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Widening the Net: The General Court Extends the Principle of Successor Liability in EU Competition Law  1
Given that there may often be a significant time-lag between the end of a cartel and the date it is actually penalised by the European Commission, the rules governing succession to liability for EU competition law infringements have proven significant in practice. However, two recent General Court judgments have arguably extended the scope of succession to breaking point. This article provides an overview of the existing principles and then considers the judgments and the potential problems they raise.

FRÉDÉRIC MANIN, RAINER VELTE, GUSTAF DUHLS AND GONÇALO ANASTÁCIO

Competition Law Compliance across Europe: a Multi-jurisdictional Challenge 6
The authors summarise some key differences in relation to competition law compliance in France, Germany, the United Kingdom and at EU level. The aim is to identify the pitfalls and to provide food for thought to companies and their advisers when considering how to assess risk and maximise the effectiveness of such programmes for multi-national or global businesses.

SINÉAD BREATHNACH

Sweetening the Carrot: The Role of Leniency Programmes in the Fight against Cartels 12
Discovering and dismantling cartels is quite an arduous task and in order to assist in this endeavour many jurisdictions have introduced corporate leniency programmes. The aim of these programmes is to encourage the self-reporting of anti-competitive activity by cartel members and although first introduced in the United States, leniency programmes are now in place in the European Union and the majority of its Member States, including Ireland.

ROB VAN DER LAAN

About dogs and barking: Jersey Competition Regulatory Authority Decision C793/11 Jersey Telecom Limited 17
In February 2012, the Jersey Competition Regulatory Authority issued its first decision concluding that there had been an infringement of art.8(1) of the Competition (Jersey) Law 2005. In this article we discuss various aspects in relation to the fine and the link between competition law in Jersey and the European Union.

DR NIKOLAOS E. ZEVGOLIS

Resale Price Maintenance (RPM) in European Competition Law: Legal certainty Versus Economic theory? 25
Basic principle of European competition law is that every enterprise must define independently, i.e. autonomously, its trade (economic) policy. Consequently, for reasons of legal certainty only a modification of the per se approach for RPM and in the form of exemption could be accepted, recognising at the same time that systematic economic analysis is necessary for the rationalisation of competition law.

KAI HÜSCHELRATH, ULRICH LATTENBERGER AND FLORIAN SMUDA

Cartel Enforcement in the European Union: Determinants of the Duration of Investigations 33
We provide an empirical assessment of EC cartel enforcement decisions between 2000 and 2011. Following an initial characterisation of our dataset, we especially investigate the determinants of the duration of cartel investigations. We are able to identify several key drivers of investigation length such as the Commission’s speed of cartel detection, the type of cartel agreement, the affected industry or the existence of a chief witness.

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ELISABETTA ROTONDO

The Application of the Proposed European Standardisation Regulation in Practice 40
On September 11, 2012, the European Parliament adopted the final text of the proposed European Standardisation Regulation. The Standardisation Regulation identifies parameters within which industry, public authorities and other interested parties can voluntarily set standards in order to reduce technical barriers to cross-border trade. This will be achieved by harmonising national and often conflicting standards policies in different Member States for certain areas of public procurement.

European Competition Law: The Impact of the Commission’s Guidance on Article 102 44
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Opinion
L.T.C. HARMS

The Hedgehog, the Fox and Copyright: A Diversion  1
Copyright is supposed to protect foxes better than hedgehogs, at least according to Lord Hoffmann. An analysis of the history of the parable of the fox and the hedgehog through literature, science and philosophy tends to suggest that the comparison does not assist in solving the problems surrounding copyright. A number of little foxes are, however, destroying copyright.

Articles
STUART MACDONALD

All My Own Work: Intellectual Property Rights and the Reinvention of Innovation  4
An influential industry lobby—an odd alliance of the pharmaceutical, tobacco and creative industries—has persuaded governments that copying is bad. Illicit copying stifles creativity and impedes technology transfer to developing countries, it argues. Yet this is a modern view. Unapproved copying has long been regarded as essential for technology transfer, and governments everywhere have traditionally abstained in the seizure of foreign technology. What has changed is our understanding of innovation. It is no longer seen as a process of building on communal knowledge but a benefit of the community. Innovation is now perceived as springing from invention as part of a managed process within the organisation. The more information the organisation has and the more secure its ownership of this information, the more innovation. So the information required for innovation has come to be property, to be guarded through intellectual property rights. The IPR system, expanded and fortified, now spans the world, demanding international compliance. The lobby has had a part in creating this system, is fundamental to its operation, and works to maintain it, arguing that copying is inhibited to innovation. This article looks at how the lobby works, and suggests that a victim of its efforts may be innovation itself.

PATECIA COYARRUBIA AND ANDRES ECHEVERRI URIBE

The Madrid Protocol in Latin America: Is Colombia Changing Business Strategies or Acting as a Guinea Pig? 15
The aim of this article is to analyse the consequences of Colombia’s accession to the Madrid Protocol, a system which grants an international trade mark with the filing of one application only. The central question is whether Colombia’s accession will produce a “snowball effect” in Latin America.

LEE A. BYGRAVE

The Data Difficulty in Database Protection 25
This article examines the definition of the term ‘database’ in the 1996 Database Directive. It focuses on whether or not biological material may legally be regarded as database constituents. The issue, it argues, serves as a reminder of the general need for lawmakers to rigorously address the meaning of information concepts.

WEI-LIN WANG

A Study on Conflicts of Interest in Academia-Industry Co-operation: The Defence for and Modifications to the Bayh-Dole Act (Part 2) 34
The second part of this article will continue to discussing the issue in limitation on knowledge dissemination. This article takes the stance that the correct implementation of the march-in rights provision of the Bayh-Dole Act is critical to maximise the benefits and minimise the ill-effects of the Bayh-Dole Act. However, over the past two decades, no funding agency has ever exercised the march-in rights. This study will propose two modifications to expand the current march-in rights provision, as well as a guideline to help funding agencies determine when and how to exercise the march-in rights.

Comments
PAUL BICKNELL

The recent judgments in Budějovický Budvar Narodní Poddíl v Anheuser-Busch Inc considered the scope and meaning of statutory acquiescence under art 9(1) of the Trade Marks Directive in the context of long and well-established honest concurrent use of the sign BUDWEISER.

KSHITI VORA AND MARCUS COLLINS

Seeing Things Clearly: Brand Owners are Advised to Take a Broader View of Domain Names 53
Gripe websites created by disgruntled customers or other critics can often give rise to alarm among brand owners. The instant temptation at such times may be to take swift action through Nominet’s Dispute Resolution Service. However, as shown by the recent ruling on the domain name opticalprescriptionsbylily.co.uk, actively attempting to combat such websites, through Nominet’s Dispute Resolution Service, outside the English courts, may prove counter-productive for brand owners. It may be more prudent instead to closely monitor such websites and seek removal of any defamatory or infringing content.

PAUL BICKNELL

Principles for the Assessment of “Special Grounds” under Article 104(1) of the CTM Regulation: Starbucks (HK) Ltd v British Sky Broadcasting Group Plc; EMI (IP) Ltd v British Sky Broadcasting Group Plc 55
The Court of Appeal has recently enunciated a set of principles to aid in the assessment of whether “special grounds” exist under art 104(1) of the CTM Regulation. In so doing, the Court of Appeal avoided the potential pitfalls associated with a rigid test.
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"Foreign Affairs ... will tolerate wide differences of opinion. Its articles will not represent any consensus of beliefs. What is demanded of them is that they shall be competent and well informed, representing honest opinions seriously held and convincingly expressed. ... It does not accept responsibility for the views in any articles, signed or unsigned, which appear in its pages. What it does accept is the responsibility for giving them a chance to appear."

Archibald Cary Coolidge, Founding Editor
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REDEMPTION DEFERRED: MILITARY COMMISSIONS IN THE WAR ON TERROR AND THE CHARGE OF PROVIDING MATERIAL SUPPORT FOR TERRORISM
By Major Dana M. Hollywood ............................................................... 1

On June 24, 2011, the Court of Military Commission Review (CMCR) released its decision in the case of U.S. v. Hamdan, holding that material support for terrorism (MST) constitutes a law of war violation. The Court of Appeals for the D.C. Circuit granted certiorari and heard oral arguments in the case on May 3, 2012. The court released its decision on October 16, 2012, as this article was going to the publisher. This article argues that the charge of MST is not a violation of the law of war, and that is the conclusion ultimately reached by the D.C. Circuit.

This article contends that MST can be viewed as the consistent logical continuation of the Bush Doctrine, a sweeping pronouncement that the U.S. will make no distinction between those who aid terrorists and the terrorists themselves. Both MST and the Bush Doctrine seek to impose liability on a third party, provided that party possesses a “permissive” mens rea, and performs some act falling within the broad ambit of material support, regardless of whether the assistance intended to further a terrorist act.

The Obama Administration has largely accepted the
theoretical underpinnings of the Bush Doctrine while endorsing a bifurcated approach to military commissions. Despite a lack of bipartisan support for bifurcation, after two acts of Congress, a Supreme Court decision and an executive review, the military commissions system is at long last a fair and transparent forum for the administration of justice. Nevertheless, continuing to charge suspected terrorists with MST before military commissions not only threatens hard-won convictions, but has renewed questions about the system’s legitimacy.

The CMCR’s holding that MST constitutes a war crime rested on a subtle, yet fatal error. In its decision, the court conflated mere criminal acts with war crimes. Notwithstanding the CMCR’s holding, the charge of MST cannot be said to constitute a violation of the laws of war, and military commissions have no jurisdiction over the charge. As military prosecutors continue to level the charge, they compromise the commissions’ credibility and defer total redemption.

MANAGING THE CONFLICT BETWEEN U.S. E-DISCOVERY AND THE GERMAN DATA PROTECTION ACT

By Oliver Förster and Osama Almughrabi

This article describes both e-discovery in the United States and the German Federal Data Protection Act, the Bundesdatenschutzgesetz (BDSG). It details the conflicting demands of those institutions in the event of litigation, as well as the consequences for a company caught between them. Namely, e-discovery often requires the disclosure of vast amounts of electronically stored information held by a company, while the BDSG prohibits the disclosure of personal information outside of specific exceptions. Failure to disclose the data could result in significant sanctions in the U.S., while disclosing data can lead to large fines and constitutes a criminal offense in Germany.

Next, the article describes two ways to prevent discovery that conflicts with the BDSG: protective orders and the Aerospatiale test. A protective order requires a showing of “good cause,” and the BDSG can satisfy that requirement. The Supreme Court’s Aerospatiale test is used to determine when comity prohibits use of FRCP discovery. Because the
Aerospatiale test references the Hague Evidence Convention as an alternative to FRCP discovery, the article then describes the Convention and how it can be used.

Finally, the authors present some advice for companies to avoid the e-discovery/BDSG conflict. This advice includes storing personal information separately from nonpersonal information, avoiding transferring information collected elsewhere into Germany, and cooperating with the opposing party and the court during the discovery process.

Information Freedom, a Constitutional Value for the 21st Century
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On July 2, 2012, Verizon filed a brief with the United States Court of Appeals, District of Columbia Circuit, stating that the open-network, antidiscrimination rules adopted by the Federal Communications Commission "violate[d] the First Amendment by stripping [Verizon] of control over the transmission of speech on [its] network." Verizon argued that its broadband network is its "microphone" and its "newspaper," essentially claiming the online communications of some 200 million Americans as its own.

This article first describes how the United States First Amendment and communications law have evolved to a point where Verizon's argument is plausible. It then compares our own network-speech jurisprudence with that of a different constitutional culture. The First Amendment, while understood as a "free speech" protection, is frequently just the opposite – either missing in action, or applied to lessen the amount of speech, information, and opinion available to the public. One reason for this is that courts have typically focused on the "government shall make no law" language rather than the "freedom of speech" phrase at the end of the First Amendment.

The German post-war constitution (the Grundgesetz or Basic Law), by contrast, was built on the ashes of a fascist dictatorship that had misused mass communications, and was structured to make a similar catastrophe as unlikely as possible in the future. Its speech article (Article 5) guarantees the
"institutional freedom" of broadcasting and the press, and protects speech and information transfer as dynamic processes. The German Constitutional Court has interpreted Article 5 to require the state to safeguard the opinion and information-transfer functions of broadcast media in particular, and of "individual and public opinion-building" in general, as necessary conditions for democracy.

NOTES

U.S. PRESERVATION REQUIREMENTS AND EU DATA PROTECTION: HEADED FOR COLLISION?
By Tania Abbas

Large, multinational corporations today preserve vast quantities of electronic data out of fear that they will suffer sanctions under the Federal Rules of Civil Procedure for destroying evidence that could be relevant to ongoing or pending litigation. But, as U.S. companies hoard data, European regulators are stepping up enforcement of privacy laws that require the systematic elimination of data that identifies individuals without their consent. These laws, such as EU Directive 95/46, on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, are arguably far-reaching and may affect data relating to persons with only minimal contacts in the European Union. In some cases, current and proposed laws could implicate data preserved in the United States that has no connection to any EU resident. Litigants in U.S. courts know well that American judges can and do order production of evidence despite foreign privacy laws forbidding it - creating a Hobson's choice between sanctions here for non-compliance with discovery orders or sanctions abroad for violation of the privacy law. But, the ways in which preservation alone can violate non-U.S. data protection laws is less well-known. If current trends continue, however, the over-preservation practices of multinational corporations could come under the scrutiny of European regulators who are increasingly empowered to enforce potentially broadly applicable data protection laws.
The Department of Justice and the Securities and Exchange Commission aggressively pursue and punish individuals and companies who bribe or attempt to bribe foreign officials in other countries pursuant to the Foreign Corrupt Practices Act of 1977 (FCPA). However, the FCPA as it is currently interpreted by the Department of Justice has been the object of growing criticism. The United States Chamber of Commerce has argued that good faith efforts to comply with the law are often unsuccessful and that statutory amendments are necessary to "secure clarity" with respect to enforcement policy. A year ago, the Department of Justice responded to this criticism by publicly committing to release guidance on the FCPA's criminal and civil enforcement provisions. Commentators argue that this guidance, if the Department ever issues it, is not likely to respond to the criticisms of scholars and practitioners who oppose the current enforcement policy altogether. This Note finds that statutory amendments are necessary to require the DOJ to take notice of, and respond in a meaningful way to, the legitimate criticism of its current enforcement policy.

This Note begins with an introduction to the text of the antibribery provisions, followed by a summary of two of the COC's key criticisms of the FCPA as currently interpreted by the DOJ. It then examines the procedural law governing the DOJ's enforcement policy formulation to demonstrate that the Department has consistently chosen the least transparent means to formulate its enforcement policy. Finally, the Note concludes by briefly comparing legislative and administrative developments in the United Kingdom surrounding that country's UK Bribery Act 2010 as a potential procedural benchmark for Congress to better guide the DOJ procedurally in formulating its enforcement policy.
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