded her impeachment. In September, the Environmental Protection Agency (EPA) in the US discovered that the software in **VW cars presented false emission tests results**.

It was an important year for international relations too. Iran concluded the agreement with the US, UK, Russia, France, China, and the EU that would put strict controls on **Iran's nuclear programme**. In exchange, Iran would escape the majority of the sanctions that had until now been in place. Russia, Ukraine, Germany and France reached an agreement on the **conflict in Eastern Ukraine** that has so far resulted in a ceasefire and the withdrawal of heavy weapons. After 54 years of hostility, the **US restored its diplomatic relations with Cuba**. Finally, October was the month of conclusion of one of the largest trade agreements in the world, the **Trans-Pacific Partnership** (TPP).

Věra Jourová
Promoting a culture of tolerance in Europe: protecting free speech, while preventing hate crimes

Freedom of expression is a fundamental right in a democracy based on the rule of law. It includes the freedom to express ideas regarded as critical, offensive or controversial by some. It is enshrined in the EU Charter on Fundamental Rights and the European Convention on Human Rights. We cherish freedom of expression and strive to protect it.

At the same time, freedom of expression must not be abused to violate the freedoms of others. Under European law, advocacy of nationalist, racial or religious hatred that constitutes incitement to hatred or violence is punishable. By negatively targeting a specific group of people based on race, religion, descent or national or ethnic origin, hate speech not only goes against our values of tolerance and non-discrimination; it can also lead to hate crime and violence. At a time where Europe is providing shelter to refugees fleeing precisely these kinds of violent divisions, we need to stand together against such actions. At a time where Europe needs to stand united facing atrocious terrorist attacks, it is crucial that the Internet is not used as a vehicle to incite violence or hatred, and is rather used to spread democracy.

We have a variety of means to do this.

Combating hate speech requires collective action. It concerns not only the minorities who are targeted, but our society as a whole, which needs to unite around our core values of tolerance and freedom. This means bringing together governments and civil society, including business. On 1 and 2 October, we organised the first Annual Colloquium on Fundamental Rights, with a focus on the fight against anti-Semitic and anti-Muslim hatred. The Colloquium was a perfect example of collective action. National and local authorities, representatives of religious communities, NGOs and media representatives sat around one table to exchange concrete ideas on combating the intolerance which breeds hate speech. A consensus emerged on the crucial role of education in combating hatred and discrimination. Teachers must be trained to help children to embrace diversity. Children can become agents of tolerance within families and communities, promoting counter-narratives to eradicate the hatred we have seen spreading throughout our societies.

On the Commission's side, we are also working with the leading Internet providers and platforms to get them on board to take manifest hate speech inciting to violence down from the web. We know that the Internet knows no borders. We must ensure that illegal hate speech inciting to violence is flagged and removed at the earliest opportunity.

Hate speech inciting violence is a serious crime and must be treated accordingly. The EU Framework Decision on Combating Racism and Xenophobia obliges Member States to criminalise public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin. All Member States have laws in place which punish the most serious forms of hate speech. The Commission is ensuring that these are properly implemented. We need prompt investigation and prosecution of racist or xenophobic hatred and violence.

The Race Equality Directive and the Employment Equality Directive must also be strictly enforced. According to the latest Eurobarometer on discrimination, 1 in 5 people of a religious minority have experienced discrimination or harassment in the last year. This is why the proposed Equal Treatment Directive is a priority for me. It would prohibit discrimination on the basis of religion or belief, disability, age and sexual orientation in areas beyond the employment field relating to social protection, education and access to goods and services, and it would help to create a society of diversity and respect, where hate speech has no place.

For victims who do experience hate speech or hate crime, proper support and protection is crucial. The Victim's Rights Directive, in force since November, will improve victims' rights, and provide them with the support and access to justice which they need.

As I said during the Colloquium, the road to a society of tolerance is long, and we all need to join forces to encourage a culture of respect in the European Union. We must not lose our core values, which are based on precisely these principles.

Biography

Vera Jourová is currently European Commissioner for Justice, Consumers and Gender Equality. In 2014, before arriving to the European Commission, Ms Jourová held the position of Minister for Regional Development in the Czech Republic. Prior to this, from 2006 to 2013, she worked in her own company as an international consultant on European Union funding, and was also involved in consultancy activities in the Western Balkans relating to the European Union Accession. She holds a Degree in Law (Mgr.) and a Master's Degree (Mgr.) in the Theory of Culture from the Charles University, Prague.

FREEDOM OF EXPRESSION

Joe McNamee
Freedom of expression in the digital sphere

Everything good needs to be nurtured. The Internet has given us amazing benefits, both socially and economically. However, as was famously observed, the price of freedom is eternal vigilance and this is particularly true of the Internet in 2015.

The Internet was designed to be open, to be resilient by not having a single point of failure, thereby allowing

anyone able to communicate freely with anyone. However, networks tend, almost by definition, to consolidate, reducing choice and robustness. If the Internet was an organism, it would be one with a weak immune system, susceptible to the sickness of centralisation that attacks its very heart.

This centralisation can be seen in the 'net neutrality' debate. The access providers that we rely on to connect to the Internet are consolidating and seeking (through blunt blocking/throttling and more subtle data deals with online monopolies) to become centralised gatekeepers between their users and the Internet. Then, of course, the Internet is no longer the Internet, because the anyone-to-anyone openness is strangled by short-term rent-seeking of anti-competitive monsters.

In parallel, the virtual online infrastructure is suffering from the same sickness. We see a small number of companies – Facebook and Google in particular – becoming deeply disturbing quasi-monopolies. Many people cannot imagine using the Internet without using Facebook, which claims to have over a billion regular users. Running a political campaign requires use of a Facebook page. Being a campaign organisation requires having a Facebook page.

This centralisation gets even worse in developing countries, where Facebook has aggressively done deals with mobile operators for its 'free basics' service, which allows subsidised access to sites approved by Facebook. With 'free basics', the operators get revenue from Facebook, removing incentives to invest in networks to provide real Internet access. Facebook becomes *the* gatekeeper for all online communications and individuals get an impoverished, restricted, innovation-killing, personal-data-harvesting crumb of Internet from the table of one of the richest companies in the world.

Google's monopoly is different. It has amazing insights into our personal lives, friends, habits and personalities. It is hard to spend ten minutes browsing the web without encountering Doubleclick advertising/tracking, Google advertising/tracking, Google Analytics, embedded YouTube videos, Google+ images, embedded Google maps, Google docs, Google search, Google APIs, Google fonts... the list is extraordinary. Few people know that they interact with Google on a huge proportion of sites that they visit, even if they never use Google search. Billions of people being tracked via trillions of clicks, searches and cookies. This is a major threat to the democratic nature of the Internet, if we consider security expert Bruce Schneier's warning that "*someone who knows things about us has some measure of control over us, and someone who knows everything about us has a lot of control over us*".

This monopoly power is real. It is real power. Facebook says its terms of service allows it to manipulate users' moods for "*research*" purposes. Facebook censors content in surprising and unpredictable ways. It has been demonstrated that both Google and Facebook have the power to manipulate elections. This power carries very little, if any, responsibility for these companies. Power without responsibility is corrosive and corrupting. Always. Our political 'leaders' naively and recklessly issue populist calls for this power to be used to fight terrorism, hate speech, child abuse, copyright infringements – not only failing to address this concentration of power but actively encouraging it. This is short-sighted and dangerous.

The threat of this centralisation is clear and growing. Facebook's censorship tools are imposed in an "*arbitrary and capricious*" way by the company, according to one article in the **Economist**. Both Facebook and Google implement the US's **Digital Millennium Copyright Act** on a global level, allowing easy options for political censorship, as shown, for example, by censorship-by-copyright of videos critical of **Brazilian** presidential candidate Aécio Neves and of content, such as documentaries that were critical of **Ecuadorian** officials.

Similarly, in the UK, the **Blocked.org.uk** project run by the Open Rights Group found that 11% of the top 1000 sites (as ranked by Alexa) were blocked by the default 'parental controls' settings of at least one UK internet provider. Blocked sites included a watch-making business, a women's rights page, a designer clothes page, a political blog on the Syrian war and a Porsche brokerage.

In December, the EU will launch its "*internet forum*" with a flurry of happy press releases. In this forum, tech giants work on non-legislative liability-free ways that private companies can use to restrict access to unwanted content. What could possibly go wrong? Why not ask companies - that have neither the legitimacy nor the expertise to do the job properly – to blunder into a socially, racially, politically dangerous environment to take whatever measures seem like they might be a good idea? Again, what could possibly go wrong?

The Internet is democratic, open, challenging, diverse and robust. EDRi exists because of our commitment to keep it this way.

Biography

Joe McNamee is Executive Director of European Digital Rights (EDRi), an association of 32 privacy and digital civil rights organisations from across Europe. He studied Modern Languages in Bristol (BA), European Politics (MA) in Swansea and International Law (LLM) at the Brussels School of International Studies. He has worked on Internet-related topics almost continually since 1995,

having started his online career as a technical support advisor for an Internet provider in 1995. He was responsible for three independent studies for the European Commission on Local Loop Unbundling, on Convergence and on Telecommunications and the Information Society in eight former Soviet states.

Ramute Remezaite

European lawyers pay a high price for free speech in repressive environments

Freedom of speech cannot be taken for granted, even in many parts of Europe which has long been considered a champion of human rights. Although European States have agreed on the importance of the protection of freedom of speech for democratic societies by jointly adhering to the European Convention on Human Rights, those exercising their fundamental freedoms often pay a high price.

Human rights lawyers have been increasingly targeted by the authorities and other powerful forces for defending and seeking justice for those who often have no voice or have been punished for expressing their critical opinions in public.

This year's European Lawyers Day, which coincides with International Human Rights Day – and is meant to celebrate the rule of law and human rights - is sadly marked by the murder of Tahir Elçi, a prominent Turkish human rights lawyer and the President of the Diyarbakir Bar Association. He was shot dead during a press conference in Diyarbakir city, Turkey, on 29 November 2015. Prior to that, he received numerous death threats for defending Kurdish human rights. Other lawyers are behind bars for the same reasons.

One of Azerbaijan's leading human rights lawyers Intigam Aliyev who has been tirelessly supporting a new generation of human rights lawyers - and stands behind a third of the judgments of the European Court of Human Rights against Azerbaijan - has languished in prison since August 2014, in very poor health, and has been sentenced to seven and a half years' imprisonment in April 2015. Like many others, he has been speaking out against the wrongdoings of the authoritarian regime and has sought justice for many of those who could not remain silent either. His imprisonment under blatantly bogus charges was a heavy blow to Azerbaijan's justice system.

Mr Aliyev's fellow lawyer Khalid Baghirov, one of the very few remaining human rights lawyers who dared to take on human rights cases (and a promising leader of the country's legal human rights community), has been subjected to disciplinary proceedings and was eventually disbarred for publicly speaking about his cases and statements made in court.

Other lawyers face criminal defamation charges, excessive checks upon arrival at prisons to see their clients, and other forms of pressure and intimidation. This has a strong chilling effect on lawyers and unsurprisingly only a small number are prepared to continue such work, leaving many people without any effective access to justice.

Countries like Turkey and Azerbaijan, which have publicly adhered to the core human rights foundations adopted in Europe and promised freedom of speech to all their citizens, have put all our common values that lawyers aim to defend in great jeopardy, on a European level. It is fundamental that lawyers carry out their work without undue restrictions and that their freedom of expression is safeguarded, as a free and independent legal profession is essential to the protection of human rights and access to justice.

Biography

Ramute Remezaite *is a Legal Consultant with the European Human Rights Advocacy Centre (EHRAC). She has been a human rights lawyer at the Media Rights Institute and Legal Education Society, as well as a program officer at the Bertha Foundation and the Human Rights House Foundation. Ms Remezaite has a PhD from Middlesex University on the implementation of judgments of the European Court of Human Rights in fragile democracies, as well as a Masters in Public International Law from Oslo University.*

Pressure on Memorial

The Russian human rights NGO Memorial has recently come under increasing pressure from the Russian

State.

On 9 **November** 2015, the Russian Ministry of Justice accused Memorial in an annual audit of "*undermining the foundations of the constitutional order* " and of calling for "*a change of political regime*", following the NGO's critique of Russia's alleged involvement in Ukraine.

Some of the conclusions of that audit have been **accused** of being "*poorly based and not confirmed by facts*" by Russia's High Commissioner for Human Rights, Ella Pamfilova.

The organisation potentially faces a fine, criminal prosecution or closure.

These events followed the **designation** of Memorial as a "*foreign agent*" by the Russian State on 6 November. Foreign agent status was introduced in Russia in **2012**, and has led to the registration of over 100 NGOs, which **must** be registered as foreign agents if they engage in "*political activity*" and receive foreign funding. Russia claims that the St Petersburg branch of Memorial received funds from the European Commission and the US National Endowment for Democracy, the latter having also been labeled "*undesirable*" by Russia.

Human Rights Watch **alleges** that the 'foreign agents' term can only be translated in Russian as 'spy' or 'traitor', though this is denied by the Russian courts. In any case this label, or threat of it, has led to many rights groups closing their Russian offices.

Memorial responded by stating that they "*are exercising … freedom of thought and speech and freedom of association, which are guaranteed by Articles 28 and 30 of the Russian Constitution… We do not consider it appropriate to remain silent if we see that officials, including the highest officials, are violating human rights and the norms of international law*."

The NGO will be appealing the Justice Ministry's report on the basis that it is unconstitutional. Amnesty International has **condemned** the Russian State's actions as a "*vengeful assault on freedom of expression*". The Council of Europe has **spoken** in support of the NGO, as has the **European Union**.

The Russian State had previously called for the Russian Supreme Court to have Memorial "***liquidated***" in 2014. The call was **dismissed** by the Court on 28 January 2015. Memorial's offices were also raided by the Russian State in 2008 and 2009.

Memorial was founded in 1987 by dissidents such as Andrei Sakharov, originally to commemorate political repression in the Stalinist era. Its stated **objectives** include campaigning for democracy and the rule of law. It has received the 2009 European Parliament Sakharov Prize, among other awards.

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China breathing fire: EU accused of 'ideological prejudices' following Special Representative's visit

The EU Special Representative for Human Rights (EUSR) Stavros Lambrinidis came under fire from China's Foreign Ministry following his second official visit to the country in early November.

The Chinese State's reaction came in response to an EU **press release** which highlighted concerns over the country's limits on lawyers' freedom to practice, amongst other issues. The press release follows the recent arrest and detention of numerous Chinese human rights lawyers and activists, who have reportedly been denied their basic rights.

The Chinese Foreign Ministry's spokesperson Hong Lei is **reported** as saying in a statement, **published** on the Ministry's website, that the EUSR had "*turned a blind eye to the development of human rights in China*". This comment was made despite the EUSR press release praising"*important developments*" in terms of China's commitments to reduce both poverty and the number of crimes which carry the death penalty, as well as proposals to improve residence rights for migrant workers.

The EUSR was also accused of making *"irresponsible comments about China's legislative and judicial work"* which according to the Ministry "*interferes in China's domestic affairs but also runs counter to the spirit of governance by the rule-of-law*".

The EUSR is not the first international actor to express concern over China's patchy record concerning, in particular, human rights lawyers' freedom to practice and freedom from persecution, as well as possible miscarriages of justice. In an opening **statement** at the 30th session of the UN's Human Rights Council (HRC) in September and October this year, the UN High Commissioner for Human Rights voiced concern over "*the detention and interrogation in recent months of more than 100 lawyers in China, in connection with their professional activities*". In July 2015, an **intervention letter** was sent to China's State Council by the Law Society of England and Wales, asking for the release of the detained lawyers and activists, some of whom

were believed to have been held without formal charge. This letter also reiterated China's obligations under the Universal Declaration of Human Rights, as a member of the UN and as a signatory of the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, with a wider call for China to provide a safe environment for human rights lawyers and activists.

An August 2015 **open letter** from Human Rights Watch to UN Member States prior to the HRC session called for joint action to address the crackdown on human rights defenders and lawyers. Countries including the USA, Germany, Ireland, Netherlands, France, the UK, and Switzerland are all **reported** to have stood by a **statement** made to the HRC by the permanent representative of the Grand-Duchy of Luxembourg Mr. Jean-Marc Hoscheit, on behalf of the EU.

It is in the wake of these multiple international calls for change, following mounting evidence of abuses, that the Chinese State called for the EU to "*respect China's legislative and judicial sovereignty*". Mr Lambrinidis felt compelled in his statement to say that the rule of law "*requires lawyers that can practice freely without fear of persecution and provide checks and balances against the miscarriage of justice*".

Despite the Chinese State's claims that only those who break the law are targeted by the authorities, it has been **argued** that the current issues are a result of President Xi Jinping's attempts to quell dissent amongst intellectuals, journalists and activists. There are also **reports** of lawyers being detained without charge on the basis of vague and spurious accusations such as "*seriously violating the law*". **New allegations** are emerging of continued abuses against human rights lawyers, including **forced confessions and torture**, and are likely to be followed closely by the EUSR despite protests by the Chinese State.

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Dieudonné verdict and hate speech

On 25 November, the French comedian Dieudonné M'Bala M'Bala (stage name "Dieudonné") was **convicted** *in absentia* in Belgium for racist and anti-Semitic comments which he made during a show in Belgium in 2012. The judges **found** that the **comments** on Jews, homosexuals and disabled people were consistent with incitement to hatred, hate speech and Holocaust denial, awarding a jail sentence of 2 months and a €9,000 fine.

Dieudonné has **several** similar convictions, as well as one for **condoning** terrorism in France, following remarks related to the Charlie Hebdo attacks.

What is perhaps of more interest, however, is a particular **conclusion** earlier this month of the European Court of Human Rights (ECtHR), when a scene in a December 2008 public performance of Dieudonné's led to his **conviction** before that Court too. At the show's conclusion, Dieudonné invited onstage Robert Faurisson, an academic convicted for negationist and revisionist opinions, to receive a prize consisting of a three-branched candlestick awarded by an actor wearing a pair of striped pyjamas with a yellow star bearing the word "Jew".

Mr M'Bala M'Bala asserted that he was within his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The French courts disagreed, leading eventually to the case being heard at the ECtHR on 10 November 2015.

The **ECtHR** held that, during the scene, the performance moved from being just entertainment to being a political meeting; one of anti-Semitism, hatred and support for Holocaust denial. In the Court's view, this was not a performance which, even if satirical or provocative, fell within the protection of Article 10. It was instead an expression of an ideology counter to the ECHR's values.

The Court stated that a blatant display of hatred and anti-Semitism disguised as an artistic production was as dangerous as a head-on and sudden attack. Article 10's use to protect this would be incompatible with and deflect from the letter and spirit of the Convention. If allowed, it would contribute to the destruction of Convention rights, contrary to Article 17 **ECHR**.

Dieudonné's supporters **claim** that there is a double standard (citing the magazine Charlie Hebdo's publications on Islam), with the decision setting a dangerous **precedent**. Others **argue** that there is a difference between satire targeting all religions, and a performance specifically targeting one group; furthermore, Dieudonné's statements on the Holocaust appeared to be a denial of the status of the Holocaust as a historical fact, as opposed to one's opinion on that historical fact.

ECtHR decision on Armenian genocide denial

The European Court of Human Rights (ECtHR)'s Grand Chamber **ruled** on Thursday 15 October that Switzerland violated Turkish national Dogu Perinçek's freedom of expression under Article 10 of the European Convention on Human Rights, by convicting him of having denied that the killing and mass deportation of Armenians by Ottoman Turks in 1915 amounted to genocide.

Mr Perinçek was inititally convicted in 2007 and 2008 by Austrian domestic courts. He had been ordered to pay a number of fines, as well as 1,000 Swiss Francs in compensation to the Switzerland-Armenia Association.

The Grand Chamber was **split** 10 to 7. The **ruling** followed a 5 to 2 decision in favour of Mr Perinçek on 17 December 2013 by the (lower) Chamber of the ECtHR.

The Grand Chamber dismissed the Swiss State's argument that its intervention under Article 10 was justified under Article 16, which allows restrictions on the political activities of aliens, as Mr Perinçek's remarks were not considered to directly affect the political process. **Nor** did the Court find that Mr Perinçek had violated Article 17, that is, engaging in activities aimed at the destruction of the Convention rights and freedoms of others.

Mr Perinçek is a doctor of law and Chair of the Turkish Workers' Party. At three public events in Switzerland in 2005, he called the allegations of genocide "*an international lie*" perpetrated by Western and Russian "*imperialists*" (importantly, not by Armenians themselves) and claimed that "*there was no genocide of the Armenians in 1915*".

The key consideration in the ruling appears to have been that the statements related to a matter of public interest and did not amount to a call for hatred, violence or intolerance.

The ruling also held that the dignity of the victims and the dignity and identity of modern-day Armenians were protected by Article 8 ECHR (right to respect for private life), - which was hailed as a success by the Armenian State and its lawyer, Sir Geoffrey Robertson QC. However, the Grand Chamber concluded that it had not been necessary to affix a criminal penalty in order to protect these Article 8 rights.

The Grand Chamber did not see its role as ruling on whether or not there was an Armenian genocide in 1915, nor whether genocide denial should in principle be criminalised, nor whether Mr Perinçek's comments amounted to genocide denial.

The Grand Chamber did, however, say that it is possible for a State like Austria to specifically criminalise denial of the Holocaust (i.e. not genocide generally) because, in the historical context of such a State, such denial would always imply anti-democratic ideology and anti-Semitism; that those States that aided or committed the Holocaust have a "*special moral responsibility*" to distance themselves from such denial. Such a link does not exist between Switzerland and Armenia. The Grand Chamber added that certain historical **facts** concerning the Holocaust had been "*considered clearly established by an international jurisdiction*" and that while the courts should not install historical truth by law, the Holocaust is an **exception** to this.

Commentators have pointed out that to say Holocaust denial in and of itself can be a reason to limit freedom of expression conflicts with the views of the UN Human Rights Committee.

Acceptance of public documents in the European Union

On 12 November, the final text of the Regulation of the European Parliament and the Council on requirements for simplifying the acceptance of certain public documents in the EU was **approved** by the JURI Committee. Final approval by the Council is envisaged on 3 December.

The main issue between Parliament and Council was on the number and types of documents considered as objects of the Regulation, with Parliament wanting education certificates and documents certifying health and

disability included in the list, and the Council inclined towards recognising only documents relating to birth, death and marriage. A compromise was reached through the provision of an assessment report by the Commission, after two years, on the appropriateness of extending the Regulation to other documents.

The Regulation is very much seen as a way of further improving the application of the right of free movement of citizens, and does not impinge on the nature of the documents: these are issued by the authorities of the Member States in accordance with their national laws. The proposed system relies heavily on collaboration between Member States, both on the side of the setting up of the system (e.g. communication of all sorts of information, like languages accepted, lists of public documents, lists of certified translators, types of authorities which can certify copies, National Authorities) and in the functionality of the system (e.g. exchange of information, and monitoring).

The Regulation introduces further simplification of administrative formalities for the circulation in the Member States of public documents regarding civil status (i.e. birth, death, marriage, civil partnership, parenthood), residence, domicile, nationality, criminal record and documents required for standing in elections. No apostille is required for these documents, and national authorities must make clear that one is not necessary, even if still available, if requested.

The Regulation applies also to certified copies of the documents, and to electronic versions of public documents and multilingual standard forms suitable for electronic exchange, if they can be presented in accordance with national law.

One important requirement of the Regulation is the establishment of standard multilingual forms for the purpose of facilitating the translation of the public documents to which they have to be attached. These forms cannot circulate autonomously between Member States, who will then communicate to the Commission the public documents to which they can be attached; they will then be published on the European e-justice Portal. The requests for information and administrative cooperation between Member States will be dealt with through the Internal Market Information System (**Regulation no. 1024/2012**).

An ad hoc Committee composed of representatives of the Commission and Member States will be established to monitor the application of the Regulation and for the exchange of best practices.

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French derogation from the ECHR

For the first time in 30 years, France has **derogated** from the European Convention on Human Rights (ECHR).

The derogation, dated 24 November, was contained in a *note verbale* (a type of diplomatic communication) from the Permanent Representation of France to the Council of Europe, and was registered at the Secretariat General of that organisation.

In order to take such action, a State must rely on the provisions of **Article 15 ECHR** on derogations in times of emergency. Article 15(1)-(2) states that:

1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

In its derogation, the French State cited the 13 November Paris attacks and said that:

"*The terrorist threat in France is of a lasting nature... The French Government has decided* [to declare a] *state of emergency... Such measures appeared necessary to prevent the commission of further terrorist attacks.*"

The message confirmed the extension of the state of emergency for three months, with effect from 26 November. It said that some of the measures will involve a derogation from ECHR obligations, thereby complying with Article 15(3) which obligates States to inform the Council of Europe of any derogations.

The text of the derogation does not specify which ECHR right(s) will be the subject of the derogation.

The last time France derogated in this way was in 1985, when it declared a state of emergency in the French overseas territory of New Caledonia following an **uprising** in the same year. That derogation lasted for eight months.

ClientEarth v Commission: Judgment

On 13 November, the Court of Justice of the European Union (CJEU) **ruled** that impact assessments intended to guide the Commission in drawing up its proposals for legislative acts are not, in principle, to be accessible to the public before those proposals have been disclosed.

ClientEarth, an environmental protection NGO, brought the claim against the Commission after having been denied access to two of the Commission's impact assessments on its decision not to adopt a Directive underpinning the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Commission said that such access would negatively impact the policy-making process. ClientEarth wanted this decision annulled.

ClientEarth attempted to appeal under **Regulation 1049/2001** on access to documents, which provides that decisions by EU institutions such as the Commission should be taken as openly as possible, meaning the fullest possible effect should be given to the right of public access to documents of the institutions.

Here the Court held that an **exemption** applies where disclosure of the document would seriously undermine an EU institution's decision-making process for developing a policy proposal, unless there is an overriding public interest in disclosure.

The CJEU found that in the context of the preparation and development of policy proposals and legislative acts, the Commission does not need to carry out a specific and individual examination of documents when drafting impact assessessments. The Commission may also rely on grounds of a general nature relating to: the need to preserve its 'thinking space', room for manoeuvre, and independence; the need to preserve the atmosphere of trust during discussions; and the risk of external pressures liable to affect the conduct of the ongoing discussions and negotiations.

The CJEU's reasoning applies for so long as the Commission has not made a decision to adopt or abandon the proposal.

Critics of the decision say access to impact assessments would let citizens participate in the lawmaking process, and that increased transparency would make it more difficult for the Commission to block the adoption of Directives.

Conference on EU Regulation 650/2012 on international successions, 19 November 2015

On Thursday 19 November, notaries and lawyers from the four corners of the European Union gathered in Brussels for a conference on the application of **Regulation 650/2012** on international successions which came in force on 17 August 2015.

After a long queue to enter the building, due to security reasons, the Conference kicked off with an introduction by Commissioner for Justice, Consumers and Gender Equality, Vera Jourová. Ms Jourová remarked that this Regulation is exactly what the citizens of Europe expect and welcome: legislation which makes everyday life easier.

The following sessions however, which looked into the difference between choice of law and choice of court, succession planning, the European Certificate of Succession and cooperation between professionals, did not actually bode well for making the life of European citizens easier.

The interpretation of the rules was significantly different between practitioners of different countries, and between practitioners and the Commission itself. In particular, the European Certificate of Succession seemed to be creating considerable disagreement, with the Commission claiming that it is a new instrument, not comparable with existing national instruments, and therefore that it must be enforced as it is, without any further transposition. Yet some practitioners, particularly Spanish and French, claimed that to have force the Certificate needs to be transposed into an authentic national instrument. Further disagreements arise from: the relation between the choice of law (admissible by Article 20-22 of the Regulation) and the choice of jurisdiction (which is not contemplated by the Regulation); the difference between the administration of the estate and the administration of the succession; and the concept of public policy as a reason for not recognising the decision of another Member State's authority in matter of successions.

The UK has not opted in to the Regulation; the general consensus seems to be that for the purposes of the Regulation the UK is a so called 'third country', which will continue to apply its own rules on international successions. It is undeniable, though, that the effects of the Regulations will be felt in the UK too, and almost the entire session dedicated to third countries revolved around the UK. A remarkably fluent (particularly compared to the continental disquisitions) intervention by Professor Jonathan Harris, from King's College, London, clarified the English law of recognition of decisions by other States and how the choice of English law by a testator, even not being recognized by the English courts, could have the desired effect, since it is recognised by the country which is competent on the basis of English law.

Watch this space for plenty of CJEU cases!

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Criminalisation of service providers for radical content: The Dati Report

On 25 November The European Parliament **voted** in favour (548 votes for, 110 against and 36 abstentions) of a report by Rachida Dati MEP (France, EPP) that calls for criminal charges against online firms if they do not remove material from their websites that promote terrorism.

In a **press release**, the Parliament said that:

"The terrorist attacks in Paris have highlighted once more the urgent need for coordinated action by the member states and the EU to prevent radicalisation and fight against terrorism... The resolution sets out concrete proposals for a comprehensive strategy to tackle extremism, to be applied in particular in prisons, online and through education and social inclusion."

The Parliament said that it wants:

"... illegal content that spreads violent extremism to be deleted promptly, but in line with fundamental rights. Member states should consider legal action, including criminal prosecution, against internet and social media companies and service providers that refuse to comply with an administrative or judicial request to delete illegal content or content praising terrorism..."

The approach clashes with the Commission's preference for a voluntary initiative.

The report focuses on countering radicalising material online, but also includes measures to tackle extremist networks in prisons and freeze passports and financial assets of would-be terrorists.

Critics of the report argue that threatening internet companies with criminal charges could lead to overzealous censorship and might spur backlash from people whose posts are removed.

The report is **non-binding**, but comes ahead of the European Commission's launch of a new partnership to target radicals online with the voluntary help of technology companies.

The adopted text is available **here**.

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Post Paris attacks: France calls on Article 42(7)

In a **speech** on 16 November following the Paris attacks, French President François Hollande invoked **Article 42(7)** of the Treaty on the Functioning of the European Union (TFEU). EU countries **responded** to the invocation the next day with "*unanimous support*". It is the first time the article has ever been used.

Article 42(7) TFEU states that:

"*If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power... This shall not prejudice the specific character of the security and defence policy of certain Member States*."

The Article, known as the 'mutual defence clause' is often confused with the 'solidarity clause' contained in **Article 222** TFEU, which covers situations of terrorist attacks and man-made disasters. That provision obliges the Union to, amongst other things, "*mobilise all the instruments at its disposal, including the military resources made available by the Member States*" to prevent the terrorist threat in that State's territory if such an attack takes place.

According to the think-tank Open Europe, choosing Article 42(7) **means** that France will make its arrangements bilaterally with EU members; leaving the EU to act as a 'facilitator' under the TFEU. This contrasts with Article 222, which specifically provides for the EU and Member States to act jointly in the face of a terrorist attack. It is argued that this gives France a more central role in the decision-making process, and aligns better with Mr Hollande's **view** that "*France is at war*". In other words, France has opted for the more intergovernmental - rather than supranational - approach.

Further, Article 42(7) can be implemented immediately, whereas Article 222 requires a conclusion or decision of the European Council.

The news agency Politico **claims** that NATO's own mutual defence provision, Article 5 of the North Atlantic Treaty, was not invoked because some members of the French cabinet did not want to put pressure on the US, nor further destabilise the Middle East with a NATO intervention.

Article 42(7) **does not actually obligate** Member States to undertake military action (out of respect for the traditional **neutrality** of many Members). It is therefore likely that support will come through greater intelligence-sharing, as well as assistance to France's UN **peacekeeping** operations so that it can free up resources for deployment elsewhere.

Conference: Building European Rules of Civil Procedure

On 26 and 27 November, the European Law Institute (ELI) organised a conference in Trier, Germany, at the Academy of European Law, to discuss the work undertaken so far by ELI working groups on the building of European rules of civil procedure.

In light of the EU having ascertained competence in the field of civil procedure, albeit in limited cross-border cases, the conference aimed to study the feasibility of the project aiming to elaborate a European variant of the transnational principles of civil procedure (**Unidroit, 2004**). This could well lead to a possible future Directive on minimum standards in civil procedures in the Member States.

The ELI undertakes its work through 5 working groups, made up of academics and practitioners, which include lawyers and judges. The groups cover:

- Access to information and evidence
- Provisional and protective measures
- *Res judicata* and *lis pendens*
- Obligation of the parties, lawyers and judges
- Service and due note of proceedings

Using the Unidroit principles as a starting point, the working groups examine procedural rules in the Member States, and have begun drafting common rules which would be applicable in all Member States. In certain cases, for example the working group on provisional or protective measures, the rules are general and applicable also at national level, while in other areas the rules are cross-border specific.

A lively debate took place at the conference, reflecting the different legal traditions of participants from various Member States, and highlighting the problems faced by the working groups. A number of issues remain unresolved however, including the powers of the courts in respect to the admissibility of evidence, the use of technology in the taking of evidence, the relationship between access to information and evidence, the inclusion of interim payments in provisional measures, the consequences of inadequate disclosure by the parties, the meaning of *res judicata*, and the duty of 'loyal cooperation'.

The project is being followed very closely by the European Commission and the European Parliament, whose representatives actively participated at the Conference.

The project is expected to finish its work by the end of 2017, with the publication of final drafts by the working groups.

For more information, ELI can be contacted at **http://www.europeanlawinstitute.eu**.

Served on a *s'il vous plaît*: The UK's EU renegotiation demands

On 10 November, UK Prime Minister David Cameron set out his key demands in the UK's renegotiation of its membership in the EU in a **letter** to European Council President Donald Tusk.

The renegotiation comes ahead of the planned UK referendum on EU membership, the date for which is **yet to be decided**. It is hoped that a successful renegotiation will sway the British public to vote to stay in the EU.

Mr Cameron's four key objectives **are**:

- The Eurozone - Securing binding principles ensuring that countries outside the Eurozone are not materially disadvantaged by it. This includes safeguards that steps to further financial union cannot be imposed on non-Eurozone members by the 19 Eurozone members' majority, and that the UK will not have to contribute to Eurozone bailouts.
- Regulation – Here the UK aims to secure targets for the reduction of excessive regulation (in order, partly, to "*turbo-charge*" trade deals with South East Asian countries) and extending the single market, though it wants to keep specific safeguards for the City of London as regards financial regulations.
- Migration - Stopping those coming to the UK from claiming certain benefits until they have been resident for four years (though this seems to be **flexible**), and stopping what Cameron sees as "*abuse*" of freedom of movement.
- Sovereignty - Allowing Britain to opt out of an "*ever closer union*", and giving greater powers to national parliaments to block EU legislation.

Mr Cameron is in "*no doubt*" that his demands would require Treaty changes - something that requires unanimity of consent among the Member States.

Tusk has **said** a deal with the UK on renegotiation would be "*really tough*", whilst Commission President Jean Claude Juncker is willing to work for a "*fair*" deal. There has been a mixed response from the Member States: initial reactions from Italy, Germany and France have been **positive**, less so from Eastern and Central European countries.

It is **speculated** that Mr Cameron faces an easier task in particular on cutting regulation as this coincides with Mr Juncker's and Mr Timmerman's pet project, the Better Regulation Agenda. It could also be easy for the Commission to accommodate some increased power for national parliaments. However, the demands regarding the Eurozone, the City of London carve-outs and restricting EU migrants' access to benefits are likely to be **more difficult** to achieve.

If the right deal is not struck, the Prime Minister said he would have to "*think again*" about whether the EU is right for the UK - though he appears to already have **ruled out** the 'Norway option'. As **Le Monde** puts it, "*the poker game has begun*".

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Tying up the 'golden thread': proposals to strengthen the presumption of innocence

On 4 November 2015, the Permanent Representatives Committee (Coreper) approved a **compromise agreement** with the European Parliament, taking legislators one step closer to a proposed Directive strengthening the presumption of innocence, as well as enshrining the right for a defendant to be present at trial in criminal proceedings.

The proposed measures would also require Member States to ensure that suspects and accused persons are not presented as being guilty before a final judgment (for example through the use of measures of physical restraint, or being forced to wear prison clothing), and to provide effective remedies for those whose rights under the proposed Directive are breached.

Félix Braz, Luxembourg Minister for Justice and President of the Council on Justice and Home Affairs said that this was "*an important step in the creation of a European judicial area*", serving to protect one of the fundamental rights of criminal defendants. It should be noted that the UK, having exercised its right to opt out of certain measures in the field of justice and home affairs, will not be subject to the Directive.

Elsewhere, the Directive would impose minimum standards for defendants in criminal trials across the EU, complementing and building on those rights guaranteed by the **European Convention on Human Rights**

(ECHR) and the **Charter of Fundamental Rights** (under Article 6(2) and Article 48 respectively). According to the Council's **press release**, the Directive would "*strengthen mutual trust and confidence between the different judicial systems of the member states and will facilitate the mutual recognition of decisions in criminal matters*".

This proposal follows those already introduced in the field, for example the right to **information in criminal proceedings** and to **translation/interpretation**, already established under the Commission's 2009 **roadmap** which seeks to introduce a catalogue of rights for suspects in criminal proceedings.

The Commission published a **green paper** on the presumption of innocence in April 2006, owing to concerns over divergence in criminal law procedures and the erosion of the presumption in certain Member States. This highlighted numerous instances where the burden of proof does not rest fully with the prosecution, as well as gaps in the privilege against self-incrimination (including the right to silence), and the right not to give evidence.

In this field the UK has been **accused** of "*opting out of the measures that protect the citizen from the abuses of the state*". For example, Section 34 of the **Criminal Justice and Public Order Act 1994** allows **inferences** to be drawn where a suspect is silent when questioned under caution prior to charge or at the point of charge. Section 35 of that Act similarly allows inferences to be drawn from silence at trial. These practices have so far been found to be consistent with the Convention: the European Court of Human Rights (ECtHR) held in its 2001 decision, *Condron v UK,* that the 1994 Act seeks an appropriate balance between the right to silence and the drawing of adverse inferences. This is summarised in **guidance** published by the Crown Prosecution Service.

It has been **suggested** that Viscount Sankey's famous 'golden thread' rule, i.e. the prosecution's burden of proof being central to the English criminal justice system, is being eroded, along with the standard of proof. As a result, some will lament the UK's opt-out in this area. Measures intended to **increase efficiency** in proceedings, including the CPS's **Early Guilty Plea** scheme, can result in defendants opting to plead guilty early on in return for a lighter sentence, when the prosecution have not fully met their obligations to serve both material supporting their case and un-used material.

The Law Commission also concluded in a 2013 **report** that the existence of a reverse burden of proof for a defendant claiming insanity as a defence is wrong and unnecessary; it remains to be seen whether UK legislation will be changed in this area, given the opt-out. Article 5 of the proposed Directive would require Member States to "*ensure that the burden of proof in establishing the guilt of suspects and accused persons is on the prosecution*".

The compromise agreement will now be subject to 'legal scrubbing' before being submitted to the European Parliament for a vote at first reading. Following adoption, Member States (other than the UK, Ireland and Denmark) will have two years to bring into force the necessary laws, regulations and administrative provisions to comply with the Directive.

Commission proposals to revamp EU copyright law

A revamp of EU copyright law was one of 16 key actions introduced by the Commission's May 2015 **Digital Single Market Strategy**. The goal is increased harmonisation between Member States' copyright laws, opening the door for European citizens to access more diverse online content across the EU, enhancing cultural diversity and granting better access for the creative industries. In proposals aimed at strengthening consumer rights, the Commission also hopes to improve the portability of content such as films and music across the EU, whilst clamping down on commercial scale infringements of intellectual property (IP) rights.

Following the 2014 **public consultation** on copyright rules, and in anticipation of the Commission's proposals, the Parliament's Legal Affairs (JURI) Committee set up a **working group** on IP Rights and Copyright Reform, to address concerns that the current Copyright Directive (**Directive 2001/29/EC**) is outdated, particularly in view of the increasing availability of protected content online. This working group has already adopted resolutions on the **online distribution** of audiovisual works and the **enforcement of IP rights**. In June this year, JURI, followed by the Parliament in plenary, adopted an own-initiative report (the **Reda report** - named after Julia Reda MEP, Germany, Greens/EFA). The Internal Market and Consumer Protection and Industry, Research and Energy Committees also submitted their own reports on the matter. Further, the Commission published a **report** summarising the responses to its consultation.

The Reda report comes ahead of a Commission Copyright Framework Communication on amendments to the copyright regime which is expected by the end of the year. It highlights the need for change concerning the territoriality of copyright (acquisition and enforcement on a country-by-country basis), as well as a re-

evaluation of exceptions and limitations within the current rules. It has been **argued** that current issues stem from the exhaustive nature of the exceptions and limitations, as well as the vast majority of these being optional, and a lack of clear guidelines on the contractual overridability of limitations.

The report suggests that certain exceptions be made mandatory, whilst specifically calling for exceptions allowing public libraries to lend works in digital format, and permitting text and data mining for public interest research. The **report** also invites the Commission to consider the potential impact of the introduction of a single European copyright title *"on jobs and innovation, the interests of authors and right holders, and the promotion of consumers' access to cultural diversity*".

The Reda report also highlighted issues encountered by EU citizens in accessing protected content due to geo-blocking, resulting from a lack of harmonisation between Member States' copyright laws. The current **public consultation** on geo-blocking will close at the end of December, after the expected date of the Commission's Communication. Freedom of panorama is also mentioned in the report, and is likely to be present in forthcoming EU policy-making decisions. So too are proposals for a so-called 'Google Tax', **proposed** by the Commission in October, whereby internet search engine providers would be required to pay a fee for displaying copyrighted material on their sites. Such a measure has existed in Germany since 2013, requiring search engines such as Google to pay a fee to the publisher of any content which they use or link on their sites.

The Commission has now published a **road map**, which goes into little detail but confirms the intention to look into all the issues raised by the Reda report. Legislative proposals to enhance cross-border portability of content will be introduced either in December or in early 2016 (subject to the opinion of the Regulatory Scrutiny Board), whilst concrete proposals relating to territoriality, exceptions and enforcement fall within a list of proposals for adoption in Spring 2016.

It seems that the Commission will not propose full harmonisation of copyright under EU law. Indeed this is not addressed by the road map, likely due in part to perceived issues with ensuring respect for principles of fair remuneration for the use and reproduction of protected work across the Member States.

A draft Copyright Framework Communication was leaked in November, and early **reports** suggest that the Commission's proposals will not directly address geo-blocking issues, but rather take a gradual approach to removing obstacles to cross-border access, starting with a regulation on portability. The Commission has separately launched a geo-blocking **consultation**, responses to which will feed into further proposals on that subject.

The Commission will explore the possibility of a "follow the money" approach to preventing profiteering from serious copyright infringement. Proposals on a single European copyright title do feature amongst longer term proposals, however the Commission acknowledges that this would require major changes to current rules and would likely necessitate a single copyright jurisdiction with its own tribunal. The final form of the Commission's Communication is eagerly awaited.

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Time for TAXE: Take 2

On 25 November the European Parliament voted to adopt **a final report** on tax rulings, and other measures similar in nature or effect, prepared by the TAXE Committee. This special Committee was set up by Parliament a year ago to investigate tax rulings in various EU member states, and to seek ways of combating unfair tax practices and tax evasion.

The Committee's work has attracted significant attention. Over 1,000 **amendments** were proposed to the **draft report** by co-Rapporteurs Elisa Ferreira and Michael Theurer, which is very rare for a non-legislative initiative. Furthermore, when certain multinational companies (MNCs) were **reluctant** (or, in some cases, "*unable*") to attend a TAXE hearing, the Committee requested that the Constitutional Affairs Committee (AFCO) remove from the Transparency Register those which failed to respond to the Parliamentary summons. Eventually a number of MNCs did appear before the Committee to **answer questions**.

The report also sparked particular interest amongst practitioners, with recommendations for greater public transparency on tax rulings and related practices, whilst being critical of the dual legislative consultancy/client advisory role played by tax advisors concerning aggressive tax planning strategies. The report goes on to suggest that Member States could even adopt a common approach to setting corporate tax rates.

As confirmed in a Parliament **press release**, the report also suggests the adoption of EU measures to address tax base erosion and profit-shifting, so as to ensure that profits are taxed where they are generated. This includes an endorsement of plans to table new proposals for a Common Consolidated Corporate Tax Base

(CCTB). However, despite acknowledging the Commission's plans for a staged approach towards a CCCTB (which is currently the subject of a **consultation**), the report expresses concerns that certain issues could be shelved in the short term under such an approach, and calls for a "*concrete and short deadline*" for full consolidation. There is also a call for the Commission to adopt guidelines on what constitutes state aid in taxation cases, and to ensure better protection for whistleblowers.

Despite the TAXE Committee having fulfilled its purpose and the report having been approved, the Committee has **requested** a further six months to continue its work. This request has been honoured by the Conference of Presidents; however, as TAXE has exhausted its mandate, the Presidents have decided to set up a further **special Committee** to continue the TAXE Committee's work. "TAXE II" will be composed of the same members under a follow-up mandate. TAXE's reincarnation raises the question of the role of the new committee and whether this represents a duplication of the Parliament's efforts, especially given Parliament's limited advisory role in the field of taxation.

The ECON Committee has already adopted its report on "*Bringing transparency, coordination and convergence to Corporate Tax policies in the Union*". Although the full details of this **draft report** have not yet been published, its recommendations build on the same topics as those in the TAXE report. The ECON report is due to be voted on in Plenary on 16 December. As this is a legislative initiative report, the Commission has three months to respond to the ECON Committee's recommendations through legislative proposals. Failing this the Commission would have to provide reasons for not doing so.

Since TAXE is operating in essentially the same area, it remains to be seen exactly what the new committee's role will be. Indications are that it will continue to focus on cracking down on corporate tax avoidance, and ensuring the implementation of its predecessor's recommendations. Its role is to be defined in greater detail in the first week of December, but it may be that the Parliament is seeking to create a committee specialising in tax matters.

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Madeleine Kelleher
Surveillance of lawyer-client communications

In modern democracies, inalienable rights of citizens include freedom of speech, and for lawyers themselves, acting as lawyers, these rights include the confidentiality of the lawyer-client relationship. This relationship is increasingly threatened by modern methods of surveillance.

The dangers of terrorism have led governments to increase surveillance, for understandable reasons. Unfortunately, this can include the monitoring of lawyer-client communications.

Recently, the Dutch law firm Prakken d'Oliveira filed a case against the Dutch State on this question, and the Council of European Bars and Law Societies (CCBE) joined as a party. The Court was questioned on the legality of eavesdropping by domestic intelligence agencies on calls between clients and lawyers. In its verdict delivered on 1 July 2015, the Court recognised that the ability to communicate confidentially with a lawyer is a fundamental right which was being breached by the surveillance policy in question. The Court therefore ordered the Dutch government to stop all interception of communications between clients and their lawyers under the current regime within six months. The verdict was upheld in October, following an appeal.

Other steps are also being taken to safeguard confidentiality. For example, on 29 October 2015, the European Parliament adopted a follow-up resolution to its original resolution of 12 March 2014 on the electronic mass surveillance of EU citizens, where it stressed that mass surveillance "*underlines in particular the rights of EU citizens to be protected against any surveillance of confidential communications with their lawyers.*"

The resolution also stressed the necessity of a coherent definition of national security. Without it, there is the possibility of abuse by the intelligence services. The CCBE believes that surveillance of lawyer-client communications, if undertaken at all, should be monitored by a body independent of the executive, preferably a judge (or judges) with the power to intervene. Judges should also decide on the use by prosecutors of information collected.

The right to confidentiality is not a right for lawyers, but for clients, to guarantee both their right to speak freely with lawyers, and their fair trial.

More information about the CCBE's role in the protection of confidentiality can be found on our website

(**www.ccbe.eu**), together with information on European Lawyers Day 2015, which takes place on 10 December with a theme of freedom of expression.

Biography

Madeleine Kelleher works for the Council of Bars and Law Societies of Europe (CCBE). She has an MA(Hons) in Chinese from the University of Edinburgh and was the UK Representative for Charitarian, an organisation that engages in profiling best practice in business ethics, government social responsibility, climate change, China charity and global philanthropy.

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Filling the void: Commission publishes its clarifications on transatlantic data transfers

On 6 November, the Commission published a **communication** in which it clarified its position on international data transfers following the landmark ruling of the Court of Justice of the European Union (**C-362/14**) (CJEU). The ruling, which invalidated the Safe Harbour decision, resulted in much uncertainty for businesses and organisations that transfer data across the Atlantic.

In its communication, the Commission stressed that Safe Harbour could no longer be used as a lawful basis for data processing and pointed out that there exist other lawful grounds for the transfer of data to third countries that are not deemed to grant an adequate level of protection for personal data:

- binding corporate rules (BCRs);
- standard contractual clauses (SCCs); and
- derogations under Article 26(1) of the **1995 Directive** (performance of a contract, consent, public interest grounds, protection of the vital interests of the data subject, transfer made from a register intended for the public).

In accordance with the CJEU ruling, the Commission stressed that the national Data Protection Authorities (DPAs) remain independent in their own assessment of the legality of data transfers within their territories. It also confirmed that companies may use a combination of different tools for their data transfers.

The Commission additionally confirmed that negotiating a new agreement with the US remains a priority. The negotiations, which started in 2013 and followed the Commission's 13 recommendations on improving the Safe Harbour scheme, received an impetus after the CJEU ruling. It remains clear that the Commission prefers to negotiate a new agreement as soon as possible in order to improve legal certainty relating to transatlantic data flows. It will also carry out a regular assessment of its existing adequacy decisions to ensure their compliance with the requirements of the Directive and the CJEU ruling.

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Bigger Brother: UK Government introduces the Investigatory Powers Bill

On 4 November, the UK government published a draft Investigatory Powers Bill (IPB) for pre-legislative scrutiny and public consultation. The Bill will be introduced in 2016 and will govern the use of investigatory powers by law enforcement and the security and intelligence services.

The Bill is introduced in a complex political climate. Along with similar pieces of legislation, it faces mounting **criticism** in relation to wider surveillance powers of security and intelligence agencies and their increasingly intrusive nature (hence its nickname, the 'Snoopers' Charter'). The current UK legislation that governs investigative powers is 15 years old and needs updating in light of technological change and several high profile reviews, such as the one carried out by David Anderson QC. In his **report**, he described the current legislation as "*obscure since its inception*" and modified many times afterwards leading to a situation which is "*undemocratic, unnecessary and – in the long run – intolerable.*"

Various aspects of the surveillance regime have been subject to litigation in the UK and the EU. In the **Belhaj and Al-Saadi case**, brought before the Investigatory Powers Tribunal, the UK Government Communications Headquarters (GCHQ) was required to destroy parts of the documents they held which contained legally privileged information. In the **Digital Rights Ireland case**, the Court of Justice of the EU declared the Data Retention Directive, which is the basis for some of the current UK legislation, invalid.

The Bill is an important piece of legislation from the point of view of the legal profession as it also regulates

communications that may be privileged. Last year, the UK legal profession **argued** that law enforcement and security agencies should not intercept privileged communications between lawyers and their clients. More recently, the Bar Council and Law Society of England and Wales **called** for a statutory protection of the legal professional privilege in the IPB.

The current Bill does not expressly refer to legal professional privilege, which is of particular concern for solicitors and their clients. While the Law Society will certainly follow the upcoming public debate on the Bill, it remains to be seen what safeguards will be introduced in the end. The most recent terrorist attacks in Europe have reawakened calls for more security measures and tighter border controls, and will undoubtedly influence the general direction of the policy debate in the coming months.

European Company Lawyers Association

Anthony Brooks and Anna Drozd took part in the general assembly of the European Company Lawyers Association (**ECLA**) which took place in Copenhagen on 20 November.

The ECLA gathers together 20 associations of in-house lawyers from around Europe and represents their common interests. The general assembly focused on such issues as free movement of in-house lawyers, including outside Europe, and changing practising rights for lawyers across Europe. The participants also discussed the impact of regulations on the scope of legal professional privilege, such as the draft surveillance law in the UK.

Law Society of Scotland Flagship Event: UK's Membership of the European Union - 14 January 2016, London

After successful debates at Westminster in 2012 and 2014 on the Scottish referendum, This September the Law Society of Scotland will hold a panel debate on the subject of the UK's membership of the European Union ahead of the referendum, which could be held as early as 2016.

This will take place from 6.15pm until 9.30pm at Vintners' Hall in London on 14 January 2016.

Everyone will be affected by the outcome of this referendum and everyone has an opinion, whether focusing on immigration, economic or human rights aspects.

There are hugely important topics to be discussed ranging from the free movement of people and its benefits or implications for work, workforce, study and retirement. What would be the implications for climate change, agricultural policies, taxation, foreign policy and NATO? How would it affect the legal profession and what impact could it have on the ongoing debate over Scotland's place in the UK?

This is sure to be a fantastic evening of lively and important debate, and an opportunity to question a panel of high profile speakers, with drinks and networking to follow.

For further details and to register, please follow this **link**.

Law Society of England and Wales' Annual Competition Section Dinner and Awards - 3 December 2015, London

The formal annual dinner and Horsfall-Turner Essay Prize Awards of the Law Society of England and Wales' Competition Section will take place on 3 December at the Law Society of England and Wales' Hall. This event provides an excellent opportunity to meet lawyers and other professionals working in the competition field, as well as to entertain clients and valued contacts.

This year's event features a speech by newly appointed Judge Ian S. Forrester, General Court of the European Union.

Judge Ian S. Forrester will present the first prize for the Horsfall-Turner Essay Prize (a cheque for £1,000) during this event. This annual essay competition is designed to encourage the interest of young lawyers in European law, it is open to all trainee solicitors and paralegals working at law firms/organisations with an office in the UK. The title for the 2015 competition will be "Brexit: what would it mean for the UK competition law landscape?"

The evening will start with a reception at 18:30 in the Reading Room followed by dinner at 19:30 in the Common Room.

For further details and to register, please follow this **link**.

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Defending victims of human trafficking and slavery - 7 December 2015, London

The increasing prevalence of human trafficking, modern slavery and the exploitation of its victims, who are often used by traffickers to commit criminal offences for the traffickers' benefit, requires that criminal justice professionals are aware of the need to recognise victims of human trafficking who are suspected of or charged with criminal offences. International and domestic law requires that states have in place legal and practical mechanisms to prevent the criminalisation of trafficking victims. This seminar is intended to alert defending and prosecuting solicitors to the relevant law, to CPS and Law Society guidance, how to recognise when your client may be a victim of trafficking, and to the practical steps that should be taken to have this status officially recognised.

For further details and to register, please follow this **link**.

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Human Rights Day Seminar on Freedom of Expression - 10 December 2016, London

To mark international Human Rights Day and to coincide with European Lawyers Day on 10 December the Law Society of England and Wales and the Bar Council will be holding a joint seminar on Freedom of Expression.

The seminar will focus on freedom of expression, in particular in relation to:

- the increasing number of lawyers and human rights defenders around the globe who are facing politically motivated prosecutions, unfair trials, wrongful convictions and arbitrary detention for peacefully exercising freedom of expression in the course of carrying out their professional responsibilities.
- This seminar will highlight and raise awareness to this worrying trend as well as recognize the great work of lawyers in this field.

For further details and to register, please follow this **link**.

OPEN CONSULTATIONS

Communications Networks, Content & Technology:

- **Public consultation on the needs for Internet speed and quality beyond 2020** - From 11.09.2015 – 07.12.2015
- **Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services** - From 11.09.2015 – 07.12.2015
- **Public consultation on the review of national wholesale roaming markets, fair use policy and the sustainability mechanism referred to in the Roaming Regulation 531/2012 as amended by Regulation 2015/2120** - From 26.11.2015 – 18.02.2016
- **Public consultation: eGovernment Action Plan 2016-2020** - From 30.10.2015 – 22.01.2016
- **Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy** - From 25.09.2015 – 30.12.2015
- **Geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU** - From 25.09.2015 – 28.12.2015
- **Public consultation on Standards in the Digital Single Market: setting priorities and ensuring delivery** - From 23.09.2015 – 16.12.2015

Energy:

- **Preparation of a new Renewable Energy Directive for the period after 2020** - From 18.11.2015 – 10.02.2016
- **Revision of the information and procedural requirements under Articles 41 to 44 of the Euratom Treaty** - From 03.11.2015 – 27.10.2016

Environment:

- **Streamlining monitoring and reporting obligations in environment policy** - From 18.11.2015 – 10.02.2016

Equal opportunities:

- **Public consultation on possible action addressing the challenges of work-life balance faced by working parents and caregivers** - From 18.11.2015 – 17.02.2016

Public Health, Enterprise, Consumers, Internal Market:

- **Public consultation on Chloroacetamide in the framework of Regulation (EC) No 1223/2009 of the European Parliament and of the Council on cosmetic products** - From 21.09.2015 – 14.12.2015
- **Public consultation on Zinc Oxide (colorant) in the framework of Regulation (EC) No 1223/2009 of the European Parliament and of the Council on cosmetic products** - From 21.09.2015 – 14.12.2015
- **Consultation on a possible restriction of hazardous chemical substances (CMR 1A and 1B) in textile articles and clothing for consumer use under Article 68(2) of Regulation EC No 1907/2006 (REACH)** - From 22.10.2015 – 22.01.2016
- **COMMISSION NOTICE ON ASPECTS OF THE APPLICATION OF ARTICLES 3, 5 AND 7 OF REGULATION (EC) NO 141/2000 ON ORPHAN MEDICINAL PRODUCTS** - From 17.11.2015 – 16.02.2016

Competition:

- **Empowering the national competition authorities to be more effective**

enforcers - From 04.11.2015 – 12.02.2016

Research and Technology, Public Health, Agriculture and Rural Development, Food Safety:

- **Public consultation for the Evaluation of the Commission's Communication to the European Parliament and the Council on the Action Plan against the Rising Threats from Antimicrobial Resistance (AMR) (COM (2011) 748)** - From 30.10.2015 – 22.01.2016

Justice and Fundamental Rights:

- **Public consultation on impacts of maximum remuneration ratio under Capital Requirements Directive 2013/36/EU (CRD IV), and overall efficiency of CRDIV remuneration rules** - From 22.10.2015 – 14.01.2016
- **Public consultation on the implementation and application of Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security** - From 21.09.2015 – 14.12.2015
- **Public consultation on the application of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters** - From 18.09.2015 – 11.12.2015
- **EU Citizenship: Share your opinion on our common values, rights and democratic participation** - From 14.09.2015 – 07.12.2015

Climate Action:

- **Public consultation to support the evaluation of the car labelling Directive** - From 19.10.2015 – 15.01.2016

Taxation:

- **Re-launch of the Common Consolidated Corporate Tax Base (CCCTB)** - From 08.10.2015 – 08.01.2016
- **Public Consultation on Modernising VAT for cross-border e-commerce** - From 25.09.2015 – 18.12.2015
- **Consultation on the review of the existing "structures" legislation of excise duties on alcohol and alcoholic beverages** - From 28.08.2015 – 27.11.2015

Trade, Development:

- **Towards a new partnership between the European Union and the African, Caribbean and Pacific countries after 2020** - From 07.10.2015 – 31.12.2015

Banking and finance:

- **Covered bonds in the European Union** - From 30.09.2015 – 06.01.2016
- **Call for evidence: EU regulatory framework for financial services** - From 30.09.2015 – 06.01.2016
- **Review of the European Venture Capital Funds (EuVECA) and European Social Entrepreneurship Funds (EuSEF) regulations** - From 30.09.2015 – 06.01.2016

Regional Policy:

- **Public consultation on overcoming obstacles in border regions** - From 21.09.2015 – 21.12.2015

Legislation coming into force this month

- **32015R0751**: Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (Text with EEA relevance)
- **32015R0760**: Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (Text with EEA relevance)
- **32014L0060**: Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast)

- **32015R2065**: Commission Implementing Regulation (EU) 2015/2065 of 17 November 2015 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, the format for notification of the training and certification programmes of the Member States (Text with EEA relevance)
- **32015L2060**: Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments
- **32015R2030**: Commission Regulation (EU) 2015/2030 of 13 November 2015 amending Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants as regards Annex I (Text with EEA relevance)
- **32015R2017**: Commission Implementing Regulation (EU) 2015/2017 of 11 November 2015 laying down implementing technical standards with regard to the adjusted factors to calculate the capital requirement for currency risk for currencies pegged to the euro in accordance with Directive 2009/138/EC of the European Parliament and of the Council (Text with EEA relevance)
- **32015R2015**: Commission Implementing Regulation (EU) 2015/2015 of 11 November 2015 laying down implementing technical standards on the procedures for assessing external credit assessments in accordance with Directive 2009/138/EC of the European Parliament and of the Council (Text with EEA relevance)
- **32015R2010**: Commission Regulation (EU) 2015/2010 of 11 November 2015 amending Regulation (EC) No 1708/2005 laying down detailed rules for the implementation of Council Regulation (EC) No 2494/95 as regards the common index reference period for the harmonised index of consumer prices (Text with EEA relevance)
- **32015R2003**: Commission Regulation (EU) 2015/2003 of 10 November 2015 implementing Regulation (EC) No 808/2004 of the European Parliament and of the Council concerning Community statistics on the information society (Text with EEA relevance)
- **32015D0137**: Council Decision (EU) 2015/137 of 26 January 2015 renewing the terms of office of the Vice-President of the Office for Harmonization in the Internal Market (Trade Marks and Designs) and of two Chairmen of the Boards of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs)

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**

Subscriptions/Documents/Updates

For those wishing to subscribe for free to the Brussels Agenda electronically and/or obtain documents referred to in the articles, please contact **Antonella Verde**. The Brussels Office also produces regular EU updates covering: Civil Justice; Family Law; Criminal Justice; Employment Law; Environmental Law; Company Law and Financial Services; Tax Law; Intellectual Property; and Consumer Law as well as updates on the case-law of the European Court of Justice. To receive any of these, contact **Antonella Verde** stating which update(s) you would like.

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