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### DATA RETENTION

#### Europe struggles to deliver anti-terrorism package

Retention of telecommunications data for possible police use and anti-terror investigations continues to divide the European institutions. Controversy began in 2004, when a proposal for a data retention scheme was put forward under a joint initiative by France, Ireland, Sweden and the UK. The proposal was made under the sphere of police and judicial co-operation - the 'third pillar' - meaning that the role of the European Parliament in the legislative process was merely consultative. The Parliament, furious at not being appointed co-decision-maker in a matter it saw as falling squarely within the 'first pillar', rejected the Justice and Home Affairs Council-approved initiative in September.

In an attempt to solve the dilemma, the European Commission has published its own anti-terrorism package. This includes a draft Directive obliging telecoms companies to retain a record of all fixed and mobile phone calls for one year and internet service providers to keep details of emails sent and websites consulted for six months. The package also contains two draft Framework Decisions: one on the protection of personal data when used by law-enforcement authorities, the other on information-sharing between police forces

throughout the EU. The latter would require police to respond to demands for information from other Member States' law-enforcement authorities within twelve hours. The Framework Decision on data protection represents the EU's first attempt at setting out such rules in the field of police and judicial co-operation. Interestingly, unlike the measures dealing with the retention of data by telecoms companies, the Framework Decision contains no specific provisions on how long data may be stored, though it does allow Member States to impose their own time limits under national law. Parliament will co-legislate on the draft Directive only.

The controversy surrounding the new measures revolves less around their substance than their legal basis. Many MEPs support the principle of retaining data and agree that measures which will genuinely support the fight against terrorism are much needed, and more importantly, expected, by European citizens. The sticking point remains the Council's apparent unwillingness to allow Parliament a role as co-legislator, despite the fact that its own legal team has expressed doubts over the legality of adopting the proposed Framework Decision.

At the Justice and Home Affairs Council last month, Ministers failed to agree on which of the proposals they should pursue. Whilst some delegations appear to be in favour of taking a 'first pillar' approach, others are insisting that the proposal remains in the hands of the Member States' Governments. Speaking to Parliament after the meeting, UK Home Secretary Charles Clarke stated that he was "absolutely determined" to have an agreement on data retention by the end of the year. He pleaded with MEPs to be flexible, warning that any attempt to make major changes on issues Ministers deemed vital would result in the Council simply adopting the Framework Decision instead of the draft Directive.

Parliament has made no attempt to hide its annoyance at the Council's demands to sign on the dotted line. Reports of one Justice Minister asking whether the Council was "more afraid of the Parliament or the terrorists" have done little to ease inter-institutional animosity. In its growing frustration at what it perceives to be the Council's undemocratic lack of transparency, Parliament has resorted to making threats of its own. It has declared that if the Council pursues the 'third pillar' route, it will fight for the resulting Framework Decision to be overturned by the ECJ.

The way in which this power-struggle will be resolved remains unclear. What is evident, however, is that the current political division and resulting failure to agree on these crucial anti-terrorism measures will do nothing to alleviate any public perception of an ineffectual EU decision-making process.



#### **WEBLINKS**

- [Draft Framework Decision on data retention](#)
- [Draft Directive on data retention](#)
- [Draft Framework Decision on the protection of personal data when used by law-enforcement authorities](#)
- [Draft Framework Decision on information-sharing between police forces](#)

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*Professional Practice*

## SERVICES DIRECTIVE

### Parliament stalls over vote

The intensity of debate surrounding the proposed Services Directive has not diminished since its publication – in fact, quite the opposite. In a bid to quell the disagreements between political groups and allow more time to reach a compromise on the hundreds of amendments tabled, the European Parliament's Internal Market Committee has decided to postpone its vote on the issue until the week of 21 November. As a result the plenary of the Parliament will not vote until January, at the earliest. Although a high priority for the UK Presidency, the legislative passage of this controversial Directive will now fall to the Austrians in 2006 who will assume responsibility of orchestrating an agreement on the text after the Commission has published its amended proposal.



- [Internal Market Committee website](#)

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## MONEY LAUNDERING

### European Community to sign up to Council of Europe Money Laundering Treaty

As Member States now set about implementing the third Money Laundering Directive, the European Commission has tabled a draft Decision enabling the European Community (EC) to become a signatory to the revised Council of Europe Convention No 198 on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism. Although the Convention dates from 1990, the Council of Europe decided in 1998 that an updated version was required and agreement was finally reached on a new text in May 2005. The Convention was revised to take into account the other international instruments in this area, in particular the money-laundering recommendations of the Financial Action Task Force. All Member States are party to the Convention but in a complex arrangement regarding international treaties, the EC also has competence to sign up to the Convention.



- [Proposal for a Council Decision concerning the signing, on behalf of the European Community, of Council of Europe Convention No 198](#)

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## EUROPEAN COURT OF JUSTICE RULES

### Recent changes to Members and procedural rules

Ms Eleanor Sharpston QC will take over as British Advocate General at the European Court of Justice (ECJ) following the resignation of Francis Jacobs QC, who has held the post since 1988. Ms Sharpston will serve the remainder of the term of office, which ends on 6 October 2009. Meanwhile, the seven judges of the new EU

Civil Service Tribunal were sworn in on 5 October.

Amendments to the EC Treaty Protocol on the Statute of the Court of Justice have been introduced to pave the way for the possible establishment of 'judicial panels' and extension of the preliminary ruling competency to the Court of First Instance (CFI). Both possibilities were introduced by the Treaty of Nice. Judicial panels would be set up to hear and determine at first instance, certain classes of action or proceeding brought in specific areas. The CFI would have jurisdiction to hear appeals of their decisions. As decisions of the CFI in preliminary reference or judicial panel cases may exceptionally be subject to review by the ECJ where there is a serious risk to the unity or consistency of EC law, the Council's Decision of 3 October amends the Statute to lay down the conditions and limits for such review.

Finally, a number of amendments to the ECJ Rules of Procedure have been agreed by Council and are awaiting publication in the Official Journal. This is largely a tidying-up exercise to ensure aspects of the Court's practice are reflected in the written rules.



#### **WEBLINKS**

- **[Amendments to the Court of Justice Rules of Procedure](#)**
- **[Council decision amending the Protocol on the Statute of the Court of Justice in order to lay down the conditions and limits for the review by the Court of Justice of decisions given by the Court of First Instance](#)**

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## **European Day of Civil Justice**

Over 300 delegates attended the Law Society of England and Wales' Civil Justice Day in London on 17 October. Supported by the UK Presidency, the event sought to raise awareness of the increasing impact of European law developments on domestic civil litigation and family law. The event was opened by Baroness Ashton, Parliamentary Under Secretary of State, and speakers representing the European Parliament, European Commission, UK Government, judiciary and legal profession presented a practical and progressive insight into current legislation in this area as well as future implications.

For more information please contact: Julia Bateman, Justice and Home Affairs Policy Advisor: [julia.bateman@lawsociety.org.uk](mailto:julia.bateman@lawsociety.org.uk)

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## **Best of Scotland Week**

On 30 November the Law Society of Scotland, in conjunction with the Scottish Executive, will host a seminar

in Brussels aimed at highlighting to EU decision makers the distinctive nature of the Scottish legal system. Speakers will include Caroline Flanagan, the President of the Law Society of Scotland, the director of the Scottish Drugs Enforcement Agency and eminent academics. The meeting is planned as part of a series of events entitled "Best of Scotland".

For more information contact Andrew Laidlaw, Internal Market Policy Executive: [andrew.laidlaw@lawsociety.org.uk](mailto:andrew.laidlaw@lawsociety.org.uk)

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## LSEW conferences in Asia

A seminar organised jointly by the Law Society of England and Wales, China Law Council, Guangdong Lawyers Association and Bar Council of England and Wales is planned for 4 November in Guangdong, China. Items on the agenda include corporate governance, the business development of law firms, the Alternative Investment Market (AIM), project finance, intellectual property and alternative dispute resolution. Approximately 300 local lawyers are expected to attend. A similar conference is also planned for 22 November in Korea.

For further information contact Robert Leeder, International Policy Executive for North East Asia: [robert.leeder@lawsociety.org.uk](mailto:robert.leeder@lawsociety.org.uk)

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## MODERNISATION OF CONTRACT LAW

### The future of European contract law: tool kit or civil code?

At the UK Presidency conference on "European Contract Law: Better Lawmaking through the Common Frame of Reference", any notion that a European civil code was up for discussion was soon dismissed by the Lord Chancellor. With a robust defence of the common law system and a clear signal as to the limits of the European project he made it very clear that harmonisation of national contract law was not on the table. Rather, he said, the "challenge of retaining numerous different laws of contract is to find efficient and effective mechanisms to deal with cross-border cases." Markos Kyprianou, Commissioner for Health and Consumer Protection managed to alleviate concerns by confirming that the purpose of any future Common Frame of Reference would be to remove obstacles to the Internal Market arising from differences in national contract law rules. As a "single toolbox" it would be used to rationalise and improve the process of making EU laws, setting out definitions, rules and principles.

- [UK Presidency conference documentation](#)
- [First Annual Progress Report on European contract law and the acquis review](#)

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## CONSUMER PROTECTION

### Revised Draft Consumer Credit Directive

The Commission has issued a revised proposal for a Consumer Credit Directive in the hope of facilitating agreement between the European Parliament and the Council by 2006. The draft Directive has been on the table since 2002. Parliament made some 150 amendments last year during its first reading. This new text is a consolidated version based on some of those amendments and changes prompted by responses to a consultation with stakeholders in 2005. Significantly, the scope of the proposal has been narrowed, covering consumer credit of up to 50,000 euro rather than 100,000 euro. Special rules apply to overdraft facilities, loans under 300 euro and agreements concluded with credit unions. The duty to offer advice to the consumer at the pre-contractual stage has been clarified. Other changes give consumers the right to repay credit at any time and to break a credit agreement if the related purchase is cancelled.

#### [WEBLINKS](#)

- [Modified proposal for a Directive on credit agreements for consumers amending Council Directive 93/13/EC](#)

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## CROSS-BORDER CIVIL LITIGATION

### European Enforcement Order enters into force

A new instrument to improve cross-border enforcement became available last month as Regulation 805/2004 creating a European Enforcement Order (EEO) for uncontested claims entered into force on 21 October. Designed to simplify the existing procedure under the Brussels I Regulation (44/2001), the EEO works on the basis of mutual recognition so that a judgment issued in one Member State is enforced in a second Member State without the need for a registration procedure. It applies to "uncontested claims" meaning a creditor can only obtain an EEO if the debtor has either agreed to the debt in court proceedings or not appeared in court when the claim is heard. As there is no need for judicial approval in the second Member State this new procedure should enable creditors to obtain quick and efficient enforcement abroad.

The Civil Procedure Rules for England and Wales have been amended to include a new Part 5 to part 74 CPR and a new practice direction has been issued. At time of writing Scottish and Northern Irish implementation was not available online. Please contact the Brussels office for information.

#### [WEBLINKS](#)



- [Regulation 805/2004 creating a European Enforcement Order](#)
- [Civil Procedure Amendment \(No. 3\) Rules 2005](#)
- [Practice Direction, PD 74B](#)

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## CRIMINAL LAW

### Deadline looms for adoption of European Evidence Warrant

EU Justice Ministers recently confirmed their commitment to reach agreement on the European Evidence Warrant (EEW) by the end of the year. An ambitious target, given that many of the key provisions of this fast-track instrument remain in dispute. The EEW would create an order, issued by a judicial authority in one Member State and enforced by police or other authorities in another Member State, to obtain certain types of evidence for use in criminal proceedings. Points of contention include the definition of issuing authorities, the question of who has the right to issue an EEW and who has the power to refuse or postpone the execution of such a warrant. Of particular concern to external commentators is the lack of precision in terms of how defendants can use the EEW. It seems this is to be left up to national systems to clarify. With many other areas also being left to the discretion of Member States, the debate on the EEW has highlighted the immense differences in the investigative and prosecutorial systems of all Member States.

For a copy of the latest text of the European Evidence Warrant proposal please contact [brussels@lawsociety.org.uk](mailto:brussels@lawsociety.org.uk)

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## INTELLECTUAL PROPERTY

### Online music providers offered EU-wide licences

Providers of online music should be able to obtain a single EU-wide copyright licence as a result of a new Recommendation announced by the Commission on 12 October. The measure has been addressed not only to Member States, but also to all economic operators involved in the management of copyright and related rights within the EC. The Commission's choice of a recommendation as opposed to a legally-binding directive or regulation means Member States now have wide discretion over whether and how to apply the measure's general principles - an approach that has been criticised by the online music industry as allowing too much flexibility. Intellectual property rights in musical works are often managed by collective rights managers (CRMs), who provide management services to right-holders as agents. The Recommendation aims to allow right-holders to entrust the management of their 'online rights' to one CRM of their choice, in respect of the EU-wide licensing of a particular work and irrespective of the Member State in which either the right-holder or the CRM is situated.



**WEBLINKS**

- [Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services](#)

## COMPANY LAW

### New audit rules agreed

On 11 October, EU finance ministers finalised new rules governing statutory audits and auditors. As had been widely reported, the main stumbling block in negotiations between the institutions had been the proposed requirement for companies to set up a dedicated audit committee. Under the final text Member States may allow the administrative or supervisory bodies of a company to carry out these functions instead. The Directive also sets down new rules on the qualifications, professional ethics and registration of auditors. Audit firms will have to ensure the rotation of a company's auditor partner every seven years, safeguard independence from the audited company and guarantee transparency. Public oversight of the audit profession and improving cooperation between national bodies are also covered. In a concession to Parliament, the Commission will have to report before the end of 2006 on the impact of national liability rules on the insurance conditions for auditors including an analysis of the limitations of financial liability. The Directive should be published in the coming months.



## Viewpoint

### White Paper on Legal Services in England and Wales

The Lord Chancellor (broadly equivalent to a Minister of Justice) has now published the White Paper setting out his plans for implementing the agenda of reforms to legal services in England and Wales recommended by Sir David Clementi. Lord Falconer's approach contained few surprises, but there was one area where it went further than Clementi. In a section on alternative business structures (ABS) the way is opened to multi-disciplinary practices, firms which can offer not only legal services, but associated services, too – an innovation the Law Society of England and Wales (the Society) has long promoted.

Of course there is a lot of work to do now in preparation for the new regime and the Society has been working for some months on the ways that ABS might be regulated. Our aim is to ensure that the opportunities that the new practice models present are appropriate for solicitors. That means a light-touch regulatory approach that nonetheless provides consumers with the assurances that they rightly demand. Much has been made of the possibility of external ownership of firms, with some perceiving it as a threat to the independence of the lawyers employed. But with the appropriate safeguards in place, the opportunities are huge for the legal profession to benefit from new investment to fund new ways of delivering services.

So what could ABS mean for the legal profession? The proposals in the White Paper have the potential to present great opportunities for practitioners. What that may mean is increased access to finance to fund capital projects that will support expansion or help to achieve efficiencies, it could also be the freedom to take advantage of potential synergies with providers of, for example, insurance services or with estate agents. New ways of rewarding staff would be possible, particularly non-lawyers who contribute to the growth and

success of the business, and different practice structures that could create more opportunities for those who may at the moment find it difficult to enter the profession.

Whilst we welcome many of the proposals in the White Paper we are however concerned by the cost of the new regulatory framework. At the moment, the Government pays for the various elements of oversight regulation – the Lord Chancellor, the Master of the Rolls and so on – but is suggesting that in the future, the legal profession should bear all of the costs of the new Legal Services Board that will take over. The Society will be lobbying hard to try to prevent new financial burdens being imposed on the profession.

There was however a very clear and welcome commitment in the White Paper to ‘maintain the principles of those providing legal services’ with the core values of the profession being defined as independence, integrity, the duty to act in the best interests of the client and client confidentiality. It is in that spirit that we will all move forward and the Society will be working hard with practitioners and the Government to get the best out of the reform process for the profession and their clients.

The Society is also aware that similar debates are taking place both at the EU level, with the European Commission’s recent follow-up report on competition and professional services, and within other Member States. We will be following these developments with great interest.



## WEBLINKS

- [Department for Constitutional Affairs \(White Paper\)](#)
- [Review of legal services by Sir David Clementi](#)

## Biography



**Kevin Martin** is president of the Law Society of England and Wales. He took up office on 14 July 2005 and will serve for one year. Kevin Martin qualified in November 1970. His former practice of KJ Martin & Co merged with Lodders law firm in 2001. He now works as a consultant in the private client department.

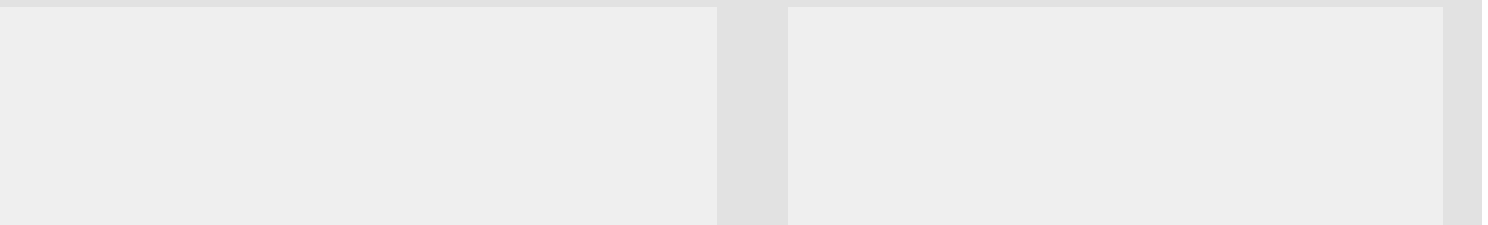
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The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: [brussels@lawsociety.org.uk](mailto:brussels@lawsociety.org.uk)

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