



## REPORTAGE

**Commission embraces new powers of criminal sanction setting**

## PROFESSIONAL PRACTICE

**EMPLOYMENT LAW  
Council talks run out of time**

**MONEY LAUNDERING  
Lawyers asked to give their views**

**SERVICES DIRECTIVE  
Compensation and guarantee funds are safeguarded**

## LAW SOCIETIES' NEWS

## LAW REFORM

**DATA RETENTION  
EU strikes data retention deal**

**FINANCIAL SERVICES  
Commission publishes new financial services strategy**

**TAXATION  
ECJ rules that UK tax laws constitute a barrier to freedom of establishment**

**CIVIL LITIGATION  
Cross-border payment order: agreement in sight**

**COMPANY LAW  
Agreement on accounting rules**

**CHOICE OF LAW  
Applicable rules**

## VIEWPOINT



**Baroness Ashton of Upholland  
UK Presidency gives centre stage to civil justice**

## THE BRUSSELS OFFICE

**Subscriptions/ Documents/ Updates**

**About us**

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**The Law Society of Scotland**

**The Law Society of Northern Ireland**

**To unsubscribe, please click here**

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)



## Reportage

### Commission embraces new powers of criminal sanction setting

A landmark judgment by the European Court of Justice has given the European Commission the authority to impose criminal sanctions on environmental polluters. Although the judgment itself is undoubtedly a bold step forward in the fight against environmental crime, it is speculation regarding the potential extension of these controversial powers to other areas of Community competence that has dominated recent headlines.

The case of Commission v Council (C-176/03) involved an action for annulment of Council Framework Decision 2003/80 on the protection of the environment through criminal law. The Commission argued that the Decision had been adopted by the Council using an incorrect legal basis, namely the 'third pillar' provisions on police and judicial cooperation in criminal matters, which require unanimity in the Council. The Court agreed, stating that the legislation should have been adopted under the environmental protection provisions of the EC Treaty – 'first pillar' provisions which require a Commission proposal followed by co-decision between the European Parliament and Council.

The Commission has hailed this clarification of competencies a "step forward for democracy" as the Parliament, via the procedure of co-decision, now has joint legislative powers with the Council to impose penal sanctions whenever recourse to criminal law measures appears necessary to ensure the effectiveness

of Community law.

The effect on the Commission's own sphere of competence, however, has not been left unaffected. The drafting of the judgment has prompted the Commission to assert that the principle underlying the ruling should not be applied exclusively to environmental law, but should in fact apply to all areas of Community law. This extension to other policy areas signals a sharp increase in the Commission's powers. Firstly, the Commission has the right to propose European crimes and the level of criminal penalties applicable in a vast range of policy areas. Secondly, the Commission is entitled to take action against Member States before the Court if they fail to implement EU legislation properly.

Although the ruling was welcomed by the Commission and the Parliament, as it brought clarification to a long-running dispute over competency, the reaction from Member States and the media was significantly more hostile. The UK Government opposed the findings vigorously, stating that it is "inappropriate to harmonise criminal law at EU level". In a similar vein, the UK press were keen to play on current domestic insecurities concerning EU encroachment on national sovereignty with headlines such as: "Europe wins the power to jail British citizens".

On 23 November, the Commission adopted a Communication summarising the conclusions to be drawn from the case and the implications for present and future legislation. Significantly, the Communication has called for ten existing inter-governmental agreements to be converted into Directives in a bid to secure the legal certainty of the texts, in light of the Court's ruling. The agreements, which cover areas such as money laundering, counterfeiting, fraud and people-trafficking, were adopted under 'third pillar' provisions and now require revision. The Commission is hoping, however, for political agreement between the EU Institutions not to alter the substance of these existing Framework Decisions. The Commission is urging Parliament to concede its right to amend the texts and hence avoid a series of protracted negotiations over legislation that has, in effect, already been adopted.

Through its Communication, the Commission has clearly presented an own-initiative report on the extent of its competencies. Despite its announcement of the future "legal spring-cleaning" of existing unstable Framework Decisions, the Commission is reluctant to re-open a debate on the substantive law of each of the texts affected. It remains to be seen, however, whether Parliament, armed with the weapon of co-decision, and Member States, keen to protect national sovereignty, will concur.



#### **WEBLINKS**

- **[Judgment in Case C-176/03 Commission v Council](#)**
- **[Commission Communication on the implications of the Court's judgment of 13 September 2005 \(Case C-176/03 Commission v Council\)](#)**



## Professional Practice

### EMPLOYMENT LAW Council talks run out of time

The 8 December meeting of EU Employment Ministers failed to reach any agreement on proposals to amend EU working time rules. Considered essential to resolving the problems of on-call time, the proposal also aims to phase out the infamous opt-out. Member States rejected a final compromise text and could not agree on whether a specific date should be set for the opt-out to disappear. Disagreement also centred on how workers with more than one job should be treated. There was broader support, however, for the idea that time spent on-call at work but "inactive", that is, resting, should be treated differently to time spent actively working. This runs contrary to the European Court of Justice's interpretation of the current rules, reiterated in a judgment of 1 December (*Dellas*), which found against the French system of counting an inactive, on-call period as a fraction (normally 1/2 or 1/3) of 'active' time when calculating pay and overtime.



#### WEBLINKS

- [Commission's amended proposal for a Directive amending Directive 2003/88 concerning certain aspects of the organisation of working time](#)
- [Abdelkader Dellas and others v Premier minister and others \(Case C-14/04\)](#)

---

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

### MONEY LAUNDERING Lawyers asked to give their views

In 2001, the European Commission adopted the second money laundering Directive, which imposes a range of obligations on a number of professionals, including legal professionals. These obligations require lawyers to carry out identity checks on their clients and, in certain circumstances, to report their clients to the authorities, thus calling into question legal professional privilege. The regulatory burdens imposed by the legislation, particularly in the UK, have been criticised by some, including the Law Society of England and Wales, as being disproportionate and costly. The Commission is interested in hearing back from lawyers and law firms on their experience of the legislation and has therefore published a questionnaire aimed at eliciting views. The questionnaire, which can be answered anonymously, seeks information on whether lawyers have experienced difficulty in complying with the new regulatory requirements. The deadline for responses is 31 January 2006.



#### WEBLINKS

- [Money Laundering questionnaire](#)

## SERVICES DIRECTIVE

### Compensation and guarantee funds are safeguarded

Members of the European Parliament's internal market and consumer affairs committee (IMCO) had the unenviable task of voting on more than 1,000 amendments to the draft Services Directive at the end of November. The Directive aims to facilitate the provision of services, including legal services, throughout the European Union. Both the Law Society of Scotland and the Law Society of England and Wales, whilst broadly in favour of the aims of the Directive, had a number of concerns regarding how it would operate. These concerns were largely addressed in the amendments voted on by IMCO, which agreed that compensation and guarantee funds (which are funds of last resort to compensate for dishonesty), like those operated by the two Societies for the benefit of the public, would not be adversely affected. The committee also voted to ensure that the Commission would not have the power to come up with pan-European codes of conduct which would also apply to purely domestic situations. It will now be for the plenary of the Parliament to vote on the proposal at its February session.



- [Developments in the Parliament on the draft Services Directive](#)



### Law Society hosts European Bar Associations to discuss access to justice

In November 2005, the Law Society of England and Wales welcomed fellow European bar associations to London as part of an ongoing project run by the Law Society to discuss criminal law practice within the EU. The Law Society was awarded a grant from the European Commission under the AGIS programme in 2004 to carry out a project entitled 'Enhanced Criminal Law Practice'. Using research and case studies from England and Wales, Germany, Spain, Hungary and Poland, this project examines the role of law societies and bar associations regarding criminal law practice in their countries. The conference was an opportunity to discuss how the role of the bar associations can be enhanced in relation to the service provided to criminal practitioner members on matters such as access to justice and law reform. The focus of the debate was on access to a lawyer, the right to silence, and the rules on disclosure. Non-partner participants from other countries were also in attendance to offer their advice and expertise and broaden the debate. Following the conference, participants are now charged with preparing recommendations and advice which will be presented as best practice guidelines.

## Law Society of England and Wales attends Hong Kong Trade negotiations

Alison Hook, Head of International at the Law Society of England and Wales, was present in Hong Kong in mid-December in order to promote the Law Society's position - the liberalisation of legal services - amongst interested parties. The outcome of the trade negotiations is a positive step in the process, given that the deadline for concluding talks is the end of 2006. For legal services, the meeting has produced a roadmap to the end of the Round, but a lot of work will need to be done quickly if much additional progress is to be made before negotiating time runs out. Firms interested in knowing more about the Law Society's work on the liberalisation of legal services should contact Alison at: [alison.hook@lawsociety.org.uk](mailto:alison.hook@lawsociety.org.uk)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)



Law  
Reform

## DATA RETENTION EU strikes data retention deal

After months of political wrangling, the EU finally looks set to deliver a deal on data retention for possible police use. On 14 December, the European Parliament adopted its position on a draft Directive, proposed by the European Commission in September, which will oblige telecoms companies to retain data on calls, e-mails and visits to websites for between six and twenty-four months. The measures, which required the approval of both Parliament and the Council, were agreed by Justice and Home Affairs Ministers earlier in December. Parliament's decision to support the Directive stands in stark contrast to its recent rejection of the Council's 2004 proposal for a Framework Decision on data retention, which would have only allowed MEPs a consultative role in the initiative. Satisfied that the Council is now playing by the rules and acknowledging its 'right' to co-decision, Parliament has worked quickly to push a compromise package through Brussels' legislative channels. The agreement continues to provoke controversy, however, with Ireland already threatening to challenge the Directive's legal basis before the European Court of Justice. The deal may have been done, but its effects are likely to cause ripples throughout Europe for some time to come.



### WEBLINKS

- [European Parliament First Reading position on data retention](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

## FINANCIAL SERVICES Commission publishes new financial services strategy

Earlier this year, the European Commission's Financial Services Action Plan (FSAP), which set out policy

objectives designed to improve the financial services sector, drew to a close. Whilst it has hailed the FSAP a success, the Commission is not resting on its laurels, and has wasted no time in developing new initiatives to boost Europe's economic reform and growth. On 5 December, it published a White Paper outlining its financial services policy for 2005 to 2010. Five key priorities have been identified. The Commission cites these as: a "dynamic" consolidation of progress and sound implementation and enforcement of existing rules; better regulation in all policy-making; ensuring that the correct supervisory structures are in place; creating more competition between service providers and, finally, expanding the "external influence" of the EU globally. The FSAP contained initiatives targeted mainly at the wholesale market. In contrast, the White Paper focuses more on the retail sector and the efforts which will be made to consolidate "fragmented" markets, such as that of retail banking. The Commission has, however, been careful to comply with President Barroso's drive for less, better-targeted regulation, proposing only a small number of legislative initiatives in this area.



- [White Paper on Financial Services Policy 2005-2010](#)

---

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

## TAXATION

### ECJ rules that UK tax laws constitute a barrier to freedom of establishment

The European Court of Justice has found current UK tax provisions to be incompatible with those of the EC Treaty on freedom of establishment. In a landmark judgment, delivered on 13 December, the Court found in favour of Marks & Spencer plc (M&S), which had argued that as a parent company, it should be permitted to offset losses incurred by its subsidiaries resident in other Member States against its UK tax bill. Since M&S ceased trading in continental Europe in 2001, there was no income from operations there against which to offset formerly incurred losses. UK tax law currently allows for such group relief only where the subsidiaries are established in the UK and not in other Member States. Consequently companies may be discouraged from setting up subsidiaries in other Member States as they would then be subjected to differing tax regimes. The Court held that it was contrary to the principle of freedom of establishment "to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary".

The implications of this ruling are unclear, as conditions attached to the judgment mean its effect on national tax authorities may not be as significant as initially predicted. The European Commission has confirmed it will clarify the scope of the judgment in a forthcoming Communication.



- [Judgment in Case C-466/03 Marks & Spencer plc v David Halsey \(Her Majesty's Inspector of Taxes\)](#)

---

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

## CIVIL LITIGATION

### Cross-border payment order: agreement in sight

Billed as a key weapon in the cross-border litigation armoury, the European Order for Payment could soon be available as a means by which to reclaim uncontested debt in cross-border cases. Ministers made progress at the recent Justice and Home Affairs Council, with the UK Presidency managing to secure agreement on some crucial provisions of the text. The aim of the European Order for Payment is to simplify, speed up and reduce the costs of litigation in cases involving claimants based in different Member States, thereby ensuring the swift recovery of outstanding uncontested debts. Following months of debate, it has finally been decided that the procedure will only be available for use in cross-border situations, as opposed to purely domestic situations. A First Reading agreement on the proposal is in sight, with the Council set to accept the European Parliament's position as agreed at its December plenary session. It is now up to the Austrian Presidency to ensure that final agreement on the proposal is reached in 2006.



#### WEBLINKS

- [European Parliament First Reading position on the European Order for Payment](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

## COMPANY LAW

### Agreement on accounting rules

The European Parliament voted on 15 December to agree new accounting rules, which include an obligation for listed companies to publish an annual corporate governance statement. Amending the 4th and 7th Company Law Directives, the new rules also aim to create greater transparency in relation to companies' off-balance sheet arrangements and certain transactions with related third parties. Also of note is an increase by 20% in the thresholds that define small and medium-sized limited liability companies for the purposes of the accounting rules. The amendments adopted by the Parliament had been agreed in advance with the Council of Ministers, making the Council's adoption a mere formality. The text should be published in the Official Journal in a few months, after translation and legal-linguistic checks.



#### WEBLINKS

- [Amendments adopted by the European Parliament](#)

[Previous Item](#)

[Back to Contents](#)

[Next Item](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)

## CHOICE OF LAW

### Applicable rules

Over the past few years, the European Commission has been converting a number of international conventions governing private international law into EU instruments. The last remaining such EU Convention on the applicable law on contractual obligations (known as "Rome I") has now been proposed as a draft

Regulation. The purpose of doing so is twofold, firstly, to ensure legal consistency by bringing it within the body of EU legislation and secondly, to modernise its provisions, given that it was adopted in 1980 and came into force in 1991. The proposal would apply to all cross-border contracts in the EU – with a few exceptions such as those relating to family law and wills and succession (which will be the subject of separate initiatives in 2006). The principle underpinning Rome I is that freedom of contract should prevail. The proposal has now been sent to the Parliament and the Council for their views.



- **Proposal for a Regulation on the law applicable to contractual obligations (Rome I)**

[Previous Item](#)

[Back to Contents](#)

[Reportage](#)

[Professional Practice](#)

[Law Societies' News](#)

[Law Reform](#)

[Viewpoint](#)



*Viewpoint*

## UK Presidency gives centre stage to civil justice

The Department for Constitutional Affairs approached the UK Presidency of the Council of the EU with a double objective:

- to raise substantially the political profile of civil justice within the broader Justice and Home Affairs agenda; and
- to demonstrate that this field of activity has a major and constructive part to play in improving the lives of citizens.

All Presidencies have the task of taking forward an inherited agenda of business. The character they give their own tenure depends on their priorities and the energy they bring to the task. An indicator of that energy is the number of working group days allocated to dossiers. In our case, though losing a month to the European summer holiday and another two weeks to the pre-Christmas shut-down, we had no less than 31 days on our business, with a further four on data retention, where we have substantial interest. Add to that our contribution to the Justice and Home Affairs (JHA) Councils and the Informal Meeting of Justice and Interior Ministers in Newcastle in September, our contract law conference at the Mansion House, also in September, and our civil justice conference in Edinburgh in October, and the case is made that civil law had a significant impact, more, perhaps, than in any previous Presidency.

At the Informal JHA Council, we laid to rest a dispute that had bedevilled a succession of potentially positive measures – whether those measures should apply only to cross-border cases or might also apply to purely domestic ones. We saw no basis for application to domestic cases and that argument carried the day at Newcastle.

At the contract law conference, we likewise made it clear that we saw no advantage in a new code of European contract law, optional or otherwise. The clear message to the Commission was that it should re-orient the work being done on a common frame of reference to improve the consumer acquis.

In Edinburgh, we and Scottish Executive colleagues provided a framework for discussion of what Europe should be doing to improve access to cross-border justice. Sessions on alternative dispute resolution and family mediation, e-justice, the civil judicial network and stream-lined court processes all produced constructive debate on ways to demystify dispute resolution and make it more efficient, affordable and user-friendly.

Turning to individual dossiers, we also highlighted the European small claims procedure (ESCP). In the majority of our cross-border transactions, hitherto it would have made no economic sense to pursue a grievance in court. The ESCP will provide realistic and cost-effective redress, increasing consumer confidence and thus benefiting business.

At the December Council, we banked the significant progress made in negotiations on the dossier. At the same time we secured political agreement on the European Order for Payment, and agreed key principles on the Mediation Directive.

It has been a busy six months. We made progress, not without exhaustive negotiation handled from the perspective of Presidential neutrality and working closely with the European Parliament, to which I reported back after each Presidency milestone. We believe we have galvanised the development of civil judicial co-operation, on the basis of mutual recognition.

## Biography



**Baroness Ashton of Upholland** was appointed as Parliamentary Under Secretary at the Department for Constitutional Affairs in September 2004. She became Parliamentary Under Secretary of State for School Standards at the DfES in 2001. From July 2002, she was Parliamentary Under Secretary of State for Surestart, jointly at the Department for Education and Skills and the Department for Work and Pensions. Baroness Ashton was awarded a life peerage in 1999.

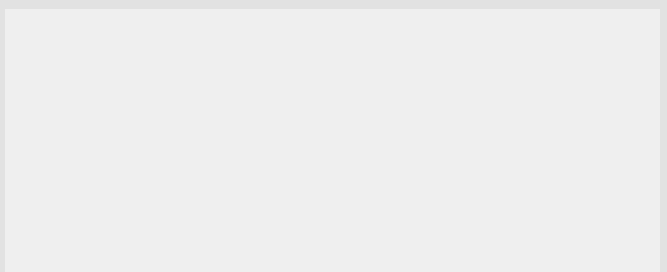
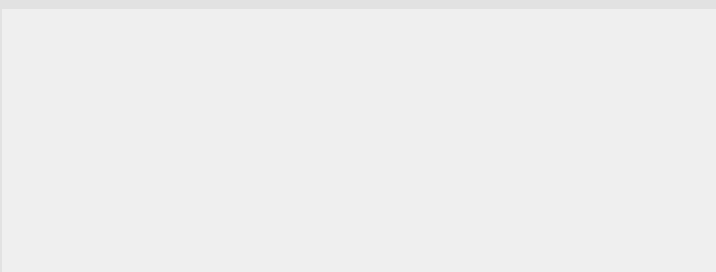
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The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society 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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