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[1] Sources available on request

Part I FUTURE EU-UK RELATIONS - NEWS AND VIEWS

A quick recap of the final steps to UK exit

- In October 2019, the EU and UK reached agreement on a revised **Withdrawal Agreement** (WA) (Consisting of the draft treaty entitled Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community https://bit.ly/2JnxMwL together with the (non-binding) revised Political Declaration on the Future Relationship (FR) https://bit.ly/2WhEObC.
- The European Council, in EU27 format, then adopted conclusions on 13 December (see *Brussels News 150* for more detail), which committed to the following (my emphasis):
    - An orderly withdrawal on the basis of the WA, with calls for its timely ratification and *effective implementation*.
    - "to establish *as close as possible* a future relationship with the UK in line with the Political Declaration and respecting the previously agreed European Council's guidelines, as well as statements and declarations, notably those of 25 November 2018. The future relationship will have to be based on a *balance of rights and obligations and ensure a level playing field*."
- You will recall that, in line with the Commission's decision of 22 October 2019, the UKTF (formerly the Article 50 Task Force) will conduct the negotiations on the future relationship. **Michel Barnier** is the Head of the UKTF, as he was of the TF50.
- During the month of January, the UKTF held a series of seminars with officials from the Member States in preparation for the next phase of negotiations. Among the materials generated during that period was a collection of helpful slides, which can be found at: https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en Of particular note given the Bar's priorities are the slides on Criminal judicial cooperation; Data equivalence (which has a section on criminal cooperation); Security and Foreign policy (which has a section on sanctions) and in more general terms, FTA, level playing field and governance. It is clear that ECJ jurisprudence and some degree of oversight, continuing adherence to the ECHR and a durable finding of data equivalence will be seen by the EU as essential elements of any agreement on judicial cooperation, whether it be on the criminal or civil side.
- On 22 January the EU 27 meeting in Council adopted guiding **principles for transparency in the negotiations on the FR**: https://data.consilium.europa.eu/doc/document/XT-21010-2020-INIT/en/pdf
- On 24 January the WA was **formally signed** on behalf of the EU by the President of the European Council, Charles Michel, the President of the European Commission, Ursula von der Leyen (VDL), and by Boris Johnson in and for the UK.
- The European Parliament (EP) consented to the WA in plenary on 29 January. EU-side of ratification was completed with European Council signature on **30 January.**
- Meanwhile, on the UK side, The **European Union (Withdrawal Agreement) Act (EUWAA)** 2020, (amending the European Union (Withdrawal) Act 2018 which enacted Brexit itself), which gives effect to the WA in UK law, received Royal

Assent on 23 January 2020. The full statute can be viewed at: http://www.legislation.gov.uk/ukpga/2020/1/contents. Just to note here that the Bar has concerns about the terms of this statute, including lack of government accountability as the next phase of negotiations proceeds; the liberal sprinkling of Henry VIII clauses, providing broad powers to ministers and "appropriate authorities" to amend and adapt implementing legislation; as well as Section 26 – which provides for the possibility for UK courts, including lower courts, to depart from retained EU case law.

- The Withdrawal Agreement came into effect at ***midnight, CET, on Friday, 31 January 2020*. As of then, the UK is no longer a Member State of the EU.**

What we can expect to happen next – the negotiating process through 2020

The Commission adopted comprehensive draft negotiating directives for the FR on **3 February 2020** See: https://ec.europa.eu/info/sites/info/files/communication-annex-negotiating-directives.pdf. These draw on the Political Declaration and series of seminars mentioned above, as well as elements of earlier EP Brexit resolutions adopted over the past three years and reported on in contemporaneous editions of this newsletter.

On the same day, the UK Prime Minister (PM) gave a speech setting out the UK's ambition for the FR, reproduced as a Written Statement to Parliament. See: https://www.gov.uk/government/speeches/the-future-relationship-between-the-uk-and-the-eu

By the terms of the WA, the **transition period** began on **1 February 2020 and is set to end on 31 December 2020**. Until then, it is broadly business as usual for citizens, consumers, businesses etc in both the EU and the UK. The UK is no longer represented in the EU institutions, but EU law still applies in and to the UK.

During February, officials from the UKTF and Member States have been meeting regularly to discuss and as necessary, amend, the draft EU mandate. COREPER, the committee of the Permanent Representatives of the Member States, has met unusually often over the past fortnight to try to finalise the text, but as of yesterday they were not quite there yet. Leaked intermediate versions indicate a general hardening of the EU's line. Whilst those in Brussels claim to see HMG public pronouncements as the usual pre-negotiation rhetoric, there is no question but that repeated insistence on e.g. the freedom to diverge, coupled with apparent row-backs on some of the commitments made in the WA itself, is making the EU side, especially countries closest geographically and most likely to be trading with the UK going forward, like France, nervous and mistrustful. Hence the increased insistence on checks and balances, including level playing field commitments as a condition of access to markets.

The **General Affairs Council is set to adopt the mandate on 25 February 2020**. **Once adopted the Commission will stick to it rigorously.**

Formal negotiations with the UK are set to begin on or about 2 March.

The EU intends to run the negotiations on all the different elements included in the Mandate – FTA, security cooperation, etc in parallel.

The precise **schedule for the negotiations** is yet to be agreed, but the EU side is expecting to proceed in cycles of 3 weeks: a week of preparation, a week of negotiation and a week of reporting, so that it can be transparent with the EP and Council.

Goods and services will be negotiated within the UKTF by **separate teams**, separately, even though there is overlap between the two, in e.g. products involving technological components or after sales service. The reason for the separation is largely down to the very different approaches taken to such negotiations at technical level. Thus for goods, the focus will be on zero tariff, zero quota, rules of origin. For services, the mandate is broad, excluding only audiovisual, with reference back to the WTO rules and covering all 4 modes of supply.

The unilateral decisions on **equivalence** for data flow and financial services are due to be taken by June, and work on both has started.

The EU expects to undertake **a stock take of progress on the negotiations at the June European Council.** If it is clear at that point that it will not be possible to reach agreement and ratify by 31 December across all areas, then they will have to prioritise.

As regards **prioritization**, the EU says it will focus its limited time and resources on areas where there is no **fallback** position in the event of a no deal exit. One can argue the other way, but the prevailing view is that for sectors like fisheries, transport and aviation, if there is no agreement then the economy grinds to a halt. In contrast, goes the thinking, GATS provides some sort of cushion for services, even if only on an interim basis.

The package to be agreed, if there is one, should emerge by **September**, latest October.

The **architecture of the deal**, and thus what formal steps are needed to ratify it on the EU side, will only be determined in the early autumn once they have an overview of content. If it is, say, an Association Agreement, or a mixed agreement (covering areas of both EU and UK competence) then the Member States themselves will have to ratify at national level, as well as the EU – adding further delay and complexity.

That could also have a knock-on effect on e.g. questions of **competence** to conclude bi-lateral deals between the UK and individual Member States in areas not covered by the main agreement, even on an interim basis.

The aim is to have at least a bare bones **FTA agreed and ratified by 31 December 2020, possibly with security cooperation etc agreed alongside**.

Role of the EP

Just by way of reminder, the other main EU institution, the European Parliament (EP) has no formal role in the process but must consent to the final deal later this year. It

will (indeed has already, see below), adopt own initiative reports as things proceed. Its Brexit Steering Group, chaired by David McAllister MEP (replacing Guy Verhofstadt MEP who is now working on the Future of Europe Conference, see below), remains active and will be briefed by UKTF throughout the process.

EP calls for level playing field & "dynamic alignment" of EU-UK rules.

As if to underline its intention to remain engaged and relevant throughout the next phase, on 12 February the EP Plenary[1] adopted, by a huge majority, its first Brexit resolution since the UK actually left the bloc. It provides a timely insight into MEPs' views on the Commission's approach to the forthcoming negotiations on the FR.

This latest EP position reiterates the EP's longstanding preference for an **EU-UK Association Agreement**, despite rather less ambitious signals coming from everywhere else. The EP would like it to be as deep as possible, based on **three main pillars**: an economic partnership, a foreign affairs partnership and specific sectoral issues – again, all referred to in earlier resolutions. Like the Commission, it insists that a non-EU country cannot enjoy the same rights as a Member State and further, that the integrity of the Single Market, and the Customs Union must be preserved.

Given the size of the UK's economy and its proximity, future competition with the EU must be kept open and fair through a "**level playing field**" in areas like social and environmental policy, tax, state aid, consumer protection and climate matters. To maintain quota-free, tariff-free trade relations, the EP expects HMG to agree to "**dynamic alignment**" of EU-UK laws in areas such as competition, labour standards and environmental protection,

The resolution also makes EP approval of any EU-UK free trade deal conditional upon a **prior agreement on fisheries by June 2020**. Though fisheries accounts for a tiny fraction of the trade that is at stake here, its importance for several Member States has moved it up the political agenda.

The text also contains chapters covering **citizens' rights** – long an EP hobby horse, as well as mobility of persons, data protection, the future of financial services, the situation on the island of Ireland, the role of the CJEU in dispute settlement, participation in EU programmes and agencies and foreign policy and security matters/

See: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0033_EN.html

Spotlight on the EU's attitude going into the negotiations with the UK

You are doubtless seeing more than enough coverage of HMG's messaging on this next phase of negotiations. For present purposes, I'll simply mention the most recent public iteration of the UK's pre-negotiation position in Brussels - the speech given by UK chief negotiator David Frost at the Université Libre de Bruxelles (ULB) earlier this week: https://reaction.life/david-frost-speech-in-full-britains-brexit-position/

The key takeaways were that the UK sees itself as a sovereign equal in this relationship and expects to be treated accordingly. It does not want a bespoke trade agreement that would keep the UK aligned with EU rules and standards, but rather an off the shelf

[1] The first plenary sitting since Brexit. The EP's membership is down from 751 to 705, though not all the new members (the seats were divided between several Member States) have yet taken office.

deal, like the EU-Canada trade deal (which abolished most tariffs and made inroads into services, but which would still involve a significant degree of trade friction). On LPF he considers that agreeing to abide by EU rules would contradict the whole point of Brexit, which was for the UK to be able to make its own decisions.

But what does the EU make of it all?

Now that Brexit has happened, the first thing to note is, rather mundanely, that the vocabulary in Brussels has moved on. It may be obvious in law, but the **EU has 27 Member States and therefore the term EU27 is no longer necessary** or used. The UK is out. It is a third country. Anyone dealing directly with the EU institutions or other Member States should bear this in mind and adapt vocabulary accordingly.

The fact that the UK is a third country informs all aspects of the EU's attitude to it now. For example, it wants to avoid setting precedents for other EU-third country trading arrangements, including existing ones with Most Favoured Nation clauses.

There remains regret at Brexit and sympathy for respected independent stakeholders like the Bar, though we should not count on that continuing if negotiations go badly.

There is awareness that negotiations on the FR will be difficult and concerns that relations could sour quickly. The EU side is trying to see HMG rhetoric as just noise but worries that the UK really will be **recalcitrant and may not act in good faith**. This concern is not allayed by Ministerial statements that indicate that the UK is already reneging on commitments made in the WA, such as on the need for customs checks between Great Britain and Northern Ireland.

Thus, whilst there is general optimism at present, **preparations for no deal** are also continuing at both EU and Member State level.

The EU's primary resolve is to move forward, get the FR sorted out in its own best interests, and focus EU resources on wider pressing challenges such as the Rule of Law, AI etc. (on which see more under Business as Usual below).

There is confidence that **EU Member States will stick together** through the second phase of negotiations, even in the teeth of individual Member State priorities. If splits emerge, they will come at the point when priorities have to be identified or formal approvals to the deal as agreed are needed. This could work against UK interests.

Whilst the EU wants as close as possible a relationship with the UK, it recognises that there are limits to what can be achieved in this second phase. The most immediate **limitations on the scope of ambition** are:

- The **limited time** available, since the EUWAA 2020 effectively makes requesting an extension to the transition period illegal. The Council Legal Service has confirmed that if an extension is not requested and granted by end June in accordance with the terms of the WA, no extension is legally possible.

- The **UK's red lines** on CJEU oversight, Single Market Freedom of Movement (FOM), especially of people, etc, coupled with the EU's red lines on cherry-picking, especially from the Single Market.

Absent an extension, the negotiations on the FR will need to be completed by September, latest October, in order to leave time for ratification by the end of 2020.
As noted above therefore, the EU is expecting to have concluded negotiations on whatever is possible in this timeframe by October, having **focused efforts on priorities from June onwards**, if by then it is obvious that a comprehensive deal is not possible by December.

The EU is fully aware that in **undertaking that June stock-take**, it will have to decide on what is **feasible and desirable** to be agreed on by the end of the year. They may not be the same thing.

Again as noted above, if it has to, it will **prioritise areas where there is no existing no deal fallback**, or where short-term coverage cannot practicably be put in place. In effect, that looks likely to boil down to trade in goods, especially just-in-time production or perishables, and sectors like aviation where absent an agreement, all planes could be grounded.

Whilst hoping for more therefore, the EU accepts that a comprehensive agreement will almost certainly not be reached by the end of 2020.

It is interesting to note that the EU is fully aware that prioritization is not only a practical (and political), but also a strategic question, for both sides. First there is the balance between the eeconomic price and benefit, versus the political price and benefit of having a deal or not in a particular area. But more than that, if you want to keep both sides at the table beyond 2020 (whether that be under an extended transition, or more likely, under the radar and in an effort to conclude follow-on agreements or other agreements within an overall framework), they both have to believe there is something still on it that they want.

Underlying all this is the fundamental point that the UK chose Brexit and is itself narrowing the scope for agreement, so the damage caused to areas of the UK economy not covered by the negotiations this year is self-inflicted. If avoidable damage is also caused on the EU side, they will be more amenable to seeking solutions, whether during negotiations this year, or thereafter.

What does all this mean for the Bar's priorities?
As longstanding readers will know, the Bar has pursued two broad-based priorities throughout the post-referendum period, whilst also actively defending our and our clients' interests on rule of law and constitutional issues, as well as legal issues across a wide range of individual practice areas.

To recap, our key horizontal (as opposed to practice-specific) priorities are to ensure future **justice cooperation in both the criminal and civil law fields**, and in support of that, to secure **market access** for our practitioners. Since future security and police cooperation are at least as high up the political agenda for the EU as they are for the UK, and are expressly included in the EU mandate, there is reason to hope that solutions can be found on the criminal justice side, albeit that they will certainly fall short of the level of cooperation we have all come to expect.

Future Civil Justice cooperation and market access, are, however, more marginalised.

Civil Justice Cooperation

At its harshest, the EU's robust view is that damage to legal services and harm suffered by UK consumers and businesses due to loss of CJC acquis are just collateral losses from Brexit. In the CJC field, this is further reinforced by the fact that the Commission has tended to see CJC as a Single Market issue, rather than a horizontal access to justice / rule of law issue as we would have it. Moreover, the EU points to the cushion of existing non-EU international fallback solutions, most notably the Lugano Convention 2007.

Seen from this perspective, and again, given the lack of ambition on CJC in the Mandate, and the limited time the UK is willing to put towards negotiations under the WA transition terms, it seems the EU can live with a cliff-edge for CJC at the end of 2020. It could then wait and see how bad the reality is, and in particular, whether EU citizens and businesses suffer as a result of the difficulties in recognising and enforcing EU judgments and orders in the UK.

If therefore, it becomes necessary in June to prioritise negotiation topics, we are not likely to see CJC moving up the list. The Bar has, however, been lobbying both the UK and EU side to try to counter these various perceptions and obstacles, as well as to ensure that the fallback of UK accession to the Lugano Convention is in place on time, and we will continue to do so. We are likely to be amassing further evidence-based data in support of our concerns over the next 3 months, so please contact me at the address below if you are able to contribute.

LEGAL SERVICES

In order to be able to continue to provide professional legal services in and into the EU from 1 January 2021, the UK professions will need, a priori, EU-UK agreement on 3 elements:

1. Market access (modes of supply),
2. Mobility of persons (including visa rules) and
3. Mutual Recognition of qualifications.

The future FTA, whether immediately, or following further negotiation, should deal with the modes of supply aspects, though potentially not for all areas of law. But even under GATS, the EU's offer on say, mode 4, fly-in, fly-out, is already seen as generous. Work is ongoing to explore possibilities for an EU-UK Mutual Recognition Agreement on legal services. If the **benefits are seen as mutual** for both sides, this may gather momentum among national bars, and by extension their Member States, which could in principle bring pressure to bear to push this up the agenda, provided the adopted negotiation mandate provides for the possibility.

Whilst such a package would be desirable, there are a lot of imponderables, so various fallback options are also on our radar, including agreeing bi- or multi-lateral arrangements with other national Bars at least as an interim solution, pending the hoped for EU-UK agreement. Again the Bar, along with other arms of the UK legal profession, is exploring all the various options and taking all necessary steps to keep them on track.

Maintaining good relations with other EU national bars, always a major priority for us, has thus never been more important. A non-EU but fundamental point to bear in mind in this context is that UK continued adherence to the European Convention on Human Rights is a sine qua non for them.

Other Brexit-related reading

Just a few of the dozens of other worthwhile exposés out there:

- The Court of Justice's 31.1.2020 statement on the consequences of Brexit for itself, in case you have not seen it: https://bit.ly/2HEpC1E
- Another of Prof Steven Peers helpful papers, this time on the respective negotiating positions ahead of phase 2: https://bit.ly/2SL6Wnd
- Business Europe's new UK future relations position paper – 6 February 2020: https://bit.ly/2V8lizB

Part II EU BUSINESS AS USUAL

The Bar continues to engage on EU law developments that may have an impact on its clients or practice. It bears repeating each time: this matters while we are transiting out of the EU, and likely in many fields for many years thereafter, despite current Government positioning - on which see more above.

For now, any EU regulations that enter into force, or directives that are to be implemented, this year, will bind the UK (including in the JHA area if the UK had opted in).

Beyond that, if the Future Relationship involves close cooperation, possibly based on reciprocity in some areas, that will surely require the UK to, at the very least, mirror a lot of EU rules going forward. So, our BAU work continues.

Note that, during the early February visit to Brussels by the **Chair of the Bar**, Amanda Pinto QC, we were encouraged to continue to input our views and expertise on EU policy issues, especially ones on which our value-added is manifest despite Brexit.

Looking ahead to the Future of Europe Conference

On 22 January 2020 the European Commission set out its ideas for shaping the Conference on the Future of Europe (a project announced by VDL in her Political Guidelines from last summer, reported on in *Brussels News 148*), which is to be **launched on Europe Day, 9 May 2020** (75 years on from the Schuman Declaration

https://bit.ly/3bREKH3) and run for two years. The basic idea is to open up the debate and encourage engagement, particularly of the wider population.

The Commission proposes **two parallel work strands** for the debates:

- The first should focus on **EU priorities** and what the Union should seek to achieve: including on the fight against climate change and environmental challenges, an economy that works for people, social fairness and equality, Europe's digital transformation, promoting our European values, strengthening the EU's voice in the world, as well as shoring up the Union's democratic foundations.
- The second strand should focus on addressing topics specifically related to **democratic processes and institutional matters**: notably the lead candidate system and transnational lists for elections to the European Parliament.

The European Parliament and the Council are also working on their contributions to the Conference on the Future of Europe. The European Parliament resolution of 15 January 2020 called for an open and transparent process which takes an inclusive, participatory and well-balanced approach towards citizens and stakeholders. Meanwhile, the European Council conclusions of 12 December 2019 called on the Croatian Presidency (January – June 2020) to begin work on the Council's position. The Croatian Presidency has itself listed the Conference among its Presidency Priorities.

The plan is that the three institutions work together towards a **Joint Declaration** to define the concept, structure, scope and timing of the Conference on the Future of Europe, as well as setting down its jointly agreed principles and objectives. See further: Communication: Shaping the Conference on the Future of Europe

European Commission Work Programme 2020

In *Brussels New 150* I gave you a snapshot of the initiatives of likely greatest interest to the Bar listed in a November 2019 draft of the Commission's Work Programme 2020 (CWP 2020). The previous edition also examined the overall priorities of the Commission 2019-2024, of which any one annual work programme is of course only part.

The formal CWP 2020 was adopted on 29 January 2020 and comprises a Communication with several annexes, listing new initiatives, existing initiatives that were launched under previous Commissions and which this Commission intends to complete this year; older measures that need to be evaluated and as necessary, repurposed, and others that, for reasons of obsolescence are being repealed.

See all at: https://ec.europa.eu/info/sites/info/files/cwp-2020-publication_en.pdf

It is interesting to see what has made the cut for 2020 and what has been dropped, even in the short time since late November. We are told, for example, that the fact that the Commission's plans to adopt a decision this year whereby the EU would become a signatory to the 2019 Hague Worldwide Judgments Convention, is just a matter of workload.

For ease of reference, I provide below an indicative list of initiatives of greatest interest to the Bar and the wider European legal profession / order from the three annexes. The procedure reference provided for existing ones allows you to search up their status through the EU institutions' websites. Example: https://oeil.secure.europarl.europa.eu/oeil/search/search.do?searchTab=y

Annex 1 – New initiatives

Apart from the European Green Deal, the December 2019 adoption of which was covered in *Brussels News 150*, and the Conference on the Future of Europe, and brand-new AI and data related initiatives that are covered under their own headings elsewhere in this newsletter, the obvious highlights include:

- WTO reform initiative (non-legislative, due Q4 2020)
- A new Consumer Agenda (non-legislative, Q4 2020)
- European Gender Equality Strategy (non-legislative, Q1 2020), followed by binding pay transparency measures (legislative, incl. impact assessment, Article 157 TFEU, Q4 2020);
- European Democracy Action Plan (non-legislative and legislative, incl. impact assessment, Articles 224 and 114 TFEU, Q4 2020)
- Annual Rule of Law Report (non-legislative, Q3 2020)
- New Strategy for the Implementation of the Charter of Fundamental Rights (non-legislative, Q4 2020);
- EU Strategy for Victims' Rights (non-legislative, Q2 2020);
- Report on the application of the General Data Protection Regulation (GDPR) (non-legislative, Q2 2020);
- Alignment of relevant Union law enforcement rules with regard to data protection (non-legislative, Q2 2020)

I remind you here that VDL has undertaken to table proposals requested by the EP, effectively giving it a right of legislative initiative. We may thus expect to see more new files this year than those contained in the CWP, Annex 1.

Annex II – **Refit Initiatives** – measures that are to be revised / evaluated by end 2020:

- 2018 Geo-blocking regulation 302/2018;
- * Vertical Block Exemption Regulation
- *Procedural and jurisdictional aspects of EU Merger Control
- *SME definition – Commission Recommendation 2003/361 – which, if it leads to a change in the criteria, will have a significant knock-on effect on the scope of application of dozens of other EU measures;
- EU legislation on design protection;
- Directive 2008/48/EC on Credit Agreements for Consumers
- Directive 2002/62/EC on Distance marketing of consumer financial services
- *General Product Safety Directive 2001/95/EC (and see under AI below)

Annex III – Priority Pending Proposals

- Air passenger compensation – COD(2013)0072
- The daylight saving directive (of general interest) COD(2018)0332
- Initiatives related to the European services e-card dating from 2016
- Digital Europe Programme for 2021-27 COD(2018)0227

- Regulation establishing the European Defence Fund COD(2018)0254
- A long list of pending initiatives in the financial services and taxation fields
- *Third country access (goods and services) to EU Public Procurement market and vice versa COD(2012)0060
- *EU's rights for the application and enforcement of international trade rules COD(2019)0273
- *OLAF cooperation with the European Public Prosecutor's office in criminal investigations COD(2018)0170
- *Conditions of entry and residence of highly skilled third country nationals
- *Consumer collective redress –COD(2018)0089 (see most recently, coverage in *Brussels News 150*)
- Implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation 2008/0140 (CNS)
- Regulation amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers 2017/0035 (COD)
- Conditions for accessing EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) ECRIS-TCN] COD(2019)0001
- Law applicable to third-party effects of assignments of claims COD(2018)0044
- Harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings 2018/0107 (COD)
- European Production and Preservation Orders for electronic evidence in criminal matters 2018/0108 (COD)
- Amending Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) 2018/0204 (COD)
- Regulation amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters 2018/0203 (COD)
- Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States 2018/0136 (COD)
- Rights and Values (funding) programme 2018/0207 (COD)
- Justice programme (funding) 2018/0208 (COD)

Shaping Europe's Digital Future – Data and Artificial Intelligence

Amid great fanfare, on 19 February, the Commission unveiled its ideas and actions for the digital transformation of the EU in order to "foster both an open and democratic society and a vibrant and sustainable economy."

The main elements of this package are a **Communication on the European Data Strategy** and a **White Paper on Artificial Intelligence**. In presenting the package, the Commission makes the connection between this and other headline EU policy objectives, including the fight against Climate Change and other elements of the European Green Deal (see *Brussels News 150*). I commend a cross-reference also to the CWP coverage above.

Europe as a leader in trustworthy Artificial Intelligence

The White Paper - A European approach to excellence and trust" sets out the policy options to ensure the "human-centric development" of Artificial Intelligence (AI).

It states that the Commission, in partnership with the private and the public sectors, wants to mobilise resources and create the right incentives to accelerate deployment of AI, including by smaller and medium-sized enterprises. Clear and targeted rules will be put in place to address high-risk AI systems (such as in health, policing, or transport, but also as regards access to justice) without putting too much burden on less risky ones. Meanwhile strict horizontal EU rules for consumer protection, to address unfair commercial practices and to protect personal data and privacy, continue to apply.

For lower risk AI applications, the Commission envisages a voluntary labelling scheme if they apply higher standards.

Note, the Commission is running a public consultation on this White Paper, which is open until 19 May 2020. Please follow the link to respond. The Bar Council will consider doing so through its EU Law Committee.

Of interest to the wider Bar will be the Commission's report accompanying the White Paper which analyses "**The implications of AI, Internet of Things and other digital technologies for safety and liability legislation**" : https://ec.europa.eu/info/publications/commission-report-safety-and-liability-implications-ai-internet-things-and-robotics-0_en

It examines the suitability of existing product safety legislation in the face of new challenges brought by these technologies, such as connectivity, autonomy, data dependency, data bias, opacity, complexity of products and systems, software updates and other complexities. As you might expect, it identifies a number of gaps that need to be addressed in the coverage and makes recommendations for legislative action. It also examines the need for new measures.

Europe as a leader in the data economy

The objective of the European data strategy is to set up a true **European data space**, a single market for data, to unlock unused data, allowing it to flow freely within the European Union and across sectors for the benefit of businesses, researchers and public administrations.

To achieve this, the Commission will propose to establish the right regulatory framework regarding data governance, access and reuse between businesses, between businesses and government, and within administrations.

The Commission will also support the development of the technological systems and the next generation of infrastructures needed to enable the EU and all the actors to grasp the opportunities of the data economy.

Finally, it will launch sector-specific actions, to build European data spaces in e.g. industrial manufacturing, the green deal, mobility or health.

The Commission is also gathering feedback on its data strategy.

Links to further background reading:

In 2018, the Commission presented an AI strategy, and agreed a coordinated plan with Member States. Last year, the Commission followed up with its April 2019

Communication "Building Trust in Human-Centric Artificial Intelligence" https://bit.ly/2vQRUDC which emerged alongside the report by the EU's High-Level Expert Group on Artificial Intelligence, entitled Ethics Guidelines on trustworthy AI.

Artificial Intelligence – EP's asks ahead of the Commission's Big Reveal

In anticipation of the Commission's above initiative, on 12 February, the EP adopted a resolution on Artificial Intelligence (AI) and Automated Decision Making (ADM) in which, not for the first time, it put the interests of consumers at the forefront of its policy asks.

Whilst welcoming the potential of ADM to deliver innovative and improved services to consumers, such as virtual assistants and chatbots, it wants consumers who are interacting with an ADM system to be "properly informed about how it functions, how to reach a human with decision-making powers, and how the system's decisions can be checked and corrected. Such systems should only use high-quality and unbiased data sets and "explainable and unbiased algorithms." Review structures should be set up to remedy possible mistakes in automated decisions, and consumers should have a right of redress against any that are final and permanent.

The EP's headline demands are:

- **Humans should be in ultimate control** and able to overrule, "decisions that are taken in the context of professional services such as the medical, legal and accounting professions, and for the banking sector".
- **Adjust and update safety and liability rules to the new technologies:** Several existing EU consumer protection measures, including the horizontal **Product Liability Directive**, will need to be updated to reflect these technological advances and the rights and responsibilities that follow.
- **Use unbiased algorithms and review structures and avoid differentiated pricing and discrimination:** The EP wants the Commission to closely monitor the implementation of existing rules that require traders to inform consumers when the price of goods or services has been personalised on the basis of ADM and profiling of consumer behaviour; and to guard against ADM being used to discriminate against consumers based on their nationality, place of residence or temporary location.

For the EP resolution, go to: https://bit.ly/2HGIi0N

CRIMINAL JUSTICE, SECURITY AND FUNDAMENTAL RIGHTS

Anti-money laundering – UK transposes 5th Directive just before midnight

I reported in *Brussels News 149* on various plans afoot in the fight against Money laundering, including the UK government consultation earlier last year on transposition of 5AML, which was due to be implemented into Member State national law last month. The results of the consultation were positive, and HMG did indeed implement 5AML, the resulting UK regulations entering into force on 23 January.

It must be in the running for the title last past the post pre-exit.

What are the key changes?

A key objective for 5AMLD is to crackdown on **terrorism**, strengthening the controls and measures under earlier iterations, and adapting them to technological advances. Thus, **cryptocurrencies** and their exchange now face the same AML regulations applied to financial regulations under the Fourth Directive, including mandatory registration for cryptocurrency exchanges and an obligation to submit suspicious activity reports.

Another key amendment is **enhanced due diligence** to deal with transactions from countries deemed to be high risk. As well as the existing obligations to obtain evidence of the source of funds and wealth, information on beneficial ownership and the background to a transaction must also be recorded.

In addition, the EU has **broadened the criteria for identifying high-risk countries** that it deems to have serious deficiencies in their AML and counter-terrorism regimes, based on, inter alia, availability and exchange of information on the beneficial owners of legal persons and legal arrangements. The newly enlarged EU 'blacklist' now includes 23 countries.

Some of the other amendments made under 5AMLD include new national bank account registers so that investigatory authorities can access bank account information even without a suspicious activity report, and the cessation of anonymous accounts such as safety deposit boxes and passbooks. Increasing transparency of beneficial ownership is also a feature, though there is expected to be some mileage in the interpretation of 'legitimate interest', the test to establish the right to access such information. As ever, the balance between security and the fight against crime, and the protection of personal data is a fine one.

For details of the 2019 UK consultation and the resulting 2020 implementing regulations, go to: https://www.gov.uk/government/consultations/transposition-of-the-fifth-money-laundering-directive

EPPO hitting resource problems even before it is operational

In early February, the recently-appointed first ever European Chief Prosecutor, Laura Kövesi updated the EP's Economic and Financial Affairs (ECON) and Civil Liberties (LIBE) Committees on progress towards the setting up of the European Public Prosecutor's Office (EPPO). You'll recall from *Brussels News* coverage throughout 2016/17 that just getting the founding regulation https://eur-lex.europa.eu/eli/reg/2017/1939/oj over the line was quite a feat, and some Member States, whilst signatories, are still dragging theirs now that money and resources are needed (apologies for play on words!).

Work on setting up the new office started last year with the aim that it be operational by the end of 2020. Perhaps unsurprisingly, the Chief Prosecutor is already raising concerns about the anticipated heavy workload (especially fighting cross-border and VAT fraud) and its implications for the case-management system, the staff and budget. She has already put a proposal to the Commission for an increase in the latter and wants to have on her team full-time European delegated prosecutors focused only on the EPPO (and not only part-time delegated prosecutors as currently proposed by some Member States).

She received support from the MEPs present, who also agreed on the need for the EPPO to cooperate and coordinate with EUROJUST, EUROPOL and national authorities. A constructive dialogue with non-participating Member States was also strongly underlined.
See further at, for example: https://bit.ly/2T1Ubnp

Fundamental Rights Agency – Project on presumption of innocence

The FRA is about to launch an EU-wide project examining the presumption of innocence and more broadly, the overall fairness of criminal proceedings. Describing the existing Presumption of Innocence Directive 2016/343 as "small and thin," the project is rather more ambitious. See: https://fra.europa.eu/en

Digital Cross-Border Cooperation in Criminal Justice

In late January, the Commission hosted a conference on **'Digital Cross-Border Cooperation in Criminal Justice'** within the joint framework of the ongoing EU projects: **EVIDENCE2 e-CODEX**, **EXEC** and **e-Evidence.** The Council of the Bars and Law Societies of Europe, the CCBE, of which the Bar is a member, is a project partner**.**

The different ways in which the EU is seeking to try to keep pace with technological developments in the fight against crime as well as in its commission is interesting in and of itself. But in the context of Brexit, this also provides insight into the types of technical cooperation on which one would hope the EU and UK can reach agreement in the coming months, in order to avoid obvious lacunae in their security and crime-fighting armoury. By way of a quick overview:

- The **e-Evidence Project**, coordinated by the Commission's DG Justice, led to the setting up of the **e-Evidence Digital Exchange -** a secure decentralised system interconnecting Member State e-Evidence Portals, allowing them to communicate swiftly and expediently with respect to electronic exchanges in the context of the **European Investigation Order** (EIO) and the various Mutual Legal Assistance instruments (MLA) in the criminal law field.
- **'Electronic Xchange of e-Evidence'** (EXEC) Project extends and strengthens key components of the e-CODEX infrastructure so as to enable the fully electronic exchange of European Investigation Orders and related electronic evidence between Member States. Each participating Member State uses e-CODEX to set up an access point to interconnect with other Member States for exchanging electronic evidence.
- 'Linking EVIDENCE into e-CODEX for EIO and MLA procedures in Europe' (EVIDENCE2e-CODEX) Project provides for the Evidence Exchange Standard Package Application, a web application for creating and/or preparing the evidence so as to facilitate its exchange through the above infrastructures.

The Conference papers, together with links to further details and background about each of the above tools, can be found at: **https://evidence2e-codex.eu/.**
See also most recent coverage in *Brussels News 150* of the EU's ongoing legislative work on the e-evidence proposal.

Criminal law - Alternative methods to Detention

By way of a follow-up to coverage in *Brussels News 150* of the JHA Council's early December soft law conclusions, which provided an overview of EU past and possible future incursions into the challenging question of alternatives to custodial sentences, I draw your attention to the Finnish Council presidency (second half 2019) Presidency Report entitled Alternative measures to detention. It emerged just before Christmas, but alas too late for me to reference it. The report provides further background to the discussions, as well as voluminous documentary evidence, that supported the aforementioned early December conclusions. It is therefore likely to be helpful to any practitioners who found those of interest. See: https://bit.ly/37J0O31

Respect for the rule of Law as a condition for EU funding?

You will recall from detailed coverage in *Brussels News 148 & 149*, the Commission's priorities for the next 5 years include using the full EU toolbox to counter increasing challenges to the Rule of Law within the EU. As discussed in earlier editions throughout 2017-18, the Article 7 TFEU sanctions are seen as something of a blunt instrument, not least since unanimous Council support is needed to impose them. Quite apart from the inevitable sensitivity regarding the EU being seen as "interfering" in Member State constitutional matters (e.g. as regards the appointment or retirement of national judges), the fact that you only need one sympathetic Member State in order for the sanction to be vetoed, means, at least in the current climate, that such sanctions won't get through.

Whilst work is underway behind the scenes on various elements that were, most recently, set out in VDL's plans for Rule of Law during her term as Commission President, two in particular are in the news just now:

Making **the rule of law an integral part of the next Multiannual Financial Framework 2021-27 (MFF)**. You have likely seen coverage of the European Council meeting this Thursday and Friday, to debate the MFF. Always a tricky discussion, the impact of Brexit on the EU's coffers and how that hole is to be filled is not assisting.

But perhaps even more difficult, and a topic that likewise has pre-occupied the EU and the Member States for some months now, is the question of linking rule of law and the sound management of EU funds. You may recall that the Commission tabled a proposal for a regulation on just this topic in May 2018 (**COD(2018)0136**), which found EP support in 2019, despite some early misgivings about legal basis. The expanded proposal is now in trilogue discussions between the co-legislators. Meanwhile however, elements of the ideas therein are being tested in the context of settling the MFF. There is tension between on the one hand, taking a "protective" approach – i.e. safeguarding the EU budget from breaches of rule of law – and, on the other hand, a "strategic" one, reinforcing the leverage of the EU Funds to promote European common values.

Various iterations of the MFF have emerged. Most notable now are the Finnish Council Presidency version from December and European Council President Charles Michel's latest proposal, which is seen by many, including the EP, as having diluted the already unpopular Finnish proposal. The EP wants more funding for e.g. the

European Green Deal and the fight against Climate Change (see e.g. https://bit.ly/37Jin3e

The debate about linking the MFF, and specifically EU funding, to respect for the Rule of Law, has been raging for months and is expected to come to a head over these days. Whilst bringing offending governments to heel by hitting them in their purse looks superficially attractive (and Poland and Hungary are net recipients) there are myriad concerns, including the risk that citizens rather than governments would suffer if certain types of EU funding are cut; that it reeks of interference in sovereign business (the constant fear for the EU when faced with rule of law problems in the Member States) and that it could be used to stir up anti-EU sentiment in the countries in question. This is definitely one to watch just now.
For more on the MFF more generally and the process of its adoption, see: https://bit.ly/38KMxUU

In other Rule of Law news this week: The new commitment to produce an **annual report on the state of the Rule of Law in all Member States**. This is listed in the CWP above for Q3 2020, but the Commission has now confirmed more precisely that the first ever of these will emerge in October and will include a chapter on anti-corruption.

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