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# LAWYER MONTHLY

CONNECTING THE LEGAL & BUSINESS PROFESSION, GLOBALLY

ISSUE 65-15

# Time is money!

## EU ruling on work travel time

Also Inside:

**Tackling the Refugee Crisis -**
from a 'Human Rights Law' perspective

**The only way is up! -**
PwC on UK GDP growth

**Colemans talks Libor manipulation**

**My Legal Life**
Featuring:
**Aidan Redmond SC**

# EDITOR'S NOTE

Welcome to this month's edition of Lawyer Monthly! As usual I am excited to bring you an abundance of news and features to keep you updated with all the legal and corporate news stories from across the globe.

An interesting story that we covered this month was the EU Court judgment regarding work travel times. The Court ruled that travelling from home to first client, patient or customer and home from the last one at the end of shift is counted as working time which should be paid for. Many groups have welcomed the ruling, with the Union for British Gas, GMB, being one of them. Kathleen Walker Shaw, GMB Europe Officer, commented: "GMB welcomes this judgment by the Court of Justice of the European Union as important confirmation that the journeys made by workers without fixed or habitual place of work between their homes and the first and last customer of the day constitute working time."

She added: "GMB has many members who work for British Gas, the AA and home care workers who start and finish their work at home, who will feel reassured that the court has so clearly recognised that travelling from home to your first client, patient or customer and home from the last one at the end of your shift is rightly counted as working time. This time should now be paid for."

The ongoing migrant and refugee crisis is still making the news pages across the world and is even having an effect on the law now. Several EU countries have closed their borders to try to stem the flow and Hungary has changed the law so that migrants can be prosecuted for entering the country illegally and could face up to three years in prison. Only time will tell how this sad saga will end.

In financial news this month, the UK inflation rate fell back to 0%, down from where it stood at 0.1% in July. Reasons cited for this drop include a fall in oil prices and the ongoing supermarket price wars.

Also this month I am pleased to tell you that the Lawyer Monthly Legal Awards have been published and are available to view on our website at www.lawyer-monthly.com. Why not take a look and see who has been voted the 'crème de la crème' by their peers!

As part of our exclusive interviews this month, we speak to Kim Harrison, a human rights lawyer at Slater and Gordon about how the refugee crisis can be tackled. We also speak exclusively to Jonathan Dinsdale, from Colemans-ctts about the Libor manipulation scandal and PwC's chief economist, John Hawksworth about the UK's GDP growth.

I hope you enjoy this edition of Lawyer Monthly and I look forward to bringing you more news and insight next month when we will be looking at the rules surrounding copyrights, Public Private Partnerships and our International Roundtable on Litigation.

**Claire Middleton**
**Editor**


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# Europe
## Special Report

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# International Law Turkey

To begin our Europe Special Report this month, *Lawyer Monthly* takes a look at the issues surrounding International Law in Turkey by speaking to Dr. Harun KILIÇ L.L.M, the founding Partner at KILIÇ & Partners Law Firm based in Istanbul. Harun is admitted to both the German and Turkish bar associations and has gained a PHD from Bonn University. His primary role is advising the firm's larger clients on many aspects of both Turkish and International business law.

**What is the current state of the mergers and acquisitions market in Turkey? Is the majority of activity international or domestic?**

Merger and acquisition transactions remain vibrant within Turkey and domestic businesses have embraced the availability of global funding and are aware of the business opportunities locally, this is shown particularly by the number of transactions ranging from USD 10 -100 million commonly regarded as middle market transactions. This market is also steadily attracting an appetite from foreign investors, especially in manufacturing and wholesale & distribution sectors.

The larger M&A's within Turkey over the past few years have been driven by government privatizations and disposals by the "Saving Deposit Insurance Fund" of energy, infrastructure and manufacturing assets. During 2014 there was privatization of various government assets in infrastructure and energy which amounted to USD 8.6b and the Saving Deposit Insurance Fund disposals equalled USD 0.4b. The government has a continued appetite to boost the market economy and will continue to invite acquisition tenders for state-owned energy plants, gas grids and insurers to attract more international investments to Turkey during 2015. There may be bottlenecks for M&A deals considering U.S Fed rates and the current Russian situation, but this may just create more regional Investments. Nevertheless, it is expected that M&A deals will be continue to be in the spotlight through and beyond 2015 with the continuation of the privatization process and expectation of deals involving energy pipelines, public highways, bridges, ports, gas and electricity distribution, with the sale of both BOTAS and IGDAS the government owned gas operator and distribution company, already in process.

**What is the process associated with international M&A transactions? How does the process differ between international and domestic M&A transactions?**

The M&A transaction process within Turkey is more or less akin and identical to many other jurisdictions. We may distinguish the main process in three main parts "pre-negotiation" "negotiation" and "closing". During the pre-negotiation phase parties sign a Memorandum of Understanding "MoU" or Letter of Intent the "LoI". These are instruments of evidence of the parties involved and provide a guideline at the negotiation phase. However neither document is specifically regulated under Turkish Law, thus they can be designed and shaped in accordance with each of the parties demands they may include exclusivity and confidentiality clauses or the parties may execute separate agreements. As a rule after signing a MoU or LoI and prior to starting any negotiations on the draft contracts, a due diligence process will commence in order to evaluate the target enterprise. After due diligence process, the negotiation phase takes over where discussions of the share purchase agreements and shareholders agreement may take place if the selling party is to retain a shareholding in the newly created entity. It is worth noting that the shareholders agreement will prevail as the guideline of the transaction after the process is complete and should be considered very carefully by the incoming partners of the target enterprise unlike the other agreements. Also one should bear in mind, some transactions may subject to regulatory authority permission such as Energy Market Regulatory Authority, and also Competition Board. Lastly, the closing of the transaction will be concluded with respective transfers.

**What difficulties do companies in Turkey typically encounter during international transactions? How can these difficulties be minimised?**

A large proportion of Turkish businesses and companies are operated by families, even multi-million dollar holdings are family-owned. This can cause issues as the main shareholders are usually family members and they often act as if they own the company personally, which creates an obstacle for a corporate structure. Family owned companies often handle corporate governance

poorly, having late general assemblies or even none. Inadequate book keeping and shareholders debts instead of profit distribution this can also be a problem. In most cases, data and company information is difficult to collate with these type of companies, who often do not have up to date and relevant documentation. Consequently, the importance of a competent Turkish Lawyer and a full due diligence process is clear for a foreign investor, as they will face problems of compliance and be unable to determine of a fair price for the enterprise. The situation is getting better a with the newly adopted Turkish Commercial Law, which has set standards for company auditing and the application of international accounting standards and corporate rules in line with European Union legislation.

**How attractive is Turkey as a place for foreign investment? How are foreign investments typically structured?**

Turkey's Foreign Direct Investment Law is regulated in an investor-friendly way and offers many government incentives for foreign investment, such as tax breaks and free zone industrial areas across the country. The Customs Union with the EU and Free Trade Agreements with 16 countries and bilateral investment treaties with 82 countries. Turkey operates on the principles of freedom for investment by foreign entities. When a foreign investor plans to enter to Turkey, there are a variety of different options. They can set up a company, branch or liaison office or look for a Merger or Acquisition of a Turkish enterprise. Typically for foreign investors, concluding a M&A transaction is often the favourable one as they feel more comfortable commencing a business with an ally who already has experience and connections within Turkish market.

**What are the main legal requirements that foreign investments must comply with in Turkey?**

The foreign direct investment law ensures foreign investors are treated in exactly the same way as domestic investors. Consequently, foreign investors enjoy the same rights, privileges, exemptions and obligations as domestic companies.

**When setting up a company in Turkey, what should first be considered? What difficulties do foreign investors typically encounter when setting up a company?**

Setting up a company is very similar to many other jurisdictions and as outlined previously, Turkey's Foreign Direct Investment Law is regulated in an utmost investor-friendly way. Foreign investors are allowed to establish any form of company as regulated under Turkish Commercial Law. Limited liability companies "LLC" and joint stock companies "JSC" are the most widely used. It is worth considering which company formation is best depending on the sector and business plans of the investors. Things to consider the investment capital required when setting up a Joint stock Company is TRY 50,000 where as a Limited Liability Company only requires TRY 10,000 to establish according to Turkish Commercial Law. A Joint Stock Company can be more flexible and professional in terms of corporate structure and can have advantages before the authorities and banks in terms of credit issues, licenses or permissions as they find JSCs are more liable compared to LLCs. Turkish Commercial Law now allows a more simple procedure for Direct Foreign Investment, one of the most important changes is that a foreigner can now be the sole director and 100% shareholder in a Turkish registered company.

**Is there anything else you would like to add?**

There have been many recent changes in the Turkish Government's approach to Foreign Investment and numerous amendments made in Law that will satisfy many concerns foreign entities may have had in the past. Turkey is a growth economy and open for business and there are many M&A and Investment opportunities worth exploring and we would be happy to provide advice and insight, within some of the most interesting industry sectors such as energy, telecommunications, utilities and PPP projects. **LM**

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# Competition and Antitrust Law

# Romania

As part of Lawyer Monthly's Europe Special Report, we turn our attention to the laws and issues surrounding competition and antitrust in Romania. To this end, we speak to Bruno Leroy and Eleonora Udroiu from Leroy și Asociații, one of Romania's leading independent law firms. Originally set up as the local office of Gide Loyrette Nouel, the team at Leroy și Asociații has gained national and international recognition due to its contribution on some of the most significant investments and transactions in Romania

Partner and member of the Paris Bar Association, Bruno Leroy holds a Master's Degree in International Business Law from the Paris School of Management (ESCP) and a postgraduate degree from the University of Paris V. Bruno specializes in foreign investments, competition, mergers & acquisitions, real estate, projects and energy. He has advised on headline M&A and on sensitive European law and competition matters. Bruno has advised international groups on issues pertaining to restrictive agreements and abuses of dominant position as well as on the occasion of numerous notifications of concentrations between undertakings.

Eleonora Udroiu is a managing associate and member of the Bucharest Bar Association. She holds a law degree from the University of Bucharest, a European law degree from the University of Paris I Panthéon-Sorbonne and a Master's degree from the French National School of Administration. Eleonora has more than ten years of experience in competition and commercial law as well as in energy law. She has been involved in the preparation of a significant number of merger notifications to the Romanian Competition Council.

**Merger control regimes are adopted to prevent anti-competitive consequences of concentrations; do you feel it is effective in doing so?**

The Romanian merger control regime largely mirrors the one applicable at EU level, with a few minor exceptions related in general to the length of the procedural terms.

Merger control in itself is a useful tool, preventing negative effects on competition that may arise from mergers and acquisitions. Reduced competition may harm consumers through higher prices, reduced choice or less innovation.

Therefore, Romanian legislation imposes that notifiable concentrations not be implemented prior to obtaining clearance from the competition authority.

However, it is important that no unnecessary administrative burden is placed by the authority on companies and that transactions are not delayed excessively. Most of the concentrations do not raise serious competition concerns and therefore should be dealt with swiftly, so as not to unduly impede the commercial objectives of a proposed transaction.

**How does antitrust compliancy affect local and foreign businesses? Did the global financial crisis impact this at all?**

The global financial crisis has not deterred the Competition Council from its growing interest in investigating possible anti-competitive practices of companies, continuing its enforcement efforts in the area of cartel investigations, which remained a top priority in 2015. This trend is reflected in the recent fine applied by the Competition Council to 11 media service companies for having participated to a collective boycott arrangement.

*"The global financial crisis has not deterred the Competition Council from its growing interest in investigating possible anti-competitive practices of companies, continuing its enforcement efforts in the area of cartel investigations, which remained a top priority in 2015"*

Given the increased scrutiny of the Competition Council, implementing an effective antitrust compliance program at all company's levels has become more important than ever both for local and foreign businesses. An effective compliance program should include (i) comprehensive training to all executives and managers and to the employees with pricing and sales responsibilities and (ii) regular monitoring of activities which may raise competition risks.

**Has the economic climate seen an increase in competition litigation?**

These past few years' trends in competition litigation were in general maintained in 2015. Private enforcement remains rare in Romania and the fines applied by the Competition Council are almost systematically challenged in courts by the companies.

In addition, we have noticed a growing practice of the Competition Council of accepting commitments proposed by companies in antitrust investigations. Indeed, a company accused of anticompetitive practices has the possibility to propose commitments in order to address the competition concerns pointed out by the authority. Such commitments may consist, for instance, in amending commercial agreements or applying a certain pricing policy. In order to be accepted, it is paramount that the commitments are sufficient to protect competition and adequately address the concerns which triggered the opening of the investigation. In exchange, the company may escape sanctioning or receive a significant fine reduction. However, it is important to emphasize that accepting commitments is a faculty of the authority.

We welcome this recent tendency, since the commitments procedure benefits both the competition authority and in particular companies found to have breached the competition rules. Commitments effectively enable the investigated companies to redeem themselves, ensuring an effective and immediate restoration of a competitive environment, while the preventive role of competition rules is still achieved.

However, the companies who benefitted from accepted commitments need to be aware of the risk of being fined in case they fail to follow them through. This risk is illustrated by recent cases, when the authority applied fines to companies for failure to comply with the commitments undertaken during investigations. In one case, the fine was applied to distributors of mobile phone prepay products involved in anti-competitive agreements. In another case, the Professional Football League was sanctioned for failing to comply with the commitments related to the football matches broadcast rights in competitive seasons.

**What do you feel have been the top competition/ antitrust stories for 2015 so far?**

In the past few months, we have seen the completion of a number of major investigations as well as the launching of equally important new ones.

First, we should mention the new investigation targeting an alleged exchange of commercially sensitive information on the insurance market. This investigation was opened ex-officio in July 2015. Dawn raids took place at the headquarters of several insurance companies as well as of a professional association.

Should a breach of competition rules be proven, the fines may range between 0.5 to 10 percent of the premiums collected by each company in the year preceding the application of the fine.

Other important news was the completion of an investigation on bid rigging in the oil and gas drilling sector.

It is interesting to note that this was the first ever Romanian investigation which was opened following a leniency application filed by one of the investigated companies. This whistleblower received immunity from fine, as a reward for informing and cooperating with the competition authority.

This recent case illustrates the favorable approach of the Competition Council towards leniency policy, which is perceived as an effective tool in fighting cartels. Given this precedent, we may expect that more investigations will be opened based on leniency applications in the future.

Finally, there has been an intense time for the retail food sector, considering that an old major investigation has been completed and that a new one has been opened.

At the end of 2014, four retailers (two companies of the German group Metro, the Romanian subsidiary of the Belgian Delhaize and Selgros, part of the Swiss TransGourmet) and 21 of their suppliers were fined with an amount totaling approx. EUR 35 million.

These companies were accused of fixing reselling prices, directly and indirectly. The promotions policies were particularly under scrutiny. The authority claimed that suppliers were prevented from conducting simultaneous promotions in competing retail chains.

Upon completing that investigation, the Competition Council almost immediately opened a new one in this sector. Once again, the alleged anticompetitive behavior concerns price fixing between some retailers and their suppliers. **LM**

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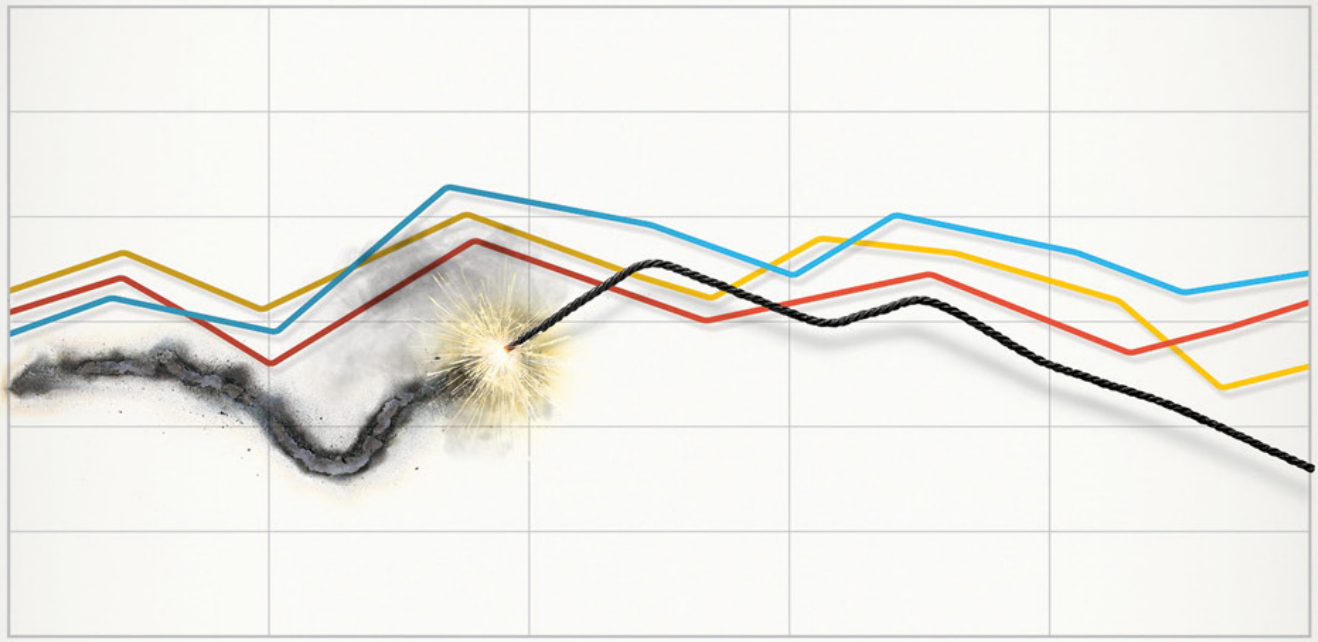

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# Forensic Accounting

## United Kingdom

The Network of Independent Forensic Accountants ("NIFA") defines forensic accounting as the 'integration of an individual's accounting and auditing knowledge with investigative skills that have been gained from years of practical experience'. The increase in high-profile corruption and fraud cases since the financial collapse has led the role of the forensic accountant to become more prominent in the public eye. As part of our Europe Special Report on Forensic Accounting, *Lawyer Monthly* speaks to Adam Stronach, Chairman of NIFA and the Corporate Finance & Forensic Services director at Harwood Hutton. Harwood Hutton is a firm of accountants and tax advisors with offices in London and Buckinghamshire. The firm is over 50 years old and has a successful record of helping clients develop their businesses by offering quality specialist services. Clients range from private clients and owner managed businesses to subsidiaries of fully quoted companies.

**Can you tell me a little about your work within forensic accounting?**

Most of my work is concerned with assisting courts or tribunals with understanding quantum, accountancy or business valuation issues in disputes and providing expert opinion on these areas. The range of work is extensive, encompassing professional negligence cases where I have been asked to comment on the work of other auditors, or to assess damages arising from the management of accounts by trustees and financial services companies, through to unfair prejudice actions where there has been a need for expert evidence on the value of shares.

During the course of my career I have also been involved in assessing consequential losses for insurance purposes and with investigating fraud and financial irregularity for companies. Systems failure helps facilitate corporate fraud, and the work of forensic accountants can help identify systems weaknesses and provide recommendations on how improvements can be made.

**What are the biggest challenges facing the UK forensic accounting environment currently?**

There has been considerable change in the way UK courts deal with the cost of cases. The Jackson Reforms mean that cost budgeting has become all important, and that includes the cost of expert evidence. At the outset of cases, experts are being asked to provide budgets for their work, yet often it is not clear what case information ought or will be available to the expert when he or she comes to write the expert report. The pressure on legal teams for cost budgets to be accurate is enormous as it is very hard to go back to court and ask for a variation in the budget. That pressure trickles down to experts, but as cases progress they are often not masters of their own destiny, with additional issues coming up and supplementary instructions being issued. In principle, each time this happens an expert can go back to his instructing solicitors and explain why his or her costs are going to increase, and the courts can be approached to extend the agreed budgets, but that is a process which, understandably, parties and their legal teams would prefer to avoid.

**How do you help clients overcome these challenges?**

We are regularly asked for budgets and cost updates as cases progress, which we are more than happy to provide, and also have clients who ask for fixed fee pricing. This can work well so long as we have a reasonably complete set of information on which to base a fixed fee quote. If there is cause for a variation, we identify the issues involved and go back to the clients to explain the position.

**How has the practice area changed since you embarked upon your career?**

Forensic accounting used to be about reports for court and fraud investigations. Now there are a whole raft of specialists within the forensic accounting specialism itself. There are experts in forensic IT and digital disclosure helping law firms. There are those who deal just with international arbitration cases, and those who stick to UK court work. There are experts in regulatory compliance and fraud prevention, building systems and processes to aid compliance with, for example, the UK Bribery Act, who then hand cases over to colleagues in fraud investigation should a breach of systems and processes becomes clear later on. Forensic accountancy departments are not solely the preserve of accountants. There will often be teams of lawyers, researchers, IT specialists and other consultants working with and leading teams of accountants. Technology plays an increasing role in helping with data mining, sifting information which will then be available to forensic specialists for their review. Much has changed in the last twenty years or so, and it remains a dynamic area of work.

**I see that you lead a wide variety of corporate finance assignments, including acting as lead adviser on £multi-million sale and purchase deals, and drafting due diligence reports for owner-manager clients and quoted international companies. What do you enjoy most about your work?**

The most satisfying element of the role is seeing a piece of your work that is taken and used to help inform decisions by clients. Some take the view that checking historical accounts and disclosures is of less value as, by then, the moment has passed, and clients are more interested in the future. That underplays the importance of the traditional role of accountants, and I am yet to undertake a review of historical figures without identifying one or more points that clients can take away and adjust for in the future. When you get to transactional and advisory work, you are working hand in hand with client management, providing them with information and opinion that helps them decide what to do next and address financial risks they might be facing. **LM**

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# Life Sciences United Kingdom

Concluding our Europe Special Report, we turn our focus on to the Life Sciences sector and the legal challenges that affect it. To this end, *Lawyer Monthly* speaks to Patrick J H Campbell, a European patent attorney, UK chartered patent attorney and partner and Head of the Biotechnology and Life Sciences Group at J A Kemp. J A Kemp is a specialist intellectual property firm with offices in London, Oxford and Munich and is one of the biggest firms of its type in Europe.

**How drastically do patent cases vary from country to country?**

There are some fundamentals that are shared by all patent systems. For example, to qualify for patent protection, all patent systems require that the invention is new, non-obvious and described in the patent specification in a way that can be reproduced by a specialist in the relevant scientific or technical field.

However, there are some differences: sometimes an invention that is patentable in one territory is not patentable in another. For example, in Ariosa v. Sequenom, the US Court of Appeal for the Federal Circuit has recently invalidated several patent claims about testing foetal DNA for genetic abnormalities as being directed to a law of nature and therefore not eligible for patent protection, whereas the issue did not even arise in the corresponding case in the European Patent Office (which was handled by one my partners here at J A Kemp).

Our international clients come to us mainly for our expertise in prosecuting, defending and opposing patents in Europe. To enable us to provide strategic advice to our domestic clients on their international patent filing strategy, we stay abreast of developments in patent law around the world. We have a network of firms abroad that we instruct on behalf of our UK clients and on whom we rely when tricky local issues arise.

**What challenges arise when working for clients in different countries?**

One constant challenge is prosecuting patent applications that have been drafted with say US law in mind though the European Patent Office; a patent application that is "right" for the US is not always "right" for Europe. The European Patent Office has about the strictest approach to amendments to patent applications of any Patent Office in the world; the European Patent Office will often refuse an amendment as introducing "added subject matter" into a patent application that would be allowed elsewhere. We are constantly having to explain to our US clients that an amendment that they have made to secure grant of their US patent application will not be allowed by the European Patent Office, which they naturally find frustrating.

Language is a significant issue in Japan and also with our growing client bases in other parts of Asia. We are fortunate that English is the dominant language in the global life sciences industry and that most of our clients write and, to a lesser extent, speak excellent English (or at least English that is considerably better than my Japanese!). However, we still have to make an extra effort to ensure that we have correctly understood what our Asian clients want to achieve and that we communicate information to them in a way that is readily comprehensible. A small change in the language in a patent claim can of course make the difference between whether or not the claim covers our client's commercial product or process.

**You are the Head of the Biotechnology and Life Sciences Group at J A Kemp, one of the biggest Groups of its type in Europe. What frustrations and rewards does this role bring?**

One frustration is that we often have to turn work down owing to a conflict of interest. Life sciences patenting is a small world and the work in Europe is heavily concentrated on a small number of firms, which means that that we quite often find that a potential new piece of work conflicts with an existing client.

One of the biggest rewards is a sense that, in some small way, we are helping our clients to invent and develop inventions that improve or prolong people's lives. For example, I have this week been working on a new prostate cancer

drug called enzalutamide that was invented at the University of California, Los Angeles. The drug has recently been licensed as a first-line treatment and will prolong the lives of many sufferers. The drug is also proving to be profitable for our client UCLA and their licensees.

I also enjoy my role in recruiting new people to the firm and training and developing them. I oversee the firm's graduate recruitment programme and find it very rewarding to help someone make their start in their professional career and then develop into a fully-fledged patent attorney.

**Have there been any recent legislative changes regarding this sector that have affected your work? If so, please explain.**

We have a big change on the horizon, namely the introduction of a Unitary Patent system and Unified Patent Court in the European Union. At present, we can file a single patent application at the European Patent Office but, when the Patent Office grants the patent, it becomes a bundle of separate national patents that can be enforced only through the national courts. A patent proprietor who wishes to enforce his patent across the whole of the European Union may have to bring multiple parallel actions in multiple European countries. Under the proposed new system, it will be possible to obtain a single, unitary patent across the whole of the European Union (except in Croatia, Poland, Spain and possibly Italy, who don't currently wish to play ball). The patent proprietor will then be able to enforce the patent across the EU in a single action in the Unified Patent Court. However, the proprietor has to carry the risk that, if the patent is found to be invalid, it is lost for the whole of the EU in one go, so the proposed new system should have advantages for both patent proprietors and alleged infringers alike.

The Unified Court will have "Local Divisions" and "Regional Divisions" around Europe and a "Central Division". The Central Division will be in London, Paris and Munich, with cases being split between the three locations on technology grounds. London will deal with patents in the fields of chemistry, pharmaceuticals, biotechnology and medical devices, which is an exciting prospect for those of us who, like me, are based in London and work these fields. The most optimistic forecasts are that the system will come into force in 2016, but a delay is likely (not least owing to the UK's referendum on membership of the European Union).

**Is there anything else you would like to add?**

The life sciences industry has now matured to a point where the early blockbuster biological drugs are coming to the ends of their patent lives. This is, in turn, leading to development of "biosimilar" drugs (that copy the original drug as closely as possible) and "biobetters" (that improve on the original). A whole new industry is developing in this area. Established biotechnology and pharmaceutical companies, such as Merck and Amgen, are investing in the area, but new entrants, such as Samsung, are emerging. This should add to the interest of our work in the future; there are going to be some interesting patent battles as the developers of these new drugs seek to clear paths to market whilst patent owners try to block them. **LM**

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