



# European Company Lawyers Association

Association Européenne  
des Juristes d'Entreprise  
(ECLA/AEJE)

JUNE 2009

## Newsletter for the Member Associations of ECLA

### NOTE FROM THE EDITOR

Dear Reader,

This issue of the In-House Counsel newsletter contains interesting contributions from our foundation sponsor and from our sponsors. We hope you enjoy the articles.

I had also hoped to receive contributions from our members on local events, new legislation, recent court decisions, practical experiences, or any other legal commentary but I did not get any..... Please do not be too shy to send your contribution! It need not be a long one; even a short note on what is going on in your organization will be greatly appreciated!

Francesco.benigni@ecla.org

### PRESIDENT'S REPORT WARSAW

At ECLA's board meeting in Warsaw on 8 May, Han Kooy, ECLA's president, presented the report on the activities performed by the executive board since the board of directors meeting was held in Zagreb on 17 October 2008. He presented the new brochure of ECLA which updated the 2005 edition. It is now posted on the website. The president confirmed the validity of the program of ECLA which was approved in 2002. This means that ECLA continues to represent in-house lawyers in Europe, provide them with education, training and information and with the best networking venue for in-house lawyers in Europe. Han Kooy focused on potential new members: in particular, Slovenia who attended the board meeting in Warsaw as observer. Finland, Russia and Ukraine, are also progressing towards ECLA membership. Mr. Kooy also stressed the important role the sponsors can play for the activities of ECLA and of the member organizations. In addition, he mentioned ECLA's taskforces. He focused on the legal privilege taskforce regarding the appeal of the Akzo Nobel case which should be decided by the European Court of Justice in 2010. Mr. Kooy also discussed the appointment of ECLA as observer at the UNCITRAL's sessions and recalled ECLA's participation in Vienna in October 2008 and in New York in February 2009. Lastly, Mr. Kooy mentioned that the European Commission recently awarded to ECLA, in partnership with ADR Center, a project concerning the cost of not using the ADR, such as mediation, for the resolution of litigation in Europe. He talked also about the proposed application [which was presented on 28 May] for another project funded by the European Commission for the ADRE in the ACP countries.

## BOARD OF DIRECTORS AND ANNUAL GENERAL MEETING IN WARSAW

On 8 May the directors of ECLA held their spring board meeting in Warsaw and the members of ECLA held their annual general meeting for the approval of the annual accounts of the association. The meetings were hosted at the offices of Wierzbowski Eversheds, which also provided assistance to the organization. The board members of ECLA enjoyed the warm, friendly and professional hospitality of the National Chamber of Legal Advisers ("Krajowa Izba Radcow Prawny") guided by the ECLA's vice-president Iwona Mirosz.

## ELECTION OF OFFICERS AND APPOINTMENT OF THE GENERAL MANAGER

Han Kooy informed the board at the meeting held on 8 May in Warsaw that Francesco Benigni expressed his intention to slow down when his consultancy agreement expires on 30 June 2009. Therefore, the board of directors appointed Paul de Jonge as general manager from 1 July 2009. The board of directors then re-appointed Han Kooy as president, Iwona Mirosz as vice-president and Petr Smelhaus as treasurer. ECLA will look for candidates to replace Paul de Jonge as the secretary general.

## LEXIS NEXIS MARTINDALE-HUBBELL NEW ECLA SPONSOR

Effective 1 May 2009, ECLA entered into a three year sponsorship agreement with Lexis Nexis Martindale-Hubbell International (MHI). The sponsorship arrangement not only will provide new financing for the activities of ECLA, but also new important services and products for the individual members. This year MHI introduced MH

Connected, an online networking site for the global legal community. MHI will create a group for ECLA on MH Connected. ECLA and its members will have control over who can join and access this group. MHI will also help develop a "group hosting strategy" and will work with ECLA and the member associations to set up groups, content and communities, member sign-ups and exposure to opportunities in the larger MH Connected legal community. MHI will also help with individual members join the group.

## NEXT ECLA BOARD AND MEETING IN BUCHAREST ON 9 OCTOBER 2009

Dan Stoica, representing the Romanian association has offered to host the autumn board meeting which will be held in Bucharest on 9 October.

The ECLA and MHI alliance has the following benefits:

- ECLA's exposure to the legal community and enhanced networking and collaboration among the members;
- Creation of private communities on MH Connected enabling ECLA members and leadership to collaborate and share ideas; and
- Tools for ECLA members to network with each other and with other in-house counsels and their colleagues.

## EUROPEAN COMMISSION FUNDED PROJECT ON THE COST OF NON ADR

In our March Newsletter, we informed you that in late 2008 ECLA was awarded an important project entitled "The cost of non ADR; surveying and showing the actual costs of intra-community commercial litigation", by the European Commission, in partnership with ADR Center SPA, Rome. All ECLA members will be called upon to take part in the survey which should be launched in late September 2009. The results will be presented at an international conference in the spring of 2010.

## TASKFORCE ON MEDIATION

ECLA is Europe's leading association of in-house counsel in Europe. ECLA represents more than 34.000 individual in-house counsels and is represented in twentytwo European countries.



The general manager, Francesco Benigni, informed the board members in Warsaw that the mediation taskforce that he coordinates now has nine members: Plamena Kotseva, Bulgaria; Suzana Kolesar, Croatia; Michal Krejci, Czech Republic; James Kinch, Ireland; Roberto Pillitteri, Italy; Gertruda Kubiliute, Lithuania; Ljiljana Cekovska, Macedonia; and Gjertrud Helland, Norway. The remaining member organizations are encouraged to appoint a representative to the taskforce.

### **SALARY SURVEY AMONG THE EUROPEAN COMPANY LAWYERS**

Following the decision taken last October in Zagreb by the board of directors of ECLA, in March 2009, ECLA issued a salary survey among the member organizations. The individual members are requested to answer a questionnaire concerning salaries. The results will constitute very useful information for all general counsel and their associates in Europe. All ECLA members should participate in the survey.

### **NEW POTENTIAL MEMBERS**

ECLA currently has 22 member organizations in 22 European countries representing more than 34.000 company lawyers. ECLA has established contact with the organizations in Finland, Slovenia, Russia and Ukraine, which should shortly become new members. ECLA has also established contacts in other countries where an in-house counsel organization does not yet exist (such as Austria, Hungary and Iceland). For these countries ECLA is providing expertise and assistance to help the local in-house lawyers build an organization which could eventually become a member of ECLA.

### **FOURTH FORUM FOR IN-HOUSE COUNSEL, BRUSSELS 23-24 APRIL 2009**

The Fourth Forum for In-House Counsel organized by ECLA and ERA ("Academy of European Law") was held in Brussels on 23-24 April. The participants, coming from many ECLA's member organizations, expressed their appreciation on the topics on European law and for the speakers. ECLA has already

started organizing the Fifth Forum which will be held in 2010.

### **COOPERATION WITH UNIDROIT**

The working group of UNIDROIT, is finalizing its discussion of the draft of the third edition of the Principles of International Commercial Contracts. The final draft of the new chapters of the Principles should be ready by the end of 2009 and ECLA will be called upon to prepare its comments and a position paper of the European in-house lawyers that it represents. Therefore, ECLA should form an ad-hoc working group to work on this task.

### **MEETING WITH THE PORTUGUESE ORGANIZATION**

Vitor Marques Moreira, the new president of the Portuguese Institute of Company Lawyers ("Instituto dos Advogados de Empresa"-IAE), recently invited Francesco Benigni to visit the Portuguese member organization. Mr. Benigni was received in the beautiful offices of the Bar and IAE in



Lisbon. He was welcomed by the president of the Portuguese Bar Association (“Ordem dos Advogados”), Mr. Antonio Marinho e Pinto, and he was introduced to the members of the IAE board. Vitor Marques Moreira presented the recent activity of the IAE and the fantastic membership increase from 200 to 1200 in only six months. On 19 June the IAE organized its annual conference in Lisbon. It was a full day program with presentations on very interesting topics for company lawyers. It is interesting to note that a Portuguese company lawyer is a member of the same bar association as any self-employed lawyer. A company lawyer in Portugal can at the same time act as a self-employed lawyer, e.g. having his own clients and can even plead in court (“ius postulandi”).

## HOLIDAY RIGHTS FOR THE SICK

By Stefan Corbanie, Senior Partner Brussels, Eversheds

Are workers who are absent from work as a result of ill-health entitled to holidays, even if they have not worked at all during a holiday year? In a decision which will prove costly for many employers throughout Europe, the European Court of Justice confirmed recently that they are.

In summary, the ECJ, in two joined cases: Stringer and Schultz-Hoff, decided that when a worker is absent on sick leave, their entitlement to paid holiday under the Working Time Directive (WTD) continues. On termination of employment, workers are entitled to a payment in lieu of annual leave they have been unable to take. The extent

to which this will impact in the different member states (which does not include Norway) will depend on their current legislation and practices.

To read the full story, follow this link:

[https://www.eversheds.com/uk/home/articles/index.page?ArticleID=templatedata\Eversheds\articles\data\en\International\\_HR\\_ebrief\Holiday\\_rights\\_for\\_the\\_sick](https://www.eversheds.com/uk/home/articles/index.page?ArticleID=templatedata\Eversheds\articles\data\en\International_HR_ebrief\Holiday_rights_for_the_sick)

## ADOPTION OF THE THIRD PACKAGE IN THE FIELD OF ENERGY

On behalf of the Law Europe Energy Practice Group,  
Cécile Musialski & Amélie Mazingue  
Philippe & Partners, Law Firm, Brussels

### 1. Introduction

On 21 April 2009, the European Parliament voted a package of legislative measures (the “Third Package”) to further liberalise the European electricity and gas markets. This vote (which still has to be formally endorsed by the Council) puts an end to a long and vivid debate around the initial Commission’s proposal of Third Package (September 2007).

The Third Package is composed of five pieces of legislation, namely a Regulation establishing the Agency for the Cooperation of National Energy Regulators (“the Agency”), an Electricity Directive amending and completing the Electricity Directive 2003/54/EC, a Gas Directive amending and completing the Gas Directive 2003/55/EC, an Electricity Regulation amending and completing Electricity Regulation 1228/03/EC, and a Gas Regulation amending and completing the Gas Regulation 1775/05/EC.

The Third Package aims to resolve the shortcomings of the European energy market as identified by the Commission in its sector inquiry report of 10 January 2007. As such, it goes beyond the liberalisation of European Energy markets initiated by the two previous waves of liberalisation (initiated about ten years ago approximately).



## 2. Main achievements of the Third Package

The present newsflash provides an overview of what we consider as the most important aspects of the Package.

### 2.1. National Regulatory Authorities

National Regulatory Authorities (NRAs) ensure an effective and non-discriminatory access to the electricity and gas markets. In doing so, NRAs control tariffs applied to the consumers. For example, the Third Package safeguards the independence of NRAs and strengthens their statutory powers and duties. The Third Package enumerates a series of duties and powers of NRAs, including the promotion of effective competition (in close collaboration with national competition authorities). NRAs have the power to take all necessary measures to promote a well-functioning market. They can take binding decisions and perform on-premise investigations. A strong cooperation between NRAs in all Member States is also envisaged.

### 2.2. The Agency

A new European Agency (the "Agency for the Cooperation of Energy Regulators") is created to assist NRAs on common rules for the internal market of gas and electricity in Europe. The Agency has, among other things, the power to take individual binding decisions (in contrast with ERGEG that does not have such powers) in specific fields. Its main tasks are to coordinate the work of the NRAs and to promote cooperation between them. In doing so, it will complement the work of the NRAs, especially in cross-border situations. ERGEC has even a decision-making power for issues of cross-border infrastructure, when no common solution can be reached at the level of NRAs or when NRAs require it. The Agency has also the

power to monitor the work of ENTSOe and ENTSOG (see below).

### 2.3. ENTSOe and ENTSOG

The Third Package creates a new structure of cooperation between network operators of gas and electricity: the European Network of Transmission System Operators of Electricity ("ENTSOe") and the European Network of Transmission System Operators of gas ("ENTSOg"). The newly-created system operators will cooperate in a formalised structure rather than on a voluntary basis, as it has been the case so far. ENTSOe and ENTSOG will thus replace the existing associations of system operators (UCTE, ETSO, EASEE-Gas, etc). Among other things, these associations have the power to elaborate (under the scrutiny of the Agency and the final adoption-power of the Commission) "network codes", including rules on security. ENTSOe and ENTSOG are coordinators for long-term planning of system development. The Agency monitors the work of these two associations. The creation of ENTSOe and ENTSOG aims to strengthen the transmission of electricity and gas within Europe from both the security and the market viewpoints.

### 2.4. Unbundling

Unbundling was the most disputed point between the Member States and the European institutions in the debates on the Third Package. The existing unbundling in Directives 2003/54/EC and 2003/55/EC is allegedly not sufficient enough to ensure a good-functioning market. The Third Package goes further with three possible options. The first option for unbundling is the so-called "Ownership unbundling". It is the option preferred by the Commission. Ownership unbundling prevents a company from controlling both generation and supply activities on the one side and, on the other side, transmission activities. This solution creates the dismantlement of "giant" energy companies (i.e. fully vertically integrated) in France (EDF and GDF) and in Germany (E.ON and RWE). The second option is the one called "Independent System Operator" (ISO). It allows network ownership for vertically integrated companies. However, it requires

**ECLA procures  
at least a 20%  
discount for its  
members on  
activities that it  
sponsors.**

that the transmission network be managed by an independent company, the ISO. The ISO is in charge of taking all important commercial and investment decisions. The third option is the «Independent Transmission Operator» (ITO). It is a response to the (successful) efforts of France and Germany to avoid full ownership unbundling. Under this option (preferred by many Member States to the ISO solution), companies active in production and/or supply activities retain transmission system activities (and important decisions related to them) provided they comply with strict rules on external supervision (setting up of a supervisory body, observance of a compliance programme, appointment of a compliance officer, etc.).

### 3. Conclusion

The Third Package will enter into force twenty days after its publication in the Official Journal of the European Union. Beforehand it has to be formally endorsed by the Council (endorsement is expected closely before or after summer break). From that moment on, Members States will have eighteen months to transpose the Directives into their national laws. What remains to be seen is whether the measures will overcome the long-lamented market failures.

### Law Europe Energy Practice Group

Law Europe is a network of business law firms with more than 25 members in the European Union and overseas. Law Europe has established a number of Practice Groups dedicated to key areas of specialist legal practice, including one on Energy, which consist of specialist lawyers from each of the Member firms. The objective of the Practice Groups is to promote the sharing of knowledge between specialist lawyers from different jurisdictions. As an ECLA sponsor, Law Europe is pleased to present this article on new EU measures for the liberalisation of European Energy markets to ECLA members.

### THE NEW BELGIAN RULES ON GOLDEN HANDSHAKES

#### By Claeys & Engels, Ius Laboris

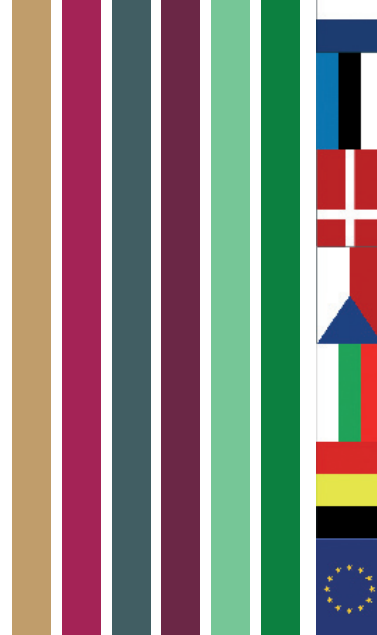
The Belgian Corporate Governance Committee has recently published the second edition of the Belgian Corporate Governance Code for listed companies. The 2009 version contains new rules which are designed to limit golden handshakes for executives.

Belgium has a reputation for expensive severance indemnities – going up to three years' pay for very senior employees. The Labour Courts determine such indemnities based on the employee's age, seniority and remuneration. Except

in case of serious cause, a very narrowly defined concept, the circumstances of the dismissal are irrelevant for the calculation of the indemnity. A badly performing employee will thus be treated the same as a an employee made redundant for economic reasons.

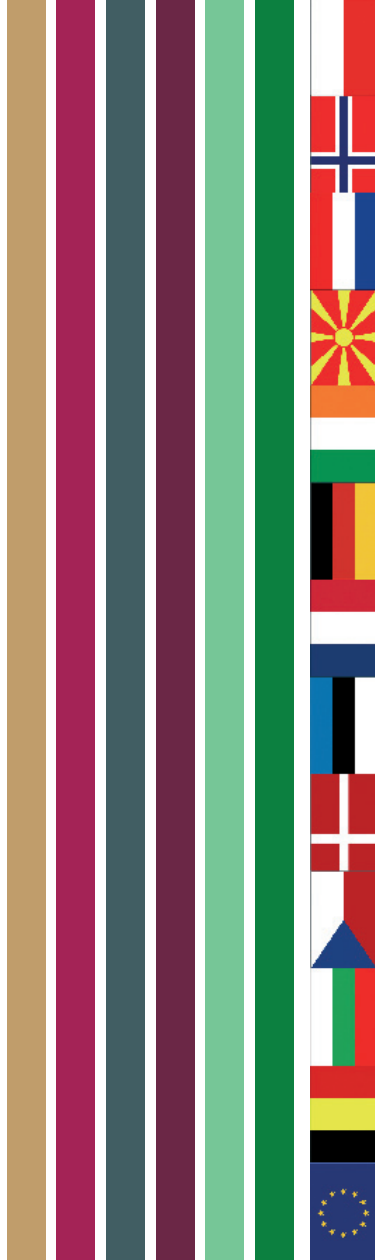
In this context no-one should have been surprised to see executives leaving companies with significant termination packages. Yet, like in many other countries, the absolute numbers of certain golden handshakes, most notably in the banking sector, have caused public outcry.

In the fall of last year, the Belgian Government announced a bill purporting to limit termination indemnities of executives of listed companies. However, the Council of State struck down this bill saying it was discriminatory in several respects: executives of listed companies being treated differently than those in non-listed companies; executives being treated differently than the high-ranking employees just below executive level; and non-performing executives being treated similarly than executives leaving with a good track record.



**Check out ECLA's group on MH Connected. See our website for more details.**





Please send us your  
articles, updates  
and information so  
that we can include  
them in the  
newsletter.

The Corporate Governance Committee stepped in to propose non-binding rules, based on the “comply or explain” principle. The new rules require that new contracts with CEOs and executive managers of listed companies do not provide severance indemnities in excess of 12 months’ base and variable pay. The rules allow companies to go up to 18 months for special reasons, which the company must publish. 18 months would be permissible for true golden parachutes, triggered only in case of change of control. But the new Code also allows to go up to 18 months if this is necessary to obtain the candidate’s agreement... If a CEO or executive manager did not meet contractual performance criteria the Code imposes a maximum of 12 months’ base pay.

Reactions to the new Code have been mixed. MPs have indicated that a non-binding Code is not sufficient. The Minister of Justice announced that the Government is considering making the rules mandatory. There is continued pressure to make the rules applicable to any government-owned or –subsidised company, much like the rules in the 2008 Emergency Economic Stabilisation Act in the U.S.

In the meantime, the Council of State’s comments suggest that a much bigger reform of the severance rules should be envisaged. But that debate has not yet really started. Most recently, a proposal has been made in Parliament to tax away golden handshakes. But, unlike the Netherlands and the U.S., public support for such a measure appears to be limited.

With various EU countries adopting different more or less binding rules restricting golden handshakes in some fashion, one wonders whether this could not be better coordinated at EU level. On April 30, the EU Commission adopted a Recommendation that severance indemnities for executives in listed companies should in general not exceed two years’ base pay (not taking into account variable pay) and should not be paid in case of inadequate performance. But, for the time being, that remains only a “Recommendation” to the Member States.

Should you have any other question with regard to this matter, please contact:

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#### **BOARD MEETING IN BUCHAREST ON 9 OCTOBER 2009**

Dan Stoica, ECLA’s director representing the member organization in Romania, has offered to host the autumn board meeting on 9 October in Bucharest.

