

# The Year in Review

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## Europe

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## Europe

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## Europe

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This article discusses selected developments in European Law during 2015.

### I. European Law

#### A. FROM SAFE HARBOR TO PEARL HARBOR: THE EUROPERAN COURT OF JUSTICE DECISION IN MAXIMILIAN SCHREMS

##### 1. Introduction

In *Schrems v. Data Protection Commissioner*, Case C-362/14, which was decided on October 6, 2015 (the “Decision”), the Court of Justice of the European Union (“CJEU”) invalidated the EU-US data protection safe harbor (“Safe Harbor”) program for failure to provide an adequate level of protection to personal data transferred from the EU to the U.S.<sup>1</sup>

This ruling has had a massive impact for most transatlantic business, as all EU companies must now review their existing contracts and operations and quickly find an alternate legal basis for their data transfers to the US with a minimal disruptive impact on their activities.

##### 2. The Decision

The case was brought by Austrian student and privacy activist Max Schrems, who complained to the Data Protection Authority (“DPA”) of Ireland (where Facebook has its European headquarters) that Facebook’s transfers of personal data made under the EU-

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\* Thomas Stanton, Laurent De Muyter (From Safe harbor to Pearl Harbor: the Court of Justice decision in Maximilian Schrems), Angélique Devaux (Reform of Regulated Professions and Changes to Social Security in France), Audrey Kavets (EU Dublin Regulation Questioned as Refugee Crisis Persists), Valeria Miller (Tax and Terrorism in Italy), Jörg Rehder & Andreas Ripken (Munich District Court Holds that a Managing Director May Demand Release from Personal Liability if a Company is Threatened by Bankruptcy), John Richards (EU Unitary Patent and Unified Patent Court), Roselyn Sands (New Measures in France on employment law affecting foreign companies).

1. See Case C-362/14, *Schrems v. Data Prot. Comm’r*, 2015 E.C.R. I-1.

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U.S. Safe Harbor program violated the EU Data Protection Directive 95/46/EC (“Data Protection Directive”), because Facebook would have cooperated with the National Security Agency’s PRISM mass surveillance program to allow unrestricted access to mass data on American servers.

The Irish DPA concluded that it lacked the power to review the European Commission’s (“EC”) determination that the Safe Harbor ensures an adequate level of protection. This conclusion was challenged in court, leading the Irish High Court to request a preliminary ruling from the CJEU on the following two questions: (1) whether the Irish DPA was “*absolutely bound*” by Decision 2000/520/EC on the adequacy of the protections provided by the Safe Harbor principles (“Safe Harbor Decision”)<sup>2</sup> and (2) whether, alternatively, the DPA was able to conduct its “own investigation of the matter” and, if so, whether it was allowed to suspend the transfer of data upon a finding of inadequate protection.<sup>3</sup>

In its Decision, the CJEU held that neither the Data Protection Directive nor the Safe Harbor Decision can prevent a DPA from examining the claims of an EU Member State data subject that his/her personal data has been transferred to a third country that does not ensure an adequate level of protection.<sup>4</sup> The CJEU further held that the Safe Harbor Decision improperly restricted the DPA’s ability to protect the fundamental rights and freedoms of individuals throughout the EU who question the Decision.<sup>5</sup> But in the CJEU’s view, only the CJEU has the power to declare an EU act, such as the Safe Harbor Decision, invalid, not the DPA.<sup>6</sup> Where a national authority deems an act invalid, it must refer the question to the CJEU.<sup>7</sup>

The CJEU then considered the validity of Safe Harbor Decision itself, and held that the finding of adequate protection for personal data transferred to the U.S. via the Safe Harbor mechanism was invalid because it did not adequately protect the fundamental rights of Europeans<sup>8</sup> for the following reasons:

- The mechanism puts the needs of U.S. law enforcement officials ahead of the fundamental privacy rights of EU citizens by allowing U.S. law enforcement unfettered access to the transferred data.
- The Safe Harbor rules offer EU citizens no judicial means of redress in the U.S.
- The Safe Harbor decision denies EU DPAs the power to review complaints challenging the validity of data transfers to third parties.
- U.S. legislation authorizes, on a general basis, the storage of all personal data of all the persons whose data is transferred from the EU to the U.S. without any differentiation, limitation, or exception being made in light of the objectives pursued,

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2. Commission Decision 2000/520/EC, of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbor privacy principles and related frequently asked questions issued by the US Department of Commerce, 2000 O.J. (L 215) 7.

3. Case C-362/14, Schrems v. Data Prot. Comm’r, 2015 E.C.R. I-1, ¶ 36(2).

4. *Id.* ¶ 53.

5. *Id.* ¶ 103.

6. *Id.* ¶ 61.

7. *Id.* ¶ 64.

8. *Id.* ¶¶ 91-95.

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and without providing an objective criterion for determining limits to the access and use of this data by public authorities.<sup>9</sup>

3. *Consequences of the Ruling*

As a result of the Decision, the Safe Harbor is no longer a basis for transferring personal data from the EU to the U.S. This directly affects the business of more than 4,400 U.S. and EU companies that conduct their activities, as well as those of their EU clients, on such basis.<sup>10</sup>

Both the Commission and the Article 29 Working Party (“WP 29”) (an advisory body including all EU DPAs and the European Data Protection Supervisor) confirmed that discussions with the U.S. should continue towards a “renewed and safe framework for the transfer of personal data across the Atlantic.”<sup>11</sup> In its communication dated November 6, 2015, the Commission declared that its objective is to conclude the discussions with the United States authorities within three months.<sup>12</sup> On its end, the U.S. Congress has almost finalized the adoption the Judicial Redress Bill (H.R. 1428) ensuring that EU citizens will have access to judicial redress possibilities in the U.S. in cases of privacy breaches.<sup>13</sup> Until a new Safe Harbor is put in place, however, companies must find alternative grounds for transferring personal data from the EU to the U.S.

The most helpful solution that is readily available is the use of Standard Contractual Clauses (“SCCs”), as the terms are pre-approved by the EC and thus no substantive DPA approvals are required in most (but not all) EU Member States. On the other hand, SCCs require the execution and maintenance of a network of privacy agreements because all relevant corporate entities must sign the SCCs. It should also be noted that specific SCCs may contain further restrictions.

Another alternative is the adoption of Binding Corporate Rules (“BCRs”), but it is a limited solution in that it only addresses intra-group transfers for multinational companies, not transfers to outside third parties (e.g., service providers). Furthermore, BCRs may only be suitable for closely-knit, highly hierarchical companies, not loose conglomerates. More importantly, BCRs require the substantive approval of the applicable DPA, and significant updates to data processing/transfer activities trigger a further duty to report changes to all relevant DPAs, which is likely to entail significant time and resources. Due to the level of complexity and time involved, BCRs are more of a

9. See Case C-362/14, Schrems, 2015 E.C.R. I-1; Court of Justice of the European Union (CJEU) Press Release No. 117/15, The Court of Justice declares that the Commission’s US Safe Harbour Decision is invalid (Oct. 6, 2015).

10. Joshua P. Meltzer, *Examining the EU safe harbor decision and impacts for transatlantic data flows*, BROOKINGS (Nov. 3, 2015), <http://www.brookings.edu/research/testimony/2015/11/03-eu-safe-harbor-decision-transatlantic-data-flows-meltzer>.

11. European Commission Press Release STATEMENT/15/5782, Vice-President Timmermans and Commissioner Jourova’s press conference on Safe Harbor following the Court ruling in Case C-362/14 (Schrems) (Oct. 6, 2015); see European Commission Press Release, Statement of the Article 29 Working Party on the implementation of the judgment of the Court of Justice of the European Union of 6 October 2015 in the Maximilian Schrems v. Data Protection Commissioner case (C-362-14) (Oct. 16, 2015).

12. *Communication from the Commission to the European Parliament and the Council on the Transfer of Personal Data from the EU to the United States of America under Directive 95/46/EC following the Judgment by the Court of Justice in Case C-362/14 (Schrems)*, at 15, COM 566 (Nov. 6, 2015).

13. Judicial Redress Act of 2015, H.R. 1428, 114th Cong. (2015).

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mid- to long-term solution rather than an immediate “quick fix,” and even then, not all EU Member States (e.g., Portugal) recognize them.

U.S. companies could also transfer data to countries with adequate protection if they receive the unambiguous consent from data subjects. But in the employment context, consent is viewed with skepticism by DPAs on the basis that it may not be freely given, and thus, it might be held to be invalid.<sup>14</sup> Moreover, data subjects can withdraw consent at any time, which further adds to the legal uncertainty surrounding the concept of consent.

There are other notable adequacy-related exceptions under which transatlantic data transfers can be authorized, including a data transfer necessary for the performance of a contract between the data subject and controller (i.e., the entity responsible for determining the purposes and means of the processing of personal data) or the implementation of pre-contractual measures requested by the data subject. Personal data transfers from the EU to the U.S. may also be allowed for the conclusion or performance of a contract executed in the interest of the data subject between the controller and a third party. Lastly, the defense of legal claims might also be considered as a permissible basis to justify such transfers.

The WP 29 indicated that if no solution, in terms of alternative transfer tools, is found by the end of January 2016, then “EU data protection authorities are committed to take all necessary and appropriate actions, which may include coordinated enforcement actions.”<sup>15</sup>

B. EU UNITARY PATENT AND UNIFIED PATENT COURT

1. *The Patent Package*

On December 17, 2012, the EU issued a regulation for creating a Unitary European Patent to cover all of the then EU Member States, except Spain and Italy, who had opted out.<sup>16</sup> Italy has, however, reversed its position, and on October 2, 2015, was accepted as a member of the cooperating group, leaving only Spain and Croatia (which joined the EU after the negotiations commenced) outside of the unitary patent. On the same day that the unitary patent regulation was issued, a separate regulation was issued relating to the languages that are to be used.<sup>17</sup> On February 19, 2013, most EU Member States (except Spain and Poland) signed a treaty to create a European Patent Court system that ultimately would have jurisdiction over all patents issued by the European Patent Office (“EPO”). This system will have an effect on the participating countries, irrespective of

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14. See Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, Article 29 Working Party 2093/05, WP 114 (Nov. 25, 2005).

15. See EC Press Release, Article 29 Working Party, *supra* note 11.

16. See Commission Regulation (EC) No. 1257/2012, of the European Parliament and of the Council of 17 December 2012 on implementing enhanced cooperation in the area of the creation of unitary patent protection, 2012 O.J. (L 361) 1.

17. See Council Regulation (EC) No. 1260/2012, of 17 December 2012 on implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, 2012 O.J. (L 361) 89.

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whether such patents are new unitary patents or patents forming part of the traditional bundle arising from a European patent application.<sup>18</sup>

Final rules of procedure for the Unitary Patent Court were published on October 27, 2015. In a protocol signed on October 2, 2015, a “sunrise” provision was adopted to allow preparatory steps to expedite the implementation that will need to be carried out before the treaty is formally ratified by all of the necessary countries. The protocol permits the court to obtain premises, appoint judges, and set up a registry. Both the regulations and the treaty will come into effect when the treaty has been ratified by thirteen of the signatories, with the qualification that these signatories must include Germany, France, and the United Kingdom.<sup>19</sup>

### 2. *The Unitary Patent Regulations*

In essence, the EU regulation on a unitary patent will provide that, with respect to patents prosecuted through the European Patent Office, in addition to the possibility of designating individual countries for protection, it will be possible for the applicant to designate a unitary EU patent covering all of the 26 participating countries.<sup>20</sup> If the unitary patent is elected, maintenance fees will be payable annually to the European Patent Office, which will then pass on a portion of the fees collected to the national patent offices. The level at which these fees are to be set is currently under discussion.

The regulation on translation provides that the language requirements will eventually be the same as those of the European Patent Office; namely, that claims of the granted patent defining its scope of protection are to be published in English, French and German, that the descriptive part of the patent will be published in only one of these languages, depending on the language in which the application giving rise to the patent was filed, and that there will be a possible subsidy for applicants from EU member countries for which English, French or German are not a national language.<sup>21</sup> For a transitional period, of a maximum 12 years, those European patents that are to have unitary effect and are granted in French or German will need to be translated into English. Those granted in English will need to be translated to another official language of the EU. These translations will be required until high-quality machine translation becomes available to ensure the accessibility of patent information.

### 3. *The Agreement on a Unified Patent Court*

The final instrument of the patent package is the litigation treaty, which was signed on February 19, 2013 by all EU states except Spain and Poland, and which will ultimately become the only means for enforcing any patent granted by the EPO in a participating

18. See Council Agreement (EC) No. 2013/3 on a Unified Patent Court, 2013 O.J. (C 175) 1.

19. As of September 2015, Austria, Belgium, Denmark, France, Luxembourg, Malta, Portugal, and Sweden had completed ratification. Ian Wood, *Principal Developments Since Signature Of The Unitary Patent Court Agreement*, CHARLES RUSSELL SPEECHLYS (Nov. 24, 2015), <http://www.charlesrussellspeechlys.com/insights/latest-insights/intellectual-property-new/principal-developments-since-signature-of-the-unitary-patent-court-agreement/>.

20. See Commission Regulation 1257/2012, O.J. (L 361) 1.

21. See Council Regulation (EC) No. 1260/2012, O.J. (L 361) 89.

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country.<sup>22</sup> There will, however, be a transition period during which applicants will be able to specify that for any patent granted by the EPO that is not a unitary patent, they do not wish the new scheme to apply to the patent in question, and that litigation on that patent continues to be before the national courts.

The new court system will have jurisdiction over European patents having unitary effect, supplementary protection certificates, any other European patent that has not yet lapsed when the treaty comes into effect, and any European patent application that is pending when the treaty comes into effect.<sup>23</sup> But for the first seven years of operation, which term may be extended to fourteen years, the owners of the rights in question other than unitary patents will still be able to opt out of the new court system and have litigation relating to that right tried before a national court having jurisdiction over it.

Under the new patent court structure, there will be a court of first instance and a patent appeals court.<sup>24</sup> Although the appeals court will sit in Luxembourg, it will not be part of the CJEU. The court of first instance will have national/regional divisions and, following the June 29, 2012 decision, a three-branch central division.<sup>25</sup> The country/regional divisions will be created on the basis of countries, or groups of countries, handling at least fifty patent infringement cases per year,<sup>26</sup> and will have jurisdiction over patent infringement as well as the ability to decide counterclaims in infringement actions challenging the validity of the patents in suit. Other challenges to validity will have to be brought before the central division.<sup>27</sup> Country/regional divisions will have the option of transferring any issues relating to validity to the central division. This has proved to be a controversial provision in that it could result in a case's infringement issues being tried in a regional or national division while the validity of the patent in question is being litigated in the central division. This arrangement is consistent with the present situation in Germany, where infringement is handled by a district court and validity by the federal patent court, which causes concern in other countries. But German judges have indicated that they are willing to deal with validity issues in appropriate cases and, thus, the hope is that this will be less of an issue than at one time seemed likely.

As noted above, the central division will have three branches. The official seat and location of the registry will be Paris and the first president of the court will be French. But in light of the need for specialized expertise in some areas of technology, two branches will be created: one in London dealing with chemistry, including pharmaceuticals, and the other in Munich to deal with actions relating to mechanical engineering.

The law to be applied by the Court, including the definitions of what is and is not an infringement, is set out in Articles 24 through 30 of the Treaty, and basically follows what was originally proposed for the Community Patent Convention in 1975, including provisions relating to both direct and contributory infringement, but it also includes

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22. See Council Agreement (EC) No. 2013/3, 2013 O.J. (C 175) 1.

23. *Id.* art. 3.

24. *Id.* art. 6, § 1.

25. *Id.* art. 7.

26. There are proposals for regional divisions: one for Sweden, Scandinavian, and Baltic countries, possibly with its seat in Malmo; one for Bulgaria, Cyprus, Greece, Romania, and Slovenia; and possibly one for Central European countries, with its seat in Bratislava. An agreement as to the Baltic/Scandinavian division for Sweden, Estonia, Latvia, and Lithuania was reached in May 2014. Proceedings will be in English. Denmark, however, will have its own national division and its proceedings will be in Danish.

27. Council Agreement (EC) No. 2013/3 on a Unified Patent Court, art. 33, § 4, 2013 O.J. (C 175) 1.

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references to the exceptions set out in EU regulations and directives adopted since then, such as those for testing of veterinary and human medical products and farmers' rights provisions.<sup>28</sup> The normal EU rule on the free flow of goods will apply to any product placed on the market within the EU by or with the consent of the patent owner, "unless there are legitimate grounds for the patent proprietor to oppose further commercialization of the product."<sup>29</sup>

Under Article thirty-three of the Treaty, infringement actions will be able to be brought in the local or regional division where the infringement occurs or in the local or regional division where the defendant resides. If the defendant does not reside in a country party to the agreement, an action for infringement will be able to be brought in the central division as an alternative to the national or regional division where infringement occurs. Furthermore if a revocation action is already pending before the central division, the patent holder will have the possibility to bring an infringement action to the central division.

The Court will have the power to grant a permanent injunction prohibiting a continuation of infringement not only against a direct infringer but also against "an intermediary whose services are being used by a third party to infringe a patent."<sup>30</sup> Breach of an injunction may result in "a recurring penalty payment payable to the Court."<sup>31</sup> The powers of the Court also include the possibility of making orders not only with respect to infringing products, but also regarding "materials and implements principally used in the creation or manufacture of those products." Other possible orders include recalling products from the channels of commerce.<sup>32</sup>

Damages may be awarded against an "infringer who knowingly or with reasonable grounds to know, engaged in a patent infringing activity."<sup>33</sup> The Agreement states three principles with respect to damages: (1) the injured party should, to the extent possible, be placed in the position it would have been in had no infringement taken place; (2) the infringer should not benefit from the infringement; and (3) damages shall not be punitive.<sup>34</sup>

Article sixty-nine provides that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless special circumstances apply or equity requires otherwise.<sup>35</sup>

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28. See Directive 2001/82, of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, 2001 O.J. (L 311) 1; Directive 2001/83, of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, 2001 O.J. (L 311) 67; Directive 2009/24, of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, 2009 O.J. (L 111) 16; Directive 98/44, of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnical inventions, 1998 O.J. (L 213) 13; Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights, 1994 O.J. (L 227) 1.

29. Council Agreement (EC) No. 2013/3 on a Unified Patent Court, art. 29, 2013 O.J. (C 175) 1.

30. *Id.* art. 63, § 1.

31. *Id.* art. 63, § 2.

32. *Id.* art. 64, § 1.

33. *Id.* art. 68, § 1.

34. *Id.* art. 68, § 2.

35. *Id.* art. 69, §§ 1-2.

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C. MUNICH DISTRICT COURT HOLDS THAT A MANAGING DIRECTOR MAY DEMAND  
RELEASE FROM PERSONAL LIABILITY IF A COMPANY IS THREATENED BY  
BANKRUPTCY

A managing director of a company with limited liability (*Gesellschaft mit beschränkter Haftung*, commonly abbreviated as “GmbH”) may be held personally liable if he fails to file for bankruptcy on behalf of the GmbH in a timely manner. This is because one of the managing director’s fundamental duties is to oversee the company’s financials to such an extent that he can, at any given time, determine whether his company is in fact bankrupt. A managing director may not delegate the duty of filing for bankruptcy. A company is considered to be bankrupt in Germany if it either cannot pay its debts as they become due<sup>36</sup> or if it is over-indebted.<sup>37</sup> German bankruptcy law also permits a debtor to file an application for a “threatened bankruptcy.”<sup>38</sup> Germany’s legislature reasoned that the earlier an entity seeks bankruptcy protection, the higher the likelihood that the company’s reorganization will be successful and, as a result, the greater the chance that the company will survive.

In a case decided by a Munich District Court on May 22, 2015, a managing director sought to avoid potential personal liability by demanding a release from liability because the company at issue was on the verge of bankruptcy, i.e., was threatened by bankruptcy.<sup>39</sup> Based on a 2013 Munich Court of Appeals decision holding that a managing director may not file a threatened bankruptcy application on behalf of a GmbH without prior shareholder approval,<sup>40</sup> the shareholder in the 2015 case argued that the managing director had no right to file a threatened bankruptcy application without first obtaining the shareholder’s approval. Such a filing, the shareholder continued, would negatively impact—if not jeopardize—the GmbH’s operations. In fact, as stated in the 2013 holding, a managing director is subject to personal liability if he files a threatened bankruptcy application without obtaining prior shareholder approval.

Instead of seeking to file a threatened bankruptcy application, as was the case in the 2013 decision, the managing director in the 2015 decision sought a release from personal liability from the shareholder. The shareholder denied this request. The managing director decided to submit his resignation as a corporate officer on December 17, 2013, because the GmbH’s bankruptcy was imminent and he did not receive the requested release to avoid potential personal liability. Only ten days later, the managing director’s employment relationship with the GmbH was terminated for cause, effective immediately.

The managing director in the instant case filed an action against the GmbH arguing that it was not permitted to terminate the employment relationship for cause. Instead, the managing director argued that the termination is not effective until June 30, 2014,

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36. Insolvenzordnung [InsO] [Insolvency Act], Oct. 5, 1994, BGBl I at 2866, § 17, last amended by Gesetz [G], Nov. 20, 2015, BGBl I at 2010, art. 16 (Ger.).

37. *Id.* § 19.

38. *Id.* § 18.

39. Landgericht München [LG München] [Munich District Court I] May 22, 2015, 14 HK O 867/14, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 954, 2015 (Ger.).

40. Oberlandesgericht München [OLG München] [Munich Higher Regional Court] Mar. 21 2013, 23 U 3344/12, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1121, 2013 (Ger.).

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because, pursuant to his service agreement, the GmbH was required to observe a six-month termination notice period (and pay him his salary for these six months).

The court agreed with the managing director. The GmbH was threatened by bankruptcy, causing the managing director to seek a release from liability. The question posed to the court was whether the managing director was justified in asking for such a release from personal liability, thereby transferring the risk of liability from the managing director to the shareholder. The court weighed the interests of the shareholder against those of the managing director, noting that a shareholder's liability is limited only to its paid-in capital upon the filing of a GmbH's bankruptcy, while the managing director is subject to unlimited personal liability if he fails to file for bankruptcy in time. The court also noted a number of times that a GmbH's threatened bankruptcy status could quickly turn into an actual bankruptcy. Regardless, if the managing director does not receive the requested release, the potential personal liability remains with him. As a result, the court concluded that if a company is threatened by bankruptcy, the shareholder must either release the managing director from liability (if so requested) or permit the managing director to file a threatened bankruptcy application. In the instant case, neither occurred, meaning the termination for cause was invalid and the managing director had a right to his salary through the ordinary termination notice period, i.e., through June 30, 2014.

Though this case provides helpful guidance to managing directors as to when they may seek a release from liability when a company is facing potential bankruptcy, an explanation of the basis for the court's decision as to why the managing director in this case sought the release from the shareholder, and not from the company (the party with whom the managing director has a legal relationship), would have been helpful. Regardless, managing directors, whether they reside in Germany or the United States, always need to keep a keen eye on the company's financials to be able to gauge whether they may be exposed to potential personal liability.

D. REFORM OF REGULATED PROFESSIONS AND CHANGES TO SOCIAL SECURITY IN  
FRANCE

1. *Reform of the Regulated Legal Professions*

After a long and tempestuous parliamentary process characterized by numerous modifications and public protests alongside the debate, French economic reform was promulgated on August 6, 2015,<sup>41</sup> through the so-called "Macron Law."<sup>42</sup> Following recommendations from the Council of the EU,<sup>43</sup> the Macron Law aims to boost French competitiveness and is structured around three key points: removing restrictions on the access to and exercise of professional services, increasing investment, and creating jobs.

41. Loi 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques [Law 2015-990 of Aug. 6, 2015 for Growth, Activity, and Equal Economic Opportunities], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 6, 2015, p. 13537 (Fr.).

42. The economic law was named the "Macron Law" after being introduced to the French Parliament by French Economy Minister Emmanuel Macron. Cole Stangler, *Macron Law: French Labor Reforms Force Vote Of Confidence In Parliament*, INT'L BUS. TIMES (Feb. 20, 2015, 11:51AM), <http://www.ibtimes.com/macron-law-french-labor-reforms-force-vote-confidence-parliament-1822080>.

43. *Council Recommendation on France's 2013 national reform programme and delivering a Council opinion on France's stability programme for 2012-2017*, at 8, COM (2013) 360 final (May 29, 2013).

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The regulation of legal professions is one area of the French economy reformed by the new law. In particular, tariffs were completely reformed and will take into account “relevant cost of services and a fair compensation based on objective criteria”<sup>44</sup> in order to introduce competition between law firms.<sup>45</sup> New rules to set up law firms are also introduced, but are restricted to specific zones where the creation of law firms is necessary in order to improve proximity or services.

The most economically significant change comes from the development of legal and judicial activities as a result of the opening up of share capital between law firms.<sup>46</sup> Thus, attorneys (*avocats*), including foreign attorneys allowed to practice in France, civil law notaries, legal auctioneers, bailiffs, judicial representatives (*mandataires judiciaires*), patent lawyers (*conseils en propriété industrielle*), and certified accountants (*experts comptables*) can now associate together in a single company. The clearly stated objective of the French Government is to provide clients an overall legal service in one company in line with other European countries (such as Germany, Spain, Italy, and the United Kingdom) and to develop competitiveness of French companies at the European and international level. French law firms therefore should be more dynamic in order to answer the demand of internationalization of services and should ideally create more jobs.

The economic law requires that all shared capital and voting rights be owned directly or indirectly by professionals exercising one of the legal professions in the company or by partnership legally established in a European member state or a State that is part of the European Economic Space Accord or the Swiss Confederation. The latter requirement does not necessarily exclude foreign law firms from inter-professional law companies, first because French certified accountant firms may already be controlled by natural or legal persons domiciled abroad, including outside the EU,<sup>47</sup> and second because some European law firms (such as Austrian, Estonian, Finnish, Hungarian, or Polish firms) may also be totally owned by foreign pension funds or foreign legal companies. The development of inter-professional law companies partly responds to the expectations of the Transatlantic Trade and Investment Partnership (TTIP)<sup>48</sup> currently under negotiations, which intends to create a free trade area between the United States and the European Union and places legal activities on the same level as commercial services. However, it also leaves French professionals with uncertainty with regard to ethical problems and conflicts of interest issues between different legal professions and a loss of independence for each of them.

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44. Law 2015-990, art. 50.

45. The law also introduced the possibility of an equalization system and potential discounts.

46. Law 2015-990, art. 65.

47. Loi 2014-443 du 30 avril 2014 modifiant l'ordonnance n° 45-2138 du 19 septembre 1945 portant institution de l'ordre des experts-comptables et réglementant le titre et la profession d'expert-comptable [Ordonnance No. 2014-443 of 30 April 2014 amending Order No. 45-2138 of 19 September 1945 on the Institution of the Order of Accountants and Regulating the Title and the Accounting Profession], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 30, 2014, p. 7552 (Fr.).

48. See European Union (EU) Proposal, Transatlantic Trade and Investment Partnership (TTIP), U.S.-E.U., July 31, 2015, [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153669.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf).

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2. *Social Security Contribution and Non-Residents*

On February 26, 2015 in *Ministre de l'Economie et des Finances v. Gerard de Ruyter*, the CJEU condemned France for cumulative application of social security contributions, which is prohibited by Regulation No 1408/71.<sup>49</sup> The Court ruled that patrimonial sources of income of French residents working in another EU Member State cannot be subject to French social security contributions (namely, the Contribution Sociale Généralisée [CSG] or General Social Contribution and the Contribution pour le Remboursement de la Dette Sociale [CRDS], or Social Debt Repayment Contribution). In *de Ruyter*, the taxpayer was domiciled in France but was working in The Netherlands and subject to the Dutch, not the French, social security system. The decision was confirmed by the Conseil d'Etat, the highest administrative jurisdiction of France, on July 27, 2015.<sup>50</sup>

Following both decisions and according to the press release issued by the French Finance Ministry on October 20, 2015, non-residents of France who have paid French social contributions on certain types of French income and capital gains since January 2013 are now able to reclaim the payment of those taxes from the French tax office. Claims must be completed no later than December 31 of the second year following the tax payment. Claims are limited to persons affiliated to a social security system in another EU Member State or a State that is part of the European Economic Space Accord, or the Swiss Confederation. Other persons affiliated to a non-European social security system are not eligible for the possibility of reclamation. A tax law amendment, however, has been suggested by French deputies to extend claims to all non-residents of France who are in the same situation in order to prevent a tax discrimination based on the payment location of the social security contributions, whether inside or outside of the EU, and that could be further condemned by the CJEU.<sup>51</sup> The issue is currently under discussion in the French Parliament.

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49. Case C-623/13, *Ministre de l'Économie et des Finances v. Gérard de Ruyter*, 2015 E.C.L.I. 123. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=162537&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=270685>.

50. Conseil d'État [CE], July 27, 2015, No. 334551 Rec. Lebon 10ème / 9ème.

51. Assemblée Nationale [National Assembly of France], Proposition de loi 3049 du 15 Septembre 2015 visant à tirer les conséquences de l'arrêt «Ruyter» du 27 Juillet du Conseil D'Etat et à abroger la soumission à la contribution sociale généralisée et à la contribution pour le remboursement de la dette sociale des revenus fonciers et des plus-values de source française des Français établis hors de France [Proposed Law 3049 of Sept. 15 2015 to draw the consequences of the "Ruyter" judgment of July 27, 2015 the Council of State to revoke the submission to the general social contribution and the contribution for the reimbursement of the social debt of land revenue and more - gains to source French of French established outside of France], Sept. 15, 2015, No. 3049.

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E. NEW MEASURES IN FRANCE ON EMPLOYMENT LAW AFFECTING FOREIGN COMPANIES

Two key laws were voted in 2015 in France: (1) the law for growth, activity and equal economic opportunities, dated August 6, 2015 (the “Macron Law”)<sup>52</sup> and (2) the law on social dialogue and employment, dated August 17, 2015 (the “Rebsamen Law”).<sup>53</sup>

The Macron Law contains over 200 articles touching on a wide range of issues. All of its provisions will have an impact on companies doing business in France, including issues related to the posting of workers. The Rebsamen Law contains provisions aimed at encouraging foreign investment and creating employment in France. The law also lightens the requirements related to employee representatives in French companies, thus helping foreign companies with legal entities in France.

1. *Employment-Related Provisions of the Macron Law for Foreign Companies*

a. Employees Posted to France

Some of the most important provisions for foreign companies doing business in France are those regarding posted employees in France, which has been an important political and economic subject over the past year. In this respect, the Macron Law provides a variety of new obligations and liabilities for posting of foreign employees in France.

In 2014, to further reinforce the EU directive related to “social dumping”, the French legislature passed legislation that made mandatory the filing of certain documents with the French Labor administration when seconding employees to France.<sup>54</sup> The Macron Law goes several steps further.<sup>55</sup>

First, users of posted workers must now file documents, in French, with the French Labor Inspector in order to ensure that all the mandatory legal requirements for a posting have been met. Failure to do so is sanctioned by a \_ 2,000 fine per employee whose documents were not properly filed, for a maximum total fine which has been increased from \_ 10,000 to \_ 500,000.

In addition, the labor administration now has the power to suspend the posting of an employee working in France if the “user” entity has failed to comply with key mandatory rules, such as minimum wage, working hours or even for having failed to provide the labor inspector with documents translated in French.

These changes illustrate France’s focus on ensuring that companies comply with applicable legislation when posting foreign employees in France, and failure to do so may now expose such companies to considerable financial as well as business risks.

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52. See Loi 2015-990.

53. Loi 2015-994 du 17 août 2015 relative au dialogue social et à l’emploi [Law 2015-994 of Aug. 17, 2015 on Social Dialogue and Employment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 18, 2015, p. 14346 (Fr.).

54. Loi 2014-790 du 10 juillet 2014 visant à lutter contre la concurrence sociale déloyale [Law 2014-790 of July 10, 2014 to Fight Against Unfair Social Competition], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 11, 2014, p. 11496 (Fr.).

55. See Loi 2015-990 at arts. 279, 280.

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b. Measures Affecting Labor Court Proceedings

Several provisions in the Macron law aim at enhancing alternative dispute resolution proceedings and reducing the time required to obtain a court decision. The provisions include the possibility for labor courts to fast-track certain litigation and render decisions within three months.<sup>56</sup>

In addition, parties may now agree in the employment contract to arbitrate disputes, particularly under the condition that both parties be assisted by a lawyer when signing the arbitration agreement. Even if such an arbitration clause is not enforceable for all employees, foreign employers should consider the possibility of including this provision in employment contracts of key managers working in France in order to avoid potential costly and lengthy litigation.

2. *The Main Provisions of the Rebsamen Law for Foreign Companies*

a. Simplified Obligations with the Works Council

Instead of the seventeen mandatory meetings with the Works Council that was previously required on a variety of subjects, the employer now must only meet in the information and consultation process three times a year. Moreover, only three subjects need be addressed: 1) the strategic orientation of the company, 2) the financial and economic situation of the company, and 3) the company's human resources policies and the working and employment conditions. The employer is also required to create a database with all of this information.<sup>57</sup>

In addition, instead of having to collectively bargain twelve different subjects with the unions, they are now regrouped into three negotiations.

b. Merging Employee Representative Bodies

Before the Rebsamen law, companies with under 200 employees could opt to merge the Works Council and the personal delegates ("délégués du personnel"). The Rebsamen law provides greater relief for employers, as they may now opt to merge into a single representative body of not only the personal delegates and the Works Council, but also the Health and Safety Committee. Employers who employ less than 300 employees can proceed with this merger after having informed and consulted with the relevant representative bodies. Employers with more than 300 employees may do so, but only if collectively bargained with a representative union.<sup>58</sup>

F. TAX AND TERRORISM LAWS IN ITALY

In 2015, the Italian Parliament passed several new laws and also ratified several international agreements with foreign countries, including Canada, Mexico, Montenegro,

56. Loi 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques [Law 2015-990 of August 6, 2015 for growth, activity and equal economic opportunities], art. 258, JOURNAL OFFICIEL DE LA RÉPUBLIQUE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2015, p. 13547.

57. Loi 2015-994 du 17 août 2015 relative au dialogue social et à l'emploi [Law 2015-994 pm social dialogue and employment], arts. 10, 18, JOURNAL OFFICIEL DE LA RÉPUBLIQUE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 18, 2015, p. 14346.

58. *Id.* art 13.

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Turkey, Israel, Kazakhstan, and the United States. The most notable new laws are the law against terrorism and the ratification of the F.A.T.C.A. Agreement with the United States to improve international fiscal compliance.

1. *Law Against Terrorism*

The law against terrorism was initially passed as a temporary provision with law n. 7 of February 18, 2015 (published in the *Gazzetta Ufficiale* n. 41 of February 19, 2015) and later converted into permanent law by law n. 43 of April 17, 2015 (published in the *Gazzetta Ufficiale* n. 91 of April 20, 2015). The law was a response to the adoption of United Nations Security Council Resolution No. 2178 on September 24, 2014.<sup>59</sup> The Resolution called “all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children.”<sup>60</sup> Additionally, the Resolution required all Member States to “ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice,” and that all Member States ensure that their respective domestic laws establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize the offenders according to the seriousness of the offense.<sup>61</sup> The new law was originally passed by the Italian Parliament due to the urgency and necessity to create new methods to facilitate the coordination of criminal proceedings, to prevent terrorism in cooperation with international armed forces and police, and to promote peace.<sup>62</sup> Under the new law, those who introduce into the Italian territory or use any explosive materials as detailed in regulation (CE) n. 98 of 2013 of the European Parliament and the European Council of January 15, 2013, if convicted, may be punished by imprisonment of up to eighteen months and fined up to 247 euros.<sup>63</sup> Similarly, those who fail to disclose the theft of explosive materials, if convicted, may be punished by imprisonment of up to one year and fined up to 371 euros, and those who fail to report suspect transactions related to explosive materials may face a fine between 1,000 and 5,000 euros.<sup>64</sup> Additionally, the new law authorized the allocation of funds and the participation of the Italian armed forces in several international missions to be completed by September 30, 2015, which include the Multinational Specialized Unit (MSU), European Union Rule of Law Mission in Kosovo (EULEX Kosovo), Security Force Training Plan in Kosovo, the European mission in Bosnia-Herzegovina, called EUFOR ALTHEA, the United Nations’ mission called United Nations Peacekeeping Force in Cyprus (UNFICYP), the mission in the Mediterranean called Active Endeavour, and NATO’s mission called Baltic Air Policing.<sup>65</sup>

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59. D.L. 18 febbraio 2015, n. 7, G.U. 19 de febbraio 2015 n. 41 (It.).

60. S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

61. *Id.*

62. D.L. 18 de febbraio 2015, n. 7, *supra*, note 59.

63. *Id.*

64. *Id.*

65. *Id.*

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2. *Foreign Account Tax Compliance Act*

On February 8, 2012, France, Germany, Italy, Spain, and the United Kingdom signed an agreement with the United States on Foreign Account Tax Compliance implementation.<sup>66</sup> On June 18, 2015, the Italian Parliament ratified and executed the Foreign Account Tax Compliance Agreement (F.A.T.C.A.) with the United States to improve international fiscal compliance. Law n. 95, published in the *Gazzetta Ufficiale* n.155 on July 7 2015, became effective on July 8, 2015.<sup>67</sup> Under the new law, all financial institutions in Italy (including banks and the Italian Postal Service), must request from all American customers who want to open a financial account (any equity or debt interest in the financial institution)<sup>68</sup> at their institution the following information: social security number, first and last name, complete address, date of birth and proof of the American citizenship. For legal entities, the required information includes the business's legal name and principal place of business. The law also applies to non-financial institutions controlled by American citizens or citizens residing in the United States. The financial institutions, in compliance with section 1471 of the U.S. Internal Revenue Code, must identify all U.S. Reportable Accounts<sup>69</sup> and report the required information annually to the Italian Competent Authority (Ministry of Economy and Finance). The Italian Ministry of Economy and Finance will then report the information to the United States' Secretary of the Treasury. Under the Agreement, for reporting with respect to 2017 and subsequent years, Italy promised to establish by January 1, 2017 rules requiring Italian Financial Institutions to obtain the U.S. taxpayer identification number of each U.S. person. In exchange, and also for reporting with respect to 2017 and subsequent years, the United States promised to establish by January 1, 2017 rules requiring U.S. Financial Institutions to obtain and report the Italian taxpayer identification number of each account holder of an Italian Reportable Account. Under the agreement, the Parties must implement the necessary requirements to prevent financial institutions from adopting practices intended to circumvent the reporting required under the Agreement. The United States have F.A.T.C.A. agreements with most EU Member States, but not all.

G. EU DUBLIN REGULATION QUESTIONED AS REFUGEE CRISIS PERSISTS

Perhaps one of the casualties of the refugee crisis in Europe will be the agreement of the EU Member States regarding the enforcement of a common EU border. The Dublin Regulation<sup>70</sup> goes back to the Dublin Convention,<sup>71</sup> signed June 15, 1990 (the UK signed

66. U.S. Dept. of Treas. Press Release, Joint Statement From the United States, France, Germany, Italy, Spain and The United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (Feb. 8, 2012).

67. Legge 18 giugno 2015, n. 95, in G.U. 7 luglio 2015 n. 155 (It.).

68. Agreement between the Government of the United States of America and the Government of the Republic of Italy to Improve International Tax Compliance and to Implement FATCA, U.S.-Italy, Jan. 10, 2014, U.S. Dept. of Treas.

69. *Id.*

70. Council Regulation (EU) 604/2013 of June 26, 2013, Establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin Regulation recast), 2013 O.J. (L 180).

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in July 1992). The Convention was ratified in 1997.<sup>72</sup> Its driving principle is that a refugee entering into a safe EU state must apply for asylum in that state.<sup>73</sup> If the refugee proceeds to a second safe EU state, that second state must repatriate the refugee to the first safe EU state into which he entered, because his application for asylum may only be filed specifically in that state.<sup>74</sup> This rule has some notable exceptions.<sup>75</sup>

Originally, the logic of the Dublin Regulation seemed obvious. It was designed to prevent refugees from applying for asylum in a number of EU states, with the hope that at least one would grant the application. Apart from avoiding multiple filings, refugees were also to be stopped from forum shopping for a EU state with more favorable legal treatment.

In the aftermath of hundreds of thousands, if not millions, of Syrian, Afghani, Eritrean, and other refugees and/or economic migrants arriving at the EU's borders and—in most cases—bypassing the same, the states in the interior of the EU, who would otherwise have no authority to process asylum applications under the Dublin Regulation, decided to suspend it. On August 25, 2015, Germany announced (via Twitter) that it was no longer *de facto* applying the Dublin Regulation to the processing of asylum applications filed by individuals asserting a Syrian origin.<sup>76</sup> By October 21, 2015, however, Germany was back to applying the Dublin Regulation and was sending Syrian nationals back to the EU countries of first entry, with Greece being a notable exception.<sup>77</sup>

Discussions in Europe have begun regarding what will follow the Dublin Regulation. Taking hints from Dr. Merkel, the EU has begun to debate a quota system based on vague socio-economic factors (e.g., number of inhabitants of the host state, economic and unemployment situation in the host state, and number of refugees previously accepted by the host state) so that refugees and/or economic migrants can be distributed more evenly. The level of cooperation with respect to this proposal has been varied, with states such as France and Great Britain indicating that they will not participate. At the EU level, the consensus has been that the Dublin Regulation would not be abandoned entirely, but the quota system would apply during a “crisis”.<sup>78</sup>

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71. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01) [Dublin Convention], June 15, 1990, 1997 O.J. (C 254).

72. Prior to the Dublin Convention, asylum applications were governed in many EU Member States by the Schengen Agreement and readmission agreements between certain Member States. *The Dublin Convention on asylum applications: What it means and how it's supposed to work*, REFUGEE COUNCIL (Aug. 2002), [https://www.refugeecouncil.org.uk/assets/0001/5851/dublin\\_aug2002.pdf](https://www.refugeecouncil.org.uk/assets/0001/5851/dublin_aug2002.pdf).

73. Dublin Convention, arts. 3(2)-(3).

74. Article 3(4) provides a certain “opt-out” that can be agreed to in these cases, and Article 9 states that Member States can also review applications at the request of another Member State on humanitarian grounds. *Id.* art. 3(4).

75. Articles 4-8 (e.g., close family member already has refugee status in another Member State, an asylum applicant has a valid residency permit in another Member State). *Id.* art. 4-8.

76. @BAMF\_Dialog, TWITTER (Aug. 25, 2015, 4:30 AM), [https://twitter.com/BAMF\\_Dialog/status/636138495468285952](https://twitter.com/BAMF_Dialog/status/636138495468285952).

77. *Deutschland wendet Dublin-Verfahren wieder für Syrer an* [Germany turns Dublin procedure again for Syrians], *HANDELSBLATT* (Nov. 10, 2015, 16:31), <http://www.handelsblatt.com/politik/deutschland/fluechtlinge-deutschland-wendet-dublin-verfahren-wieder-fuer-syrer-an/12568464.html>.

78. Ian Traynor, *Germany to push for compulsory EU quotas to tackle refugee crisis*, *GUARDIAN* (Oct. 23, 2015), <http://www.theguardian.com/world/2015/oct/23/refugee-crisis-germany-push-compulsory-eu-quotas>.

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Beyond the European-wide framework, both Sweden and Germany have taken legislative action in the second half of 2015 in light of the increased number of incoming refugees. Sweden took the approach of introducing temporary residence permits for refugees rather than permanent ones. Further, local authorities in Sweden will be obligated to accept a share of refugees, but would receive grant money to help the local governments cope with the influx. On October 24, 2015, Germany's new Asylum Procedures Acceleration Act (*Asylverfahrensbeschleunigungsgesetz*, or "*AsylG*") entered into force.<sup>79</sup> The new regulation modified certain existing laws and provided that, *inter alia*, asylum-seekers should be prepared to receive in-kind and not cash payments,<sup>80</sup> and Albania, Kosovo and Montenegro<sup>81</sup> were added to the list of "safe countries of origin" (*sicherer Herkunftsstaat*) – as opposed to countries of origin in a state or war. Beginning with applications filed from September 1, 2015, asylum applicants from safe countries of origin face employment bans during the processing of their applications.<sup>82</sup> Asylum applicants from non-safe countries of origin also face employment bans.

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79. *Asylverfahrensbeschleunigungsgesetz* [AsylG] [Asylum Procedures Acceleration Act], Oct. 20, 2015, BGBl. I at 1722, no. 40 (Ger.)

80. *Id.* art. 2, § 3.

81. *Id.* art. 1, § 35.

82. *Id.* art. 1, § 20.

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