



ICLG

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Copyright 2018

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A practical cross-border insight into copyright law

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General Chapter:

1	Communication to the Public: the Only Right Worth Talking About? – Will Smith & Phil Sherrell, Bird & Bird LLP	1
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Country Question and Answer Chapters:

2	Australia	MinterEllison: John Fairbairn & Emily Hawcroft	7
3	Brazil	Daniel Legal & IP Strategy: Giovanna M. Sgaria de Morais Moulin & Hannah Vitória M. Fernandes	14
4	Canada	Bereskin & Parr LLP: Jill Jarvis-Tonus	20
5	China	ZY Partners: Zhou Qiang & Deng Huiqiong	26
6	France	Weisselberg Avocat: Elise Weisselberg	32
7	Germany	HOYNG ROKH MONEGIER: Thomas H. Schmitz & Mathis Breuer	37
8	India	LexOrbis: Dheeraj Kapoor & Aprajita Nigam	42
9	Japan	Anderson Mōri & Tomotsune: Masayuki Yamanouchi & Yuri Fukui	49
10	Korea	JIPYONG: Seung Soo Choi & Seungmin Jasmine Jung	55
11	Malaysia	Seow & Associates: Jessie Tan & Renny Tan	60
12	Mexico	PEREZ CORREA & ASOCIADOS, SC: Israel Pérez Correa & Hugo H. Zapata	69
13	Nigeria	S. P. A. Ajibade & Co: John C. Onyido & Yetunde Okojie	75
14	Philippines	SyCip Salazar Hernandez & Gatmaitan: Enrique T. Manuel & Vida M. Panganiban-Alindogan	81
15	Russia	Vash Patent LLC: Aleksey Robinov	89
16	Senegal	LPS L@w: Léon Patrice Sarr & Ndèye Khady Youm	95
17	South Africa	KISCH IP: Vicky Stilwell & Zama Buthelezi	100
18	Switzerland	FRORIEP Legal SA: Frédéric Serra & Melina Haralabopoulos	107
19	Taiwan	Deep & Far Attorneys-at-Law: Yu-Li Tsai & Lu-Fa Tsai	112
20	Turkey	Güzeldere & Balkan Law Firm: Altuğ Güzeldere & Didem Ataün	118
21	Ukraine	Gorodissky & Partners (Ukraine): Nina Moshynska	128
22	United Kingdom	Bird & Bird LLP: Rebecca O’Kelly-Gillard & Phil Sherrell	135
23	USA	Arnold & Porter Kaye Scholer LLP: Roberta L. Horton & Michael Kientzle	141
24	Vietnam	BROSS & PARTNERS: Le Quang Vinh	150

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Communication to the Public: the Only Right Worth Talking About?

Bird & Bird LLP

Will Smith



Phil Sherrell



Introduction

The past 12 months have seen significant further development in European Copyright law as the European Commission and the Court of Justice of the European Union (“CJEU”) continue to grapple with the thorny issue of copyright in the online environment. Against a wider background of new content-sharing technology, ever increasing user-generated content, and a perceived lack of fair remuneration for the creative industries, the exclusive right to communicate a work to the public has taken on a pivotal role.

The ways in which content is disseminated and consumed in the online environment have changed significantly in recent years with a general move away from downloads, which engage the reproduction right as a local copy of the work is made, to streaming where users merely access the work without making any permanent copy.

This shift in consumer behaviour is reflected in the more recent decisions of the CJEU. In recent cases, including *GS Media*,¹ which we discuss below, the Court has held that merely making a work available (as many online service providers do) was capable of being an act of communication, rather than requiring an active transmission of the work. The scope of the communication to the public right appears to have been widened further by the subsequent decisions in *Filmsteper* and *Ziggo*.²

At the same time as the CJEU continues to address the issue of what amounts to a communication to the public, the European Commission is in the process of steering the draft Directive on Copyright in the Digital Single Market (the “Copyright Directive”) through the legislative process. One key objective of the Copyright Directive is to address areas where changes in technology are causing the traditional copyright framework to become less effective, such that reform is needed. Central to the proposed reform are the obligations of online services providers who store and communicate copyright works to the public. That is to say, in what circumstances should an online service which provides access to content require a licence from the rights holder?

This article will analyse the key provisions of the Copyright Directive and consider how these might interact with the recent CJEU decisions relating to communication to the public.

The “Value Gap”

In order to place the proposed reforms under the Copyright Directive in context, it is necessary first to understand the so-called “value gap”. The “value gap” is the name given by rights holders (and others) to the gap between the royalties generated for creators and

owners of copyright works and the revenue generated by websites involved in the exploitation of those copyright works. The gap is said to arise in part due to the widespread online presence of unlicensed content.

On websites which host user-uploaded content, unlicensed user uploads often compete directly with content authorised by rights holders. Generally, the host continues to generate revenue, in particular through advertising to visitors of the site, regardless of whether the content viewed is authorised or not. However, rights holders lose out because traffic to their authorised content is diluted and royalties are typically calculated on the basis of the number of times content is accessed (or streamed).

In a report published in April 2017,³ the International Federation of the Phonographic Industry quantified the “value gap” as follows: user upload video streaming services (which comprise the world’s largest on-demand music audience) were estimated to have more than 900 million users returning a revenue of US\$553 million in 2016, i.e. US\$0.61 per user; in contrast, audio subscription services had a user base of 212 million users generating licence fees of US\$3.9 billion, i.e. US\$18.39 per user.

The problem is then said to be compounded as websites which are able to offer content for free force licensed content providers to cut their own subscription fees with a knock-on effect for authors. This has led some rights holders to pull their content from subscription services altogether in protest at what they see as unfair royalty rates.⁴ Many rights holders see the protections for intermediaries under the E-Commerce Directive⁵ as giving platforms an unjustified advantage in negotiations regarding content licensing and wish to see these defences restricted.

On the other hand, platforms which provide access to content argue that without the technical advances they have introduced to distribute content cheaply and directly to consumers, whilst at the same time passing royalties on to the rights holders, the creative media industries would be in a much worse position. For example, Google announced last year that YouTube alone has generated over US\$2 billion to rights holders by licensing uploaded content through its automated rights management service, Content ID.⁶

Addressing the “value gap” is one of the aims of the Copyright Directive. One of the issues discussed in this article will be how changes to copyright law, both judicial and legislative, will affect the intermediary liability regime.

The Copyright Directive

The Copyright Directive was published in September 2016 with broad objectives to further harmonise copyright law across the EU

and to allow for wider online access to works. The explanatory memorandum highlights three important goals of the Copyright Directive:

- (i) to enhance cross-border access to copyright-protected content services;
- (ii) to facilitate new uses in the fields of research and education, and
- (iii) to clarify the role of online services in the distribution of works and other subject matter.

It is the third of these goals that we will focus on in this article.

The role of online services is clearly central to the dissemination and exploitation of content in the digital environment. This provides both opportunities for rights holders, as there are ever more innovative ways to reach and engage consumers, and also risks, as ways to access unauthorised content also continue to develop. This can be seen from the different kinds of online services which are the subject of references to national courts and the CJEU.⁷

The Explanatory Memorandum

Against this background, the Explanatory Memorandum of the Copyright Directive explains that the proposal seeks on the one hand to “clarify the role of online services”, i.e. to recast the obligations of online service providers, whilst at the same time guaranteeing “that authors and rights holders receive a fair share of the value that is generated by the use of their works”.

The Explanatory Memorandum also states that the Copyright Directive “includes new obligations on some online services”. These obligations will apply to “information society services storing and giving access to large amounts of copyright-protected content uploaded by their users”.

Of course, online service providers have been quick to remind the Commission of the hosting defence under Article 14 of the E-Commerce Directive. Quite how the reforms proposed by the Copyright Directive may fit with this protection will be discussed below.

The Recitals

Some clues to the possible erosion of the hosting defence may be found in Recital 38 of the Copyright Directive which refers explicitly to Article 14 of the E-Commerce Directive.

The first paragraph of Recital 38 states that information society service providers that store and provide access to the public to copyright protected works uploaded by their users, thereby performing an act of communication to the public, are obliged to conclude licensing agreements with rights holders unless they are exempt under Article 14 of the E-Commerce Directive. In this regard, the Recital also explains some circumstances in which this either will or will not be the case.

In contrast, the final paragraph of Recital 38 states that information society service providers storing and providing access to the public to “large amounts of” copyright protected works uploaded by their users should take appropriate and effective measures to ensure protection of works or other subject matter, such as implementing effective technologies. Recital 38 makes it clear that this obligation should apply even when the service provider is eligible for exemption from liability under the hosting defence.

The first paragraph of Recital 38 is not a controversial statement. Anyone who communicates a work to the public should be authorised to do so by the rights holder unless they benefit from an exception

(whether or not they also store the works). What will be interesting to see, is how this fits with the understanding of communication to the public under CJEU case law and whether the nature of entities which may be subject to this provision changes as the interpretation of communication to the public by the CJEU continues to evolve (as to which, see below).

The second paragraph is potentially more significant. The provision is limited to information society service providers storing or providing access to large amounts of copyright protected works. Whilst this is at present far from a precise definition, the intention is clearly for major platforms such as YouTube and Facebook to be caught. There will need to be clarity over the point at which an information society service provider becomes a big enough player, in terms of the amount of content hosted, for this provision to apply.

The Articles

The key operative provision of the Copyright Directive designed to give effect to the two goals identified above is Article 13, which has arguably been the most controversial part of the Copyright Directive. It applies to information society service providers that store and provide access to large amounts of works uploaded by their users (repeating the requirement for the amount of content to be “large”). Those providers must take measures either:

- (i) to ensure the functioning of agreements concluded with rights holders for the use of their works; or
- (ii) to prevent the availability on their services of works or other subject-matter identified by rights holders through cooperation with service providers.

At first blush this does not look particularly unusual. Use of content must be licensed (i.e. pursuant to an agreement with the rights holder) and providers must operate a notice and take down procedure (such as is already required in order to benefit from the hosting defence).

However, the devil is in the detail. Firstly, the requirement is for providers to “take measures”, this suggests a need for providers to be more proactive. Secondly, Article 13 goes on to state “[i]f those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate”. This is a clear indication that the onus is shifting towards service providers, rather than rights holders, to take the initiative in policing infringing content.

When this provision is read in conjunction with Recital 38, it seems that there has been a narrowing of the hosting defence and the imposition of a monitoring obligation. Quite how that sits with Article 15 of the E-Commerce Directive, however, is not explained. Article 1 of the Copyright Directive lists a number of Directives which are not to be affected by the Copyright Directive with the notable absence of the E-Commerce Directive from this list.

The precise final scope of Article 13 of the Copyright Directive remains unclear at present (both in terms of application and obligations); however, it seems clear that the landscape for platforms hosting content will change at least in part. Given the increasing number of online services who are considered by the CJEU to “provide access” to content, that is to communicate it to the public (as discussed below), the application of the new measures could extend well beyond the main players which are the obvious targets of the reforms.

Interpretation of the InfoSoc Directive

The harmonisation of the communication to the public right has its origin in Article 3(1) of the InfoSoc Directive⁸ which provides that:

“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works...”

The term ‘communication to the public’ was not defined by the InfoSoc Directive; however, as a measure of European Union law, it must be given a common interpretation across Member States. Therefore, any issue as to whether an allegedly infringing act actually amounts to a communication to the public is a question for the CJEU, a question which has now been asked around 20 times in relation to various different technological means of communicating copyright works, with more cases pending.

The CJEU case law establishes that the concept of a communication to the public comprises two criteria (both of which must be met): (i) an ‘act of communication’; and (ii) a ‘public’.⁹

The first key case to consider the meaning of communication to the public was *Rafael Hoteles*, which concerned the installation and use of televisions in hotel rooms. An important factor in the judgment of the Court was that the act of communication was to a ‘new public’, i.e. a different public to those to whom the original act of communication was directed. The reasoning of the Court was that absent the intervention by the hotel (by installing televisions) its customers would not have been able to view the broadcast work.¹⁰ This requirement for a new public has now taken on a key role in establishing whether a communication to the public takes place. As will be discussed below, defining a new public in relation to online communication presents particular challenges.

The other key component in establishing a communication to the public is that there must be an ‘act of communication’. Following *Svensson* and *Filmstjeler*, it is now clear that it is sufficient that the work is merely made available to the public such that they may access it (even if they do not in fact do so). This element of the decision in *Svensson* was contrary to the European Commission’s submissions who had argued that an act of communication had to be limited to a ‘transmission’ or ‘retransmission’, which would not be the case for hyperlinking to a work.

Recent Cases on the Scope of “Communication to the Public”

GS Media

The decision of the CJEU in September 2016 in *GS Media* was long awaited as it addressed one of the key unanswered questions following the decision in *Svensson*¹¹ in 2014. To recap, in *Svensson* it was held that providing a hyperlink to a work which was already freely available online with the rights holder’s consent was not a communication to the public because there was no new public. By publishing the work online without restriction, the rights holder was deemed to have communicated the work to all Internet users.

A key unanswered question was what happens in the situation where the original communication of the work was without the rights holder’s consent?

GS Media concerned photographs of Britt Dekker, a Dutch television presenter, taken during a shoot for Playboy magazine. The photographs were uploaded, without permission, to an Australian data-storage website. GS Media, which operates a website called *GeenStijl*, published an online article which contained a hyperlink to the data-storage site from which the photographs could be downloaded.

The question for the CJEU was whether the provision of the hyperlink was a communication to the public.

Before considering the CJEU’s decision, it is worth pausing to consider the opinion of the Advocate General. In his opinion, AG Wathelet stated at (paragraph 54):

“I consider that hyperlinks which lead, even directly, to protected works do not ‘make available’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works.”

This was a departure from *Svensson* and would (had it been followed) have caused many of the questions arising from that case (for example, how does one know if the original communication was authorised by the rights holder?) to fall away. Central to the Advocate General’s reasoning was the notion that the intervention of the linking party must be vital or indispensable in order to allow access to the work. If the work could be accessed regardless of the activity of the linking party, there should not be an act of communication. This approach relates the notion of the intervention being indispensable to the action of communication itself, in contrast to *Svensson* where it effectively formed part of the analysis of whether there was a new public. It is notable that, as in *Svensson*, the European Commission stated in its observations in *GS Media* that there could be no act of communication in the absence of a transmission or retransmission of the work.

The CJEU, however, took a different view.

The CJEU’s judgment focuses on other factors relating to the identification of an act of communication and notes that an “individualised assessment”, taking account of “complementary criteria” should be undertaken. Paragraph 35 of the judgment states:

“The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customer would not, in principle, be able to enjoy the broadcast work.”

That is, the intervention of the linking party had to be indispensable to the user being able to access the work. In addition, the CJEU placed weight on the knowledge of the intervening party. Based on this analysis, the CJEU held that posting a hyperlink to a work which is freely available but without the rights holder’s consent is an act of communication, provided the poster knew or should reasonably have known that the original communication was unauthorised. In circumstances where the link is posted for financial gain, such knowledge is to be presumed.

This requirement for knowledge in establishing whether or not an act of communication has occurred has been met with significant criticism. Communication to the public, like all primary acts of infringement, has hitherto been regarded as a question of strict liability i.e. an act either is or is not an act of communication, regardless of a person’s state of mind. Following *GS Media*, linking now may or may not be an act of communication, depending on the particular circumstances.

Secondly, the presumption of knowledge where the linking is for profit is now a key consideration in linking cases (despite not even having been mentioned in *Svensson*). The requirement has been viewed as vague and potentially very onerous. It is not clear what the profit making activity should apply to, i.e. whether to the link alone or to the rest of the website on which the link is displayed. If the latter view is correct (and this is the view that national courts applying *GS Media* have taken in Sweden and Germany) this would require the poster of a link on virtually any site connected to a business or containing adverts (and therefore operating for profit) to check the rights holder’s consent before linking to his content. This has arguably been the case since *Svensson*, but the burden has now definitively shifted away from the rights holder and on to the linking party.

This rebuttable presumption could clearly create a tension with the E-Commerce Directive if the communicating party could be considered an information society service provider within the protection of Article 15. Requiring an online intermediary to check in each case whether the content communicated is lawful would seem to amount to a *de facto* monitoring obligation, the imposition of which is prohibited by Article 15.

Filmspeler

The CJEU's judgment in *Filmspeler* came in April 2017, after *GS Media*.

The case concerned a multimedia player (the '*filmspeler*') upon which the defendant, Mr. Wullems, installed open source software which allowed users to play files through a user-friendly interface. Integrated into the interface were add-ons, created by third parties, some of which linked to a website on which protected works were made available to internet users without the consent of the rights holder. Activating the links through the remote control of the *filmspeler* connected the user to a stream of the content. Although the links were freely available online, they were not readily identifiable by the public and the majority of them changed frequently.

Therefore, like in *GS Media*, the online content was unauthorised, and Mr. Wullems was aware of this (indeed, he advertised the multimedia player as a way to watch online content without the consent of rights holders).

In its observations, the European Commission again argued for a narrow construction of the concept of an act of communication. The opinion of AG Campos Sánchez-Bordona states at paragraph 48:

“Moreover the Commission states that there must be some limit to the widening of the definition of ‘communication to the public’.”

In this vein, the Commission noted that the case concerned the sale of a multi-media player and not the provision of hyperlinks and that the intervention of the *filmspeler* was not crucial in order for users to access the content, nor an essential part of the process connecting the content on the website to the end user.

AG Campos Sánchez-Bordona was not persuaded by this argument and his opinion suggested that the fact that the hyperlinks on the *filmspeler* increased the range of potential users was significant in establishing a communication to the public. Accordingly, the *filmspeler* could not be considered as a mere physical facility.

In its judgment, the CJEU agreed with the Advocate General and held that the provision of the *filmspeler* was an act of communication because it enabled a direct link to the unlawful content without which the end users would find it difficult to access those works.

In both *Filmspeler* and *GS Media* it was accepted that the initial communication of the content linked to (or at least some of the content in the case of *Filmspeler*) was not authorised by the rights holder. There is perhaps a slight linguistic difficulty in applying the 'new public' requirement to cases where no communication to the public has been authorised (i.e. there was no original authorised communication by the rights holder to an 'original' public). However, following *GS Media*, any unauthorised communication is effectively deemed not to have been made to any public. Therefore, in *Filmspeler*, there was a new public because in many cases the rights holder had not authorised the initial communication. The Court did not explore the implications of the fact that certain of the *filmspeler* links resolved to authorised content, a feature which one might have expected would be material to the analysis.

Ziggo

The case of *Ziggo* concerned a request against Ziggo and another internet service provider to block access to the well-known peer-to-peer file sharing site, The Pirate Bay. The question arose as to whether there was a communication to the public in circumstances where The Pirate Bay did not host any infringing content itself but merely provided a means for its customers to access unauthorised content on the computers of other customers (i.e. peer-to-peer) (AG Szpunar described the .torrent files provided by The Pirate Bay as a "treasure map"). Importantly, whilst it is theoretically possible to find files offered on a peer-to-peer network without using a site like The Pirate Bay, in practice any search for such files would generally lead to an aggregation site such as The Pirate Bay.

The CJEU held that, although The Pirate Bay did not host content itself, by making available and managing an online sharing platform, the operators of The Pirate Bay intervene, in full knowledge of the consequences of their conduct, in order to provide access to protected works. The Pirate Bay therefore performed an essential role in the making available of the works in question and there was an "act of communication". As with *GS Media* and *Filmspeler*, the knowledge requirement was therefore of particular importance.

In considering whether there was a "new public", the CJEU noted that the communication in issue is, at the very least, to all of the platform's users. This amounted to tens of millions of users, sufficient to be considered a "public". The evidence also showed that a very large number of the torrent files on The Pirate Bay related to works published without the consent of the rights holders. There was therefore a communication to a public not originally taken into account by the rights holders and thus a "new public". The CJEU's analysis of the new public requirement also refers to the operators of The Pirate Bay being aware that the works communicated were unauthorised. It is unclear whether this means that knowledge is also a requirement for the new public analysis as well as in establishing whether there has been an act of communication.

Whilst *Filmspeler* seems to approve of the presumption of knowledge set out in *GS Media* (albeit it is not material to the decision because actual knowledge was already apparent), in *Ziggo* the analysis of knowledge instead appears to be relevant to establishing the "new public" requirement.

Analysis

The Copyright Directive appears deliberately to be broadly drafted. Unlike the evolving definition of communication to the public provided by the CJEU, it does not require the intervention by the provider to be indispensable, nor for the provider to have full knowledge of the consequences of its action. Instead, the effect is that any making available will trigger the obligations under Article 13 (provided the storage and quantity requirements are also satisfied). Of course, liability for copyright infringement where works are communicated to the public without the permission of the rights holder could still be avoided under the hosting defence, but it seems that the "obligation to monitor" cannot be.

This flows from the absence of a "new public" criterion under Article 13 of the Copyright Directive. As discussed above, if an authorised work is freely available online with the rights holder's consent, hyperlinking to this work is not a communication to the public (following *Svensson*) and it appears that linking to other copies also falls outside the right. The Article 13 protections would continue, however, regardless of any previously authorised communications.

This demonstrates that the obligations under Article 13 of Copyright Directive are additional to the existing copyright framework and are intended to apply to any making available regardless of whether such an act is in fact a communication to the public. These distinctions could be important where there is uncertainty as to whether or not the communicating party falls within the protections of the E-Commerce Directive.

At the same time as the Copyright Directive seeks to impose additional obligations on traditional “hosts” to address the perceived “value gap”, the decisions of the CJEU are also *de facto* addressing the same issue by imposing liability on a range of other online intermediaries who appear not to benefit from the E-Commerce Directive. In the cases discussed in this article, the findings in relation to the communication to the public right were conclusive in establishing liability because the protections of the E-Commerce Directive were not available (or at least were not argued).

Conclusion

Article 13 of the Copyright Directive proposes ambitious reforms to the legislative regime applicable to online platforms and it may be that the new obligations are in fact better understood as standalone requirements which are separate from the existing communication to the public right as it is ordinarily understood.

Given the overall objectives of the Copyright Directive, and the widely acknowledged problems with online infringement, including the “value gap”, it seems likely that at least some limitation of the hosting defence and the introduction of monitoring requirements is inevitable. However, the provisions which seem to contradict the E-Commerce Directive and in particular the apparent imposition of monitoring obligations on hosts of content will continue to be the subject of fierce lobbying from the major online platforms and the content industries alike.

Taken together, the CJEU’s decisions and the proposals of the Copyright Directive would seem to suggest that entities performing different roles in the content distribution chain (i.e. whether hosts or linking sites) will continue to come under increasing pressure to limit the communication of unlicensed content in the future.

Endnotes

1. C-160/15.
2. C-527/15 and C-610/15.
3. Accessed at <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2017> on 31 May 2017.
4. Perhaps the most notable example was Taylor Swift who removed her content from Spotify between 2014 and June 2017 as a boycott.
5. Directive 2001/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
6. Accessed at <https://www.blog.google/topics/public-policy/continuing-to-create-value-while/> on 4 July 2017.
7. For example, the services considered in: *Twentieth Century Fox Film corporation and Others vs Sky UK Limited and Others* [2015] EWHC 1082 (Ch) (“Popcorn Time”), *Filmspeler* (C-527/15) and *Ziggo* (C-610/15).
8. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
9. See, for example C-160/15 at paragraph 32 (GS Media).
10. C-306/05 (at paragraphs 40–41).
11. C-466/12.

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- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



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