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Editorial

To trade freely or not has long been a contentious question. Robert Peel saw his government fall as a result of repealing the Corn Laws in 1856, and events over the last year have only given increased momentum and urgency to the debates surrounding the effects that opening markets to increased international trade has on national economies and society. On one side, there have been those who advocate a more open, liberal approach to trade, pointing out the wide-ranging benefits to the economy and consumers. On the other side are those who prefer a more careful and protectionist approach to trade, stressing that the benefits of trade are not evenly spread throughout societies, thus leaving some behind.

The political events of 2016 and 2017 have further opened up the public debate on which of these two visions should be pursued. Both Britain's capacity to strike trade deals, and the extent to which free movement of people was a proportionate price to pay to access the European single market were key issues in the Brexit referendum last June. In the US, the effect of existing and pending trade agreements on manufacturing jobs at home, and whether those agreements were a 'good deal' for America came to be a top priority for both candidates through the autumn.

In both countries, it must be admitted, the candidates were tapping in to more widespread concerns among a broad section of NGOs and civil society, who previously organised protests in Brussels and other cities, primarily against a proposed EU-USA agreement, the Transatlantic Trade and Investment Partnership (TTIP). There have been consequences. In the EU, the concerns about CETA, the agreement between EU and Canada, brought the process to a standstill and even threatened the annulment of the almost finalised deal. Progress has been stalled on other ambitious trade deals, such as TTIP, and the multilateral Trade in Services Agreement (TiSA). In the US, one of the first moves of the newly elected President Donald Trump was to annul the Trans-Pacific Partnership (TPP), a trade agreement with such countries as Japan, Australia and Malaysia. Further into his presidency, he has announced a major review of the US trade agreements and the benefits which they bring to the country.

In the EU, 2017 is the year of elections in major EU economies where the clash of ideas on the future of the countries and of the EU and its role in the world remain important topics for the electorate. Many in the EU sighed with relief on Monday 8 May with the announcement of the electoral win of Emmanuel Macron as the next French president. The looming possibility of France being led by his rival Marine Le Pen would have meant for many the dramatic revision of some of the EU's most important policies, including trade. Across the English Channel, or la Manche as it is known by many in Europe, the UK is getting ready for the General Election called on 8 June. The result of this election gives an indication where the UK is turning on EU and international trade: whether the global, European or local vision of UK in the world will prevail.

The departure of the UK might well remove obstacles to taking a tougher stance against China and its exports of cheap steel into the EU. It also comes at an interesting moment for the legislators with the progressing reform of anti-dumping and anti-subsidy measures, known as Trade Defence Instruments (TDIs).

In this issue of In Focus, we bring you in-depth analysis from our network of experts in trade policy. We are delighted to feature an article from Commissioner Cecilia Malmstrom in which she outlines the EU trade talks with Mexico and the EU's future approach to trade policy. Laurence Ankersmit from Client Earth brings us insightful details of the CETA crisis in the Belgian province of Wallonia. Peter Balas from Covington and Burling discusses the trade policy implications of Brexit. Further in the newsletter, Iain MacVay and Jorge Miranda from King & Spalding provide a thorough outline of the EU's trade defence instruments (TDIs) reform. Vanessa Naish and Hannah Ambrose from Herbert Smith Freehills further discuss the relationship between the EU's investment court system and the wider EU legal order. Additionally, we prepared our own ABC of trade.

Finally, we welcome Stuart Brown, trainee solicitor, along with Arfah Chaudry and Peter Boyle, interns, who have recently joined the joint Brussels Office. They will be taking over responsibility for editing and producing the monthly Brussels Agenda.

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Cecilia Malmström
Strengthening the EU's trade ties - Mexico and beyond

The 28 member states of the European Union – and 27, once the UK has left us – together form one of the largest trading blocs in the world. The EU's strength as both exporter and importer gives a powerful voice in international trade negotiations and in fora like the World Trade Organisation. But as a wise man once said – with great power comes great responsibility. With our strength follows an obligation to strive for a global trade system based on fairness and multilateral rules. That is why EU trade policy needs to be at once effective, transparent and value-based.

In the world of global trade, circumstances change quickly, and the European Union needs to be well equipped and able to adapt to those new realities. As part of our broad trade agenda, we are initiating and negotiating trade agreements with partners all over the world, while working to improve agreements that are already in place. One of the agreements that are currently being revamped is the one between the EU and Mexico, originally concluded in 2000 and in need of an update. Together, we now aim for a broader and more far-reaching deal, benefiting both European and Mexican citizens.

The latest round of negotiations took place in April, and the next is scheduled for June. In order to take stock and accelerate further progress, I am meeting Minister of Economy Ildefonso Guajardo in Mexico City this month to discuss how to take the negotiations forward. While there, I am also taking the chance to meet with European and Mexican businesses as well as civil society organisations, trade unions and other actors, in order to strengthen our exchange between stakeholders further.

The European Union enjoys long-standing and deep trade ties with Mexico, but it has indeed been a long time since the last update of our relationship. Global trade patterns have changed substantially during the sixteen-year period since our existing deal was struck. In our ongoing negotiations, we are now working towards an agreement that can better mirror other ambitious trade deals that the EU and Mexico have since negotiated – such as our recent agreement with Canada – and that corresponds better to the trade structures of today. A few decades ago, Mexico mainly exported raw materials and agricultural products and imported manufactured goods. Today, Mexican import and export of manufactured goods are on equal levels and trade in services is increasing.

The EU is Mexico's third-largest trading partner after the US and China, and Mexico's biggest export market

after the US. Between 2005 and 2015, the yearly trade flow of goods between us more than doubled, from 26 to 53 billion euros, thanks to our already existing agreement. EU foreign direct investment stock has accumulated $156 billion since the deal came into force. Apart from boosting this already important trade, making our ties to Mexico more efficient would also provide greater access for European companies to both North and Central America, connected to the Mexican economy through dynamic supply chains. And an update would also contribute to Mexico's long-term goal of diversifying its economy further.

Among the things we are now discussing is protecting European products and know-how with so-called 'geographical indications', as well as finding ways to balance the need to uphold our respective sanitary measures for goods like vegetables while making sure they do not overlap and create unnecessary barriers. Also, chapters on sustainable development and intellectual property rights are being developed. Work is now well underway to deepen openness on both sides in order to boost growth, make our firms more competitive, widen choice for consumers, and create jobs. Our goal is to have a political conclusion to these negotiations by the end of this year. At the same time, it's important to get this deal exactly right – substance, as always, must prevail over speed.

In line with our commitment to a more transparent trade and investment policy we have published our negotiating proposals on our website for all to see. This enables interested parties to join and contribute to the discussion, which I believe is absolutely necessary to reach a good agreement.

In a time when protectionism is on the rise the world over, supporters of open trade must stand up for the idea of further cooperation. Fair and effective trade agreements, based on commonly agreed rules, are not only important for economic growth but can also be a way to promote sustainable development and shared values. As part of our agenda, we are soon kicking off negotiations with Australia and New Zealand while continuing our talks with, for instance, Indonesia and the Mercosur bloc. With our closest Asian ally Japan, we will hopefully reach a deal quite soon. And at one point in the future, our trade agenda will also encompass negotiations with the UK, once the principles of the withdrawal from the EU have been decided upon.

Going forward, the EU will continue to build bridges instead of walls, and work for progressive trade agreements with partners all over the world.

Biography

Cecilia Malmström has been EU Commissioner for Trade since 2014, following four years as Commissioner for Home Affairs. Prior to that, she held a variety of academic and political posts in Sweden, and was an MEP from 1999 to 2006. As Trade Commissioner, her responsibilities include pursuing an ambitious trade agenda to the benefit of European citizens, SMEs and the broader economy, representing the EU in the WTO, as well as upholding European values such as human rights, social and environmental protection.

TRADE

Laurens Ankersmit

Mixity as an obstacle to future EU-UK relations?

In the wake of Wallonia's resistance to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, concerns have been raised over the ability of such a region to block a future trade deal between the UK and the EU. Such concerns are understandable and it would be ill-advised not to take a closer look at the foundations of one of the hallmarks of EU external relations law – the practice of mixed agreements – and prepare for a situation in which indeed each Member State, including countries such as Spain, Poland, and Belgium will have to ratify a future trade deal. I will argue, however, that there are aspects of EU treaty-making practice that may make this process less problematic than it seems.

Wallonia: what really happened

In the autumn of last year Wallonia's resistance to CETA resulted in Belgium's initial inability to sign the deal. This was widely and erroneously seen as a last minute stunt by Wallonia's Prime Minister Magnette for

electoral gain. In reality, however, the Walloon parliament had adopted a resolution on the agreement (one of the first parliaments to do so) six months earlier setting out a few moderate demands in exchange for Wallonia's consent to Belgium's signature. The resolution was adopted less than two months after the legally revised text of CETA was published on the Commission's website, and the text can be found **here**. The first demand, for instance, was that CETA's Investment Court System would be legally checked by the European Court of Justice via a request for an Opinion pursuant article 218 (11) TFEU. These demands were initially unwisely ignored by both the federal government and the Commission resulting in the delay for a few days of the signature of the agreement.

The EU's constitutional principle of conferral

The reason that Wallonia had a say in CETA has to do with the constitutional particularities of both Belgium and the EU. For reasons of space, I will discuss the EU only. The EU's key constitutional principle of conferral requires that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein (Article 5(2) TEU). This principle applies to the EU not only *internally*, but crucially also *externally*. As a result, the EU is legally not in the position to conclude an international agreement if even the tiniest fraction of the agreement covers an area for which the EU has no competence. The practical solution to this problem is that the EU Member States 'help' the EU by filling in this gap in competence and conclude the agreement for those areas.

To add a layer of complexity, in areas where competences between the EU and the Member States are shared, the EU (via the Council) often elects to only exercise part of its competence in order to ensure that the Member States can be part of the agreement as well. This is done to ensure visibility of the Member States on the international scene, to reassure third parties, and to avoid complex battles over competence between the EU and the Member States.

While the common commercial policy (CCP) is an EU exclusive competence, the scope of that competence has been subject to decades-long extensive litigation and Treaty change. In general, the scope of the CCP has gradually expanded over the years. However, the Commission is currently pursuing a policy of negotiating 'deep and comprehensive' trade agreements that cover areas that go beyond the areas covered by the CCP. The most obvious example is that an agreement such as CETA also covers investment protection, whereas the CCP does not encompass the regulation of portfolio investment. Whether or not the EU is required or has the option to resort to mixed agreements is currently the subject of Opinion 2/15, a judgment of the European Court of Justice that is expected on May 16.

An additional point of contention not linked to mixity is whether the Council will have to vote by unanimity or qualified majority voting when concluding an agreement on behalf of the EU - In short, in most cases it is the Commission who negotiates and the Council who takes the decision to conclude an agreement with the consent of the European Parliament. Again, this outcome depends on the content of the agreement (article 218 (6) TFEU).

Dealing with mixity and unanimity

All of this means that before a deal is reached it is difficult to say whether such a deal requires Member State ratification, or even unanimity in the Council. A blockade of a future deal by one Member State or even a region, therefore, very much remains a legal possibility until the exact content of the agreement is known. Of course, negotiators can steer clear from areas that are not EU exclusive competence, but that is not always practical or politically desirable.

In the end, therefore, it would be wise to take the interests of all Member States seriously in the negotiations and not to unnecessarily cross any red lines that may be drawn at Member State level.

While this might sound like a daunting prospect, the EU has successfully resorted to mixed agreements for decades. It is considered to be a hallmark of EU law, and indeed there are only a handful of trade agreements that the EU has concluded on its own. Moreover, the EU generally provisionally applies vast parts of trade deals pending ratification at Member State level. Even if there is resistance to an agreement at Member State level there is always room for compromise in the end. Not only did Wallonia give its consent to a Belgian signature after a few days of negotiations, CETA is likely to be provisionally applied in the coming months.

Biography

Laurens Ankersmit works for environmental law organisation ClientEarth and teaches EU international relations law at the Brussels School for International Studies – University of Kent. He has previously worked as a lawyer for the Dutch Ministry of Foreign Affairs and for Clifford Chance Brussels. He also worked as a researcher and lecturer at VU University Amsterdam. Laurens completed a PhD at VU University Amsterdam on the intersection between trade and environmental protection in February 2015.

Peter Balas

The Trade Policy Implications of Brexit: High Risk, Murky Rewards

With greater clarity on both the UK and the EU positions, we now have a better understanding of the huge challenge they face in finding agreed terms for Brexit. Discussions will now begin about the staging of talks, the fate of millions of EU and UK citizens, and the financial settlement. However, there is much less clarity for business and the legal community on the trade policy implications of Brexit.

What is clear is that the UK has left only two options open: a "semi-hard" Brexit, where some kind of a bespoke Free Trade Agreement ("FTA") would be negotiated, or a "fully hard" Brexit, falling back on just the standard relations among members of the World Trade Organization ("WTO"). Even the first option will have substantial economic costs for both sides – though probably more for the UK. By refusing not just continued participation in the EU's Internal Market (what could be expected), but also the maintenance of the Customs Union, the UK chose an option leading to much more disruption in the established economic links. The reason for choosing this lowest level of preferential relations is explained by the UK to keep its full sovereignty to freely negotiate trade agreements with third countries. However, this freedom comes at a heavy price for the future EU-UK relations.

Trade in Goods: A Hard Customs Border and The Importance of NTBs

By leaving the EU's customs territory, the introduction of a new customs border and customs controls between the UK and the EU-27 will be unavoidable. While the financial costs are not negligible, the impacts on traditional business relations, cooperation and production chains are much higher. Any time a part or a component will be supplied to a cooperating partner on the other side, it will need to cross the new customs border – possibly several times. Even if the future FTA relationship is deep and comprehensive, it will still be necessary to check whether there are differences in the tariffs applicable, and whether the product can be considered as "originating" in the UK or the EU-27, in order to prevent third parties benefitting from the bilateral deal.

If the EU-UK talks are successful, there are ways to lighten these burdens somewhat, to facilitate trade flows, but the two sides will still be separate customs territories. For products arriving from other parts of the world, at present the UK is often the EU's external customs border. In the future, this border will move to the Channel – or to the Irish border. Therefore, it is not clear how the UK Government will honour its commitment to avoid introducing hard borders and controls between Northern Ireland and Ireland – not to mention the implications of a repeated, potentially successful Scottish independence referendum. It remains to be seen how Prime Minister May's decision to call snap elections in June will influence the outcome of the Brexit talks.

While a strengthened negotiating position for the UK Government would be certainly useful, there are also other trade policy challenges. An important question will be the UK's situation with respect to the EU's numerous preferential arrangements. From the moment of Brexit, the UK will cease to be a party to these agreements and it will need to negotiate its own agreements with the EU's international counterparts. It is not guaranteed that the terms the UK can achieve on its own will be the same as for the much larger EU-27. Partners may decide to reduce their own commitments, due to the reduced value of a UK-only agreement. A related issue is whether, and how, the UK could re-join the "Pan-Euro-Mediterrean" system of cumulation and origin – an important trade facilitation agreement between the EU and its European FTA partners.

Conditions of entry to the markets, and the measures applied at the borders (be they tariffs, or other type of limitations) are important. However, these days, the technical regulations, testing requirements, standards, health measures – *i.e.*, Non-Tariff Barriers ("NTBs") – are the real obstacles to trade. In the goods sector, these have been largely harmonized among EU Member States. The Great Repeal Bill ensures that, at the time of Brexit, there will be no differences in these terms, but thereafter all bets are off. Much will depend on the EU-UK bilateral arrangement, on the cooperative spirit of both sides. As long as the UK continues to apply the EU regulatory regime post-Brexit, there will be no problems. But how long will this last? It is clear that, once the UK starts its FTA negotiations with new overseas partners – be it the US, Commonwealth members or other major players – the NTBs inherited from the EU will be a focal point of contention. It is difficult to imagine that the U.S., for example, would not set a high price in the regulatory area for an FTA with the UK, after several years of unsuccessful Transatlantic talks (under the TTIP process). They will very probably demand the abolishment or at least substantial loosening of many EU health, sanitary, and environmental rules in the UK. Thus, the UK will face a difficult choice: to give either preference to an FTA with the U.S., or to continued easy access to the EU-27's market.

Trade in Services

Most of the above refers to trade in goods. Services, a major factor of the UK's wealth and competitiveness, pose different challenges. Many of the benefits from the free flow of services are linked to being part of the EU's Internal Market. After Brexit the possibility of providing services in the whole of the EU by setting up a company, bank, *etc*. in the UK alone will cease to exist. Creating conditions for the preferential access of services will require individual negotiations with the interested Member States. Here again, the outcomes are difficult to predict and will depend on their relative interests, strengths and cross-sectoral linkages.

After Brexit, the UK will again become a fully sovereign member of the WTO. However, this will not be an automatic process: it will be necessary to find agreement with the other WTO members on the new conditions of its membership. Experience has shown that any change of the terms of WTO membership (*e.g.*, to reflect EU enlargements) involve very difficult talks. The other WTO members, relying on the WTO practice of approving all agreements by consensus, always try to use such occasions to get additional market access beyond the level that would be legally due. Thus, the UK will probably also face lengthy and difficult negotiations. This process opens the risk of trade disputes and the mutual withdrawal of existing WTO concessions.

Conclusion: A Substantial and Uncertain Price to Pay

If the UK-EU talks are successful, the new settlement will come at a substantial price for both sides and will almost certainly take much longer than Article 50's two-year deadline. The alternative, a UK economically much detached from the Continent, would be much worse. While the UK might eventually negotiate meaningful trade agreements with other partners, these will come at a heavy cost to its relations with the EU. The process might turn into a downward spiral: every new concession or measure that differs from those applied in the EU-27 will reduce for the latter the value of trade relations with the UK. This is especially true for such sensitive sectors as agriculture; but across the board, all regulatory diversion will create new obstacles. Thus, it is well advised that everywhere – be it in Whitehall or the Berlaymont, the business community, or the legal profession – the stark choices are well understood, and decisions are taken in full knowledge of the consequences.

Biography

Péter Balás is a senior policy advisor and member of Covington's Public Policy & Government Affairs team. He draws on over 40 years of experience in the field of European and international politics and trade to advise clients on policy related issues.

Most recently, Ambassador Balás held the positions of Deputy Director General, DG Trade to the European Commission (2005-2014) and Head of the Support Group for the Ukraine in the European Commission (2014-2015). He was previously Ambassador and Permanent Representative of Hungary to the World Trade Organisation.

As part of Covington's global public policy and government affairs team, Ambassador Balás is part of a market leading group of experienced lawyers and other former senior policymakers. The team advises clients on a range of European public policy issues, including the EU policy-making processes and the functioning of the European institutions.

Iain MacVay and Jorge Miranda from King & Spalding

No more non-market economy status? Commission proposes new rules on anti-dumping and anti-subsidy

The European Commission has proposed two sets of amendments to the basic anti-dumping and anti-subsidy Regulations, 2016/1036 and 2016/1037. The proposals are designed for different purposes but both will, if passed into law, result in significant changes to the operation of trade remedies in the EU.

The first set of amendments is intended to deal with the implications of the termination in December 2016 of one of the provisions addressing methodologies for determining "normal value" under China's WTO Accession Protocol. The EU system of applying non-market economy status by listing targeted countries within the Dumping Regulation is no longer sustainable under WTO rules. China has already requested a WTO Panel challenging the continued application by the EU of the non-market economy methodology.

The EU is, therefore, under considerable time pressure to implement the amendments, which are more likely to be defensible under the WTO than the current approach in the Regulation. There is also a risk to the EU's credibility as the provision in the Accession Protocol justifying the current system expired without the EU having taken action to put an amended Regulation in place prior to the change in the WTO legal context.

The central element in this proposal is to entirely forego non-market economy designation of countries. This will be replaced by a provision allowing the Commission use international prices or analogue country prices where the market in the exporting country is found to be subject to 'significant distortions', whether introduced by direct government control of producers, by discriminatory measures benefitting local producers or by access to finance influenced by public policy objectives rather than market forces.

One legal problem for the EU is that it will need to distinguish this approach from the use of adjusted input costs, justified by distortions in the soybean market in Argentina, which was rejected as inconsistent with Article 2 of the Anti-Dumping Agreement by the WTO panel and AB in *Biodiesel*.

The proposal does not make clear how the evidence of 'significant distortions' is intended to be introduced in any investigation but presumably complainant industries will be able to bring forward such evidence. In recognition of the problem of developing that evidence the Proposal provides for the Commission to issue a report 'where appropriate' on the basis of the criteria of significant distortions outlined above. This provision is permissive and does not set out when it would be appropriate for the Commission to issue such a report.

There is no clear indication of the legal status of such a report by the Commission, although any report is to be placed on the file in relevant investigations and interested parties may "supplement, comment or rely on the report and the evidence on which it is based." The proposed provision also specifies that determinations in the investigation "shall take into account all of the relevant evidence on the file." (Art. 1(c) of the proposed Regulation). In other words, any such reports and the evidence they are based on could be the basis for applying the adjusted cost methodology to the dumping calculation.

The Proposal also provides for the Commission to take into account subsidy programs identified in the course of an investigation under the Anti-Subsidy Regulation even if they were not identified in the original complaint or notice of initiation. The Proposal would require the Commission to offer further consultations to the government concerned and to amend the notice of initiation and offer all interested parties to comment.

The second set of amendments being proposed date from 2013 with a view to updating the Regulations. They include a number of changes to the operation of both anti-dumping and anti-subsidy Regulations. The key changes are limitations on the application of the lesser duty rule and the facilitation of self-initiation of investigations where there is concern over possible retaliation against complainants by exporting countries.

In cases of distorted raw material costs the Commission will not have to apply the lesser duty rule, which requires the lesser of the injury margin or the dumping margin to be applied. The proposal also includes other significant changes to the procedures used in trade defence instrument cases, including delays of four weeks from publication of provisional findings to imposition of provisional measures and provisions for importers to be reimbursed for duties collected during an expiry review where the measures are not maintained.

Taken together, the two proposals will improve elements of the process and transparency of operation of EU trade defence instruments and it will likely resolve the WTO legal problem of application of special rules for determining "normal value" based on pre-determined lists of countries, although the WTO findings in the Biodiesel case will raise questions about the new methodology. The change to the lesser duty rule is likely to result in much higher duties in those few cases where it is applied and the continued use of a special methodology, although based on entirely different criteria, might result in continued targeting of Chinese imports with substantial duties.

Biography

Iain MacVay is a partner in King & Spalding's International Trade Practice. He counsels clients on EU and international trade and investment law, including WTO disputes and negotiation of trade agreements. Brexit and its impact on UK and EU companies and their supply chains is now a significant part of Iain's practice. Iain also advises on EU law, including compliance with EU rules on export controls, sanctions, customs, anti-dumping and anti-subsidy actions. Iain represents clients before the EU institutions, especially the Commission, and Member State authorities as well as the WTO and other international institutions.

Biography

Jorge Miranda is an economist with over 20 years of experience in the area of GATT/WTO trade remedy rules and subsidy disciplines. He is co-author of A Handbook on Antidumping Investigations, jointly published by Cambridge University Press and the World Trade Organization, and has authored numerous other publications in his area of expertise.
Mr. Miranda was a Counsellor in the Rules Division of the WTO Secretariat from 1995 to 2002. In this capacity, he assisted six dispute settlement panels, and he trained the trade remedy authorities of nearly 25 WTO member countries.

Since joining King & Spalding Mr. Miranda has assisted parties involved in nine WTO disputes, and he has provided advice with respect to WTO negotiations on subsidies and the WTO-consistency of various trade measures. In addition, he has assisted companies involved in trade remedy investigations -- both complainants and respondents -- conducted in Australia, Brazil, China, the EC, Jamaica, Japan, Mexico and Peru. He has also consulted for UNCTAD and has served as a NAFTA dispute settlement panelist.

Vanessa Naish and Hannah Ambrose, Herbert Smith Freehills LLP

No more non-market economy status? Commission proposes new rules on anti-dumping and anti-subsidy

In its recent trade agreements, the EU has introduced a new mechanism to resolve disputes arising between investors and states which may herald the beginning of a move away from the traditional use of investor-state arbitration, as can be seen in the final test of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the agreed text of the EU-Vietnam Free Trade Agreement. The Commission has recently consulted stakeholders on whether it should go a step further in its retreat from investor-state arbitration and incorporate a "multilateral investment court system" into its existing and future investment agreements, together with those of its Member States. Indeed, the EU envisages that, in due course, the ICS would determine investor-state disputes under treaties entered into between countries outside the EU. Current indications suggest that this investment court system may replicate in many ways the two-tier dispute resolution process which is already found in the CETA. While the EU continues to develop its thinking with regard to the practical operation of the investment court, it is open to question whether the proposed investment court system is compatible (either practically or legally) with EU law. Throughout this article, Section F (Resolution of investment disputes between investors and states) of the CETA is used as a guide to the EU's likely approach to the Investment Court System. Quotations referenced herein are to that CETA text. One aspect of this debate concerns the threat created by the investment court to the CJEU's role in ensuring the consistent application of EU law.

The EU may conclude international agreements which provide for the creation of a court or body which is responsible for the interpretation and enforcement of the provisions in that agreement and the decisions of which are binding on the EU institutions, including the CJEU, as can be seen in paragraph 182 of **Opinion 2/13** of the ECJ. However, if questions of EU law may be raised before and ruled on by that court or body, there is an inherent conflict with the CJEU's exclusive competence under the EU Treaties to give a final and authoritative interpretation of EU law.

The EU's proposed investment court will have jurisdiction to determine whether a respondent state (or, depending on the international agreement, the EU), has violated the substantive protections set out in the relevant international agreement. EU law may well form a part of that analysis. The domestic law of a respondent EU Member State which forms the basis of the investor's claim may implement, or purport to implement, EU law. Furthermore, where the EU is a party to an investment agreement (or trade agreement with an investment chapter), the fundamental purpose is to enable an investor to be able to challenge acts of EU institutions which are purportedly in accordance with, and seeking to implement, EU law. This is clearly acknowledged in Article 8.21 of the CETA, in which the EU makes a determination as to whether it or a Member State should be the respondent to the claim, based on whether the measures complained about include measures of the EU. This is also the position under the Energy Charter Treaty, for which a framework for the allocation of financial responsibility in relation to those claims has been established under Regulation (EU) No 912/2014.

The EU appears to have retreated from its position that the CJEU has exclusive jurisdiction over issues of EU law and that EU law issues cannot be determined by an investment tribunal - indeed that position was rejected by a number of tribunals, including those in **Eastern Sugar B.V. v The Czech Republic**, , **Achmea B.V. v The Slovak Republic** and **Electrabel S.A. v The Republic of Hungary**. Yet from the EU's perspective, the need to protect the CJEU's position as ultimate guardian of EU law remains.

The EU is expected to adopt a number of procedural safeguards. It is anticipated that the investment court – although note that the CETA text refers to "tribunal" rather than court – will not, as per Article 8.31(2), have jurisdiction to determine the legality of a measure under the domestic law of the disputing state party (domestic law may be EU law, and/or the laws of a Member State, or the law of a third party contracting state or states, depending on who was the respondent party). In determining whether the measure is inconsistent with the treaty, the investment court may consider the domestic law as a "matter of fact". The idea, it may be understood, is that the only binding element of the investment court's decision is the *dispositif* as to the legal rights and obligations of the investor and the respondent state under the *treaty* itself.

Yet calling a decision on an issue of EU law merely a "finding of fact" does not necessarily delimit its practical impact. Assuming it follows the CETA model, the EU's proposed system envisages a possibility of appeal to an appellate court on grounds including a "manifest error in the appreciation of the facts, including the appreciation of relevant domestic law", as laid out in Article 8.28(2) of the CETA. A decision of an appellate body agreeing with a first instance interpretation of EU law as a "finding of fact" will give weight to that interpretation. Furthermore, that decision may also have precedential value in other cases heard under the same treaty (and potentially other treaties). In particular, in a situation where that particular issue of EU law may never have been referred to or interpreted by the CJEU itself, the body of jurisprudence produced by the investment court may have greater weight than the EU might like. As a creation of the EU, the decisions of the investment court surely become part of the EU legal order in a way that the decisions of an ad hoc investment arbitration tribunal do not.

A further safeguard, contained in Article 8.31, which is anticipated is that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party". But by expressly limiting the lack of binding impact to a specific "Party", the implications are not clear for a court or authority which is not "of that Party". The investment court may make an interpretation of EU law in an award which an investor may seek to enforce in a different Member State to the respondent Member State. Supposing that the investor could do so under the New York Convention – as envisaged by Article 8.41(5) of the CETA – is the enforcing Member State court bound by the tribunal's finding on the meaning of EU law? This issue raises the spectre of difficulties at the enforcement stage. For example, the investor may find that a non-respondent party Member State refuses to recognise and enforce the award on the basis that EU law forms part of public policy, as was discussed by the ECJ in the case of **Eco Swiss v Benetton International**.

To narrow the risk that the investment court makes a ruling which is incompatible with interpretation of EU law by the EU institutions, including the CJEU, it is likely that the EU would also require that the investment court follow the "prevailing interpretation given to the domestic law by the courts or authorities of that party". However, this assumes that there is a "prevailing interpretation" of the EU law in question. A huge swathe of EU law has not been interpreted at all and certainly not by the CJEU. This issue has been recognised by the CJEU before: "*The interpretation of a provision of EU law, including secondary law, requires, in principle a decision of the Court of Justice where that provision is open to more than one plausible interpretation…*", as stated at para 245 in Opinion 2/13 of the ECJ (thereafter advocating the prior involvement of the CJEU before the ECtHR reaches an opinion based on a consideration of EU law).There is no preliminary reference procedure whereby the investment court can refer questions of EU law to the CJEU.

The Commission will clearly endeavour to safeguard the role of the CJEU. Indeed, the "informal" opinion of the European Parliament's Legal Service on the compatibility of the investment dispute settlement provisions in the CETA issued on request by the INTA suggests that it has done enough. In addition, The European Parliament voted against requesting an opinion of the European Court of Justice under Article 218(11) TFEU on the compatibility of the CETA with the EU treaties. The Commission is likely to adopt the same approach to doing so in any investment court as that shown in CETA. Indeed, it is required to do so under the CJEU's own Opinion 2/13 which requires that "*an international agreement may affect [the ECJ's] own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order*". The question is whether the safeguards implemented and proposed by the Commission are enough.

Biography

Hannah Ambrose is a professional support consultant and global arbitration practice manager in Herbert Smith Freehills. She provides guidance on strategic and legal choices in the field of dispute resolution and enforcement of arbitral awards. She assists clients in navigating the practical implications of public international law, advising in particular on state immunity, investment protection and investor-state dispute settlement (ISDS). She is a member of the Law Society of England and Wales's Trade in Legal Services Working Party, helping to develop policy positions in relation to ongoing trade negotiations and implementation of trade agreements between the EU and other states.

Biography

Vanessa Naish is a professional support consultant and arbitration practice manager in the global arbitration practice of Herbert Smith Freehills. She advises clients and colleagues on complex issues relating to arbitration. She also advises on public international law, in particular state immunity and investment protection issues. Vanessa helps to lead and drive the firm's thought leadership and client and external engagement on key developments in both areas. Vanessa is an editor of our arbitration and PIL blogs, hsfnotes.com/arbitration and hsfnotes.com/publicinternationallaw. She is a member of the Law Society of England and Wales's Trade in Legal Services

Working Party.

An ABC of trade and investment

An ABC of trade and investment

Getting to know trade and investment policy may be a tough challenge for those who are new to the topic. The breadth of issues covered by it and its fast evolution keep even the experts on their toes. To make this task easier for anyone wishing to polish their trade policy know-how, we decided to select the most commonly used phrases, terms or abbreviations and explain them.

A – Amber Box

Under WTO law, agricultural subsidies are classified into 'boxes', depending on the magnitude of distortion which they create. *Green Box* subsidies – such as environmental and pest control support - produce no distorting effects, and are not prohibited under WTO law. *Amber Box* subsidies by contrast, which encourage the increase of production, are constrained by WTO limits, due to their price decreasing effect in international trade. Not to be confused with *Blue Box* subsidies which do not have the effect of increasing production and are not forbidden. For example, payments directly to farmers based on production would be Amber Box, whilst payments which aim to limit production – to 85% or less of base production – would be considered to fall within the Blue Box.

B – Bananas

That's right, the fruit that most of you have on your tables or eat every now and then has been a subject of the most important trade disputes in the world. In addition to being the 18th most valuable crop in the world, bananas formed a series of cases brought against the European Community at the WTO, culminating in *EC-Bananas III*. These cases concerned the assignment of quotas by the EC towards Caribbean exporters, in order to meet commitments made during post-colonial transitions. A finding against the EC led to imports of bananas from third countries.

C – CETA

The Comprehensive Economic and Trade Agreement between Canada was signed on 30th October 2016, following a last minute compromise to enable the province of Wallonia to give its assent. If this had not happened, then Belgium would have been unable to assent, and the EU as a whole would not have been able to ratify the treaty. C.f. *Mixed Agreements*

Described as a 'Deep and Comprehensive Treaty', CETA eliminated 98% of tariffs on goods between Canada and the EU, as well as addressing trade in services between the two countries. Legal services are not excluded from the agreement – unlike, for example, supply of audio visual services in Europe, and of cultural industries in Canada, as per Article 9.2 of the CETA - thus provision of legal services between the EU and Canada should be accorded by each party: *"treatment no less favourable than that it accords, in like situations, to its own service suppliers and services."*(Article 9.3 of the CETA). More specifically, CETA also addresses (in its Chapter 10) the entry into each state of persons for the purposes of doing business, and requires, in Article 26.2, both the EU and Canada to establish a joint committee on Mutual Recognition of Professional Qualifications.

D – Disciplines

Disciplines are the 'rules' of the WTO. National treatment and non-discrimination, for example, are both considered 'Key Disciplines'.

E – EU

The European Union has been a member of the WTO in its own right since 1995. Although each member state is also a WTO member, the TFEU gave the EU Commission exclusive competence over trade-in-goods policy, and thus the Commission speaks for all members at WTO meetings.

The question of whether post- Brexit Britain will automatically revert to being a 'full' member of the WTO is not contentious; The UK was a founding member of GATT, the 1948 precursor to the WTO, continues to be a member in its own right, and Maika Oshikawa – head of the WTO's accession negotiations – has said that the UK will not need to reapply. That being said, if a 'hard Brexit' becomes reality, and the UK has to revert to trading on WTO rules, then a new political consensus will need to be forged between the UK and remaining members of the WTO as to the particular tariffs and subsidies which Britain will apply. One theme that has

come out of the Brexit discussions is that the UK would be likely to duplicate the EU tariff regime, while seeking to subsequently reduce tariffs with other WTO members. This however will effectively bind the UK to not introducing higher tariffs than currently in place. *C.f. Ratchet Effect*

F – Fork in the Road

In investment treaties, a 'Fork-in-the-Road' clause states that a party bringing a claim must choose to do so either in the domestic courts of the defendant state, *or* via arbitration. Once action has been brought in one forum, the other route is blocked, although exceptions do exist to allow 'contract- based' claims to be brought at the same time as 'treaty-based' claims. *C.f. ISDS*

G – GATS

Whereas the original trading agreement, GATT, addressed goods, as its name suggests, GATS – the General Agreement on Trade in Services – extended the multilateral trading regime to cover international service provision. Article III of the **GATS** imposes a transparency obligation on members to notify the Council for Trade in Services at least annually of *"all legal or regulatory changes that significantly affect trade in sectors where specific commitments have been made"*. The aim of this is to ensure that new barriers to trade in services are not being erected. It is important to note that the agreement does not define a 'service.' Instead, it sets out four modes of delivery of services. This terminology is now used across the world in various trade negotiations. *C.f Modes*

H- Harmonized System

The Harmonized System is a common set of 6-digit codes, under which all traded goods are classified. Each code is itself a more specific example of a broader family, composed of two to four digits; *10* for examples denotes 'cereals', *1004* denotes 'oats' and finally *100410* is used for "oats seed". Countries are free to extend in more detail beyond six digits for their own national purposes.

I – ISDS

Investor-to-State Dispute Settlement is a common provision of investment treaties. It allows investors of one party to seek arbitration against their host state, i.e. another party to the treaty. The use of the ISDS is not new and dates back to the 1960s. Although its origin was predominantly to ensure the impartial conduct of international arbitration, the world has changed since then and the ISDS has begun attracting controversy. Its opponents claim that it lacks transparency and would have allowed foreign companies to litigate against EU governments if national legislation threatened their business interests. Its proponents say it provides a neutral and efficient forum for dispute resolution. They add that in practice tribunals are reluctant to rule against government legislation, save in cases where discrimination between parties has occurred.

In case of the EU, part of the controversy is caused by the relationship between the jurisdiction of the independent tribunal and the EU law. After all, there are matters covered by an investment agreement that are also covered by the EU law. And since investment became part of the EU competence under the Lisbon Treaty, the question of the autonomy of the EU has gained importance.

In the run up to the signing of the CETA agreement, part of the objection of Wallonia involved the inclusion of an ISDS clause. In part in response to criticism from civil society, the EU and Canada have agreed an 'Investment Court System' to place investor state disputes arising from CETA on a more judicial footing, such as by appointing a permanent pool of judges and providing a more extensive appeal mechanism.

J- "Job Killer"

This, along with "worst trade deal maybe ever signed anywhere" is how President Trump has described North American Free Trade Agreement (**NAFTA**), in the context of the loss of US jobs in manufacturing during the time it has been in force. This standpoint is of course disputed, primarily as it fails to take into the growth of automation in manufacturing during the same time period, and fails to weigh job losses with broader economic benefits. At one point, it was speculated that Trump would sign an executive order to renegotiate NAFTA, but that position seems to have softened, albeit not without some highly charged tweets concerning dairy and softwood, and diplomatic efforts from the Mexican and Canadian heads of state.

K – Keynes

John Maynard Keynes was a British economist whose ideas had a profound impact on the theory and practice of macroeconomics and the economic policies of governments. Taking a broad view, the WTO stems from John Maynard Keynes's proposals for the post WWII world financial order. The subsequent Bretton Woods conference, in 1944, recommended the reduction of obstacles to international trade, leading to a proposed an 'international trade organisation', in conjunction with the International Monetary Fund, and the World Bank. The ITO, however, failed to pass the US Senate, and the less ambitious General Agreement on Tariffs and Trade (GATT) was passed in its place. The scope of GATT was extended by the 1995 Uruguay Round of negotiations, leading to the WTO.

L – Listing (positive or negative)

In trade negotiations, the parties indicate which areas they wish to open up to other parties to the agreement. They can do that using two different techniques, positive or negative list. A positive list is when a party has to indicate ('positively') which sectors it will open up. It then has to list all exceptions. A negative list is when a party lists only the exceptions. What is not indicated among the exceptions will be treated as opened up under a given agreement. Further reading: **Commission guide**

M – Modes (of delivery of services)

Since there exists no definition of services (cf. GATS), trade in services is described in different 'modes of supply', describing how the action is carried out. These are: Mode 1 (cross border supply), Mode 2 (consumption abroad), Mode 3 (foreign commercial presence) and Mode 4 (movement of natural persons). In the case of legal services, Mode 1 would apply to the product crossing the border – e.g. a lawyer providing advice by mail, email or fax, Mode 4 by contrast, requires the lawyer providing the service to cross the border. Further reading: **GATS Glossary**

N – National Treatment

National treatment is an international law principle found in all of the WTO agreements, which requires governments to treat foreigners as they would their own citizens. Thus, conditions of market access, where covered by the agreement, cannot be more onerous for foreign suppliers than domestic ones.

A consequence of strictly applying national treatment could mean that where a government reduces the rights of its own citizens, then it could quite legally do the same to foreigners. As such, a principle of 'minimum standard' has been developed, to provide a floor of internationally accepted minimum standard of treatment. This tribunal-led development remains a point of contention between developed and developing nations.

O – Online Dispute Resolution ('ODR')

Following the Regulations on Consumer Disputes, the EU Commission has set up an Online Dispute Resolution platform to allow consumers to submit a complaint against a trader where goods or services have been bought online. All online traders selling goods or services to consumers, regardless of whether they market across borders, must provide on their website a link to the ODR platform and an email address of a first contact for consumers.

P – Paragraph 6 Systems

A provision of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), paragraph 6 systems are waivers allowing for generic medications to be exported to least-developed countries (LDCs), as long as it is not part of a commercial or industrial policy. This was to address criticism of TRIPS that increased patent protection of drugs, contributing to a price rise in LDC markets. Further reading: **WTO guide to TRIPS**

Q- Quotas, tariff-rate

A quota is a fixed and limited amount or number of products that are officially allowed under a trade agreement. In case of the WTO, most quotas have been eliminated and replaced with so-called tariff-rate quotas (TRQs). The TRQs allow certain quantities inside a quota are charged lower import duty rates, than those outside which can be higher. In effect, a TRQ is a two-tier tariff. Currently, the EU applies TRQs only on agricultural products.

The question of TRQs is one of the hot topics discussed in the context of Brexit. Post- Brexit, the quotas applicable in the context of TRQs will need to be readjusted within the new WTO setting (with the EU and UK as separate members). This is unlikely to be attractive for third country exporters who will lose flexibility of moving supply around as demand in one EU market falls. In order to reduce the likelihood of other WTO members objecting it is predicted that the UK will offer quotas which are slightly greater than their current proportional consumption of existing EU quotas. *C.f. Schedules, BreXit.*

R – Ratchet

A ratchet clause is a provision through which the parties (to a trade agreement) commit that, if one of them decides in the future to further open up their respective markets in one specific sector, they will not be able to backtrack.

S – Schedule

Schedule is an official list of things that are affected by a trade agreement. While the text of a trade agreement sets out general rules applicable to all parties, the individual parties must include sectors and

subsectors that will be affected by it (cf. listing). They do it within 'schedules of commitments'. In services, for example trade in legal services, this means indicating on what conditions lawyers from jurisdictions covered by the agreement can practise within each other's territories.

T – TiSA

TiSA stands for Trade in Services Agreement which is currently being negotiated between 23 parties (including the EU and the US). It was designed to advance liberalisation of the global trade in services which would go beyond GATS. The agreement is negotiated within the WTO framework and although it does not include all WTO members, it is designed to include new members in the future (at the moment, it covers the so-called 'Really Good Friends' group of developed economies who together represent more than 70% of the global service economy). *C.f. Ratchet, Modes*.

U – Unbound

The term 'unbound' refers to commitments in a schedule (cf. schedule, listing). All commitments are bound unless otherwise specified. If a country indicated that some of its commitments are unbound, it means it may wish to remain free to maintain or introduce measures inconsistent with market access or national treatment. Further reading: **GATS guide**

V- Value Added threshold

A Value Added threshold is designed to prevent exploitation of different tariff rates on products originating in third countries and then traded between parties to a trade agreement. Imported goods from third parties must pass a 'value added' threshold before they can be subsequently transferred within the FTA at a zero duty rate. A free trade agreement applies only to goods moving between the parties to that agreement. Thus third party goods, entering one country in the FTA, and subsequently being exported to another country in the FTA, are subject to the tariff regime of that destination country. To pass this threshold, and FTA will usually stipulate that either a certain value of the finished product must have been added in the exporting FTA state, or that the good has been 'sufficiently processed'. In the EU- South Korea deal, for instance, fibres needed to be 'spun or knitted' in the FTA state to be considered to have had sufficient value added to be considered to have originated there. In the case of cars, no more than 45% of the value of the car must have originated from outside the FTA state. Further reading: **ECB working paper**

W – WTO

The World Trade Organisation is an inter-governmental organisation that regulates international trade. It provides a framework for negotiating trade agreement and resolving disputes between members. It officially commenced on 1 January 1995 under the Marrakesh Agreement, signed the previous year, and which replaced the General Agreement on Trade and Tariffs (GATT). The WTO currently has 164 members which include the entire EU and its individual member states, as well as Russia and China. Its headquarters is located in Geneva.

Continued by the WTO and started under GATT, the negotiations take place within so called rounds. These are multi-issue and multilateral negotiations on trade in goods and services carried out periodically among all members and designed to further liberalise markets. One of such rounds, the Uruguay Round (started in 1986) resulted in the Marrakesh Agreement setting up the WTO.

The latest negotiating round, called Doha Development Round, was begun in 2001. However, since 2008 the negotiations have stalled. One of the main reasons is thought to be the growing divide between the wealthier and poorer members. While the former increasingly desire to link trade in goods with trade in services and intellectual property protection, the latter accuse the EU and USA of prioritising their commercial interests above the world's poor. *C.f. ISDS*

X – breXit

Brexit is a term which means the withdrawal of the United Kingdom from the European Union. Although the exact origins of the term remain unclear, its coining has been attributed to **Peter Wilding**, chairman of **British Influence**. The term has made a spectacular career reaching the title of the word of the year by Collins Dictionary in 2016.

Brexit and its effect on the UK trade have been widely discussed in the past months. 'Falling back on WTO rules' is a phrase which has been heard in contemplation of a failure of the EU and UK to reach an agreement on trade during the two year Article 50 process. As has been seen from various concepts explained in this glossary however, that may not be an automatic process. Although the UK will not need to reapply to join the WTO as it's already a member, it is unclear if it can inherit the EU quotas and schedules of commitments, i.e. rules that determine the conditions of trade with the rest of the world. And if even if it is possible, it remains unclear what degree of opposition this move will face from other WTO members.

Y – Your pick!

If only. Trade negotiations, especially multilateral ones, are difficult affairs, with each party seeking to maximise their own advantage while minimising negative effects on them. Inevitably this leads to negotiators making compromises, in anticipation of greater benefits from a final agreement. For the Brexit negotiations, this is likely to be particularly tricky, as the parties have, in several areas – like free movement of people, access to the single market, jurisdiction of the Court of Justice – adopted seemingly irreconcilable positions. Prepare to hear some formulation of 'No Europe à la carte' repeated frequently over the course of the negotiatios.

Z – Zeroing

Where goods are suspected to have been 'dumped'' on the market, an investigating authority calculates the dumping margin by getting the average of the differences between the export prices and the home market prices of the product in question. 'Zeroing' refers to the practice of the US of disregarding (or setting at zero) instances where the export value exceed the home market value. As this results in an artificially inflated average margin, and thus an increased anti-dumping duty, the EU views this as unfair, and called for a dispute resolution tribunal to be formed to address the issue.

Establishing a European Pillar of Social Rights

The Commission has now published the **results of its public consultation** on the establishment of a European Pillar of Social Rights (the "**Pillar**"), along with its final proposal for the Pillar (**C(2017) 2600 final**) (the "**Recommendation**").

The Pillar sets out 20 key principles and rights in order to support fair and well-functioning labour markets and welfare systems across the EU.

In its communication (**COM(2017) 250 final**) (the "**Communication**"), the Commission has stated that delivering on these principles is a joint responsibility, and that the EU can help by setting the framework, giving the direction, and establishing a level playing field across all Member States.

Despite recent improvements in economic and social conditions across Europe, the Commission recognises that there is still long-term unemployment and youth unemployment, as well as risks of poverty, in many parts of Europe. The Pillar is therefore concerned with delivering new and more effective rights for citizens in order to tackle these challenges.

Consultation responses

During the consultation stage, four key priority trends emerged:

- The social consequences of the financial crisis;
- Technological progress and automation;
- Demographic developments (with the ageing of Europe's population); and
- Economic divergence across Member States.

The Pillar was seen as an opportunity to deliver a more social Europe, and as a way of reconnecting with European citizens whilst addressing the key changes in the world of work and society more generally.

In their responses, some Member States (particularly Hungary, Poland, Germany, Portugal and the United Kingdom) supported the idea that non-Eurozone Member States should have the flexibility to choose whether to be part of the Pillar. However, other Member States felt that the Pillar should avoid creating gaps between the Member States in the Eurozone and other Member States, or cause uncertainty about the application of the social acquis.

In its Communication, the Commission has confirmed that the Pillar is primarily designed with members of the Eurozone in mind, but the Commission has stressed that it is available to all Member States of the EU who wish to be a part of it.

Some of the main conclusions that were drawn from the consultation (as identified by the Commission in its report) included:

- The EU social acquis is broadly relevant and well developed;

- However, there is significant scope for action to improve the implementation and enforcement of existing rights; and
- In addition, some gaps were identified in terms of coverage of all forms of work, and areas outside labour law.

The Recommendation

In its Recommendation, the Commission has taken into account the responses to the public consultation. The Recommendation includes the final outline of the Pillar and is structured around three chapters:

- Equal opportunities and access to the labour market;
- Fair working conditions; and
- Social protection and inclusion.

Some of the key principles included in the Pillar are set out below:

Equal opportunities and access to the labour market

The Pillar highlights the need for lifelong learning, and that continued education is of importance in the fight against social exclusion in order to ensure that everyone is able to fully participate in society and the labour market.

The Pillar also identifies that gender equality must be ensured in the labour market, and that women and men have the right to equal pay for work of equal value. Additionally, the Pillar states that everyone is entitled to equal treatment and opportunities (in the labour market, education and social services) regardless of their gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation).

Fair working conditions

The Pillar ensures that, regardless of the nature of an employment relationship, all workers have the right to fair and equal treatment regarding their working conditions, access to social protection and training.

Additionally, the Pillar provides all workers with the right to fair wages that provide for a decent standard of living and seeks to ensure adequate minimum wages.

The Pillar also recognises the need of an appropriate work-life balance, and seeks to ensure the rights of workers who are parents, or who have caring responsibilities, to suitable leave, flexible working arrangements and access to care services. This principle applies equally to men and women, and gives workers the right to be entitled to special leaves of absence in order to fulfil their caring responsibilities.

Social protection and inclusion

The Pillar gives children the right to protection from poverty, and the right to affordable early education and care of good quality.

The Pillar also provides workers with the right to adequate social protection (regardless of the nature of their employment relationship). Additionally, the Pillar recognises that the unemployed have the right to adequate support from public authorities in order to reintegrate into the labour market, as well as the right to adequate unemployment benefits for a reasonable duration. The Pillar emphasises that these benefits should not be a disincentive for a quick return to employment.

Conclusion

The responses to the public consultation have confirmed that there is a shared need to act in order for Europe to achieve more inclusive economic growth and greater social inclusion. The Pillar addresses these challenges by setting out twenty principles which prioritise the rights of citizens and by establishing a joint direction to provide equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion.

The Commission has said it will continue to work closely with the European Parliament and the Council on the Pillar, and we await further developments concerning its implementation across the Member States.

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Hungary's Higher Education Law: national sovereignty or EU competence?

In a long series of developments between the EU and Hungary, the disagreements may be heading to a loggerheads. Viktor Orbán, Hungary's Prime Minister, has come under widespread scrutiny previously

regarding his policies on migration quotas, treatment of asylum seekers and there has been concerns over a draft bill requiring NGOs to declare foreign funding from foreign sources.

More recently, Hungary passed a Higher Education Law on 4 April 2017, which could effectively force the Central European University (CEU) to close. The law requires foreign accredited universities in Hungary to have a base in their home country and not to teach any foreign accredited courses. In CEU's case, the university is based in the US, thus it would have to open a campus in the US and not teach any US accredited courses.

The legislation will enter into effect on 11 October 2017 and CEU would have to open a campus in the USA by February 2018 to remain open. University officials have called this onerous and far too expensive, to the point the University will be forced to close.

Legal proceedings and EU Competence

The CEU and the Commission entered into discussions on 12 April and 26 April to enable the Commission to assess the issues surrounding the Higher Education Law.

On 26 April 2017, the EU Commission confirmed it sent Budapest a letter of formal notification on its legal case against Hungary and has given Hungary a month to respond including a formal demand of an explanation and a remedy to go forward on the legal concerns. This is the first step in EU infringement procedures. The Commission can refer the case to the Court of Justice of the European Union who could impose financial penalties on the failure of a Member State to comply with EU law.

The attacks on academic freedom are seen as attacks on democratic values and even the rule of law. Yet, it must be noted that these cases are difficult for the Commission to bring. The EU has no general competence over the rule of law – apart from the ability to bring Article 7 TEU proceedings, which is a political process and requires that 4/5 of the Member States agree that there is a serious breach of these fundamental values – or education, because **Article 165 TFEU** gives a MS sovereignty on its education system.

The Commission stated that its reason for bringing proceedings against Hungary is that the Higher Education Law is "not compatible with the fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment but also with the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union, as well as with the Union's legal obligations under international trade law." The investigation looks at whether Hungary has infringed the spirit of **Article 2 TEU** and whether the Higher Education Law would be incompatible with the free movement of capital, the EU Charter of Fundamental Rights and the freedom of assembly. One can see that the EU does indeed have competence in such areas.

However, Orbán believes that the European Commission is "going beyond its competencies" and that "the regulation of higher education is a member-state competency, not the EU's". The Hungarian government however, states that the Higher Education Law "adopted by the Hungarian parliament is a minor amendment that applies to 28 foreign universities in Hungary and all it does is introduce uniform rules applying to them, closes loopholes, introduces transparency and ends privileges that these foreign universities enjoyed over European ones."

Parliamentary session on Hungary

The European Parliament session on 26 April 2017, opened the floor to discussion, whilst giving Frans Timmermans the opportunity to clarify the EU's position on Hungary's recent activities. Orbán was also present during the session to defend his actions and to enable the two parties to enter into a dialogue. Orbán attacked CEU founder George Soros for "destroying the lives of millions of European, he is the enemy of the euro, yet he is still welcomed in Brussels at the highest level." The Higher Education Law and pending NGO register have been seen as an attack on Soros's influence in Hungary. Timmermans discussed the Commission's criticism over Hungary's Higher Education Act and the Hungarian government's consultation called "Let's Stop Brussels!" to which the Commission has published a **reply**. The Commission noted it would decide later whether action against the protection of pregnant working women in Hungary is needed to ensure full compliance with maternity rules in the EU.

The discussion from 26 April 2017, continued on 17 May 2017, where the EU Parliament voted in favour to trigger Article 7 TEU. The resolution was adopted by 393 votes to 221 with 64 abstentions. MEPs believe that the controversial laws on asylum seekers, NGOs and CEU need to be withdrawn and Hungary's fundamental rights situation justifies launching the formal procedure to determine whether there is a "clear risk of a serious breach" of EU values by a Member State.

Conclusion

It seems the Commission expects Hungary to strike a compromise so that further legal action may not be necessary. Timmermans's hope is on dialogue as he stated during the Parliamentary session: "dialogue is the European way. Dialogue to solve misunderstandings. Dialogue when we disagree. That is the European way."

The Commission also confirmed it has opened dialogues with the Hungarian authorities on matters arising on migration and asylum, including keeping an eye on any developments concerning NGO registration laws.

Upholding the rule of law - The Law Society of England and Wales's vision for law and justice

With the country going to the polls on 8 June to vote for our new Governemnt, the Law Society of England Wales has established their priorities for the next Government on law and justice and as such released **Our Vision for Law and Justice**.

Robert Bourns added: "Early legal advice also prevents difficult societal and personal situations escalating. So if you've a problem with housing, how immeasurably better to solve that before you and your family become homeless - which is also likely to cost the taxpayer far more than the initial legal advice."

It reveals a five point plan:

- To reinstate legal aid for early advice, particularly in housing and family law
- To negotiate the continues access for UK lawyers to practise law across EU Member States, be able to base themselves in the EU and have rights of audience and legal professional privilege in all EU and Member State courts
- To be able to ensure civil justice co-operation is maintained with the EU in the interest of consumers, families and businesses
- To combat modern slavery by enforcing the Modern Slavery Act 2015 and allocating the necessary resources to protect any victims
- To cap the current employment tribunal fee system

Victims of clinical negligence must be able to get justice for their injuries

The Law Society of England and Wales has insisted that any patients who have been harmed by negligent care should be able to get expert legal advice if they need it.

In his response to the Department of Health consultation on fixed recoverable costs in low value clinical negligence cases, Law Society president Robert Bourns stated that "This is an issue we have campaigned hard on and we are pleased that the government listened to us and other organisations and amended their proposals."

The proposal is to apply fixed costs to claims up to £25,000. Robert Bourns also added "it must be remembered that clinical negligence claims are brought by people who have been injured through no fault of their own as a result of negligent care. These patients need specialist legal advice to help them get the compensation they are entitled to in law."

"There is a considerable risk that those most affected by these proposals would be the vulnerable in society ... whose cases can be complex and challenging but not necessarily the highest in value."

Complex claims should be excluded if the Department of Health does decide to introduce fixed recoverable costs schemes. Furthermore, the fixed costs payable should make it possible for expert clinical negligence solicitors to undertake low value cases that they would not have taken before. If this is not the case then patients will not be able to get the legal advice they need.

A fixed recoverable costs scheme would work in simple low-value cases if there was an accompanying fixed process available for litigants. The Law Society of England and Wales believes that it will be key to set clear expectations for parties' conduct and develop a streamlined regime that maintains equality for both sides of the litigation process in low value clinical negligence cases.

Serious Fraud Office (SFO) restrictions prompt new guidance for lawyers advising clients

The SFO decided to limit the role of legal advisers to witnesses in fraud investigations. This has prompted the Law Society of England and Wales to publish new guidance for solicitors advising clients.

In particular, this will affect Criminal Justice Act 1987 section 2 interviews that take place during the course of a SFO probe. Here, any person with relevant information can be compelled "to answer questions or furnish information in relation to a fraud investigation."

The Law Society believes that all solicitors must act in their client's best interest. The Law Society practice note Representing clients at section 2 CJA interviews, is a reminded for lawyers that they do not have to accept any unnecessary and inappropriate restrictions on their ability to represent clients as a result of the SFO's restrictions.

The Law Society President Robert Bourns stated: "Being compelled to answer questions under peril of criminal sanction can be a difficult and stressful experience for witnesses. Witnesses in section 2 interviews are entitled to receive proper legal advice. This allows witnesses to understand their position and determine how best to respond." Furthermore, it is important to note that he SFO guidance limits the actions that taken by a solicitor when acting for a client who is interviewed under section 2.

Robert Bourns elaborated that "the purpose of the Law Society's practice note is to draw our members' attention to the potential issues raised by the SFO guidance." The practice note addresses the concerns about professional conduct implications of the SFO's guidance, stressing the care that needs to be taken when giving undertaking by solicitors.

The Law Society of Scotland Solicitors to vote on PC freeze at AGM

The Law Society of Scotland's governing Council has proposed to freeze solicitors' practising certificate fee for the eighth consecutive year.

Solicitors will vote on whether to maintain the current practising certificate fee of £550 at the Law Society's AGM on 25 May 2017. The Chief Executive of the Law Society of Scotland, Lorna Jack stated: "We are determined to work to keep the cost of the practising certificate at its current level. The Society's Council agreed that the practising certificate fee should be frozen again this year, with members able to vote on that decision at the AGM later this month."

The practising certificate fee is compulsory for all practising solicitors in Scotland. There are currently 11,500 practising Scottish solicitors.

It was noted that although it was encouraging to see firms experiencing growth, whilst seeing the number of practising solicitors rise by roughly 2 percent per year, uncertainties surrounding the economy and firms who carry out legal aid work are still facing certain challenges. Furthermore, rising costs elsewhere, including the mandatory SLCC levy increase of 12.5% has put pressure on the solicitors profession. Thus, this decision should help with budgets in general.

The Law Society AGM will be held at its Edinburgh offices on Thursday, 25 May 2017.

Approach to abusive behaviour becoming increasingly 'fragmented'

The Law Society of Scotland has emphasised its support to continue continuing in the way the criminal justice system responds to abusive behaviour. This includes domestic abuse, however there are concerns that the law in this area is becoming increasingly fragmented.

The Law Society's response to the Domestic Abuse (Scotland) Bill, states that as various forms of abusive behaviour can already be prosecuted under other existing legislation, the new bill could create fragmentation

rather than properly address the issues at hand.

The Law Society of Scotland points out that there may be some practical issues relating to the proposed offences of abusive behaviours in relation to partners or ex-partners. In particular, there may be difficulties arising from obtaining sufficient evidence for a prosecution to occur.

Ian Cruickshank, convener of the Law Society of Scotland's Criminal Law Committee, stated that The Law Society would "welcome changes to the existing law which would better reflect the current understanding of what constitutes domestic abuse and which could provide greater protection for victims or potential victims of psychological abuse. We recognise there are difficulties in prosecuting certain forms of domestic abuse and this is something that needs to be addressed."

Furthermore, Cruickshank states the Society is not convinced, however that "the case has been made for the creation of a distinct offence of domestic abuse which is confined to partners and ex-partners, not least because much of this behaviour can already be prosecuted under existing legislation. There is a statutory offence of threatening or abusive behaviour in the Criminal Justice and Licensing (Scotland) Act 2010 and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 provides for a new specific 'domestic abuse' statutory aggravation where the abuse is of either a partner or an ex-partner."

As such, again Cruickshank states that it is unclear "why relationships with partners or ex-partners are the only relationships which should be covered by the specific provisions of the bill. Domestic abuse is not solely confined to intimate partners - adult siblings or other relatives, parents and adult children, particularly if they have learning difficulties or mental health problems, and even people living in shared houses may all experience similar abuse, including psychological harm."

The Law Society has also said there should be support for victims and those who have physically or emotionally abused their partners as a further step, to change their behaviour and to prevent such behaviour from recurring.

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Commission Implementing Decision (EU) 2017/785 of 5 May 2017 on the approval of efficient 12 V motor-generators for use in conventional combustion engine powered passenger cars as an innovative technology for reducing CO2 emissions from passenger cars pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council

EXTERNAL RELATIONS

Council Decision (EU) 2017/798 of 25 April 2017 authorising the opening of negotiations with the Government of Japan for an agreement on cooperation in the area of competition policy between the European Union and the Government of Japan

FREE MOVEMENT

Council Implementing Decision (EU) 2017/818 of 11 May 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

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SANCTIONS

Commission Implementing Regulation (EU) 2017/778 of 4 May 2017 amending for the 267th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations

TRADE

Commission Implementing Regulation (EU) 2017/763 of 2 May 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea

CASE LAW CORNER

Decided cases

Copyright

Stichting Brein v Jack Frederik Wullems ("Filmspeler") – Case C-527/15

This case was a reference from the Dutch court in relation to the Filmspeler multimedia player.

Background

That multimedia player is a device which acts as a medium between a source of visual and/or sound data and a television screen. The player included software which made it possible to play files, including third party add-ons which were available on the internet which linked to website on which protected works are made available without the consent of the copyright holders.

In advertising the filmspeler device, Mr Wullems had stated that the player made is possible to freely and easily watch audio-visual material available on the internet without the consent of the copyright holders.

Before the referring court, Stichting Brein (a foundation for the protection of the interests of copyright holders) submitted that by marketing the device, Mr Wullems had made a "communication to the public" in breach of the domestic copyright legislation. Stichting Brein also submitted that those provisions must be interpreted in the light of Article 3(1) of Directive 2001/29 (the "**Directive**") which provides:

"Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."

Mr Wullems submitted that streaming broadcasts of protected works from an illegal source was covered by the exception listed in the domestic legislation on copyright, which must be interpreted in the light of Article 5(1) of the Directive.

Reference

The reference can be summarised as two discrete issues:

1 Is there a "communication to the public" in accordance with Article 3(1) of the Directive when someone sells a device which includes add-ons containing hyperlinks to websites where protected works are made directly available without the consent of the right holders?

2 If a temporary reproduction is made by an end user during the streaming of a protected work from a third party website (where the protected work is offered without the consent of the right holder), should Article 5 of the Directive be interpreted as meaning that there is no lawful use within the meaning of Article 5(1)(b)?

"Communication to the public"

The Court held that authors have a right which allows them to intervene, prohibiting potential users of their work from making a "communication to the public". Article 3 of the Directive does not define the concept of a "communication to the public", and its meaning and scope

must be determined broadly, and in the light of the objectives pursued by the Directive.

In a **press release**, the court said that "*the CJEU has already held that the availability, on a website, of clickable links to protected works published without any access to restrictions on another website offers users of the first website direct access to those works…".*

Accordingly, the CJEU held that the sale of a device, such as the one in question, is a "communication to the public" within the meaning of the Directive, and the sale of such a device could therefore constitute and infringement of copyright.

2. Temporary acts of reproduction

Under Article 5(1) of the Directive, an act of reproduction is only exempt from the right of reproduction if five conditions are satisfied. If any one of the five conditions is not satisfied the act of reproduction will not be exempt. The Court has held that the conditions are to be applied strictly and the exemption is only to be applied in certain special cases.

One of the conditions is that the sole purpose of the process in question must be to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or protected subjected matter.

Considering the content of the advertisements for Filmspeler, and on the basis that the main attraction of the media player was the pre-installed add-ons mentioned above, the Court held that the purchasers of the player deliberately, and in full knowledge, accessed a free and unauthorised offer of protected works. Accordingly, the sole purpose was not to enable the lawful use of a work or protected subject matter.

The conditions in Article 5(1) of the Directive were therefore not satisfied, and the Court held that temporary acts of reproduction of protected works on the Filmspeler media player, obtained by streaming a third party website which offered the works without the consent of the copyright holder, cannot be exempted from the right of reproduction.

Environment

In **Case C-502/15**, **European Commission,** v **United Kingdom of Great Britain and Northern Ireland,**

Commission brought action claiming UK treatment of waste water in several council areas constituted breaches of Directive 91/271/EEC of 21st May 1991, concerning urban waste-water treatment. Formal notice served by the Commission on 26th June 2009, to which the UK replied sating that the concerned systems were under investigation as to the underperformance, as well as being the subject of enforcement action against the sewerage undertaker. In January 2014, UK indicated that full compliance with the directive was envisioned in 2020. However, a reasoned opinion was sent by the Comission, under Article 258 TFEU, and received on 11th July 2014, stating that the UK had failed to comply with various provisions of the directive, and calling on the UK to take the necessary measures to comply with the opinion within 2 months of receipt. Action subsequently brought successfully – based on technical data provided by the UK – against the UK for failing to so fulfil the reasoned opinion.

Other points addressed; although the Article 258 TFEU provides that it is for the Commission to prove the allegation that an obligation has not been fulfilled – without being entitled to rely on any presumption – as the commission has no investigative powers of its own, it is largely reliant on the information provided by the complainants or by the MS concerned. Thus, where the Commission has collated sufficient evidence that a MS has not correctly transposed a directive, it is for the MS to challenge in substance and detail the information produced. Furthermore, even where a State does not challenge a breach of obligations, it is for the Court to determine whether or not the breach exists.

Trade, Anti- dumping margin

In **Case C-239/15 P, RFA International LP,** established in Calgary (Canada),vs **European Commission,** 4th May 2017

Via a Swiss subsidiary, RFA purchases, resells, imports and warehouses, within the Union, ferrosilicon originating in Russia produced by two sister companies established in Russia. Following a complaint lodged by the Comité de liaison des industries de ferroalliages (Euroalliages), the Council adopted Regulation (EC) No 172/2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferrosilicon originating in, interalia Russia. Following this, between 30 July 2009 and

10 December 2010, RFA submitted to the Commission a number of applications for refund of the anti-dumping duty paid during the period from 7 January 2009 to 10 December 2010. The investigation in respect of the refund requested covered the period from 1 October 2008 to 30 September 2010 and was divided by the Commission into two parts. The first part related to the period from 1 October 2008 to 30 September 2009 and the second the period from 1 October 2009 to 30 September 2010. By the decisions at issue, the Commission granted the refund applications for the first investigation period and rejected the refund applications for the second investigation period.

RFA subsequently brought an unsuccessful action to the general court, and subsequently an appeal, arguing that the adjustments made under Article 2(9) of the Basic Regulation were excessive. The Commission had, under that regulation, constructed the export price on the basis of the price at which the imported products were first resold to an independent buyer, adjusted for all costs incurred between importation and resale, profit margin, set at 6%, and a reasonable margin for selling, general and administrative costs. Addressing this ground of appeal – that the General Court contradicted itself by (1) requiring RFA to produce precise calculations as to the allocation of costs and profit relating to its import and export functions and (2) endorsing the Commission's reasoning that, in the present case, there was no need to distinguish between those functions because the existence of a single economic entity was irrelevant for the purpose of calculating the export price – the Court of Justice held that this was a misreading of the judgement of the General Court. A correct reading would have been that the distinction between import and export functions does not reverse the burden of proof whereby it is for the applicant to show that the adjustments made by the Commission were excessive.

European Regional Development Fund

Cases T-403/15 – JYK sp. Z o.o. ; and T-512/14 – Green Source Polan sp. Z o.o.

Both of these cases were applications made on the basis of Article 263 TFEU seeking the annulment of two separate Commission Decisions refusing to make financial contributions out of the European Regional Development Fund.

In both judgments the Court set out the legal test that, in order to satisfy the requirement that the decision forming the subject matter of the proceedings must be of direct concern to a natural or legal person, two cumulative criteria must be met:

- The contested EU measure must directly affect the legal situation of the individual; and
- It must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of intermediate rules.

In both cases, the Court held that the two criteria above were not satisfied, and therefore the applicants were not "directly connected". Accordingly, the applicants were not entitled to bring proceedings under Article 263 TFEU and both cases were dismissed as inadmissible.

Dervied Right of Residence

In Case C-133/15, request for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Higher Administrative Court, Netherlands), re. **H.C. Chavez-Vilchez & Others,** 10th May 2017.

1. Must Article 20 TFEU be interpreted as precluding a Member State from depriving a third-country national who is responsible for the day-to-day and primary care of his/her minor child, who is a national of that Member State, of the right of residence in that Member State?

2. In answering that question, is it relevant that it is that parent on whom the child is entirely dependent, legally, financial and/or emotionally and, furthermore, that it cannot be excluded that the other parent, who is a national of the MS, might in fact be able to care for the child?

3. In that case, should the parent/third-country national have to make a plausible case that the other parent is not able to assume responsibility for the care of the child, so that the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?'

Court of Justice held in response to (1) and (2) that fact that partner from a MS is willing and able to assume care, while relevant, is not in itself a sufficient ground for concluding that there is not such a relationship of dependency between the child and a third party national that depriving the third party national of a right of residence would not compel the child to

leave the territory of the European Union. Instead, such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

Similarly, in response to (3), the Court held that Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. However, the competent authorities of the Member State concerned must undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences.

Upcoming decisions and Advocate General opinions in May

Area of freedom, security and justice

Case C-111/17 PPU – OL (Opinion of the Advocate General)

Question referred by the Greek Court:

What is the appropriate interpretation of the concept of 'habitual residence', within the meaning of Article 11(1) of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, in the case of an infant who fortuitously or due to force majeure has been born in a place other than that which her parents with joint parental responsibility for the child intended to be the place of her habitual residence, and was then unlawfully retained by one parent in the State where she was born, or removed to a third State.

More specifically, is physical presence a necessary and self-evident prerequisite, in all circumstances, for establishing the habitual residence of a person, and in particular a new-born child?

Case C-171/16 – Beshkov (Opinion of the Advocate General)

Questions referred by the Bulgarian Court:

How must the expression 'new criminal proceedings' used in Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings be interpreted, and must that expression necessarily be connected with a finding of guilt in respect of an offence committed or can it also relate to proceedings in which, under the national law of the second Member State, the penalty imposed in an earlier judgment must absorb another sanction or be included in it or must be enforced separately?

Must Article 3(1), read in conjunction with recital 13, of Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings be interpreted as permitting national rules which provide that proceedings in which an earlier judgment delivered in another Member State must be taken into account may not be initiated by the sentenced person but only by the Member State in which the earlier judgment was delivered or by the Member State in which the new criminal proceedings are taking place?

Must Article 3(3) of Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings be interpreted as meaning that the Member State in which the new criminal proceedings are taking place may not change the manner of execution of the penalty imposed by the Member State which issued the earlier sentence, including in the event that, under the national law of the second Member State, the penalty imposed by the earlier judgment must absorb another sanction or be included in it or must be enforced separately?

Case C-218/16 – Kubicka (Opinion of the Advocate General)

Question referred by the Polish Court:

Must Article 1(2)(k), Article 1(2)(1) and Article 31 of Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession be interpreted as permitting refusal to recognise the material effects of a legacy by vindication (legatum per vindicationem), as provided for by Polish succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?

Case C-225/16 – Ouhrami (Opinion of the Advocate General)

Questions referred by the Dutch Court:

Must Article 11(2) of the Return Directive be interpreted as meaning that the period of five years mentioned therein is calculated:

- from the moment at which the entry ban (or, with retroactive effect, the equivalent declaration of undesirability) was issued
- with effect from the date on which the person concerned actually left the territory of — essentially — the Member States of the European Union; or
- from some other point in time?

Must Article 11(2) of the Return Directive, having regard to the application of transitional law, be interpreted as meaning that decisions taken before that directive entered into force, the legal effect of which is that the addressee must remain outside the Netherlands for ten consecutive years, while the entry ban was determined having regard for all the relevant circumstances of the individual case and was open to challenge on legal grounds, no longer have any legal effect if the duration of that obligation, at the time by which that directive had to be implemented or at the time at which it was established that the person to whom that decision was addressed was present in the Netherlands, exceeded the period provided for in that provision?

Economic policy

Case T-122/15 – Landeskreditbank Baden-Württemberg v BCE (Judgment of the Court)

Landeskreditbank has claimed that the Court should annul the decision of the ECB of 5 January 2015, and has sought an order that the effects of the substituted decision of the ECB of 1 September 2014 should be maintained.

Landeskreditbank has pleaded five arguments:

- The ECB applied an inappropriate criterion for the assessment of particular circumstances;
- There were manifest errors in the assessment of the facts of the case;
- There was an infringement by the ECB of the obligation to state reasons for its decision;
- The ECB acted *ultra vires*, and misused its powers by failing to exercise discretion; and
- The ECB breached its obligation to assess and to take into consideration all of the relevant circumstances of each individual case.

Freedom of establishment

Case C-68/15 – X (Judgment of the Court)

Questions referred by the Dutch Court:

Must Article 49 of the TFEU be treated as precluding national rules under which:

- companies established in another Member State and having a Belgian permanent establishment are subject to a tax if they decide to distribute profits which are not included in the final taxable profits of the company, irrespective of whether profits have flowed from the Belgian permanent establishment to the main establishment, whereas companies established in another Member State and having a Belgian subsidiary are not subject to such a tax if they decide to distribute profits which are not included in the final taxable profits of the company, irrespective of whether or not the subsidiary has distributed a dividend; and
- companies established in another Member State and having a Belgian permanent establishment are, if they retain the Belgian profits in full, subject to a tax if they

decide to distribute profits which are not included in the final taxable profits of the company, whereas Belgian companies are not subject to such a tax if they retain their profits in full?

Must Article 5(1) of Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States be interpreted as meaning that there is withholding tax in the case where a provision of national law requires that a tax be imposed on a distribution of profits by a subsidiary to its parent company in that, in the same taxable period, dividends are distributed and the taxable profits are wholly or partly reduced by the deduction for risk capital and/or by tax losses carried forward, whereas under national law the profits would not be taxable if they remained with the subsidiary and were not distributed to the parent company?

Must Article 4(3) of Directive 2011/96/EU be interpreted as precluding national legislation under which a tax is levied on the distribution of dividends if that legislation has the effect that, in the case where a company distributes a received dividend in a year subsequent to the year in which it received that dividend itself, it is taxed on a portion of the dividend which exceeds the threshold laid down in the aforementioned Article 4(3) of the Directive, whereas that is not the case if that company redistributes a dividend in the year in which it receives it?

Freedom to provide services

Case C-48/16 – ERGO Poist'ovna (Judgment of the Court)

Questions referred by the Slovakian Court:

Must the expression 'the contract between the third party and the principal will not be executed' in Article 11 of Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents ('Directive 86/653') be interpreted as meaning:

- complete non-execution of the contract, that is, neither the principal nor the third party even partly performs what is provided for in the contract, or
- even partial non-execution of the contract, that is, the volume of transactions envisaged is not achieved, for example, or the contract will not last for the time envisaged?

Must Article 11(2) of Directive 86/653 be interpreted as meaning that a provision in a contract for commercial agency under which the agent is obliged to return a proportionate part of his commission if the contract between the principal and the third party is not executed to the extent envisaged, or to the extent defined by the contract for commercial agency, is not a derogation to the detriment of the agent?

In the cases concerned in the main proceedings, when assessing whether 'the principal is to blame' within the meaning of the second indent of Article 11(1) of Directive 86/653,

- may only legal reasons leading directly to termination of the contract be considered (for example, the contract ceases as a result of the non-performance of an obligation under it by the third party), or
- may it also be considered whether those legal reasons were not the result of the conduct of the principal in the legal relationship with that third party which induced the third party to lose confidence in the principal and consequently to breach an obligation under the contract with the principal?

Principles of Community law

Case C-64/16 - Associação Sindical dos Juízes Portugueses (Opinion of the Advocate General)

Question referred by the Portuguese Court:

In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by EU rules, must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the Charter of Fundamental Rights of the European Union and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law No 75/2014 of 12 September?

About us

The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: **brussels@lawsociety.org.uk**

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