

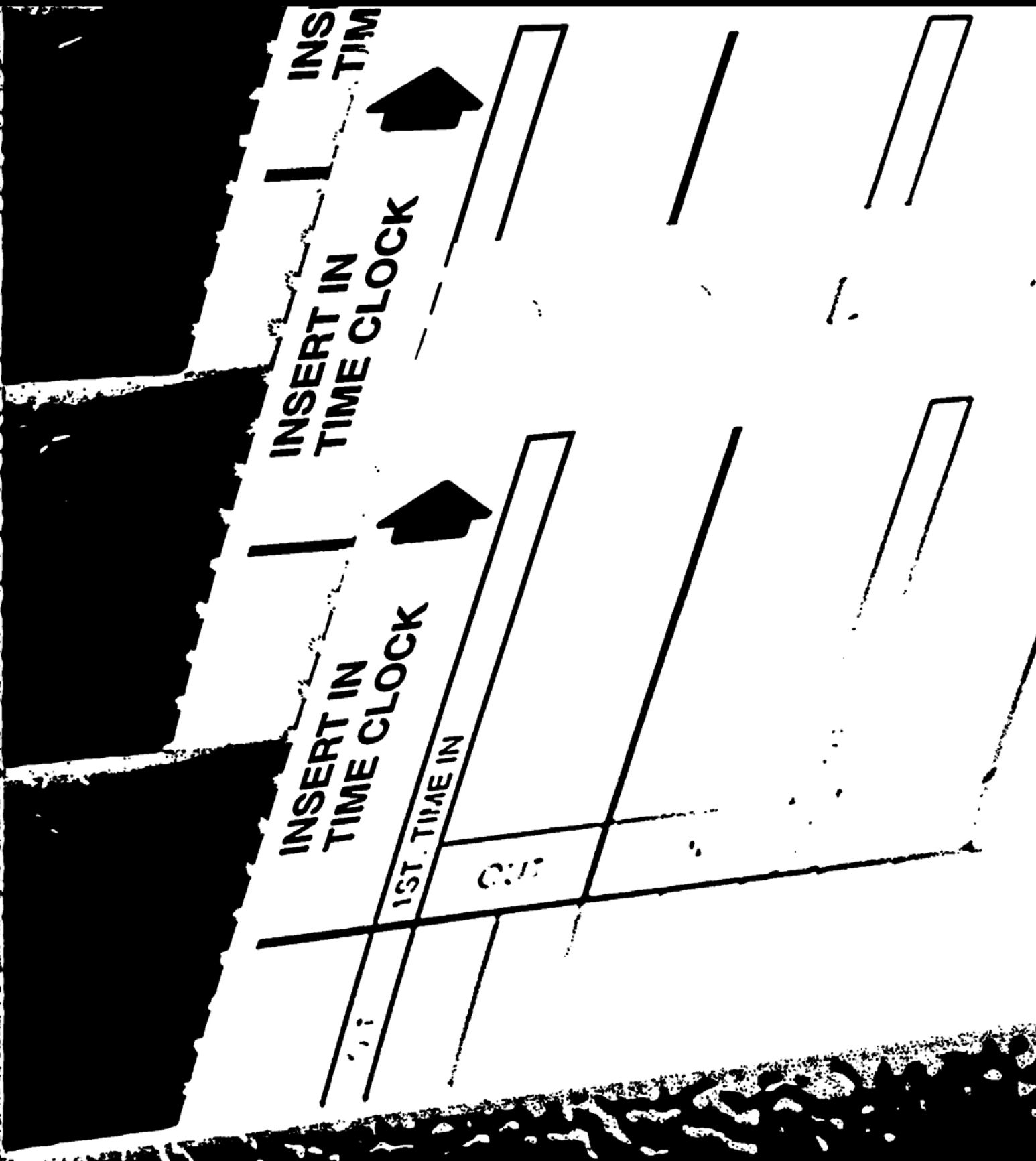


the global voice of  
the legal profession®

# Employment & Industrial Relations Law

Newsletter of the International Bar Association Legal Practice Division

**VOL 27 NO 1   APRIL 2017**



INTERNATIONAL CONVENTION CENTRE (ICC SYDNEY)

# IBA 2017 Sydney

8-13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



**T**he 2017 IBA Annual Conference will be held in Sydney, Australia's leading global city. Recognised internationally as a future-focused and innovative business centre, Sydney provides headquarters for almost 40 per cent of the top 500 Australian corporations.

The city combines natural beauty with buzzing urban villages and a city centre that's home to some of the world's most recognisable and iconic structures such as the Opera House and Sydney Harbour Bridge.

As one of the world's most multicultural and connected cities, Sydney will be an ideal location for the largest and most prestigious event for international lawyers, providing an abundance of business and networking opportunities, as well as the chance to explore one of the most beautiful cities on Earth.



## What will Sydney 2017 offer you?

- Gain up-to-date knowledge of the key developments in your area of law which you can put into practice straight away
- Access to the world's best networking and business development event for lawyers – attracting over 6,000 individuals in 2016 representing over 2,700 law firms, corporations, governments and regulators from over 130 jurisdictions
- Build invaluable international connections with leading practitioners worldwide, enabling you to win more work and referrals
- Increase your profile in the international legal world
- Hear from leading international figures, including officials from the government and multilateral institutions, general counsel and experts from across all practice areas and continents
- Acquire a greater knowledge of the role of law in society
- Be part of the debate on the future of the law



**To register:**

Visit: [www.ibanet.org/Conferences/Sydney2017.aspx](http://www.ibanet.org/Conferences/Sydney2017.aspx)

To receive details of all advertising, exhibiting and sponsorship opportunities for the IBA Annual Conference in Sydney email [andrew.webster-dunn@int-bar.org](mailto:andrew.webster-dunn@int-bar.org)

**OFFICIAL CORPORATE SUPPORTER**



## IN THIS ISSUE

<b>From the Co-Chairs</b>	<b>4</b>
<b>From the Co-Editors</b>	<b>5</b>
<b>Committee officers</b>	<b>7</b>
<b>IBA Annual Conference Sydney, 8–13 October: Our committee's sessions</b>	<b>8</b>
<b>Articles</b>	
Transgender: a new frontier in workplace diversity	10
Pensions, benefits and retirement plans: cross-border issues and conundrums	13
Security and privacy in the global workplace	16
Employment downsizing and reduction in force in India	19
Employment risks causing sleepless nights for general counsel and other in-house attorneys	22
Employment risks causing sleepless nights for general counsel and other in-house attorneys in China	25
Preventing recruitment discrimination: social media and background checks in France	29
Clothing, tattoos, piercings and the like: the new workplace in Portugal	32
The lead up to Brexit and the post-Brexit employment law landscape: the impact on multinational employers across the globe	34
Security and privacy in the workplace: Mexico	37
Preventing recruitment discrimination: social media and background checks in Brazil	39
Impact of the final peace agreement executed between the Colombian Government and FARC-EP on Colombian labour law	41
Harmonising cross-border employment practices	44
Clothing, tattoos, piercings and the like: the new workplace	47
Preventing recruitment discrimination: social media and background checks in Portugal	50
Cross-border internal investigations and their enforcement in Ukraine in the context of anti-corruption investigations in private companies	54

## Newsletter Editors

### Mercedes Balado Bevilacqua

MBB Balado Bevilacqua, Buenos Aires  
mercedes.balado@baladolaw.com.ar

### Aoife Bradley

LK Shields Solicitors, Dublin  
abradley@lkshields.ie

### Luca Massimo Failla

LABLAW Studio Legale, Milan  
l.failla@lablaw.com

### Rebecca Ford

Clyde & Co, Dubai  
rebecca.ford@clydeco.ae

## International Bar Association

Tel: +44 (0)20 7842 0090 [www.ibanet.org](http://www.ibanet.org)

© International Bar Association 2017.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

## Terms and Conditions for submission of articles

- Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
- The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
- Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at [editor@int-bar.org](mailto:editor@int-bar.org).
- The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

This newsletter is intended to provide general information regarding recent developments in employment and industrial relations law. The views expressed are not necessarily those of the International Bar Association.

## ADVERTISING

Should you wish to advertise in the next issue of this newsletter, please contact the IBA Advertising Department: [advertising@int-bar.org](mailto:advertising@int-bar.org)



Printed in the  
United Kingdom  
by Hobbs the Printers Ltd  
Totton, Hampshire  
SO40 3WX  
[www.hobbs.uk.com](http://www.hobbs.uk.com)

**Helena Tapp Barroso**

Morais Leitão, Galvão Teles, Soares da Silva & Associados, Lisbon  
htb@mlgts.pt

# Preventing recruitment discrimination: social media and background checks in Portugal

## Introduction

To say that social networking has totally changed the pattern of personal, social and professional lives in a widespread manner, and the way information travels, is captured and analysed nowadays, is clearly a cliché found in most literature.

Social media provides internet-based applications that allow for the creation and exchange of content generated by users. Job seekers, especially early career candidates and students, have been found in recent years to increasingly use social media to perform employment searches. Social media sites and tools have also proved to be a means of giving online visibility to their professional careers. It is difficult to reach definitive conclusions on the actual trend, nevertheless, surprisingly as it may seem, a recent research that surveyed 1,000 United Kingdom-based office workers revealed that only 25 per cent of job seekers used social media when looking for a job in the last year (2016), although this does not mean that candidates are moving offline; in the same period, 81 per cent used online job sites for their search.<sup>1</sup>

Trends in Europe and the United States are probably not comparable, but questions such as, 'will my Google search history impact my Google interview?' actually puts us on the track of the subject matter of this article and provides a clear indication of how concerned potential work candidates are regarding the other side of the coin, which is the use that prospective employers and recruiting agencies may be making in the hiring processes of publicly and 'not so' publicly available information on the candidates harvested from the World Wide Web.

The growing popularity of social media sites seems to have led employers to take advantage of such resources in their personnel hiring processes. A number of surveys have been performed throughout the last ten years to assess whether employers are using social media tools for

recruitment and the reasons for doing so, or choosing not to do so. For those who do use them, inquiries were sought regarding at what points of the recruitment and selection process this happened and for what specific purposes. Such surveys have been performed in Europe, but mostly in the US where from 2012 onwards (mostly 2014 onwards), specific legislation was introduced in a number of states that bars employers from requesting job candidates to hand over their social media website usernames and passwords, and restricts employers' ability to access the personal social media accounts of applicants.<sup>2</sup>

## The use of social media in hiring practices: benefits and hazards

For employers, the advantages found in using the internet to help in the recruitment processes (e-recruitment) include: (1) accelerating the recruitment process and shortening hiring times as a result of increased information flow; (2) reducing recruitment costs; (3) expanding the basis of the pool of potential employees for selection, allowing recruitment and selection to be made on a more global, and not only local, basis; (4) targeting specific groups of potential candidates or identifying potential candidates based on specific features or experience sought by the employer; and (5) increasing the information available on applicants and the ability to research and confirm information provided by candidates.

One of the concerns that organisations using social media, at some stage in their recruitment processes, have shown is connected with the possibility of putting candidates that do not have access to or do not use social media at a disadvantage; but concerns about candidates' privacy are also present, as are concerns about the possibility that this may give rise to possible discrimination based on candidates' personal characteristics.<sup>3</sup>

### Using social media for screening candidates: verification and vetting practices

The aforementioned advantages and hazards provide a good indication of the type of usage employers may be giving to social media tools in their recruitment processes, including the specific points and purposes that are being given to such tools. The legal risks connected with candidates' privacy and the risk of discriminatory recruitment (as well as the 'opposite' risk of discrimination claims being brought against employers based on personal information collected, even if, in fact, information collected did not influence the recruitment decision) are certainly related to background checking practices, and the use by employers and recruitment organisations of social media or networking sites as a tool to perform candidate screening is perhaps one of the most relevant issues to look into, considering the obvious risks to candidates' privacy and data protection.

A number of the surveys conducted over the last few years in the US and Europe that focused on assessing the practical use of social media as a screening tool found that it is a practice that could be said to be widespread on a formal and informal basis. Again, the practice in the US is probably different from that found in European countries, particularly European Union Member States, in view of the different data protection regulatory context. Nevertheless, a US study performed in 2012 showed that 37 per cent of canvassed employers used social media as a screening tool, which is a smaller portion when compared with 2009 numbers that had shown 45 per cent.<sup>4</sup>

In the context of background checking, the concepts of 'verification' and 'vetting' must be taken into account. The process of checking the accuracy of information provided by candidates and confirming that it is complete is known as verification. The candidate has a clear perception of what information or data is screened. Verification will also include checking references provided by applicants during the recruitment process.

Differently, vetting involves enquiries from third parties on the candidate's background and any other circumstances being actively performed independently by the potential employer or recruitment agencies.

### Anti-discrimination legal measures

Considering the wide variety of information that a prospective employer will usually

encounter when looking into candidates' online information, particularly that available on social networking sites, the risk that individual biases based on information found when e-surfing in pursuit of candidates' 'real profiles', conduct, environment and past is undeniable.

When performing online searches on applicants, the employer is bound to infer or come across information on some applicants that is not relevant to assess their ability to perform the job, but which may actually influence the hiring decision and lead to discrimination.

Non-discrimination principles in employment have a clear place in international law, as they have in EU legal instruments. Needless to say, the United Nations' Universal Declaration of Human Rights and various International Labour Organization (ILO) Conventions and Recommendations have encouraged countries to draft protective instruments and introduce domestic legislation guaranteeing non-discriminatory employment practices, including during the recruitment stage. At the European level, the same may be said on the basis of non-discrimination principles based on the provisions of both the European Convention on Human Rights (namely, its Article 14 that prohibits any discrimination in the exercise of the rights and freedoms enshrined in the convention), and the European Social Charter. For the EU and EU Member States, a reference to non-discrimination reaffirmation is contained in the Charter of Fundamental Rights of the EU prohibiting 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation' (Article 21). In addition, of course, due relevance must be given to local law provisions that implement both Council Directive 2000/43/EC of 29 June 2000 on the principle of equal treatment between persons irrespective of racial or ethnic origin (on discrimination, based on racial or ethnic origin) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (and its provisions against direct and indirect discrimination on the grounds of religion or belief, age, sexual orientation and disability) (the 'Directive').

As is the case of domestic legislation throughout most countries, legislation in Portugal (including the Portuguese Labour Code, which contains an entire subsection of provisions on equality and non-discrimination) comprises anti-discrimination principles and provisions at the level of conditions for access to employment, among many others, and includes issues such as selection criteria and recruitment conditions, regardless of the involved branch of activity or level of professional hierarchy for all grounds as described in the directives and in both private and public sectors. The Portuguese Constitution actually states equal rights, rules and principles, on the basis of which 'no one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation' (Article 13/2 of the Portuguese Constitution).

As far as the extent of protection is concerned, discrimination based on any grounds is forbidden and the Portuguese Labour Code explicitly refers to ancestry, age, sex, sexual orientation, gender identity, marital status, family situation, economic situation, education, origin or social conditions, genetic heritage, reduced work capacity, disability, chronic disease, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological beliefs and affiliation with trade unions, without prejudice or other discrimination grounds.

Genuine and determining occupational requirements are comprised in the exceptions to Portuguese legislation. There are also admitted exceptions in relation to disability and health/safety. Age exceptions are also found and will not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary, which is the wording of the Directive. No explicit exceptions under the heading of public security, public order, criminal offences, protection of health, and protection of the rights and freedoms of others are explicitly provided by the Portuguese Labour Code, although some national laws will implicitly include exceptions that rely on Article 2(5) of the Directive.

The Portuguese Labour Code additionally contains specific restrictions applicable to employers and recruitment entities regarding asking for information while screening candidates that contributes to preventing recruitment discrimination. For one, the employer is not allowed to request information on the candidate's private life, except for information that is strictly necessary or relevant to assess the candidate's aptitude or abilities for the job. Whenever that is the case, however, the potential employer must provide the candidate with a written document indicating the specific reasons for requesting such information.

This provision clearly permits the conclusion that, in Portugal, asking for any candidate social network login information, including passwords, or performing 'shoulder surfing' with the candidate during interviews, or at any stage in the recruitment process, is not allowed.

The same legal restriction that applies to requesting information from the candidate equally applies to obtaining supporting documents or any sort of checking on such information while screening any candidate.

A provision with explicit restrictions may also be found in the Portuguese Labour Code, prohibiting the employer from requesting information on the candidate's health or pregnancy, except when specific requirements imposed by the nature of the job role are necessary, in which case written information on such requirements must be provided by the potential employer to the candidate. In these restriction cases, nevertheless, the information on the candidate must be provided to a doctor who will merely inform the employer as to whether the candidate qualifies or not for the job in the light of such specific requirements.

### **Candidate personal data protection**

Local laws throughout EU Member States governing the processing of personal data apply not only to the employer–employee relationship but also during the recruitment process.

At present, this refers to the different local laws that implement the provisions of Directive No 95/46/EC of the Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the EU Data Protection Directive, but very shortly it will mean the provisions contained in

EU Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 – the General Data Protection Regulation – that shall apply from 25 May 2018).

Therefore, when collecting and using information about prospective employees or job applicants, including any information collected or checked as part of a recruitment or selection process in the EU, the prospective employer or recruiting entity will necessarily have to take into account the local provisions on data protection and individual personal data processing implementing the EU Data Protection Directive and currently, any such activity should already be performed taking into account the new General Data Protection Regulation requirements under a preparatory point of view. The Portuguese Labour Code actually includes a provision stating that, in all cases, the processing of candidates' personal data by the prospective employer is subject to the regulation in force on personal data protection.

In some Member States, data protection authorities have issued guidelines on employment practices that include recommendations on recruitment practices, including specific reference to candidate screening. In the UK, for example, the Information Commissioner's Office (ICO) issued the so-called 'Employment Practices Data Protection Code' intended, according to its own terms, to help employers comply with the (UK) Data Protection Act, and to encourage them to adopt good practices, which aims at striking a balance between the legitimate expectations of employees and job candidates that their personal information will be handled properly by employers or potential employers, and the legitimate interests of the latter in deciding how best to run their own businesses and, as we infer, in making grounded and accurate candidate choices.

Guidelines contained in the ICO code include the requirement for prospective employers or recruiters to explain to applicants the nature of verification processes and methods used to conduct them. It also includes requirements to limit sources for verification of certain categories of background information (eg, applicant's criminal convictions) and to give applicant's the chance to make representations should the check produce discrepancies.

As far as vetting is concerned, the code clarifies that it should be limited only to cases where there are particular and significant risks involved for the employer, clients,

customers or others, and where there is no less intrusive and reasonably practicable alternative. Wherever practicable, the information must be obtained from the candidate and, if necessary, verified, instead of sought through vetting. In any case, the prospective employer should make it clear to candidates that vetting will take place and how it will be conducted.

Another example may be found in France, where in October 2015, the Commission Nationale de l'Informatique et des Libertés (CNIL) issued practical guidelines to help employers and recruiters manage personal data of employees and job candidates. These also include recommendations on what information may be collected by employers during the recruitment process to assess the candidate's ability for the job and at the hiring stage, also indicating information that may not be collected and therefore screened or independently sought.

Guidelines provided by the ICO or CNIL, or equivalent guidelines or best practice provisions are appropriate throughout EU Member State jurisdictions because they are based on the requirements that derive from domestic law, which implements the rules and principles contained in the EU Data Protection Directive.

In Portugal, the local data protection authority has not issued general employer–employee relationship (or candidate–prospective employer/recruiting agency) guidelines, although it has issued specific employer–employee issue guidelines (eg, on testing for alcohol or psychoactive substance consumption and on geolocalisation equipment affecting employees). Nevertheless, local data protection legislation provisions fully apply during the recruitment process.

When applied to employee recruitment processes, data protection legal provisions in Portugal (as will be the case in all EU Member States) result in the recognition of relevant data protection rights for the benefit of candidates that, for this purpose, qualify as data subjects. All information rights granted to data subjects (eg, on the identity of the owner of the file, on the purposes for using the data, on the categories of processed data, on whether the information was mandatory or optional, and the consequences of failure to respond) must be duly fulfilled by the prospective employer or recruiting agency.

Employment recruitment agencies are also the addressees of specific legislation providing relevant principles and restrictions that aim



at striking a balance between the information sought from candidates to proceed to checks and verifications as thorough as recruiters may require, and applicants' right to respect for their privacy.

Recruitment agencies must abide by a proportionality principle between information requested from candidates, and the requirements and features of the job positions offered. In all cases, agencies must process candidates' data in accordance with data protection regulations. Applicants are explicitly entitled, among others, to be informed in writing by the recruitment agency on the mandatory or optional nature of data provision requests and on the consequences of failing to respond. A specific legal provision also explicitly recognises applicants' right to refuse answering

questionnaires or tests that are not related to professional aptitude or that refer to their private life.

Resorting to outsourced recruitment will, in any event, not permit different or more extensive candidate screening than in-house solutions.

#### Notes

1. [www.adapt-recruitment-software.com/news-item/online-job-boards-take-lead-recruitment-agencies-according-market-research-survey/](http://www.adapt-recruitment-software.com/news-item/online-job-boards-take-lead-recruitment-agencies-according-market-research-survey/), accessed 15 February 2017.
2. [www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords.aspx](http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords.aspx), accessed 15 February 2017.
3. [www.acas.org.uk/media/pdf/f/q/1111\\_Workplaces\\_and\\_Social\\_Networking-accessible-version-Apr-2012.pdf](http://www.acas.org.uk/media/pdf/f/q/1111_Workplaces_and_Social_Networking-accessible-version-Apr-2012.pdf), accessed 15 February 2017.
4. [www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2099](http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2099), accessed 15 February 2017.

## Cross-border internal investigations and their enforcement in Ukraine in the context of anti-corruption investigations in private companies

**Pavlo Khodakovsky**

Arzinger, Kiev  
pavlo.khodakovsky@arzinger.ua

**Mariia Baranovych**

Arzinger, Kiev  
mariia.baranovych@arzinger.ua

**Alesya Pavlynska**

Arzinger, Kiev  
alesya.pavlynska@arzinger.ua

International cooperation, the extraterritorial application of the Foreign Corrupt Practices Act 1977 (the 'FCPA') and the United Kingdom Bribery Act, as well as multijurisdictional anti-corruption enforcement have given rise to a number of cross-border internal investigations. This is a vital issue for companies doing business in Ukraine because, like most Commonwealth of Independent States (CIS) members, Ukraine can be defined as a country in a high-risk jurisdiction. In addition, while conducting internal anti-corruption investigations, a number of local legal requirements should be taken into account, including, but not limited to, current anti-corruption legislation, labour and personal data issues.

#### Recent developments in anti-corruption regulation in Ukraine

For the last few years, Ukraine has been actively reforming its anti-corruption legislation. It has already taken a number of steps to fight corruption, in particular, by developing anti-corruption legislation and establishing a number of new agencies authorised to combat corruption.

On 26 April 2015, a new law 'On Corruption Prevention' (the 'Anti-Corruption Law') came into force. This law provides for a wide range of legal developments, including a number of limitations and requirements for private companies and their employees. For instance, it stipulates certain limitations related to gifts and engaging employees who have been



# IBA App – additional functionality now added

– available from the App Store and the Google Play Store

The IBA App has been updated to become even more user friendly, providing you with the latest legal news, updates and content while on the move.

All new functionality is now available for both the App in the Apple Store and for the Android version in the Google Play Store.

## New functionality:

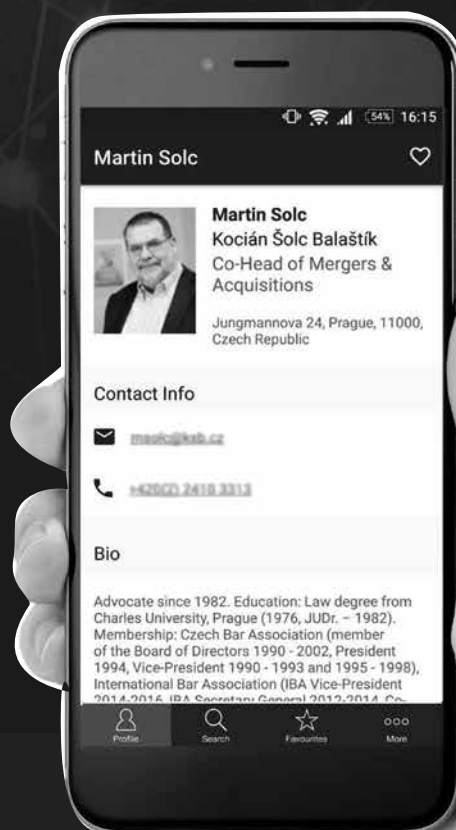
- Access to IBA Digital Content – with new articles, stories and items of interest available and updated daily
- The ability to download PDFs and podcasts from the IBA Digital Content library to your mobile device

## With the IBA App you can still:

- Search for IBA members by name, city, country, committee or area of practice and make contact via email
- Upload a profile photo and write a short biography

## How do I access the App?

- Simply download the App (search for International Bar Association and download the IBA Members' Directory) via the Apple App Store or Google Play Store
- Login with your IBA membership user ID and password
- Search the full IBA Member Directory or update your My IBA profile



**Don't let valuable contacts pass you by,  
update your profile today!**



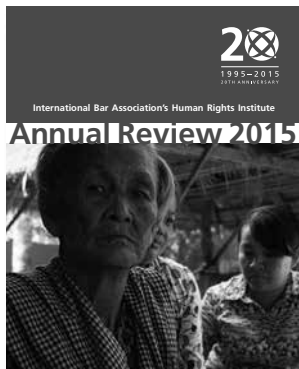
the global voice of  
the legal profession®

# The International Bar Association's Human Rights Institute



the global voice of  
the legal profession®

The International Bar Association's Human Rights Institute (IBAHRI), established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI undertakes training for lawyers and judges, capacity-building programmes with bar associations and law societies, and conducts high-level fact-finding missions and trial observations. The IBAHRI liaises closely with international and regional human rights organisations, producing news releases and publications to highlight issues of concern to worldwide media.



All IBAHRI activities are funded by grants and individual donations.

To help support our projects, become a member for just £40 a year – less than £4 a month.

Visit [www.ibanet.org/IBAHRI.aspx](http://www.ibanet.org/IBAHRI.aspx) for more information, and click join to become a member. Alternatively, email us at [hri@int-bar.org](mailto:hri@int-bar.org).

To read more on IBAHRI activities, download the IBAHRI Annual Review 2015 at <http://tinyurl.com/IBAHRI-AnnualReview2015>.



## Our work around the world

■ Work carried out in 2015    ■ Work carried out prior to 2015



[www.ibanet.org/IBAHRI.aspx](http://www.ibanet.org/IBAHRI.aspx)



@IBAHRI



/IBAhumanrights