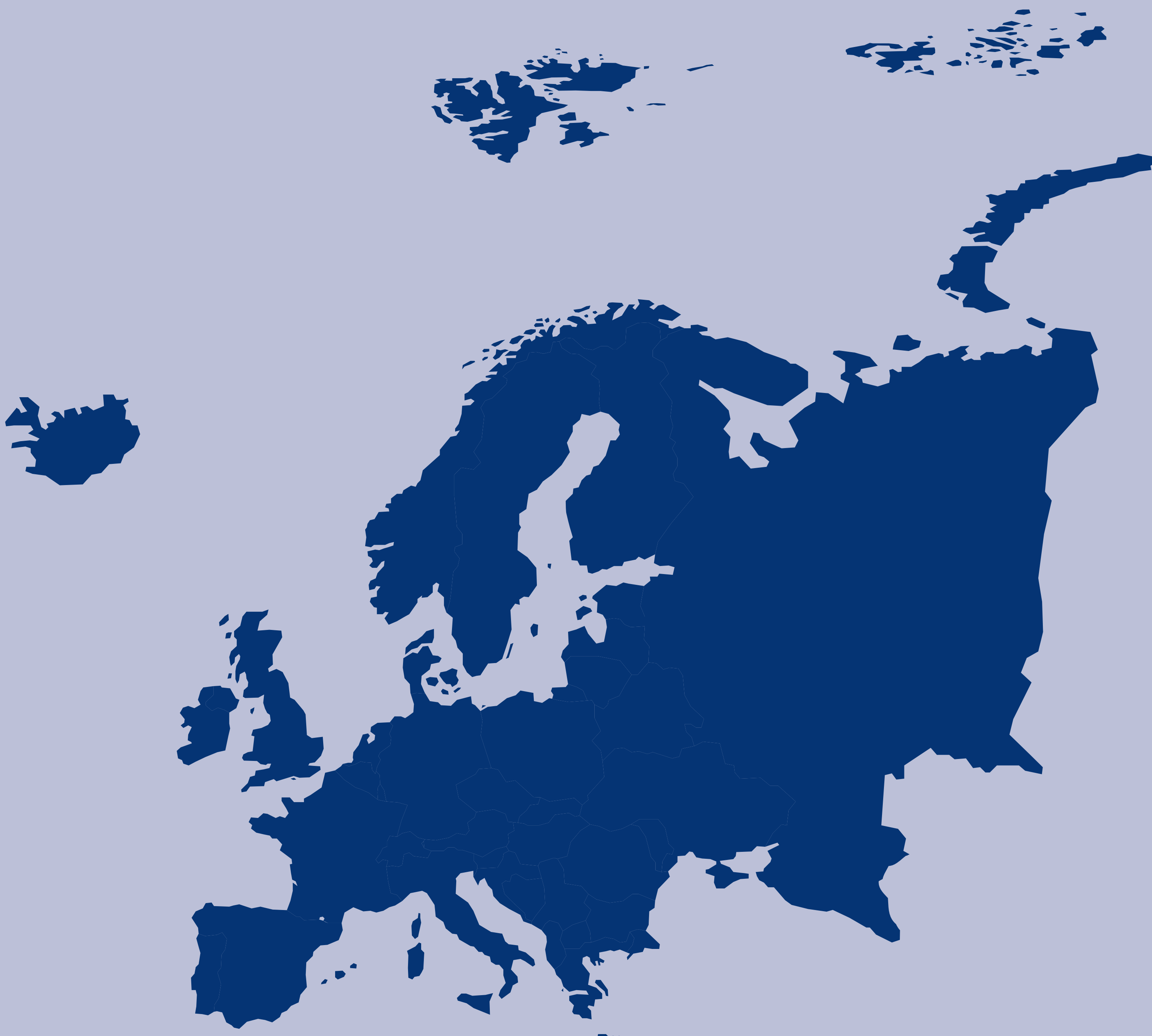
the global voice of
the legal profession®

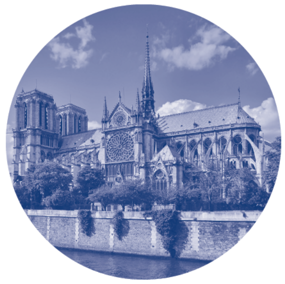
European Regional Forum News

Newsletter of the International Bar Association Legal Practice Division

NO 4 OCTOBER 2013



INTERNATIONAL BAR ASSOCIATION CONFERENCES



CPD/CLE HOURS AVAILABLE

17th Annual IBA International Arbitration Day

Advocates' Duties in International Arbitration: Has the Time Come for a Set of Norms?

13–14 February 2014 **Maison de la Mutualité, Paris, France**

A conference presented by the IBA Arbitration Committee, supported by the IBA European Regional Forum

SESSIONS INCLUDE:

- Anything goes? Do counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom?
- The gathering and taking of evidence: should we seek to level the playing field?
- Arbitrators without powers?
- *The IBA Guidelines on Party Representation*: the right step or a step too far? A debate.

WHO SHOULD ATTEND?

Lawyers in private practice, lawyers in government and public bodies, in-house counsels, SME executives involved in international business activities, and academics.

HEADLINE SPONSORS

klrcA
REGIONAL RESOLUTION GLOBAL SOLUTION

STONETURN GROUP
FORENSIC ACCOUNTANTS FOR COMPLEX DISPUTE RESOLUTION

Wolters Kluwer
Law & Business

REGISTER YOUR INTEREST NOW AT **WWW.IBANET.ORG/CONFERENCES/CONF506.ASPX**

the global voice of the legal profession

London São Paulo Seoul The Hague Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org

IN THIS ISSUE

From the Co-Chairs	4
From the Editor	5
Forum officers	6
IBA Annual Conference 2013, Boston: European Regional Forum's sessions	7
The first preliminary reference to the European Court in a Hungarian competition case: what is the role of the intermediaries in the insurance industry from an antitrust perspective?	9
French Competition Authority fines Sanofi-Aventis €40.6m for disparaging competing generic products	11
The European software patent controversy: Court of Appeal sides with the European Patent Office	13
Mortgage floor clauses: another black hole for Spanish banks?	15
Court powers to grant injunctions: interaction of Arbitration Act 1996 and Senior Courts Act 1981	16
Unlisted joint stock companies in Albania to implement the Code of Corporate Governance	19
Streamlining US–EU privacy compliance through the Safe Harbor Principles	20
The New Civil Code of Hungary	22
AIFMD: the positive and negative tax implications from a Luxembourg and German perspective	23
Recodification of Czech private law – major changes to the legal business environment affecting entrepreneurs	25
Recent developments on data protection in the Turkish telecommunications sector	27
UK courts get tough on generics	29
New energy market system of Ukraine	32

Contributions to this newsletter are always welcome and should be sent to the Newsletter Editor, Andreea Poenaru, at andreea.poenaru@wolftheiss.com.

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at editor@int-bar.org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

This newsletter is intended to provide general information regarding recent developments in European law.
The views expressed are not necessarily those of the International Bar Association.

Looking forward to Boston

Dovile Burgiene
Lawin, Vilnius
dovile.burgiene@lawin.it

Freek Jonkhart
Loyens & Loeff, Rotterdam
freek.jonkhart@loyensloeff.com

Welcome to the October 2013 edition of the European Regional Forum newsletter. We have received a number of very interesting contributions and our editors selected the ones which we believe will be most topical to our broad audience. We would like to thank all the contributors and hope the readers will find these materials useful.

Recent events

This year we have already contributed to two major events – the European Corporate and Private M&A Conference in Paris and the Investments in BRICS conference in London (both in February 2013).

Upcoming events

The most important event of the year is the IBA Annual Conference in Boston. The Forum is the main driving force behind the two sessions: 'The Nobel for Europe – a Prize for Peace and Reconstruction or a Recipe for Economic Meltdown and Disintegration?; and 'You can do what? Issues in Transatlantic disputes'. We will co-sponsor several other sessions which also are promising to be very interesting, full details can be found on pages 7–8 of the newsletter.

The Forum's traditional Monday (7 October) lunch at the Annual Conference will be particularly interesting this year. We are honoured by the attendance of Chief Justice Myron T Steele of the Delaware Supreme Court who kindly agreed to be our keynote speaker. He is an eloquent and fascinating speaker, with much to share with our audience. Needless to say, the Forum lunch is an excellent networking opportunity.

Another interesting event in Boston will be the European Forum open meeting at 1300-1430 on Thursday 10 October. Those readers who are interested in getting involved into the Forum's activities should use this possibility.

After Boston, this year we will offer the traditional conferences focused on CIS in Moscow (M&A and Law Firm Management).

We will present a number of fascinating events in 2014. We are preparing a regional Nordic conference in Oslo, the Mediterranean conference in Istanbul, the Governance and Succession conference in Berlin (together with AIJA), the traditional Balkan Legal Forum in Vienna, French-Italian day in Rome and some other events. We will keep you posted on all the planned events.

Thank you for being our members and we look forward to seeing you soon.

Andreea Poenaru
Wolf Theiss, Bucharest
andreea.poenaru@
wolftheiss.com

Another wide-ranging newsletter

Welcome to the second 2013 edition of the European Regional Forum's newsletter!

For this edition we have received a large number of interesting contributions and I would like to take this opportunity to extend my gratitude to all those who have taken the time and effort in sharing with us their legal news across various jurisdictions. The selection was very difficult given that all articles received were superbly drafted and I am sure each and one of them would be of interest. However, due to space we are only able to publish some of the articles we have received and had the pleasure of reading.

The articles in this newsletter focus on data protection, new legislative developments in various jurisdictions, competition law cases and other case-law of interest to lawyers across the region. I sincerely hope that we have managed to strike a balance in terms of topics addressed in order to provide readers with an overview of the legal changes or developments.

Given that the objective of this newsletter is twofold: to keep members informed both about the Forum's activities as well as legal developments going on around us. You will find details of the day-to-day Europe-wide events organised by the Forum by visiting **www.ibanet.org**..

We at the European Regional Forum are pleased to have seen an increase in the Forum's membership numbers and have a large number of relevant and professionally organised events ahead, all offering a wide range of topics for discussion and networking opportunities. There is always room for improvement and we hope to see you soon at the IBA's 2013 Annual Conference in Boston.

Forum officers

Co-Chairs
Dovile Burgiene
Lawin, Vilnius
Tel: +370 (5) 268 1805
Fax: +370 (5) 212 5591
dovile.burgiene@lawin.lt

Freek Jonkhart
Loyens & Loeff, Rotterdam
Tel: +31 (10) 224 6699
Fax: +31 (10) 224 6183
freek.jonkhart@loyensloeff.com

Senior Vice-Chairs
Claudia Santos Cruz
AVM Advogados, Lisbon
Tel: +351 (21) 304 501 010
Fax: +351 (21) 304 501 009
claudia.cruz@avm-advogados.com

Jörg Menzer
SPRL Menzer & Bachmann – Noerr, Bucharest
Tel: +40 (21) 312 5888
Fax: +40 (21) 312 5889
joerg.menzer@noerr.com

Vice-Chairs
Alexander Schwarz
Gleiss Lutz Law Office, Düsseldorf
Tel: +49 (69) 6551 4336
Fax: +49 (69) 9551 4198
alexander.schwarz@gleisslutz.com

Szymon Kubiak
Wardyński & Partners, Warsaw
Tel: +48 224 378 200
szymon.kubiak@wardynski.com.pl

Membership Officer
Patricia Gannon
Karanovic & Nikolic, Belgrade
Tel: +381 (11) 3094 200
Fax: +381 (11) 309 4223
patricia.gannon@karanovic-nikolic.com

Newsletter Editor
Andreea Poenaru
Wolf Theiss, Bucharest
andreea.poenaru@wolftheiss.com

Programme Officer
Claudio Doria Tölle
J&A Garrigues, Barcelona
Tel: +34 (93) 253 3700
Fax: +34 (93) 369 3001
claudio.doria@garrigues.com

Treasurer
Jarle Kvam
Wiersholm, Mellbye & Bech, Oslo
Tel: +47 (2) 102 1000
Fax: +47 (2) 102 1001
jkv@wiersholm.no

Young Lawyers Liaison Officer
Sidika Baysal Hatipoglu
B+B Law Office, Istanbul
Tel: +90 (212) 219 1630
Fax: +90 (212) 219 1632
sbaysal@bb-legal.com

LPD Administrator
Charlotte Evans
charlotte.evans@int-bar.org

BOSTON 2013 6–11 OCTOBER

ANNUAL CONFERENCE OF THE
INTERNATIONAL BAR ASSOCIATION

the global voice of the legal profession®

European Regional Forum's sessions

Monday 0930 – 1230

We can handle the truth! A global update from a cradle of liberty, on how governments limit speech and expression

Presented by the North American Regional Forum, supported by the African Regional Forum, the Arab Regional Forum, the Asia Pacific Regional Forum, the European Regional Forum, the Latin American Regional Forum and the Media Law Committeee

As far back as the Boston Tea Party, the United States has had a history of very broadly protecting the free expression of ideas. Many consider US-style freedom of speech an outlier that permits holocaust denials and neo-Nazis to march in the streets of Jewish neighbourhoods. In a rapidly changing world where communications instantly cross borders and can offend the citizens of other countries, even inciting them to violence, is it appropriate for the United States to reconsider its broad protection of free speech? For example, Canada, its neighbour to the North, doesn't permit a citizen the 'free speech' to deny the existence of the Holocaust. France does not permit eBay to sell Nazi paraphernalia. Google substantially altered its search engine capability in its Chinese version, ostensibly to address China's national security concerns. Russia recently jailed pop stars who were critical of Vladimir Putin and has since amended its definition of high treason to include moves against Russia's territorial and state integrity and includes consultative assistance to a foreign state or an international organisation.

This session, supported by all of the IBA Regional Fora, will address 'expression' regimes globally to address how countries in other fora approach 'free speech' with limitations deemed appropriate for their regions.

The session will approach the subject in two formats. The first part will have leaders in the subject matter in the different regions discuss the varying approaches of jurisdictions within their region to limit 'free speech' based on concerns which include the need to protect the reputation and privacy of citizens, to protect against speech which is contrary to accepted 'truth' and to protect against threats to national security. This portion of the session is expected to make full use of video examples, email and Twitter posts, and search engine results, ranging from the 'Pussy Riot' videos that led Russia to bring charges against band members, to the rogue video produced in the US that mocked Mohamed and led to riots against US interests in the Middle East.

After concluding the first part of the session, after the break, the last third of the session will follow on from a very successful North American Regional Forum session in Dublin, in which the attendees broke up into separate tables, with panellists joining different tables to lead debate on a mock resolution that each table will be called upon to adopt, adopt with amendments or reject. Young lawyers will be the rapporteurs for each table and will report at the end of the session on what each of the tables had concluded in that regard.

Tuesday 0930 – 1230

The Nobel Prize for Europe – a prize for peace and reconstruction or a recipe for economic meltdown and disintegration?

Presented by the European Regional Forum

The European Union is going through its most difficult phase since inception. The introduction of the euro was meant to propel the EU into the next phase of integration but has developed into its biggest problem. Budgets and economies of Member States, which assimilated with the introduction of the common currency, are now drifting further apart than ever and creating fundamental tensions. On the other hand, there is a strong conviction that there is no way back and that the EU must move into the next phase of deeper integration and less nationalism. The instruments going forward, such as the European Stability Mechanism, the bank union and stronger control of national budgets, will present great challenges, politically and legally. Economic and legal experts from inside and outside the European Union will present their views of what lies ahead for Europe.

Continued overleaf

European Regional Forum's sessions – continued

Wednesday 0930 – 1230

What's past is prologue: new rights and obligations in transatlantic trade, sales and investment

Presented by the European Regional Forum, the International Sales Committee and the Trade and Customs Law Committee

At the 25th anniversary of the CISG in the US, this session will focus on issues that arise in trade with European countries, including commercial contracting (CISG), and the broader trade and IP aspects of the forthcoming EU-Canada Comprehensive Economic and Trade Agreement (CETA), as well as CETA's implications for the ongoing EUUS negotiation over the proposed Transatlantic Trade and Investment Partnership. Since exploring direct investment is the next logical step where international sales have been successful, investment protection under CETA and the 2012 US Model BIT, remaining questions about the EU's competence to conclude such agreements on behalf of its Members States and the critique voiced against the current way of resolving investment disputes will also be discussed.

Thursday 0930 – 1230

You can do what? Issues in transatlantic disputes

Presented by the Corporate Counsel Forum, the European Regional Forum, the Litigation Committee and the North American Regional Forum

A review of the juridical nightmares or advantages faced when litigating across the Pond:

- long-arm jurisdiction;
- discovery and data protection;
- super injunctions and interim measures;
- class actions;
- punitive damages;
- enforcement;

and much more besides… !

Thursday 1300 – 1430

Open committee business meeting and lunch

Presented by the Taxes Committee

An open meeting and lunch of the Taxes Committee will be held to discuss matters of interest and future activities.

Thursday 1430 – 1730

Revision of EC Regulation 261 on passenger rights

Presented by the Aviation Law Committee, the European Regional Forum and the Leisure Industries Section

Regulation 261/2004 introduced important new rights for air passengers in the event of being denied boarding, long delays and cancellations. The Regulation took effect in 2005 and sets a minimum level of quality standards which the airlines have to live up to, in order to protect passengers.

Ever since the Regulation came into force, airlines have been seeking juridical redress to avoid its application with the effect that the European Court of Justice delivered interpretations which were not always considered to be in line with pre-existing law.

The revision process of Regulation 261/2004 began in 2012. Will the EU take the concerns of the industry into consideration and what are these concerns? Will the new Regulation foresee provisions for better enforcement, and why would this be necessary? The panel will try to seek a compromise on these and other questions, or is a compromise just not feasible? Regulation 261/2004 and its revision is not only applicable to EU airlines and passengers but to all airlines and passengers departing from an EU airport regardless of their nationality. Hence, although this is EU legislation, it will have an effect on the industry worldwide and is thus a reason for worldwide opposition.

Zoltán Marosi
Oppenheim, Budapest
zoltan.marosi@oppenheimlegal.com

The first preliminary reference to the European Court in a Hungarian competition case: what is the role of the intermediaries in the insurance industry from an antitrust perspective?

Back in December 2006, the Hungarian Competition Authority (GVH) brought a significant decision in respect of the Hungarian car insurance industry imposing significant fines, including the largest-ever individual fine of HUF 5bn (approximately €17m). On judicial review, the case reached the Court of Justice of the European Union (CJEU), which brought a seminal judgment in March 2013 having wide-ranging implications for the application of domestic antitrust law in EU Member States and for the insurance industry in general. In addition, the case is also notable for being the very first preliminary reference to the CJEU from Hungary concerning a competition law matter.

The GVH's original decision concerned agreements between car insurance companies and car dealers/repair shops, whereby car insurance companies granted higher hourly wages to the car dealer/repair shops for repair works if the given car dealer/repair shops ensured that a certain percentage of insurance products were sold in favour of the given insurance company. Under Hungarian law, car dealers are entitled to sell insurance products of several insurance companies when selling new cars to their customers.

In the GVH's assessment, these arrangements foreclosed access to the market for other insurance companies and called into question the 'independence' of car dealer/repair shops when they offered new insurance products to consumers. The GVH concluded that these agreements could be regarded as a restriction of competition 'by object', (ie, when the infringement is so serious in itself that it is not necessary for the GVH to prove its actual negative effects on the market) as opposed to a restriction 'by effect' (ie, when an infringement only exists if the GVH actually proves the negative effects of the agreement on the market). This finding was then challenged in judicial review proceedings against the GVH's proceedings; in the end, the Hungarian Supreme Court, acting as court of revision, suspended its proceedings and requested from/of the CJEU whether said agreements could indeed be regarded as being anti-competitive by object.

The question put to the CJEU was whether the GVH was correct to treat such special agreements as an infringement 'by object'. In its judgment, first, the CJEU established its jurisdiction despite the fact that the GVH applied only Hungarian competition law in the case. The CJEU found that the Hungarian prohibition of anti-competitive agreements should be read in view of European law as it, in fact, 'faithfully reproduces' the text of European law. This entailed that the Hungarian legislature decided to treat internal situations and situations governed by EU law in the same way. Importantly, this means that European law (including the case law of the CJEU) could be 'indirectly applicable' in respect of entirely domestic competition cases elsewhere in the EU.

Secondly, as to the merits of the case, the CJEU found that in order for an agreement to be regarded as an infringement 'by object', regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. The court also confirmed that while vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can still have a 'particularly significant restrictive potential' (thereby referring to clauses on absolute territorial protection and a ban on internet sales).

Thirdly, in relation to the specific agreements in question, the CJEU considered the various factors that could be relevant for the national court in classifying such agreements as falling into the 'object' or the 'effect' box:

- The CJEU emphasised that while the establishment of such a link between two activities (which are, in principle, independent) does not automatically mean that the agreement concerned has as its object the restriction of competition, it can still constitute an important factor in determining whether the existence of an anti-competitive object can be shown.
- In addition, the CJEU also stated that if there was a horizontal agreement between these two insurance companies designed to partition the market, such an agreement would be a vertical agreement concluded by these insurance companies in order to implement that agreement (ie, the specific agreements in question).
- Furthermore, the CJEU put emphasis on the local legal context/regulatory environment pertaining to dealers, that is, whether domestic law requires that dealers acting as intermediaries must be independent from the insurance companies and whether such intermediaries are required to offer the policyholder the insurance that is the most suitable for him/her.
- Finally, the CJEU made a rather general statement whereby the relevant agreements would amount to a restriction of competition by object in the event that 'it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements'.

In light of the foregoing considerations, the CJEU's judgment has a high relevance in those Member States where a provision of domestic competition law is worded materially identically to EU competition law (typically in those Member States that acceded to the EU since 2004): these domestic competition laws now appear to have been interpreted in light of EU law with the possibility to obtain a preliminary ruling from the CJEU. This could open up further argumentation lines in these domestic court cases and also enable the parties to consider a vouch for a preliminary reference to the CJEU.

In addition, the CJEU clearly attaches a pivotal importance to the role of intermediaries and their independence under the applicable regulatory rules from the perspective of competition law. This is very close to what was concluded in 2006–2007 in the US in the famous Spitzer investigation into insurance brokerage. Thus, the judgment of the CJEU therefore could have wide-ranging implications for other industries with similar intermediaries, such as media agencies. At the same time, an important criticism of the judgment is that it appears to blur the conceptual borderline between infringements belonging to the 'object' and 'effect' boxes by using a rather vague language when describing 'object' type infringements. Thus, in the future, it could become more difficult for parties to assess similarly complex agreements under competition law.

Catriona Hatton
Baker Botts, Brussels
catriona.hatton@bakerbotts.com

Paul Lugard
Baker Botts, Brussels
paul.lugard@bakerbotts.com

Adam Dawson
Baker Botts, Brussels
adam.dawson@bakerbotts.com

French Competition Authority fines Sanofi-Aventis €40.6m for disparaging competing generic products

On 14 May 2013, the French Autorité de la concurrence ('Autorité') fined Sanofi-Aventis ('Sanofi') €40.6m for abusing its dominant position in the market for clopidogrel prescribed by ambulatory care (ie, clopidogrel distributed in pharmacies). Clopidogrel is used to prevent the recurrence of serious cardiovascular diseases and in particular complications arising from atherothrombosis. The Autorité found that Sanofi had implemented a global and structured communication strategy aimed at misleading doctors and pharmacists and thereby delaying the generic substitution process, which ordinarily takes place when a patent expires.

Whilst not revolutionary in France where denigration has already been found to restrict competition, the Autorité's decision is a clear illustration of European competition authorities' increasing scepticism concerning originator companies' attempts to prevent or delay generic entry. Moreover, it is in line with the European Commission's findings in its 2009 Pharmaceutical Sector Inquiry Report, as well as the European Commission's ongoing investigation against pharmaceutical companies targeting so-called 'pay-for-delay' agreements with generic companies, especially in the form of patent settlements.[1]

Sanofi's blockbuster Plavix drug

Sanofi's clopidogrel, Plavix, is a 'blockbuster' in the pharmaceutical industry and is the fourth most sold medicine in the world. In 2008 alone, it was the largest source of reimbursement from the French public healthcare system, at €625m.

In July 2008, Sanofi's Plavix patent expired. Two complementary patents, however, remained valid until 2013 and 2017 – namely on a chemical salt of the active ingredient and Plavix's indication for acute coronary syndrome (ACS) in dual therapy.

In October 2009, Sanofi and 11 generic competitors launched generic versions of Plavix. In order to respect Sanofi's complementary patents, these generic competitors had to rely on a different chemical salt of the active ingredient and were unable to indicate their clopidogrel for ACS in dual therapy.

Sanofi's dominant position in the market for Clopidogrel

The Autorité found that Sanofi held a dominant position in the French market for Clopidogrel prescribed by ambulatory care and rejected Sanofi's argument that the successful entry of generic companies had resulted in a loss of its dominant position. The Autorité relied heavily on the fact that Sanofi had managed to retain a significant share of the market (approximately 60 per cent) whilst its largest competitors enjoyed less than a 12 per cent market share. It also acknowledged that Sanofi benefited from a very prestigious image, especially in the treatment of cardiovascular diseases, as well as a large team of sales representatives.

The Autorité's abuse of denigration

Whilst the Autorité acknowledged that a dominant company denigrating competitors would not necessarily infringe Article 102 of the Treaty on the Functioning of the European Union (TFEU) and its national equivalent, the test it lays down in its decision can easily be met. According to the Autorité, an abuse of dominant position would exist whenever a link can be established between an undertaking's dominant position and its denigrating behaviour. Establishing such a link would entail examining:

- the extent to which a dominant undertaking's communications were based on objective findings or were merely unverified assertions;

- the effects the communications had on commercial partners as well as competitors' customers; and
- whether a link existed between the undertaking's dominant position and its misleading communication strategy, including the notoriety of the company and the degree of trust other markets participants had in it.

Sanofi's abusive denigrating communication strategy

According to the Autorité, from September 2009 to January 2010 Sanofi implemented a structured communication strategy aimed at dissuading doctors and pharmacists from prescribing and delivering third party generic versions of Plavix. Sanofi's strategy took place at two important stages of the supply chain:

- It intervened at the prescription stage by convincing doctors to specify on their Plavix prescriptions that the indication was 'non-substituable'. Sanofi was thereby able to prevent pharmacists from substituting Plavix with generic versions of Clopidogrel.
- It also intervened at the point of delivery by convincing pharmacists to only substitute Plavix with its own generic version of the drug – Clopidogrel Winthrop.

The Autorité considered that the information provided by Sanofi to medical professionals stressing the differences that existed between its own clopidogrel products and third-party generic versions of Plavix was manifestly incorrect and that it discredited third-party generic products' safety without justification. This information led medical professionals to be reluctant to prescribe or distribute third-party generic versions of Plavix and explained the under-prescription of such generics. Whilst the French Health Ministry had anticipated that generic companies would gain a market share of 75 per cent by the end of 2010, in practice, they 'only' attracted a share of 65 per cent. Moreover, the Autorité found that Sanofi's own generic version of Plavix, Clopidogrel Winthrop, had managed to obtain an impressive 34 per cent market share (four times more than Sanofi's market share in generics in France).

Based on these findings, the Autorité came to the conclusion that Sanofi had abused its dominant position in violation of both French and EU antitrust law and fined the company €40.6m.

Conclusion

It remains to be seen whether the Autorité's approach to the abuse of denigration will be followed by other competition authorities, especially the European Commission. Sanofi has already stated that it is considering appealing the Autorité's decision, which may in time lead to a preliminary ruling by the Court of Justice of the European Union on whether denigration can infringe Article 102 of the TFEU and, if so, under what circumstances. In the meantime, the message is clear: pharmaceutical companies should be particularly cautious in their communications with medical professionals, especially when discussing generic products.

Note

1 See, for instance, the ongoing investigation into Servier, Johnson & Johnson and Novartis, as well as generic companies.

John Allen
NautaDutilh, Amsterdam
john.allen@nautadutilh.com

The European software patent controversy: Court of Appeal sides with the European Patent Office

The Court of Appeal of The Hague is the exclusive appeal court in patent cases in The Netherlands. For the first time, this Court takes a position on a fundamental question relating to software patents ('computer implemented inventions'). This issue is treated differently in various European countries. One view is that the entire subject matter of the claim is not patentable if the contribution, in the light of the prior art, falls within the 'excluded subject matter' categories software as such or a presentation of information as such. The other view is that if such a claim contains any technical feature at all, perhaps as trivial as a keyboard/processor/monitor combination, the subject matter is patentable but may fail on novelty or inventive step. This last approach conforms with the practice of the European Patent Office (EPO) and this approach is now also accepted by the Hague Appeal Court.

The *Rovi v Ziggo* case[1]

The Rovi/Gemstar companies are engaged in a pan-European effort to enforce a patent portfolio relating to electronic television programming guides. In the Netherlands, Rovi sued the largest Dutch cable operator Ziggo, inter alia, for infringement of its European patent (EP 1 244 300 – 'EP 300') relating to a 'method and apparatus for accessing information about television programs'. The claims of EP 300 concerned a method or apparatus for storing television schedule information in a memory, displaying some basic information in an overlay when the user changes the television channel, and then displaying a second overlay containing further information upon an input from the television user.

In the first instance, the District Court of The Hague invalidated the patent for added subject matter. After Rovi filed an auxiliary request in an attempt to overcome these objections, the Court of Appeal focused on the more fundamental questions of patentability and inventive step.

The reasoning of the Court of Appeal

The Court of Appeal first established that the claim was a mix of technical features and non-technical features. The non-technical features included the presentation of certain specific information on a television programme (such as the name of the show or a short summary of the programme's content). It then held that the only difference between the patent and the prior art was the display of specific further information from a memory upon a user input in a 'second overlay'. Ziggo argued that the novelty – if any – resided only in the nature of the information on display, since all of the technical features in the claim necessary to enable such a display were well known at the priority date of the patent.

As to the law, the Court of Appeal first of all reiterated that Article 52(2) of the European Patent Convention provides that 'software as such' and the 'presentation of information as such' are not patentable. However, the Court of Appeal also held that when such excluded subject matter is combined with technical features – no matter how trivial – the claim as a whole may escape these excluded categories. The Court of Appeal thereby explicitly adopted the principles set forth in the EPO case law, particularly in Opinion G03/08 and more specifically in TBA 154/04 (*Duns Licensing*), from which decision the Court quoted:

> 'It is legitimate to have a mix of technical and "non-technical features" appearing in a claim, in which the non-technical features may even form a dominating part of the claimed subject matter.
> Novelty and inventive step, however, can be based only on technical features,

which thus have to be clearly defined in the claim. Non-technical features, to the extent that they do not interact with the technical subject matter of the claim for solving a technical problem, i.e. non-technical features "as such", do not provide a technical contribution to the prior art and are thus ignored in assessing novelty and inventive step.'

In respect of EP 300, the Court of Appeal ruled that the information itself had no relevant interaction with the (known) technical features which enabled such a presentation of information in an overlay on a television screen. And therefore, a large part of the claim was deemed to be concerned with the presentation of information as such, whilst the remainder of the relevant (technical) features were already known in the prior art. On that basis, the Court of Appeal considered that there was no inventive step in EP 300.

Analysis: European developments and comparisons

The approach of the Court of Appeal is different from the reasoning followed in the United Kingdom. In the UK, the courts have followed the 'contribution' approach, the principles of which were set forth in *Aerotel v Telco – Macrossan's application* (and which were also applied in another *Rovi* case, that is, *Gemstar v Virgin Media*, Mann J, 26 November 2009). In that approach it is, in Summary, assessed what actually distinguishes the patent from the prior art. If the distinguishing features are excluded matter ('software as such' or 'presentation of information as such'), the entire claimed subject matter is considered non-patentable.

Interestingly, very recently the French patent court adopted the same approach as the UK court in a parallel litigation concerning EP 300. In a ruling dated 7 June 2013, the Tribunal de Grande Instance de Paris rejected the EPO approach and held that 'patentability of an invention should be assessed in an "overall way", having regard to the claimed subject matter'. More specifically, the Paris Court held that it was clear that what was actually claimed was the presentation of information, also in view of the fact that the specification expressly stated that all technical features were well known since the 1980s. According to the Paris Court, these technical features can therefore not be deemed to have been 'claimed' in the patent. And contrary to the EPO doctrine, the Paris Court held that including 'general' known technical features in a claim is insufficient to give the alleged invention a technical character.

The debate on the right test for assessing the validity – and more specifically patentability – of computer implemented inventions is therefore expected to continue in the coming years. And the recent US Federal Circuit decision in *CLS Bank International v Alice Corp* (Fed Cir 2013) shows not only that this is a global debate, but also that the issues are complicated and difficult to fit in a single approach. In *CLS Bank*, even a single Court of Appeal of the Federal Circuit could not reach a majority opinion on the correct approach.

With France joining the UK and the Netherlands siding with the EPO, the national differences within Europe may become more distinct and the question of where to file and where to litigate becomes more important. So far the end results in the different countries have been more or less the same, but theoretically the current trend means that EPO-minded countries would be slightly more lenient towards software patents than France and the UK.

Note

1 Please note that NautaDutilh represents Ziggo in these proceedings against Rovi.

Roger Canals
Arco Abogados y Asesores Tributarios, Barcelona
rogercanals@arcoabogados.es

Mortgage floor clauses: another black hole for Spanish banks?

General remarks on the Spanish housing sector

Since the financial crisis in summer 2007, Spanish banks have permanently lived in the eye of the storm. The sharp plunge on the value of real estate assets caused huge losses in the vast majority of them, leading to a subsequent bailout funded by the EU of a total amount of around €39.5bn, which aimed to cure the balance sheets of the banking sector.

However, the thunderstorm is not over for banks. Apart from coping with the painful hangover caused by the real estate bubble, another serious problem is threatening the banking sector, consisting of the potential invalidation by civil courts of the so-called floor clauses included in housing loans secured through mortgages.

Spaniards are extremely keen on owning their 'own castle'. As per the official statistics, home ownership stands at around 83 per cent while only 17 per cent rent their dwellings. This affection for ownership, which has ancestral causes that are too long to be explained in this piece, has lead in turn to a great demand for credit and a very significant exposure of Spanish banks to real estate. Moreover, between 1996 and 2007, banks entered into a kind of 'fools race' to gain a market stake, offering increasingly lower interest rates (which usually were indexed to EURIBOR plus a margin which was becoming narrower day-by-day).

Thus, the 'war on interest rates' margins applied by most banks did not even cover their financing costs, so they began to include within their mortgage loan deeds the so-called 'floor clauses ' (in Spanish, '*Cláusulas Suelo*'), by which the drop of the variable interest rate applied to any given loan was limited up to a certain fixed rate (which was usually set at around three or four per cent). As a result of such clauses, many individuals and households that entered into mortgage loans indexed at a variable rate are not enjoying the current extremely low interest rates (to date, EURIBOR is at 0.53 per cent) as they are stuck in the fixed rates arising out of the floor clauses they signed.

The storm begins: the ruling of the Supreme Court cast on 5 May 2013

In early 2010, a consumer-defending association (AUSBANC), filed a claim before the courts of Seville against three banks (Banco Bilbao Vizcaya Argentaria, NGC Banco, SAU and Cajas Rurales Unidas) asking for the floor clauses included in several loan mortgages granted by such entities to be declared null and void on the grounds of non-completion by the banks of the information duties set out in EU Directive 93/13. Such a claim was definitively settled by the ruling of 9 May 2013 by the Spanish Supreme Court, by which floor clauses that had been contested in the procedure were declared null and void, according to the following grounds:

- The infringement by the sued banks of their duties of information on the inclusion of the floor clauses as they had failed to prove that they complied with the information standards imposed by EU Directive 93/13 and the Spanish statutes on general contacting clauses and consumer protection.
- By introducing floor clauses into mortgage loans, banks were transforming de facto loans granted at variable rates into fixed rate loans with the vast majority of the clients entering into such loans unaware of the inclusion of floor clauses or not sufficiently informed of its potential consequences in the event of a sharp drop in interest rates (as eventually happened). Thus, bank clients were in fact misled and were not fully aware of the consequences of what they were signing.
- The unbalance between the level of floor clauses and cap clauses imposed within the same loans. A common practice was to set a floor clause (around three to four per cent) along with a cap clause (which could vary between 15 to 20 per cent) – the Supreme Court resolved that cap levels were unbearably elevated compared to floor rates, so that loan conditions were bluntly biased in favour of banks.

Nevertheless, the Supreme Court dismissed the petition by which plaintiffs were seeking an order for sued banks to pay back to their clients the amounts unduly collected by application of the floor clauses. In a contested provision of its above-mentioned ruling, the Supreme Court resolved that the declaration of nullity of the floor clauses did not have any retroactive effects, so banks were not obliged to pay back the amounts unduly collected, founding such decision in the necessity to preserve legal certainty and to avoid consequences against the country's economic stability and general interests. Most of the legal community has openly considered the lack of retroactive provisions as a breach of the general rule set out by Article 1.303 of the Spanish Civil Code by which the nullity of a contractual provision implies the obligation of the parties to give back or to undo all what they have received by virtue of the null provision.

In its turn, such ruling has triggered another huge potential undermining contingency for the balance sheets of Spanish banks, as banking local authorities requested banks to inform on their exposure level resulting from a hypothetical general suppression of the floor clauses.

First Instance Court rulings in favour of retroactive effects of the nullity

Meanwhile, lawsuits filed by individuals and households demanding the nullity of the floor clauses along with an order to the sued banks to pay back the amounts unduly collected are being ruled by the First Instance Courts. The rulings so far have mainly accepted the claims in full, condemning banks to pay back the amounts. Even the First Instance judgments after the Supreme Court ruling on 5 May 2013, fully accept the claims. So we are in fact assisting in a sort of revolution as the lower courts do not apply the criteria set out in the mentioned Supreme Court ruling (ie, rulings cast by the First Instance Court 2 of Malaga on 23 May 2013, and by the First Instance Court of Bilbao on 19 June 2013).

Most of the rulings of the first instance courts are based on the general provision set out in Article 1.301 of the Civil Code, whose application was avoided by the Supreme Court on the grounds of the preservation of general interest. Over the last few weeks, this tendency of the lower courts to entirely accept the claims in spite of the referred Supreme Court ruling seems unstoppable.

All the foregoing puts on the table some interesting and concerning questions: what is the actual exposure of Spanish banks to floor clauses contingency? Does this result in even worse borrowing conditions in Spain, which could undermine the economic recovery? And last but not least, how is the inconsistency on the retroactive effects of the nullity of the floor clauses between the Supreme Court and the lower courts going to end? Only time will provide the answers.

Court powers to grant injunctions: interaction of Arbitration Act 1996 and Senior Courts Act 1981

Shona Frame
MacRoberts, Glasgow
shona.frame@macroberts.com

Can the English court injunct court proceedings in a foreign court where no arbitration has commenced? The Supreme Court case of *Ust-Kamemogorsk Hydropower Plant JSC (JSC) v AES Ust-Kamemogorsk Hydropower Plant LLP (AES)* [2013] UKSC 35 dealt with this. An interesting aspect of the case was the discussion on the interaction of the provisions in the Arbitration Act 1996 concerning the courts' powers in arbitration and the Senior Courts Act 1981.

The facts

AES was the grantee of a 25-year concession entitling it to operate a hydroelectric plant in

Kazakhstan. JSC was the owner and grantor of the concession. The Concession Agreement was covered by Kazakh law but contained an arbitration clause providing for disputes to be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) to be conducted in London.

JSC raised a court action against AES in the Economic Court in Kazakhstan. An application to stay this, citing the arbitration clause, was rejected by the Kazakh court.

AES then issued proceedings in the English Commercial Court seeking a declarator that the arbitration clause was valid and enforceable and an interim anti-suit injunction to prevent JSC from pursuing the court action in Kazakhstan. That proceeded on the basis that the arbitration clause was subject to English law. The interim injunction was granted (although rejected by the Kazakh courts). The case then came before the English courts again on the hearing for the full injunction.

The first instance judge granted the injunction stating that JSC could not bring proceedings in the Kazakhstan court and restraining them from bringing the claim other than by commencing ICC arbitration proceedings in London. The Court of Appeal upheld that order. There was an appeal to the Supreme Court.

Could the Court grant an injunction?

Section 37 of the Senior Courts Act 1981 allows the High Court to grant an injunction in all cases in which it appears to the court to be just and convenient to do so. For section 37 to apply, one party needs to show that the other has invaded or threatens to invade its legal or equitable rights or that it has behaved or threatens to behave in a manner which is unconscionable.

It was argued that JSC had invaded or threatened to invade AES's legal right not to be sued in Kazakhstan. AES therefore argued that there was no reason why the Court should not exercise its declaratory powers under the Arbitration Act 1996, but also its powers under section 37 of the Senior Courts Act. It was argued that to do that would support the commitment to arbitration contained in the arbitration clause.

There was discussion in the Court as to the case law around whether the Court would injunct foreign proceedings brought in breach of either an arbitration agreement or an exclusive choice of court clause. In *Aggeliki Charis Cia Maritima SA v Pagnan SpA*, 1995 parties had agreed to arbitrate all disputes in London but one party sued in a court in Venice. The Court of Appeal held that courts should be prepared to grant an anti-suit injunction, if sought promptly, on the basis that, without it, the claimant would be deprived of its contractual rights in a situation where damages would be an inadequate remedy. It was said that an injunction should be granted to restrain foreign proceedings in breach of an arbitration agreement 'on the simple and clear grounds that the defendant has promised not to bring them'. That was endorsed in the context of exclusive choice of court clauses in *Donohue v Arnco*, 2001, a House of Lords case, where it was said that strong reasons were required to outweigh the prima facia entitlement to an injunction. Further, in *Turner v Grovit*, 2001, it was said that under English law, a person has no right not to be sued in a particular forum unless there is some specific factor giving that right. A contractual arbitration or exclusive jurisdiction clause would be such a factor. Where there is such a clause, then, absent some special circumstance, there is a legitimate interest in enforcing it.

It was concluded that unless the Arbitration Act 1996 requires a different conclusion, the existence of a London Arbitration Agreement, excluding an ability to be sued elsewhere, was an enforceable right.

Impact of Arbitration Act 1996

Was it consistent with the Arbitration Act 1996 for a court to make the order sought? JSC argued that it was not, except where arbitral proceedings had already commenced or were proposed and then only under the provisions of the Act.

It was said that the Arbitration Act contains a complete and workable set of rules for the determination of jurisdiction issues. It was argued that unless and until one or other party commences an arbitration, the court should keep its distance. Any general power contained in section 37 of the Senior Courts Act was superseded by the Arbitration Act or at least should not be exercised.

The issue in this case was that no arbitration proceedings had commenced and AES had no intention or wish to commence any. This meant that the provisions within the Arbitration Act, such as section 32 enabling the court to determine any question as to the substantive jurisdiction of a tribunal on the application of a party to arbitral proceedings, would not be applicable. There was no arbitral tribunal in existence to provoke such questions.

Section 44 of the Arbitration Act sets out the court's powers exercisable in support of arbitral proceedings. However, the matters listed in section 44 were matters which could require the court's intervention during actual or proposed arbitral proceedings. The court considered that in these circumstances there was every reason why it should be able to intervene directly under section 37 of the Senior Courts Act.

Whilst there was a reference in section 44 of the Arbitration Act to the court granting an interim injunction, that was not intended either to exclude the court's general power under section 37 of the Senior Courts Act in circumstances outside the scope of section 44 or to duplicate part of the general power in the Senior Courts Act.

Where an injunction is sought to restrain foreign proceedings in breach of an Arbitration Agreement, the source of the power to grant such an injunction is section 37 of the Senior Courts Act. The injunction does not relate to arbitral proceedings but to the fact that the arbitration agreement amounts to an agreement not to bring foreign proceedings. That agreement is enforceable, regardless of whether or not arbitral proceedings are commenced or proposed.

Section 37 of the Senior Courts Act, was said to be a general power. The court considered that it would be astonishing if Parliament should 'silently and without warning' have precluded its use in respect of foreign proceedings commenced or threatened in breach of an arbitration agreement. That would have been seen as a radical diminution of the protection afforded by English law to parties to an arbitration agreement and it was concluded that the drafters of the Act would not have contemplated that the Arbitration Act could or would undermine this.

The general power in section 37 of the Senior Courts Act requires to be exercised sensitively and with due regard to the scheme and terms of the Arbitration Act when any arbitration has commenced or is proposed. However it was thought to be inconceivable that the Arbitration Act intended, or should be treated, as effectively preventing a party from having recourse under section 37.

Comment

This case makes clear that the English courts will be prepared to intervene to protect a party's rights not to be pursued in a foreign jurisdiction where parties have contracted for arbitration in England. That protection applies whether or not any arbitration has commenced and derives from the court's general powers in the Senior Courts Act as opposed to specific provisions in the Arbitration Act. The practical issue in this case is likely to be enforcing the injunction if the Kazakh courts refuse to recognise it.

For an arbitration seated in Scotland, it is thought that the Courts would reach the same conclusion. There are similar provisions in the Arbitration (Scotland) Act 2010 in relation to the Court's powers to intervene in an arbitration. However, as in England, the Scottish Courts have a general power to grant interdicts to prevent a party's rights being infringed. Also, as in England, it seems unlikely that it would be considered the Arbitration (Scotland) Act was intended to restrict the Court's general powers.

Renata Leka
Boga & Associates, Tirana
rleka@bogalaw.com

Ilir Limaj
Boga & Associates, Tirana
ilimaj@bogalaw.com

Unlisted joint stock companies in Albania to implement the Code of Corporate Governance

With the assistance of the international experts of the International Finance Corporation (IFC), Albania drafted the Corporate Governance Code (the 'Code') for joint-stock unlisted companies. The Code incorporates definitions and principles of the OECD on Corporate Governance, which provides the structure through which the objectives of a company are set, and the means of attaining those objectives and monitoring performance are determined. The Code is not a law or a regulation that companies must comply with and it is rather considered to be a guideline for unlisted companies in Albania, aiming to provide a framework of best practice that is over and above the minimum legal requirements, and assisting Albanian companies in developing a sound governance framework.

Good corporate governance is particularly important to the shareholders of unlisted companies. In most cases, such shareholders have limited ability to sell their ownership stakes, and are therefore committed to staying with the company for the medium to long term. This increases their dependence on good governance. The Code consists of 14 relevant principles for all unlisted joint-stock companies in Albania, construed primarily under the Law on Entrepreneurs and Companies.

The first four principles focus on the importance of the establishment of the corporate governance framework, board of directors' structure and organisation. Under these principles, for a well-established corporate governance framework, the constitutional documents of the company (charter, bylaws) should clearly define the powers and the role of the board of directors, which should be organised and be bound by the company's best interest. The board should monitor and evaluate management performance, set strategic goals and take the necessary measures to meet them, and ensure that the company complies with its charter as well as relevant legal, regulatory and governance requirements. Moreover, the board should meet regularly to discharge its duties, and should be supplied in a timely manner with appropriate information. Thus, the bases for sound corporate governance are found in the company's constitutional documents, where the organisation and the way it functions must be clearly provided.

Other main principles are those regarding remuneration and oversight. Under these principles, the levels of remuneration should be sufficient to attract, retain and motivate executive and non-managing directors of the quality required for running the company successfully. The directors' remuneration should be approved by the shareholders. As the main drive towards risk undertakings and business success of the company, the directors as members of the board are responsible for risk oversight and should maintain a sound system of internal control (ie, by developing a basic risk register) to safeguard the company's interests and the shareholders' investment. Another principle regulates the governance of family controlled companies. The establishment of family governance mechanisms is necessary to promote coordination and mutual understanding amongst family members, as well as organise the relationship between family business governance and corporate governance. Besides the proper establishment of organisational and governance frameworks, it is essential to establish a clear distinction in the governance status between family governance institutions and formal governance structures of the company.

The last five principles are relevant only to large and/or more complex unlisted joint-stock companies. One of these principles refers to the division of responsibilities at the head of the company that consists in a clear distinction between the running of the board and the running of the company business (ie, the roles of chair and CEO should not be exercised by the same person). Moreover, it is really important that no single person, or small group of individuals, dominate the board's decision-making process. The well-established enterprises should have a majority of non-managing and independent directors on their boards. Another principle states the importance of the establishment of board committees in order to allow a more effective discharge of its duties. The most required committees in large enterprises are the nomination committee, remuneration committee, compliance committee and audit committee. In order to establish a well-organised and successful company, an independent and clear distinction of powers should be ensured so that there is a check and balance between the governing bodies of the company.

In conclusion, the principles adapted from the OECD in this Code provide for a best practice reference for unlisted companies in Albania that have a goal to conduct business in an efficient way through which the company is willing to achieve its business objectives. An effective governance framework defines roles, responsibilities and an agreed distribution of power amongst shareholders, the board, management and other stakeholders. Especially in smaller companies, it is important to recognise that the company is not an extension of the personal property of the owner. Many unlisted enterprises are owned and controlled by single individuals or families. Good corporate governance in this context is not primarily concerned with the relationship between boards and external shareholders (as in listed companies) nor with a focus on compliance with formal rules and regulations. Rather, it is about establishing a framework of company processes and attitudes that add value to the business, help build its reputation and ensure its long-term continuity and success.

Streamlining US–EU privacy compliance through the Safe Harbor Principles

Vivian Breier
Ruskin Moscou Faltischek PC, New York
vbreier@rmfpc.com

Mark Bailey
Ruskin Moscou Faltischek PC, New York
mbailey@rmfpc.com

The compliance challenges posed by the stricter requirements of the EU privacy laws have made it more difficult for US entities to solicit clientele from Europe. Those US entities that do desire to expand their European influence must be cognisant of the applicable risks of, and proper procedures for, conforming to this enhanced level of privacy protection. This is especially true for entities that retain personal information that will be saved and stored, and may be used at a later date. Entities that do this are considered 'data controllers' by the EU, and must abide by the applicable laws.[1]

Much of the difficulty regarding international privacy law compliance is a consequence of the differing approaches taken by the US and the EU towards guarding privacy. While the US utilises a 'sectoral approach that relies on a mix of legislation, regulation and self-regulation, the EU relies on much more comprehensive legislation'.[2] The manner in which the EU protects privacy is consistent with the European Commission's 1998 Directive on Data Protection, a wide-ranging catch-all protection that shields against personal information misuse once it's been collected.[3] The differences in the approaches adopted by the US and the EU are a direct result of the socio-historical makeup of the two regions. While the US points to its strong inclination towards a free-market laissez-faire economic foundation to justify its approach, Europe points to its 20th century history of privacy abuses by fascist regimes as its justification for stricter protections.

US entities that, voluntarily or otherwise, neglect to comply with the EU privacy standards are prohibited from receiving personal information from EU individuals. Fortunately, a joint effort by the US Department of Commerce (DOC) and the European Commission led to a process that streamlined European compliance for US entities. This process, approved by the EU in 2000, is simply referred to as the 'Safe Harbor' Principles. It affords participating US entities the convenience to avoid many of the business interruptions that would have likely resulted from privacy law non-compliance.

Companies that choose to participate in the Safe Harbor programme are required to file an annual compliance statement with the DOC and are listed on the DOC website as a company that subscribes to the Safe Harbor Principles. There are numerous benefits to subscribing to the Safe Harbor, perhaps the greatest the ability to state as such to EU organisations. As explained by the DOC, 'self-certifying to the U.S.-EU Safe Harbor Framework will ensure that EU organizations know that your organization provides adequate privacy protection, as defined by the Directive'.[4]

Seven compliance requirements are needed to be met by companies opting to subscribe to the Safe Harbor Principles. First, organisations must provide individuals with *notice* regarding their purpose for collecting and using personal information. Secondly, companies must give individuals a *choice* in deciding whether their personal information will be disclosed to third parties and how their information maybe used. Thirdly, the company must make sure that the third parties it desires to transfer personal information to also *comply* with the Safe Harbor Principles. Fourthly, companies must give individuals *access* to their personal information in order to correct, amend or delete it when desired. Fifthly, companies must make reasonable efforts to protect and secure the personal information they receive. Sixthly, the personal information received must be relevant for the purpose(s) for which it is to be used. Lastly, companies must have in place an enforcement mechanism to ensure compliance with Safe Harbor Principles.[5]

These forms of enforcement should be carried out by the private sector first and supplemented by the government when necessary. Companies participating in the Safe Harbor programme must have a dispute resolution system that will 'investigate and resolve individual complaints and disputes and procedures for verifying compliance'.[6] Dispute resolution bodies must impose sanctions that are severe enough to ensure compliance by the company, and must include publicity for findings of non-compliance.[7] Moreover, sanctions may also be imposed by the Federal Trade Commission (FTC) under section 5 of the FTC Act.[8]

Failure to completely comply with these principles may also lead to sanctions imposed by European Agencies against US companies. These penalties may be levied on any company looking to collect personal data from EU residents, irrespective of their size or influence. Google, for example, has been subject to an ongoing dispute between itself and European privacy regulators. At the centre of the conflict lies Google's fairly recent introduction of a privacy policy streamlining its use of personal data.[9] Regulators claim that Google's policy isn't transparent enough and subsequently bestows upon the company too much power in deciding how to use the information.[10] In response, Google has remained confident in asserting that its policy adequately complies with the privacy requirements set out by the EU. As of April 2013, data protection agencies in six European countries had planned to launch investigations of Google's policy.[11]

The Safe Harbor Principles provide US companies with a simplified process for complying with the more rigorous privacy protections decreed by the European Commission. In doing so, companies are able to maximise their transatlantic influence, while still respecting the privacy concerns of Europe. Companies that opt to subscribe to the Safe Harbor must conform to the seven compliance requirements of the Safe Harbor Principles. Additionally, those that do not risk facing sanctions imposed on them by the private sector, the federal government and/or European agencies.

With the collaborative assistance of counsel and knowledgeable IT people, a company can develop a data privacy plan that will provide a framework to either use outside consultants or knowledgeable employees to audit their physical building security, as well as their technological systems, so that they comply with the Safe Harbor Principles. Additionally, companies will need to file annual certifications stating that in fact they do comply with Safe Harbor requirements. Without this annual certification, even if a company complies with the Safe Harbor Principles, it may be in breach of agreements it has executed where the company represented that it subscribe to and is current with the DOC's Safe Harbor Principles.

Notes

1 Data controller as the defined by European Data Protection Directive is 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.
2 See http://export.gov/safeharbor/eu/eg_main_018476.asp, which details the difference between the US approach and the EU one.
3 The Data Protection Directive is officially known as Directive 95/46/EC. This directive decrees that personal information may only be transferred to *third countries* (countries outside of the EU) if that country provides an adequate level of protection.
4 See above, n2.
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*
8 15 USC sections 41–58: 'Under the FTC Act… an organization's failure to abide by commitments to implement the Safe Harbor Privacy Principles might be considered deceptive and actionable by the FTC.'
9 Kevin J O'Brien and Eric Pranner, 'Europe Presses Google to Change Privacy Policy' *The New York Times* (16 October 2012): www.nytimes.com/2012/10/17/business/global/17iht-google17.html?pagewanted=all.
10 *Ibid*, quoting Isabelle Falque-Pierrotin, chairwoman of the French data-protection authority: 'The new privacy policy allows an unprecedented combination of data across different Google Services… We are not opposed to this, in principle, but the data could be employed in ways that the user is not aware of.'
11 Eric Pranner, 'Google Faces More Inquiries in Europe Over Privacy Policy' *The New York Times* (2 April 2013).

The New Civil Code of Hungary

Dr Kornelia Nagy-Koppany
KNP LAW Nagy Koppany Varga and Partners, Budapest
knagykoppany@knplaw.com

Dr Laszlo Lencs
KNP LAW Nagy Koppany Varga and Partners, Budapest
llencs@knplaw.com

On 15 March 2014, Act V of 2013 on the Hungarian Civil Code will replace the current Civil Code of Hungary, which was first enacted in 1959. The New Civil Code is the product of a more than 20-year long preparation, public and professional discussion, and codification process.

Importance of the New Civil Code

The current Civil Code served as the basis for the preparation of the New Civil Code, which also incorporates the practice of the Hungarian judicial system and some of the principles and instruments of the law of the European Union, such as consumer protection and corporate law.

One of the main objectives of the codification was to prepare a codex-type new code, which includes mostly comprehensive regulations of the different areas of everyday life and the main principles of some supplementary areas of civil law such as family law.

The codex-nature of the New Civil Code also means that it establishes the basic principles for the interpretation of all other civil law related acts and legal regulations which are not part of the New Civil Code including the labour law, governed by the recently introduced Act I of 2012, and the copyright law, which is governed by Act LXXVI of 1999. The New Civil Code also sets forth the definitions applied in all civil law-related legal instruments, which will have the same meaning in these acts and regulations. After the Basic Law of Hungary, which replaced Hungary's Constitution and became effective on 15 March 2012, the New Civil Code will be the second-most important law enacted since the 2010 parliamentary elections.

The 400-page New Civil Code covers areas that were earlier embodied in separate acts of law such as the company law, Act IV of 2006, and the framework of the real property law. While the New Civil Code introduces legal instruments new to Hungary such as the trust, the private foundation and the franchise agreement, the latter of which is already used in practice, it preserves and carries over most of the current civil law regulations and instruments.

Structure of the New Civil Code

The New Civil Code consists of eight books and several parts, titles and chapters within each book, such as:

- book I on preliminary provisions and the principles of civil law;
- book II on natural persons as subjects of legal relationships;
- book III on legal persons and entities;
- book IV on family law;
- book V on property law;
- book VI on obligations and contracts;
- book VII on inheritance; and
- book VIII on final and closing provisions.

Effective date of the New Civil Code

As a general rule, the New Civil Code will enter into force on 15 March 2014, but some provisions will enjoy a transitional or delayed effective date.

Other civil law related acts

The entry into force of the New Civil Code will be governed by a separate implementation act, which has not yet been passed. The implementation act will set forth additional provisions adjusting the current civil law acts and regulations to the New Civil Code.

After the enactment of the New Civil Code, the government of Hungary has immediately commenced the codification process of a new civil procedure code and established the Civil Procedure Codification High Committee. Istvan Varga, JD, PhD, Habil, co-managing partner of KNP LAW was appointed to serve on the High Committee.

Frédéric Dupont

Atoz, Senningerberg

frederic.dupont@atoz.lu

Frank Van de Bongardt

Atoz, Senningerberg

frank.vandebongardt@atoz.lu

AIFMD: the positive and negative tax implications from a Luxembourg and German perspective

In November 2012, the European Parliament approved the Alternative Investment Fund Managers Directive (AIFMD). The AIFMD introduces rules regarding the supervision and monitoring for managers of Alternative Investment Funds (AIF). All collective investment vehicles not falling in the scope of the UCITS directive (on open-ended collective investment vehicles) are considered to be AIFs. With the deadline for implementation of the AIFMD in national law set at 22 July 2013, the AIFMD has been transposed in Luxembourg by the law of 12 July 2013 and in Germany by the new *Kapitalanlagegesetzbuch* effective as of 22 July 2013.

Relevance of the AIFMD

Before turning the focus to the main tax issues surrounding the AIFMD, it is necessary to have a quick look at why the AIFMD is getting a lot of attention and why it is relevant for the fund industry.

The AIFMD affects investment funds around the globe, as it applies to all funds that are either residing, being managed or being marketed in the EU. Starting 22 July 2013, Alternative Investment Fund Managers (AIFM) residing in the EU and complying with the AIFMD are obliged to request authorisation from national authorities and will receive, upon authorisation, an EU passport to market AIFs throughout the EU. A similar EU passport may become available to non-EU AIFMs from July 2015, from which date it is envisaged that non-EU AIFMs can also request authorisation from the authorities to receive the EU passport.

National private placement regimes currently in place in some countries are still allowing the marketing of investment funds by non-AIFMs on a national basis, but it is envisaged that these regimes will be phased out after 2018, putting more emphasis on AIFMD compliancy.

While the AIFMD itself does not primarily address tax issues, it will have some significant tax implications. While implying changes to the way AIFs are managed, where they are managed and multiplying the cases where the fund management is not located in the same country as the fund itself, the AIFMD triggers inconsistencies with tax provisions that remain national.

The key aspects of AIFMD to monitor, from a tax perspective, that are being addressed below from a Luxembourg and a German perspective are:

- substance requirements, of both a regulatory and a tax nature, related to the substance level of the management company;

- the place of management and tax residency issues of the AIF;
- a new transfer pricing approach as to the new service flows; and
- the security of value added tax (VAT) treatment of this new set of service flows.

Letterbox AIFMs, tax residency and substance issues

From a regulatory perspective, it is important to monitor the amount of substance of an AIFM. In the EU regulation of 19 December 2012 implementing the AIFMD, a provision is included that ensures that AIFMs delegating central investment management (portfolio management and risk management) functions to such an extent that they are not able to exercise their role as manager of the fund properly, will be seen as mere letterbox entities and will be disregarded as AIFM.

At the same time, it is also essential to have a close look at the level of substance from a tax perspective. In international tax law, the 'place of effective management' test is used to allocate a company's tax residency and consequently the right to tax, to one country or another. A (de facto) delegation of core decision-making – for example, regarding investments of the fund to managers located abroad – can elicit another country claiming tax residency of the fund and/or the AIFM, potentially creating unpredictable tax claims because of dual tax residency of the fund and/or the AIFM. Alternatively, the country from which a fund is effectively managed could also consider the fund or its AIFM as a permanent establishment in its state, which would trigger a partial taxation of the income generated by the AIF or the AIFM.

To solve this potential tax issue, the Luxembourg law implementing the AIFMD exempts foreign AIFs from Luxembourg income taxes where their central administration or place of effective management is located in Luxembourg. Thus, the presence of the AIFM in Luxembourg will never attract the tax residence of the foreign AIF to Luxembourg, nor will it create a taxable presence in Luxembourg.

Further, a lack of substance of the AIFM could trigger other unwanted tax consequences. Many countries deny treaty benefits to companies lacking economic substance, based on anti-abuse provisions. Given that multiple countries can claim tax residency of the fund and/or its AIFM, there is potential for unpredictable tax liabilities as two or more countries may want to tax on a worldwide basis. It is therefore important that the AIFM has the competence and capacity (employees, etc) to make investment management decisions to fulfil its role as AIFM with sufficient substance.

Finally, the regulations and the interpretation of treaties in other countries must be taken into account when setting up an AIF. It is therefore crucial to document which activities are carried out in which country, in order to demonstrate where the decisive activities are carried out.

Transfer pricing: decision-making and allocation of risks

For existing AIFMs, the increased number of functions to be performed will, in many cases, lead to revised remuneration models. According to the OECD Transfer Pricing Guidelines (section 1.49), the allocation of risks to different related entities is largely based on the capacity of a company to make decisions. As the AIFMD requires the AIFM to make the relevant investment management decisions, most risk related to the management of the funds will have to be allocated to the AIFMs, which have to be adequately remunerated for bearing the risks. Existing remuneration models for fund management companies will have to be adjusted to include higher profit margins for AIFMs to reflect the increase of risk.

VAT issues and design of service flows

A central issue when designing fund structures is how to deal with VAT. Frequently, funds and fund managers are not able to recover any VAT; therefore it is important to minimise the VAT burden for these entities.

The Luxembourg law implementing the AIFMD extends the scope of the VAT exemption applicable to the management of investment funds by amending the Luxembourg VAT legislation in order to include management services rendered to AIFs into VAT exempt services. The scope of the exemption includes management functions of AIFs, such as portfolio management and administrative functions. VAT shall, however, apply on most deal costs and may not be recoverable by the AIFM. It is therefore essential to design service flows taking into account the nature and the VAT treatment of services as well as the ability to recover input VAT in the entities concerned.

The German Draft Tax Law concerning AIFMs has not been approved at the same time as the law implementing the AIFMD and is still awaiting parliamentary approval. Therefore, it is not yet clear how the German VAT legislation will be amended. However, it is expected that – like for Luxembourg – management services rendered to AIFs shall be within the scope of the VAT exemption currently applicable to the management of investment funds.

Conclusion

The AIFMD should be carefully monitored from a tax perspective to address adverse tax consequences and maximise on any opportunities for asset managers.

A streamlined management and delegation structure would enable companies to address any adverse tax consequences in terms of place of management and double tax exposure, as well as to maintain an appropriate substance level, coordinated with an acceptable pricing of the fees in terms of transfer pricing.

In an increasingly competitive asset management sector, there are benefits to the level playing field that these regulatory constraints and national tax considerations enforce. Therefore, it will be crucial to take into account the international as well as the national rules and interpretations of the relevant legislation of the countries involved.

Stephanova Sasha
Kocián Šolc Balaštík, Prague
sstephanova@ksb.cz

Recodification of Czech private law: major changes to the legal business environment affecting entrepreneurs

On 1 January 2014, the legal environment in the Czech Republic will see the most important and substantial changes to Czech private law since 1918. A completely new Civil Code and Act on Corporations will come into effect and the impact of the new laws affects all entrepreneurs in the Czech Republic. Although the new acts are effective as of 2014, preparation for the obligations and resultant changes by the new legislation should proactively be commenced by companies and their legal advisers this year. Below is a brief initial selection of certain highlighted changes that will significantly affect entrepreneurs in their company and business operations in the Czech Republic. We will highlight further areas of change in future newsletter contributions.

Company management and corporate structure

A significant change introduced by the Corporations Act goes to the heart of the very structure of companies in the Czech Republic. Whereas previously a joint-stock company had to have both a board of directors and a supervisory board (the so-called 'dual-tier' system), it will now be possible for a company to choose a 'one-tier' system, where there is no board of directors or supervisory board but only a management board with a statutory director. Single-member boards of directors as well as supervisory boards are also generally permitted and, for the first time, such a member can even be a legal entity, although represented by a natural person. The mandatory representation of employees on the supervisory board has been abolished, as has the requirement for a company to have a reserve fund (existing reserve funds may also be dissolved). The registered capital of a company may be recorded in euros (provided that accounting legislation is complied with). Shares may be issued in different classes and advances may be paid for dividends.

Amend or face extinction!

A key reason for entrepreneurs not to underestimate the impact of the recodification is that all companies are required to amend their foundation documents (association agreements and statutes) to bring them into compliance with the new legislation and deliver them to the Commercial Register by 30 June 2014. If the company fails to do so, it may be cancelled by liquidation.

Directors and agreements on exercise of office

The Corporations Act requires companies to adjust and amend their agreements on exercising an office (especially the fee and benefit clauses) by 30 June 2014 to meet and comply with the new requirements imposed by the new legal provisions. If companies fail to do so, the exercise of such office shall be deemed to be performed for free and any fees paid or benefits provided shall be deemed to constitute unjust enrichment with all the consequences, including liability for the statutory bodies. Conditions for directors are also tightened in various areas, for example, directors may resign only at a time that is suitable for the company, greater detail is specified concerning the existing duty to 'act with due managerial care', including stricter legal consequences for a director if a company becomes bankrupt.

Controlling agreements and new rules for corporate groups

Another major consequence of the new Corporations Act is the complete abandoning of controlling agreements as a legal institute and the statutory termination of all currently existing controlling agreements. Every controlling agreement will cease to exist by the last day of the controlling party's binding accounting period. In place of controlling agreements, there are new rules applicable to corporate groups such as distinguishing between influential and influenced, controlling and controlled, managing and managed parties, and group undertakings. There are also new requirements for reports on the relationships between the controlling and controlled party, and new rules for the consequences of control.

New Civil Code – a revolution in the definition of real estate

The concept of *superficies solo cedit* returns to Czech law. A building ceases to be an independent thing as it will be viewed as a mere part of a tract of land (subject to exemptions). If a building and the land underneath is owned by one and the same party today, the building will become a part of the land as of 1 January 2014. If the title to the building is separate from the title to the land, the building will remain an independent thing. Nevertheless, a statutory pre-emptive right will be established between both owners as of 1 January 2014 (ie, the owner of the land will have a priority right to purchase the building and the owner of the building will have a priority right to purchase the land). The above statutory pre-emptive right cannot be cancelled/terminated. A new 'right to build' is introduced into the law; the right to build will become the only right that makes it possible for someone to erect a building on another person's land.

The New Civil Code introduces a new term of 'usufruct', such as usufruct to an undertaking where the usufructuary has the right to use and enjoy the benefits/profits of the leased property. Lease of non-residential premises as per Act No 116/1990 Coll is to be replaced by special provisions of the New Civil Code on the lease of business premises. The New Civil Code also features certain changes regarding termination of leaseholds and introduces the possibility of immediate termination.

Trusts and security – New Civil Code

In another revolutionary change in Czech law, trusts can be established, which will certainly be welcomed by investors as a tool for tax planning and holding property. Major changes apply to *security in rem*, especially to pledges and liens. The parties will be free to agree to a no-pledge clause or how the pledge is to be exercised (as compared with the existing provisions, which only provide for a court sale of the pledged asset). There will be new rules for released pledges and for interchanging pledges registered in a public register.

Other areas of change resulting from the recodification

The above is only a very brief overview of certain selected changes, the full scope of all changes resulting from recodification of Czech private law is very far-reaching and additionally introduces, inter alia, new rules for certain types of contracts, new rules for indemnity and conflicts of interest, new concepts in contractual rights and rights in relation to concept of things. We will outline some of these additional changes in future newsletter contributions.

Begüm Yavuzdoğan Okumuş
Mehmet Gün & Partners, Istanbul
begum.yavuzdogan@gun.av.tr

Recent developments on data protection in the Turkish telecommunications sector

Introduction

Data protection is an area that has not yet been comprehensively regulated in Turkey. While the Turkish parliament, in 2004, did attempt to pass a general data protection law based predominantly on equivalent EU legislation,[1] the prepared draft law is still on the agenda of the parliament (the 'Draft Law'). In the absence of a general data protection regime, data protection has been covered by the provisions of the Turkish Constitution, the Turkish Criminal Code and the Turkish Civil Code, in general aspects. Furthermore, various ministries and authorities have introduced, or are in the process of introducing, data protection rules for the relevant sectors within their remits.

Current rules on data protection in general

As per the Turkish Constitution,[2] a person whose personal data will be collected, processed, used and/or transferred must consent to the collection, processing, use and transfer of his/her personal data in order for these acts to be held lawful.

According to said provision, such consent must be explicit. However, as this is the only provision of the Constitution related to data protection, the scope of explicit consent is not defined and therefore not subject to any formal requirement.

In addition to the general Constitutional provision, criminal sanctions are also imposed under the Turkish Criminal Code on unlawful collection and processing of personal data. Persons who unlawfully keep personal data are subject to a penalty of imprisonment starting from six months to three years, while persons who unlawfully obtain, release and/or transfer personal data are subject to a penalty of imprisonment starting from one to four years. Compensation claims in such a case are also reserved; however there is currently no administrative fine applicable in cases of breach and this makes compliance with data protection rules weaker, even though criminal sanctions are in place.

As there is no data protection law (excluding the Draft Law and other sector specific regulations) there is no established definition of personal data or sensitive data or rules on the processing of personal data. Currently, there is neither an established national data protection authority that regulates data protection nor registration requirements. We may also say that, with exception to rules in telecommunications or other specific sectors,[3] there is no restriction on transfer of personal data abroad.

However, the Draft Law regulates the processing of personal data and establishment of a national authority, which necessitates registration requirements and brings restrictions on transfer of personal data abroad.

A closer look at data protection in the telecommunications sector

The Regulation on Data Protection and Protection of Privacy in Electronic Communication Sector (the 'Regulation') was released in 2012[4] and twice amended in 2013, with the last amendment dated 24 July 2013.[5] The Regulation is the only detailed set of rules in Turkey in force determining data protection rules. The Regulation is applicable to service providers ('operators') in the telecommunications sector[6] and contains provisions that are very similar to those of the EU Directive 2002/58/EC[7] regarding the processing of personal data and protection of privacy in the electronic communications sector.

Definition of personal information

The Regulation defines personal information as 'all information related to certain real or legal persons or to those who are identifiable'.

Definition of consent

Consent is defined as a statement of acceptance that the personal data of the person concerned is to be processed within its purpose and scope, given prior to the processing with free will and in a provable manner.

Scope of consent

Consent given by subscribers extends to persons authorised by the service provider to process personal data. However, it is the service providers' liability to ensure security and confidentiality and that use of personal data is in line with the purpose.

Rules of processing personal information

Personal information must be processed:
- in line with legal rules and in good faith;
- with the prior consent of the data subject;
- in an adequate way, relevant to and not excessive in relation to the purposes;
- correctly and with personal information kept up to date (when needed); and
- personal data must be kept in a form so that it permits identification of data subjects but not for longer than is necessary for the purposes of the data for which they were collected or further processed.

Transfer of personal data abroad – not allowed

Recent amendments made in the Regulation in July 2013 introduced the prohibition of transfer of personal data abroad, in effect as of 1 January 2014. Such a restriction is novel under the Turkish data protection practice.

Notification of risk of breach and breach

With the latest amendments, service providers are obliged to notify subscribers in case of any risk of breach and/or breach of personal data security.

Traffic and location data

The amendments also address traffic and location data, which can only be processed for the management of traffic, inter connection, invoicing issues, determination of corrupt practices and similar purposes, or for the settlement of disputes arising from consumer complaints, and invoices. In case of dispute, personal data must be stored in a confidential manner until the settlement of the dispute process. Further, traffic data required for the marketing of electronic communication services or provision of value added electronic communication services can be processed, once anonymised or with the prior consent of subscribers.

Location data, which is required for the provision of value added electronic communication services and not within the scope of traffic data, can only be processed once anonymised or with the prior consent of the subscribers.

These amendments afford further protection to subscribers in terms of revocation of consent. Subscribers must be provided with a simple tool (in the same way as when they give their consent, that is, via SMS, call centre or any other simple method) to revoke their consent without any fee. However, exceptions are reserved for natural disasters and emergencies.

Traffic and location data can be processed by the operators or by those who are authorised by the operators.

Data to be stored

Data storage is classified under the Regulation and grouped as data required for the:
- follow up of the communication and determination of its source;
- determination of where the communication ends;
- determination of the duration of the communication and its date;
- determination of the type of communication; and
- determination of the location of the mobile communication device.

Data can be stored for a period of one year as of its occurrence and for calls not realised, for a period of three months only. Such data can only be stored in Turkey.

Sanctions

In terms of sanctions, although the Regulation refers to the Regulation on Administrative Fines that is to be imposed on operators, there is no specific administrative fine in cases of breach of data protection rules. The relevant fines would be up to three per cent of the turnover of the operator generated in the previous year in cases of breach of confidentiality of communication. We believe that the effects and applicability of the Regulation is not at the ideal level as there are no sincere administrative fines to be imposed in cases of breach of personal data protection rules.

Conclusion

It is clear that a data protection regime, covering the fundamental principles and requirements to be applied in general, is necessary and Turkey is actually in need of a national data protection authority.

The introduction of such a law will harmonise Turkish data protection rules with the relevant European legislation. Furthermore, clear guidelines detailing protection rights, supervisory authorities and rights and means of recourse will also strengthen the enforceability and effectiveness of existing data protection rules. Once Turkey has an adequate legal infrastructure for data protection and privacy, it will have solid data protection rules, increasing awareness amongst people and we will accordingly begin to see more case law regarding the increasing exposure of personal information every second due to the rapid development of modern technologies.

Notes

1 EU Data Protection Directive No 95/46/EC and Commission Decision 2001/497/EC of 15 June 2001.
2 Article 20 of the Turkish Constitution.
3 Recently the Ministry of Health published a Draft Regulation on the Processing of Personal Health Data and the Provision of Data Privacy (the 'Draft Regulation').
4 When the Regulation came into force in 2012, the Regulation on Process of Personal Data in the Telecommunication Sector, which was promulgated in 2004, was cancelled.
5 The Regulation has been subject to two set of amendments, on 15 February 2013 and 11 July 2013 after its first release on 24 July 2012.
6 Operators are defined as 'companies that provides electronic communication services as per relevant authorization or those provide electronic communication network and operates the infrastructure of the electronic communication network'.
7 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

Scott Parker*
Simmons & Simmons, London
scott.parker@simmons-simmons.com

Ben Hall
Simmons & Simmons, London
ben.hall@simmons-simmons.com

UK courts get tough on generics

Introduction

Following the UK High Court decision in *Cephalon v Mylan*[1] (where Floyd J refused to grant an interim injunction, thereby allowing Mylan to launch its generic drug before the trial on the merits in relation to Mylan's infringement of Cephalon's patents) some commentators speculated that this may have marked a turning point in it becoming harder for innovator pharmaceutical companies to obtain interim injunctions in generics cases.

However, the recent UK court decisions in *BMS v Teva*[2] and *Novartis v Hospira*[3] suggest otherwise, and have addressed the behaviour expected of a generic pharmaceutical company when it is considering launching a generic drug and when corresponding with an innovator pharmaceutical company where it has obtained a marketing authorisation in advance of expiry of the innovator's patent rights. These decisions have firmly planted the balance in favour of the innovators. We discuss these decisions and comment on their practical significance below.

BMS v Teva

On 9 July 2013, the High Court granted BMS a permanent injunction on the basis that as at the date of the start of proceedings, the probability that an injunction would be required to prevent Teva from infringing BMS's patent rights was sufficiently strong to justify legal proceedings.

Background

In March 2012 Birss J granted a *quia timet* interim injunction to prevent the threatened sale of generic efavirenz (an HIV drug) by Teva. His reasons were: (i) Teva had obtained a marketing authorisation to sell generic efavirenz 22 months prior to the expiry of BMS's patent rights; (ii) Teva failed to communicate its intentions in correspondence (Teva said its plans were confidential); and (iii) Teva had previously launched generic drugs without warning the patentee and without clearing the way (ie, without applying to court to revoke the relevant patents).

Following the grant of the interim injunction, Teva stated that they did not at any material time have any plans to sell generic efavirenz in the UK before the date of the expiry of BMS's patent rights, and argued that this meant the action must fail. Teva did not deny that their product would infringe BMS's patent rights, nor did they challenge the validity of those rights.

Accordingly, the only 'live' point at trial was whether as at the date of issue of proceedings Teva was threatening and intending to infringe BMS's patent rights. The fact that the matter progressed to trial on this point alone is indicative of its importance to the balance in future originator/generic disputes.

High Court's decision

Birss J rejected Teva's argument that its actual intentions were determinative. Viewed objectively, Birss J considered: (i) the UK market for efavirenz was large and valuable, and for a generic company prepared to take the infringement risk there was a real commercial incentive to be the first generic on the market; (ii) Teva has in the past been prepared to launch products surreptitiously and without notice, at risk of infringing an originator's patent; and (iii) Teva had obtained a marketing authorisation for efavirenz far in advance of the expiry of BMS's patent rights, which made an at-risk launch feasible and a credible possibility. Birss J decided that objectively, at the time of the start of the proceedings there was a real risk that Teva could launch before the expiry of BMS's patent rights.

Viewed subjectively, Birss J considered: (i) the evidence given by Teva's witnesses at trial; (ii) Teva's internal documents; and (iii) Teva's position adopted in response to letters from BMS. Birss J concluded that the possibility of launching generic efavirenz in the UK before the expiry of BMS's patent rights was under active consideration by Teva at the date of the start of the proceedings, and launching at-risk had not been ruled out.

Having addressed the factual position from both a subjective and objective standpoint, Birss J concluded that at the date of the start of proceedings, the probability that an injunction would be required to prevent Teva from infringing BMS's rights was sufficiently strong to justify legal proceedings, and so a permanent injunction was ordered.

Practical significance

This decision should assist originator pharmaceutical companies in encouraging pre-launch dialogue with generics, especially where they have obtained a marketing authorisation some time ahead of patent expiry. Following this case, a generic company would not normally be able to get away with an equivocal response (eg, that it 'does not intend to infringe any valid patents'). Even a 'we have no plans of launching at-risk' response may be inadequate if the generic is still actively considering that option.

If the generic refuses to confirm that it: (i) does not intend to launch at-risk; (ii) is not actively considering the option; and (iii) will give advance notice if its plans change, then in the right circumstances this may be used as a trigger for an interim injunction application, especially if the generic has a track record of surreptitious at-risk launches.

Accordingly, this decision makes it harder for generics to rely on confidentiality to keep patentees in the dark about their intentions, and makes it harder for a generic to launch at-risk and without notice in the UK.

Novartis v Hospira

On 22 May 2013, the Court of Appeal granted Novartis an interim injunction pending appeal of a first instance decision revoking its patents.

Background

Hospira applied to revoke Novartis' patents covering the use of zoledronic acid for the treatment of osteoporosis and, on 15 March 2013, Arnold J found the patents to be invalid. Novartis appealed and, having heard from Hospira that they planned to launch following the first instance decision, applied for an interim injunction pending appeal.

Court of Appeal's decision

In the UK, the general test regarding interim injunctions remains as set out by the House of Lords in *American Cyanamid*. If the court decides that there is a serious issue to be tried (which there will be unless the applicant does not have any real prospect of success) then it goes on to consider if damages would not be an adequate remedy and where the balance of convenience lies.

At first instance Birss J denied Novartis an interim injunction, deeming that the assessment of the balance of convenience was different in a situation where the merits had been decided against the patentee at first instance (as compared to an application made at the outset of proceedings), noting that if the appeal had had a strong prospect of success, then that might have tipped the balance in favour of an injunction (in this case the prospects of success were 'merely arguable'). Novartis appealed.

The Court of Appeal stated that Arnold J (having granted permission to appeal the revocation decision) and Birss J had both considered the appeal to have a realistic prospect of success, thereby satisfying the first part of the *American Cyanamid* test. Novartis did not need to satisfy a higher threshold because its patent had been held invalid at first instance.

The next step was to consider the balance of convenience separately, and Birss J should not have put weight into the scales against Novartis merely because they could not satisfy a higher threshold on the merits. The unquantifiable damage to Novartis (irreversible downward price spiral was inevitable on generic launch) outweighed that to Hospira (who only had a remote possibility of enjoying the 'first mover' benefits because other generics were also ready to launch) therefore an interim injunction was justified.

Practical significance

The Court of Appeal observed that appeals in patent cases are the norm rather than the exception in the pharmaceutical industry, and that generic companies ought to plan on the basis that there will be an appeal.

If a generic allows the trial of an action at first instance to coincide with their intended product launch date, then they run the risk that an appeal could get in the way and scupper those launch plans even if they were successful at first instance at removing the relevant patents that had barred entry to the UK market.

Generic companies are now under more pressure to engage in a meaningful way with originators prior to generic launch. This is especially so where they have obtained a marketing authorisation long before patent expiry and/or have a track record of launching at risk. Furthermore, in order to minimise the risk of an interim injunction being granted by the UK court generics need to factor in the time required for an appeal to take place or, if that is not possible, seek an appropriately expedited hearing.

Notes

* This article is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this article.

1 *Cephalon, Inc & Ors v Orchid Europe Ltd & Anor* [2010] EWHC 2945 (Pat) (19 November 2010).

2 *Merck Sharp Dohme Corp & Anor v Teva Pharma BV & Anor* [2013] EWHC 1958 (Pat) (9 July 2013).

3 *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583 (22 May 2013).

New energy market system of Ukraine

Wolfram Rehbock
Arzinger, Kiev
wolfram.rehbock@arzinger.ua

Maryna Ilchuk
Arzinger, Kiev
maryna.ilchuk@arzinger.ua

In Ukraine the electricity market functions separately from the gas market. The CMU adopted a decree in February 1996, according to which the energy market started its operation on 10 April 1996.[1] The Wholesale Electricity Market (WEM) is a market established by business entities for the purchase and sale of electric energy under contract.[2]

Today, the WEM operates based on the Electric Power Industry Law, as amended on 22 June 2000. The WEM operates according to the single-buyer model. All entities forming the WEM are licencees (producing companies, distribution companies and electricity suppliers), and the executive body of the WEM administration is the Market Council. Energorynok SE (State Enterprise) is a commercial WEM operator, and thus a 'single buyer' therein (it exclusively buys electricity from generating companies and sells it to distribution companies). Ukrenergo NEC (National Energy Company), the owner and operator of the main network of 220 kV to 750kV voltage class, carries out management tasks as the WEM technical operator.

However, in November 2012, the Draft Law of Ukraine No 10571 on Operating Principles of the Electricity Market (the 'Draft Electricity Market Law') passed its first reading in parliament. The main purpose of the Draft Electricity Market Law is to liberalise the wholesale electricity market and create effective competition within the energy market. Reformation of the electricity market of Ukraine envisages a gradual transition from the current system to a bilateral contract model with a balancing market. The Draft Electricity Market Law also provides for non-discriminatory and transparent access to the main, interstate or local power networks, as well as non-discriminatory access to the electricity market.

The Draft Electricity Market Law foresees the implementation of a model of operation under direct agreements on Ukraine's electricity market, the market of 'day-ahead' contracts and a balancing market, which will provide an opportunity to regulate the imbalance that appears during electricity generation. The document also suggests the creation of a market of additional services for purchases from peaking power plants.

It is worth noting that the Draft Electricity Market Law foresees the creation of a cost disparity settlement fund (state-specialised non-profit institution), which is to exist at the expense of funds to be paid by nuclear and hydropower plants.

The fund is to handle settlements for electricity sold at feed-in tariffs, and compensate for guaranteed suppliers' losses from the sale of electricity to consumers at regulated prices, as well as the cost of the purchase of electricity generated by thermal power plants and other co-generation electricity plants at regulated prices, and its sale at market prices.

Currently it is a draft law and it has to pass the second reading and to be signed by the President. However, adoption of this law and liberalisation of the energy market are among requirements of the energy community, which Ukraine has to fulfil according to its obligations under international treaties.

Shale gas in Ukraine

One of the hottest topics in Ukraine nowadays is getting rid of dependence on Russian gas. Therefore, in 2012, the government took serious steps to develop shale gas extraction in Ukraine. For a while now, Ukraine has been negotiating with a number of international oil extractors such as Shell, Chevron and ExxonMobil. Shell won a tender to sign a production-sharing agreement (PSA) for the Yuzivska field (Kharkiv and Donetsk regions) and Chevron won a tender to sign a PSA for the Oleske field (Lviv and Ivano-Frankivsk regions). In August 2012, Exxon Mobil, Royal Dutch Shell, Petrom and NJSC Nadra Ukraine, bidding jointly, won a PSA for the Skifske oil and gas field on the Black Sea shelf. In addition, on 24 January 2013, at the Economic Forum in Davos, Shell, Nadra Yuzivska LLC and the government of Ukraine signed a PSA concerning unconventional gas extraction in the Yuzivska field. The 50-year deal envisages the drilling of 15 wells to exploit the shale gas potential in the area, in the east of the country. Also Shell received a number of tax preferences from the government within this project. The fact that Ukraine has made such concessions to the company means that it has strong interest in shale gas projects in its territory. At the same time, in Ukraine, as well as in the European Union, the use and safe production of natural gas is prominent in the energy discussion. The discussion about the environmental impact of shale gas production is ongoing, and in some countries shale gas exploration is on hold until more is known about the possible environmental impact of shale gas production. Thus, in August 2013 the Ivano-Frankivsk Regional Council refused to agree to the proposed draft production sharing agreement to be signed between Ukraine, Chevron Ukraine BV and Nadra Oleska LLC for the production of fossil fuel on the Oleska field. The issue was not closed, but was sent to be improved in accordance with the comments elaborated by a working group created at the regional council. Meanwhile, the Minister of Energy has declared that in case local authorities refuse to conform to the agreement, parliament will have to consider the issue.

Green tariffs for renewable energy

In 2012, significant amendments to the renewable energy legislation were introduced. On 20 November 2012, Bill No 10183 on Amendments to the Law of Ukraine on the Electric Power Industry (on promoting electricity generation from biogas) passed its second reading in parliament, and nine days later the Law was signed by the President.[3]

The Law came into effect on 1 April 2013, and the provision establishing 'green' tariffs for solar energy for private households will come into effect on 1 January 2014. Local content requirement provisions came into effect on 1 July 2013, ensuring a proportion of feedstock, fixed assets, works and services of Ukrainian origin in the construction of power plants.

The new Law extends the scope of the Law on the Electric Power Industry. It introduces a coefficient of 2.3 for the electricity produced from biogas. It also amends the definition of biomass so that it excludes 'products' from its scope.

Table 1 – Green tariff coefficient rate schedule under the Renewables Law

Category of renewable energy objects	Tariff coefficients for objects commissioned			
	1 Apr 2013 – 31 Dec 2014	*1 Jan 2015 – 31 Dec 2019*	*1 Jan 2020 – 31 Dec 2024*	*1 Jan 2025 – 31 Dec 2029*
Wind energy, *installed capacity* of the unit < 600 KW	1.20	1.08	0.96	0.84
Wind energy, *installed capacity* of the unit > 600 KW, < 2000 KW	1.40	1.26	1.12	0.98
Wind energy, *installed capacity* of the unit > 2000 KW	2.10	1.89	1.68	1.47
Biomass energy	2.30	2.07	1.84	1.61
Biogas energy	2.30	2.07	1.84	1.61
Solar energy, surface power facilities	3.50	3.15	2.80	2.45
Solar energy, power facilities fixed on roofs, rated capacity < 100 KW	3.60	3.24	2.88	2.52
Solar energy, power facilities fixed on roofs, rated capacity < 100 KW, objects fixed on facades	3.70	3.33	2.96	2.59
Solar energy, power facilities fixed on roofs of the private houses, rated capacity < 10 kW	3.70	3.33	2.96	2.59
Micro hydro power station, installed capacity < 200 kW	2.00	1.80	1.60	1.40
Mini hydro power station, installed capacity > 200 kW, < 1MW	1.60	1.44	1.28	1.12
Small hydro power station, installed capacity > 1MW	1.20	1.08	0.96	0.84

The green tariff coefficient rate schedule under the Renewables Law is provided below. It also includes a ten per cent, 20 per cent and 30 per cent reduction in tariffs for power plants commissioned after 2014, 2019 and 2024, stipulated by the current legislation.

Amendments also concern coefficients for electricity produced by solar objects. Accordingly, the Law provides for decrease of the coefficients for solar energy.

Also, the document differentiates small hydropower stations in accordance with their installed capacity and increases coefficients for the electricity produced by small hydropower plants.

An important innovation stipulated by the document is the green tariff for individuals. The document states the following:

> 'For electricity produced from solar energy by power facilities fixed on roofs of private houses, rated capacity <10kW, in volumes exceeding consumption by such households, the green tariff shall be awarded. Such electricity is produced without any licence.[4] The NERC shall define the procedure for purchase of and payment for such electricity (which shall be done by energy supply companies).'

In addition, the Law amends the local content requirement regarding the required share and calculation procedure. According to Law No 5485-VI, Local component[5] – *share of elements* is envisaged by this Law for an electric power industry object (elements of a local component) of Ukrainian origin used in the establishment of an electric power industry object.

Table 2 – Local content requirement

Local content requirement		
30 per cent	Solar, wind, biomass, commissioned after I July 2013	Biogas, commissioned after 1 January 2014
50 per cent	Solar, wind, biomass, commissioned after 1 July 2014	Biogas, commissioned after 1 January 2015

The updated version of the Law provides for fixed shares of the local component elements for each kind or type of objects producing alternative energy. The Law envisages a number of elements and operations to be performed in Ukraine, which count towards the local content requirement. It appears that to achieve an appropriate local content requirement in a renewable project, a power plant operator applying for a 'green' tariff must satisfy those combinations of elements, which results in compliance with the respective requirement.

Notes

1 Resolution of the Cabinet of Ministers of Ukraine No 3, on Approval of Rules and Regulations of Entrepreneurial Activity on Production of Electricity, dated 8 February 1996.
2 Article 1 of the Electric Power Industry Law.
3 Law No 5485-VI, 'the Renewables Law'.
4 Consequently, such a company may not be a member of the WEM either.
5 This is not applied to small, micro and mini hydropower stations and to generating facilities of private households.

INTERNATIONAL BAR ASSOCIATION CONFERENCES



UP TO 6 CPD HOURS AVAILABLE

Rethinking international taxation as we know it

What senior practitioners should learn from younger ones

22 November 2013 — **OECD Conference Centre, Paris, France**

A conference presented by the IBA Taxes Committee, supported by the IBA European Regional Forum

As various nations, regulators and international bodies reassess a number of key parameters and guidelines relating to international and domestic corporate tax, this conference will examine what these changes might mean to practitioners from various jurisdictions involved in the field today, and how they may impact younger practitioners over the next 30 years.

Topics include:

- Transparency and enhanced mutual assistance in tax matters: the new landscape
- Will tax competition in the EU – and beyond – survive the 'base erosion and profit shifting' developments?
- Tax planning and abuse of tax treaties: navigating within tax uncertainty?
- Can Source States protect their tax base through the Permanent Establishment Concept?

the global voice of the legal profession®

London   São Paulo   Seoul   The Hague   Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090   Fax: +44 (0)20 7842 0091   www.ibanet.org



UP TO 13.8 CPD HOURS AVAILABLE

6th Biennial Global Immigration Conference

20–22 November 2013 **The May Fair Hotel London, England**

A conference presented by the IBA Immigration and Nationality Law Committee, supported by the IBA European Regional Forum and in association with American Immigration Lawyers Association and Immigration Law Practitioners Association

TOPICS INCLUDE:

- Global Immigration – the battle between growth and security
- Global transfers, skilled workers, highly skilled, employer compliance
- Investor programmes and economic citizenship
- BRICS countries and the emerging markets
- Current European immigration scene – applying the EU Blue Card: are we getting mobility of the highly skilled employee?
- The new landscape of US immigration: 2013 and beyond – higher fences, wider gates?
- Hot tips for the future

This conference is recognised as the leading global immigration conference for immigration professionals and HR personnel.

WHO SHOULD ATTEND?

Immigration lawyers, policy-makers, in-house counsel dealing with immigration matters, human resource managers and other parties interested in immigration issues.

HEADLINE SPONSORS

CS GLOBAL PARTNERS

RANGE DEVELOPMENTS

REGISTER ONLINE NOW AT WWW.IBANET.ORG/CONFERENCES/CONF512.ASPX

the global voice of the legal profession®

London São Paulo Seoul The Hague Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org