Brussels News©

Issue 152 11 May 2020

Newsletter for the Bar Council of England and Wales, Brussels Representation Office.
For subscribing members of this Bar, unless with express permission of the author [1]

Part I LAW IN THE TIME OF COVID 2
Covid19 – Bar support 2
Overview of European Bars' measures responding to challenge of Covid19 2
Fundamental Rights Agency tracking HR in the time of Covid19 3
Impact of Covid19 on Democracy, rule of Law and Fundamental Rights 3
EP resolution on EU measures to combat the Covid19 pandemic 3
European Data Protection supervisor – use of data in fight against Covid19 3
Impact of Covid19 on prison populations 3
The role of International Trade in the post-Covid19 recovery 3
Part II FUTURE EU-UK RELATIONS - NEWS AND VIEWS 5
Towards an EU-UK Future Relationship – documentation 5
Progress of negotiations on the Future relationship 5
EU Readiness notices – preparations for 1 January 2021 8
Implementation of the Withdrawal Agreement 8
What does all this mean for the Bar's priorities? 9
Supply of cross-border legal services 10
Future Civil Justice Cooperation 11
HoL: Private International Law (Implementation of Agreements) Bill 2019-21 contains "inappropriate delegation of powers" 11
UK Parliamentary perspectives on the Future EU-UK relationship 12
House of Commons inquiry focusing on the future EU-UK relationship 13
House of Lords Inquiry on Future Financial services cooperation 13
New House of Lords EU Select Committee Sub-committees 13
Part III EU BUSINESS AS USUAL 14
EU Consultations 15
Consultation on EU Rule of Law mechanism 15
Artificial Intelligence White Paper 15
European Climate Pact – consultation 15

[1] Sources available on request

European Data Strategy 15
Roadmap on EU competition law, revisiting market definitions..... 16
Review EU anti-torture regulation 16
Implementation / application of the Charter of Fundamental Rights 16
Trade law 16
EU's rights – application / enforcement of international trade rules..... 16
Civil and Consumer Law..... 17
Updating the EU's Motor Insurance Directive regime 17
Consumer Collective redress – update 18
Environmental law and Climate Change 19
Access to justice in environmental matters – Aarhus regulation..... 19
New European Climate Law..... 20
CRIMINAL JUSTICE, SECURITY AND FUNDAMENTAL RIGHTS..... 20
New EP fact sheet on Criminal Judicial cooperation 20
CCBE guide for (EU) defence practitioners 20
Conditions for extradition from EEA to third countries..... 21
European Arrest Warrant – application of the double criminality rule 21
Miscellaneous..... 21
Latest House of Commons overview of key CJEU decisions..... 21

Part I LAW IN THE TIME OF COVID

Covid19 – Bar support

The Bar Council secretariat in London is putting a lot of effort into supporting the Bar membership, providing up to date information on court openings; financial support measures; videoconferencing advice and support, etc, as well as undertaking behind the scenes representational work on the Bar's behalf. The BC coronavirus webpage, regularly updated, offers an excellent array of useful links: https://www.barcouncil.org.uk/useful-information/coronavirus-advice-and-updates.html

Overview of European Bars' measures responding to challenge of Covid19

Over the past few weeks, the Council of the Bars and Law Societies of Europe (CCBE), of which the Bar Council is a member, has collected data from its member national bars on national experience and best practice in the face of the challenge to our justice systems of the Covid19 pandemic. The original survey posed questions on two specific criteria:

- Precautions and safety measures applied to physical meetings and contacts, and
- Ensuring containment measures do not negatively impact fundamental rights.

In responding, many bars provided rather broader data, giving us an insight into economic and fiscal measures in place in some countries as well. All this data is now available on the CCBE website and is being updated where resources allow.

Reportedly, the court system in England and Wales has stood up rather better than many, for which feat great credit is due to all concerned. See: https://bit.ly/2W6pEHD

Fundamental Rights Agency tracking HR in the time of Covid19

The FRA is keeping track of, and periodically reporting on, the respect for and abuse of human rights in the context of countries' reactions to the Covid19 pandemic. See more at: https://bit.ly/2L4UFFx

Impact of Covid19 on Democracy, rule of Law and Fundamental Rights

This briefing for the EP's Civil Liberties Committee dates from late April. It examines, inter alia, the legal and constitutional implications of the differing emergency powers that were introduced across Europe. https://bit.ly/2WJacAv

EP resolution on EU measures to combat the Covid19 pandemic

The EP plenary adopted this overview resolution in mid-April. See: https://bit.ly/2WYxBOz

European Data Protection supervisor – use of data in fight against Covid19

Last week, the EDPS addressed members of the EP's Civil Liberties Committee on the sensitive and highly topical issue of the use of personal data in the fight against the pandemic. His remarks can be seen here: https://bit.ly/2YSRM2Y

Impact of Covid19 on prison populations

Measures in place to deal with Covid19 among prison populations across Europe are being compiled and continuously updated on the Europris website at: https://www.europris.org/covid-19-prevention-measures-in-european-prisons/

Covid19 lockdowns are curtailing the freedom of movement, not only of ordinary citizens, but also of those deprived of their liberty while serving custodial sentences. Criminal practitioners will be aware that Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters, provides for the possibility for national authorities to request the transfer of custodial sentences and of sentenced persons within the EU. The Member States have suspended such transfers for now, but relevant authorities are in contact and procedures are expected to resume as soon as circumstances allow.

As it happens, late last year the Commission published a Handbook to assist the national authorities when issuing and executing requests under these provisions, which includes a section on what to do in "unforeseen circumstances". No doubt that is being pored over rather more than was expected at publication.

The handbook is available at: https://bit.ly/35DXrLi

The role of International Trade in the post-Covid19 recovery

On 6 May, European Trade (and Irish) Commissioner Phil Hogan spoke at a webinar co-hosted by the Irish Institute of European Affairs (https://www.iiea.com/) during which he provided characteristically pragmatic insights into EU trade policy in light of Covid19 and beyond. Below are a few select highlights from his presentation and the ensuing Q & A session.

- International trade will play a critically important role in recovery. There are lessons to be learned. Among the most crucial will be to avoid the tendency for nations to turn in on themselves. Immediate choices taken will be crucial now. Transparency and cooperation are the buzzwords.
- Mr Hogan expects trade recovery – fixing broken chains – will keep him busy to the end of his mandate.
- The Commissioner emphasised the EU's openness to trade. He seeks the same in external partners. The EU does not have the natural resources to be self-sufficient. It strives for "open strategic autonomy" – achieving a balance between openness and vulnerability.
- The immediate challenge is to health, but there is a huge economic challenge building. The European Commission (EC) is working to find solutions. Forecasting a 9.7% decrease of global trade this year. Similarly alarming figures for EU, both imports and exports. EC spring forecast published on 6 May: (https://bit.ly/35OUTKq) – all Member States in recession this year.
- New EU Roadmap for Recovery: https://bit.ly/35MhW8U
- EU is upgrading trade defence instruments (see item in this newsletter).
- Another EU priority is reform of global trading instruments, including WTO.
- G20 meeting recently at which Mr Hogan proposed 7 concrete measures for global recovery: https://bit.ly/2SVSI2z
- The EU is pursuing a positive agenda internationally - specifically with the USA. He has written to their trade negotiator to that effect. Tariffs don't work – they reduce trade, economic activity and jobs. USA needs to understand that.
- Expect EU and UK to be talking about trade again as of 11 May.

Q & A

- Relaxation of State aid rules in the Member States during the Covid19 pandemic are temporary
- Brexit and UK–EU negotiations
    - The Commissioner was asked about Mr Gove's statement last week that the UK would be prepared to abandon zero tariffs in order to avoid level playing field restrictions. Mr Hogan wants Mr Gove to negotiate with UKTF and not on the airwaves. He showed clear impatience that UK has been late with all aspects. He's seeking more engagement and intensity from the UK over next two rounds and he hopes transition extension would not then be needed (see more on this under Withdrawal Agreement below.
    - Mr Hogan thinks all other parts of the world will wait to see what UK-EU agree before finalising their deals with UK. EU is by far the larger market, which matters in trade negotiations, and others will take note.
- Review of EU trade policy will be completed by the end of this year – sustainability a key factor. Looking at all ideas, including a recent France – NL joint paper on trade and sustainability: https://bit.ly/3cpb8Av
- Tension between US and China: There was some progress earlier this year, but difficult again now. Disappointing that USA opted out of WTO for now because of dispute resolution systems. EU calling for them to reengage. EU has co-signed a statement with US and Japan re investment reforms: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf

I note that since giving this and other similar statements (his RTE interview the following day is a case in point), there has been a backlash in some quarters against what is seen as the Commissioner's undue and outspoken criticism of the UK government's approach to the EU-UK negotiations. The problem, as seen from Brussels at least, is that while many would hesitate to openly express their frustration and disappointment so openly, his sentiments are widely shared on this side of the channel. Whether they are misplaced or not, the underlying erosion of trust and confidence that they exemplify is not helpful.

Part II FUTURE EU-UK RELATIONS - NEWS AND VIEWS

Towards an EU-UK Future Relationship – documentation

Any attempt to assess progress towards a formal relationship between the EU and UK in this period would be incomplete without reference back to the central set of documents to which I provide links here. I make no apology for doing so going forward, until such moment as they are superceded:

- October 2019 **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.
- January 2020 EU guiding **principles for transparency in the negotiations on the FR**: https://bit.ly/2WmUoV5
- January 2020 UK: **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: https://bit.ly/2xVLX9Q
- **3 February 2020 – EU - C**omprehensive draft negotiating directives for the FR on See: https://bit.ly/35ApFGY
- **25 February 2020: EU** draft text of a Future Partnership Agreement: https://bit.ly/2KLv702
- **27 February 2020:** UK – HMG Command Paper setting out its approach to the UK's relationship with the EU - https://bit.ly/2xs4jis

As at the time of writing, no formal negotiating texts have been released by the UK, other than to the Commission negotiators during the negotiation rounds.

Progress of negotiations on the Future relationship

In *Brussels News 151*, I set out the original planning for the formal negotiations, which you will recall were expected to proceed as a series of parallel talks across different elements, organised in cycles of 3 weeks: a week of preparation, a week of negotiation (that is, 5 full days of separate face to face meetings across all the different topics on the agenda for that particular round) and a week of reporting to the Member States and the EP. Unilateral decisions on equivalence (financial services) were to be taken by June (and end of transition for data – on which, see a UK perspective at:

https://bit.ly/35QmcEn), ahead of the wider stock take of progress on the negotiations at the June European Council.

I was already reporting, back in February, that the EU considered prioritization to be inevitable given the limited time and resources, and that it expected to focus on areas where there is no fallback position in the event of a no deal exit. So we had a good idea even then that e.g. transport and aviation were going to be at the top of the pile, along with political hot potatoes like fisheries. Services, let alone professional services, were seen as less urgent, being less politically high-profile, and also, some would say naïvely, because GATS provides some sort of cushion, even if only on an interim basis.

So, what's happened since?

Well, the **first round of talks** did indeed take place in the first week of March. To remind you of their scale and ambition, they involved over 200 people, taking part in 11 separate but simultaneous meetings, covering:

1. Trade in goods
2. Trade in services and investment and other issues
3. Level playing field for open and fair competition
4. Transport
5. Energy and Civil nuclear cooperation
6. Fisheries
7. Mobility and social security coordination
8. Law enforcement and judicial cooperation in criminal matters
9. Thematic cooperation
10. Participation in Union programmes
11. Horizontal arrangements and governance

Immediately thereafter, EU Chief negotiator Michel Barnier observed that there were "very serious divergences" between the two sides – notably on:

- **Level-playing field (LPF)** - Given the size of the UK's economy and its geographical proximity, the EU insists that future competition must be kept open and fair, requiring guarantees for equal rules on, among other things, social, environmental, tax, state aid, consumer protection and climate matters. The UK says no such requirements are attached to other EU-3rd country trade agreements and why should this one be different?
- **Criminal justice and law enforcement** – The UK does not want to be tied to applying the European Convention on Human Rights, nor to agreeing to the CJEU's role in interpreting EU law.
- **Governance** - UK wants a series of sectoral arrangements on a case-by-case basis, the EU wants a global agreement.
- **Fisheries** - UK wants annual negotiations on reciprocal access between UK and EU waters. EU says this is unworkable.

Mr Barnier's full speech following the first round is here: https://bit.ly/2SVTnkz

Then came official designation of Covid19 as a worldwide pandemic, triggering progressive lockdowns across the EU and eventually the UK, followed by news that key negotiators were ill and self-isolating. In such circumstances, it was inevitable that the second and third rounds of the talks (respectively scheduled for 18-20 March and

6-8 April) were canceled, and reportedly little more than technical discussion occurred over that period.

The **second round** eventually took place, by videoconference, during the week beginning 20 April. Again, there were 11 negotiating groups, but now meeting remotely. This meant that instead of breaking off into specialist sub-groups to deal with individual topics as originally planned, complex issues were instead covered by each group in tandem (e.g. one covered capital, IP, public procurement, SMEs and digital trade) over the three days of meetings. Reportedly therefore, even now, only preliminary discussions and clarifications have occurred. The EU continues to report that the two sides are very far apart on many headline issues, including financial services, public procurement, digital trade, and also on matters even closer to home, like Mutual Recognition of Professional Qualifications, on which the UK presented a non-paper to the EU side during the negotiation round.

I should note here that, as with all other UK negotiation texts, we, the Bar, have not seen that. Nor indeed have other stakeholders, nor the EU Member States, the European Parliament, nor anyone outside the negotiation "rooms".

Mr Barnier's immediate post-second round press conference was dispiriting, though he strived to put a positive gloss on it, saying agreement is still possible. A message that ran through his presentation was that the UK cannot close the door to extending the transition period, and at the same time refuse to make concrete progress across the different areas under discussion. His statement can be seen at: https://bit.ly/2Ai4ii9

He again focused on four points and in doing so revealed that indeed very little had moved on from his last such press call in March. To make matters worse, the continued lack of progress on issues like LPF and detailed UK planning for the implementation of the Withdrawal Agreement (including as regards UK-based EU citizens' rights and customs and regulatory checks between Great Britain and Northern Ireland – see more below) are increasingly seen as the UK rowing back on what it legally committed to, in turn undermining trust and confidence going forward.

The Commission's UKTF remains insistent, as it has been from the outset, that all elements must be agreed in parallel: the practical arrangements for implementation of the Withdrawal Agreement cannot be hived off from agreement on goods, on fisheries, aviation and the other priority areas.

So, what's next?

The EU and UK have agreed two further rounds of negotiations, to take place during the weeks beginning 11 May and 1 June, which, in broad terms, will pick up where the previous round left off. The May, and likely also June round, will be held remotely. As things stand therefore, we are looking at a total of six further days of "face to face" negotiations across all these areas, between now and the high-level EU-UK stocktaking meeting, planned for late June. Other dates to note:

- **1 July 2020**: Date by which any extension to must be agreed. The EU is open to it, but not, it seems, the UK.

- **31 December 2020**: The transition / Implementation Period will end in accordance with the Withdrawal Agreement (if an extension were to be agreed, it could not go beyond 31 December 2022).

I have taken part in several recent debriefing meetings from both sides' perspectives. Whilst all are complimentary about the dedication and professionalism of those on the other side of the table, it is clear that there is significant pessimism, especially on the EU side, regarding the likelihood that a deal can be reached in the time available, let alone one that could be ratified by the end of the year. So a full or partial "no-deal" end to the transition period is very much on the horizon.
That risk is particularly live in the services area, so the Bar is planning accordingly.

EU Readiness notices – preparations for 1 January 2021

As Mr Barnier eloquently acknowledged in his statement following the conclusion of the first round of negotiations (see link above), an essential element of the work that is currently underway on both the EU and UK sides is "to prepare ourselves …. for the changes that will take place in any event – whether we have an agreement or not – on 1 January 2021". With an extension of the transition period looking unlikely, that is the date on which the UK will finally leave the single market, the customs union and all EU international agreements.
By way of practical examples of the immediate changes that will then ensue, absent agreement to the contrary:

- Customs formalities will be applied on all EU-UK imports and exports.
- Financial institutions established in the UK will automatically lose the benefit of the EU 'financial passport'.
- An authorisation or certification issued in Britain will no longer enable a product to be placed on the European market, whether it be a vehicle, an industrial good or even a medical device.

It should come as no surprise therefore, to hear that alongside its work on the negotiations, the Commission's UK Task Force (UKTF) has been busy revising its no deal "readiness" notices. Reportedly, one hundred of them are in the works with around 20 updated ones already released. Many of the pre-Brexit versions, including in the services sector, were predicated on the assumption that the arrangements would be temporary – i.e. in the expectation that the gaps would be filled by the formal arrangements to be agreed by the parties in the future relationship. If it turns out that no such agreement is in place by the end of this year (covering all or even some areas, such as goods), and there is indeed no extension, the expectation is that any "no deal" arrangements will need to be in place for rather longer.
I therefore commend you regularly consult the EC's webpage at: https://bit.ly/2WNHGO7

Implementation of the Withdrawal Agreement

Aside from negotiating the future EU-UK relationship, both sides are also required to implement the legally binding Withdrawal Agreement, which entered into force on 1 February 2020 (see links above).
That work is overseen by the EU-UK Joint Committee, which met for the first time on 30 March by teleconference, led by Michael Gove for the UK and EU Commission Vice

President Maroš Šefčovič. The day to day work on implementation is in the hands of six Specialised Committees (which are taking matters forward ahead of the next meeting of the Joint Committee, scheduled for June):

- Citizens' rights (i.e. protecting the approximately 4.5 mio UK and EU citizens who respectively are living in each other's territories)
- Other separation provisions;
- Protocol on Ireland/Northern Ireland;
- Protocol relating to the Sovereign Base Areas in Cyprus;
- Protocol on Gibraltar;
- Financial provisions.

At the heart of the Agreement is the Northern Ireland Protocol, a complex customs arrangement that maintains the region's open border with the Republic of Ireland by requiring regulatory checks to take place during transit over the Irish Sea.

That in and of itself is proving difficult, as the UK is not yet sharing its concrete implementation plans – quite literally. Mr Gove's statement last week about the UK accepting quotas and tariffs in exchange for not having to comply with LPF would make this even harder, as the border checks needed would become that much more complex and lengthier. (Incidentally, the obvious interdependence here between the content of the main FTA negotiations and the Withdrawal Agreement implementation is one of the reasons why the EU insists that all must proceed and be agreed together.)

A further problem has arisen on the NI protocol where no one on the EU side expected one. Article 12 of the Protocol states that EU officials "shall have the right to be present during any activities" relating to customs checks and that the UK "shall facilitate such presence of [EU] representatives." The EU says that this justifies a permanent EU consular presence housing customs and veterinary staff in the region, which the UK says would contravene the Withdrawal Agreement by impeding its sovereignty. Reportedly, the UK does recognise the legal necessity of a physical EU presence to participate in customs checks for goods crossing the border, but simply does not accept that that requires a permanent consular building in non-EU territory. But other Member States, and not just Ireland, have an interest in the EU ensuring that non-compliant goods do not enter the EU's Single Market via Ireland. This is just one of the myriad issues that are making progress on the overall talks, covered above, slow and frustrating.

What does all this mean for the Bar's priorities?

I have been keeping you abreast of progress on the Bar's priorities for the future relationship, most recently in *Brussels News 151* to which I refer you for more background.

I note again that like every other UK stakeholder group, as well as the EU Member States, the EP and everyone other than the EU negotiators, we have not seen the UK's texts. In terms of actual drafting therefore, we are having to work from the EU's texts, the UK's description of what it wants, and what we are told at meetings.

Supply of cross-border legal services

The Bar is pursuing several different strands of activity, adapted so far as possible to the evolving negotiations, to try to preserve reciprocal rights of access to the EU and UK markets for lawyers, with the aim that they may each continue to advise and represent their clients' interests, and the clients may continue to instruct the lawyer of their choice when involved in cross-border cases going forward.

Where possible, this work is being pursued in tandem with other arms of the legal profession and indeed, other regulated professions, but always mindful of the particularities of each.

In order to facilitate this future service supply, arrangements are needed in three areas:

(i) Agreement on the forms of **Market access** that are permitted – described in trade nomenclature under the GATS as "Modes of supply" of services. Thus, signatories permit, or not, the supply of services into their territory depending, quite literally, on where the respective service supplier and client are when the service is supplied, and the form of the supply. There are four modes, two of which are of greater interest to the Bar, being remote supply (e.g. by email or phone) and cross-border, where the service provider travels, e.g. to appear in the client's local court. These are the elements that we would want included in any trade deal were it to cover professional services. Crucially, regard must also be had to country reservations, such as re areas of law that may be practiced; seniority requirements. Legal professional privilege is also at stake.

(ii) Mobility of persons – What are the arrangements at the border? Thus, e.g. can a UK lawyer travel, visa free, to provide legal advice in person to a client in an EU Member State, for which service that lawyer will receive a fee in that territory? And of course vice-versa.

(iii) Mutual Recognition of Professional Qualifications - as you are aware, within the EU the system is governed by the general directive on MRPQ 2005/36EC. In addition, the legal profession has its own specific regime covering the provision of services and establishment, based on recognition of the home title, but opening the door to simplified / automatic acquisition of the host title. But as third country lawyers, could UK barristers continue to e.g. appear in court in an EU Member State on the basis of their home title, and without e.g. being called to the local bar?

Mindful of all these elements, we are examining the EU's draft FPA (see link above), also in light of the UK's declared approach (and absent sight of a UK text); comparing it to existing EU and other Free Trade Agreements, as well as to commitments and Member States' reservations in such agreements, in order to assess the position and adapt our advice and strategy as needed.

Given the pressure on timing and the doubts around the main negotiations, we are pursuing several parallel strands. Apart from inputting advice and expertise into the main EU-UK negotiation, we are also exploring other possible arrangements so that the Bar is as prepared as it can be for whatever 1 January 2021 brings, whether that be an extension of transition with continuing single market rights, a full EU-UK deal, a partial deal (say covering goods but not services) or none. I will keep you posted.

Future Civil Justice Cooperation

Longstanding readers will be aware that the other primary objective of the Bar in this context is maintaining EU-UK judicial cooperation. Our efforts have largely focused on the civil field, in part because the need for criminal justice and security cooperation, complex and vital though it is, carries greater political weight and thus already enjoys priority status on the EU-UK agenda. But continuing civil judicial cooperation will be crucial to business going forward, and that message bears constant repetition.

Where are we now?

Following formal withdrawal of the UK on 31 January 2020, in light of the negotiating positions of both the EU and the UK and of progress in the negotiations on their Future Relationship, and of the particularly challenging circumstances we all find ourselves in due to the Covid19 pandemic, it has become clear that the Bar's preferred route to providing legal certainty and clarity in relation to cooperation in civil and commercial matters - a comprehensive EU-UK civil justice agreement, is not achievable before the end of the transition period, if indeed, at all.

Absent such a comprehensive solution at EU-UK level, we therefore welcome the UK Government's formal application, dated 2 April 2020, for the UK to accede to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007 ("the Lugano Convention"). The other Contracting Parties, namely the EU, Denmark, Iceland, Norway and Switzerland have been asked to notify their express consent as soon as possible. You'll recall the EFTA states indicated earlier this year that their consent would be forthcoming (https://bit.ly/35P11Ct).

Unfortunately, in the past week or so, it has become clear that the EU is not minded to support the application – see e.g. coverage in the Financial times of 27 April: https://on.ft.com/2YaoL2e

We are thus having to step up our activities in support of UK accession. There are of course, well documented signs of the predicted shift away from the choice of law and jurisdiction of England and Wales in financial services and commercial contracts – witness the changes announced earlier this spring to the International Swaps and Derivatives Master Agreement. But the importance of this issue will be much more widely and directly felt than that. Accordingly, the Bar, primarily though the work of the Future Relationship Working Group and the EU Law Committee, is working with other members of the legal profession, as well as business stakeholders, to underline the importance to citizens and businesses, large and small, in the UK and in the EU, of being able to enforce their legal rights and obligations in each other's territories.

I will again keep you posted on progress.

HoL: Private International Law (Implementation of Agreements) Bill 2019-21 contains "inappropriate delegation of powers"

Looking at the issue of recognition and enforcement of foreign judgments (see item above) purely from the domestic side, on 4 May 2020, the House of Lords Constitution Committee published a *report* on the Private International Law (Implementation of Agreements) Bill 2019-21 (see *Brexit Bills 2019-21 countdown tracker: Private International Law (Implementation of Agreements) Bill 2019-21*).

This Bill provides for the implementation in UK law of international agreements on private international law (PIL agreements) (where PIL is defined to cover jurisdiction and applicable law, recognition and enforcement of judgments, and co-operation on procedural matters such as service of documents or taking of evidence):

- Clause 1 will implement the 1996, 2005 and 2007 Hague Conventions at the end of the transition period. HMG considers that their express implementation is clearer than relying on the *retained EU law* saving for directly effective treaty rights in section 4 of the European Union (Withdrawal) Act 2018.
- Clause 2 would give HMG the power to implement any other PIL agreements through statutory instruments (SIs). For example, if the UK accedes to the 2007 Lugano Convention in its own right (on which, see more above), the clause 2 power could (if enacted) be used to implement it. Similarly for the Hague Convention 2019 (on which see more in *Brussels News 150*).

Clause 2 is where the rub lies. The Constitution Committee agrees with the earlier conclusion of the Delegated Powers and Regulatory Reform Committee that clause 2 represents an inappropriate delegation of power and recommends that clause 2 should be removed from the Bill. The Constitution Committee report explains that:

- "Giving legal effect to each new PIL agreement by primary legislation avoids legal uncertainty. In contrast, SIs may be quashed under the Human Rights Act 1998 or the common law.
- Parliament's prior scrutiny of PIL agreements under the Constitutional Reform and Governance Act 2010 is no substitute for the scrutiny of primary implementing legislation. While a PIL agreement may be technical in nature, and its text not easily changed after negotiations have concluded, the implementing legislation may supplement the agreement in important areas that affect the fundamental rights of the citizen, such as by creating criminal offences."

Further reading:

- *Practice note, UK Parliament's role in relation to international agreements*.
- *Brexit materials: International agreements and international trade*.
- *Practice note, Brexit: application of international agreements to the UK*.

UK Parliamentary perspectives on the Future EU-UK relationship

Other work commitments have prevented me from getting this edition of Brussels News out as quickly as I had originally intended. As a result, some of the links provided here are a few weeks old, but I include them as they remain relevant to the ongoing FR negotiations:

- House of Lords EU Justice Sub-Committee: Report from late March providing a summary of key areas of concerns – **Legacy Issues - in the FR negotiations**, and drawing on evidence sessions held earlier this year on citizen's rights, future criminal and civil judicial cooperation and Intellectual Property (including the excellent evidence session by our own Daniel Alexander QC). See: https://bit.ly/2WHr1M0
- House of Commons Library report of mid-March on **Level Playing Field** in the Future Relationship – covering state aid, business competition and state-owned

enterprises, taxation, labour standards, environmental protection and climate change. See: https://bit.ly/3dC8J5w

- Future Criminal judicial cooperation: **Brexit and the EAW** – This early spring House of Commons Library Paper provides a good overview of the challenges associated with the loss of the European Arrest Warrant at the end of the Transition Period, and what we may expect to see replacing it. Among the interesting insights, it notes that three EU Member States (Germany, Austria and Slovenia) have cited constitutional reasons for refusing to extradite their own nationals to the UK now that it is a third country. Indeed, the general tone of the paper is that the Home Office has underestimated the scale and complexity of the challenge ahead. See: https://bit.ly/3blFDpJ

House of Commons inquiry focusing on the future EU-UK relationship

The House of Commons, Committee on the Future Relationship Inquiry: Progress on the negotiations for the future relationship, is currently open and taking evidence until, ostensibly, the end of the year. See: https://bit.ly/2zoJqoW

House of Lords Inquiry on Future Financial services cooperation

The EU Financial Affairs Sub-Committee of the House of Lords is conducting an inquiry into the future of financial services after Brexit, including decisions on equivalence (due to be taken, unilaterally, in the next couple of months) and the priorities for the future relationship with the EU. Its Chair has already written to the Chancellor of the Exchequer making several recommendations (see link below). These are not only of interest to that sector but may also read across to other key professional service sectors, and indeed policy areas (e.g. equivalence for data control). Thus:

- While the UK is currently fully aligned with the EU, there is a risk that the EU's equivalence decisions will be politicised and could be withdrawn at very short notice. There should be *regular and structured dialogue* to provide a forum for discussion and resolve any possible disagreements.
- The Government should delegate more powers to the financial regulators to give the UK's regulatory regime more flexibility and increase its ability to respond to changes. This will require increased parliamentary oversight of the financial regulators' activities.
- The UK may wish to make some targeted adjustments to ensure that the regulatory regime is fit for purpose. The UK should take a leadership role in promoting international cooperation in financial services by promoting global standards.

See further at: https://bit.ly/3bl3W7k and https://bit.ly/3fAl8sB

New House of Lords EU Select Committee Sub-committees

In late April the House of Lords' EU Select Committee announced that it has restructured itself, appointing five new Sub-Committees to replace the previous six, in a bid to adjust the committee's work to the new, post-Brexit reality.

There are now four EU-facing Sub-Committees, each with a broad policy remit, designed to help the Committee to scrutinise the Government's policies and actions in respect of the EU. This includes the conduct of negotiations on the UK-EU relationship

as well as its implementation of the Withdrawal Agreement. They will also consider EU proposals in detail. Links to the four can be found at:
EU Environment Sub-Committee
EU Goods Sub-Committee
EU Security and Justice Sub-Committee
EU Services Sub-Committee
The fifth new sub-committee deals with International Agreements and will scrutinise all new international agreements and treaties negotiated and concluded by the UK Government with countries and organisations other than the EU. See further at:
International Agreements Sub-Committee

Part III 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 fall to be implemented into national law during the transition period will bind the UK (including in the JHA area if the UK had opted in), along of course, with all EU law that is being onshored.
Beyond that, there will be areas where some degree of alignment, even if loose, will occur going forward. So, our BAU work continues.
As with all else that has changed in the past couple of months due to Covid19, so the EU's own agenda has taken quite a knock. As I write, most Member States are still in lockdown, with very little clarity as yet as to when that will lift, what EU cooperation will look like when it does; what effect this will have on priorities, especially fundamental decisions like adoption of the Multi-annual Financial Framework (MFF), and flowing from that, whether there will be a shake-up so that issues that looked to be at the top of the agenda but weeks ago will drop away, at least for now.
Pessimists see Covid19 as an existential threat to the EU, following so closely on the heels of Brexit and with nationalistic fervour at play in several Member States. Perceived delay in the EU's initial Covi19 response is in part explained by the fact that health is in fact a Member State competence. Moreover, that national leaders have tended to protect their own in the face of an immediate threat to life and limb like Covid19 is surely understandable, and even defensible. Put another way, how could you justify favouring EU as opposed to national interest when faced with such an emergency? And indeed, EU Primary law envisages exceptions to the status quo. For example, the Schengen Borders Code provides Member States with the power, temporarily to reintroduce (proportionate) border controls at internal borders in the event that a serious threat to public policy or internal security has been established. This is, in effect, is what has happened. And whilst the delay in agreeing EU funding for Member States, especially Italy and Spain, was hugely regrettable, it is a symptom of the fact that the ultimate decision-making powers in the EU rest with the Member States, and thus that Brussels cannot force heads of State or Government to take such

decisions, rapidly or at all. In the event of course, several different elements to the "EU solution" have since been agreed (see links in the first part of this newsletter), and more is expected to follow when the MFF is back on the table.

EU Consultations

Consultation on EU Rule of Law mechanism

The European Commission is reviewing its policy on rule of law challenges, against the background of the mounting difficulties the EU has experienced over recent years with certain Member States, notably re the independence of the judiciary – a history that I have covered in this newsletter (see e.g. *BN 143*). As you know, the EU institutions have had recourse to the Article 7 TEU procedure introduced by the Lisbon Treaty, and found it wanting. Moreover, the Covid19 pandemic has provided cover for those countries that were already in the EU's sights, namely Poland and Hungary, to further flout the rule of law – see above, and mention in the EP's mid-April resolution: https://bit.ly/2yJ9xqw

Recognising that a reinforced armory is needed to counter such threats, the EC plans to establish an EU Rule of Law Mechanism and will also issue its first annual Rule of Law report, both scheduled for October 2020. We wait to see whether the timing holds. The recent public consultation sought input from stakeholders on developments at both national (EU27) and horizontal EU level. The CCBE is responding and encouraging its members to do so. Relevant Bar bodies are also following this work. See: https://bit.ly/2Lf1Rz9

Artificial Intelligence White Paper

As part of its broader Digital Strategy (see *Brussels News 151*), the Commission recently published a White Paper entitled "A European approach to excellence and trust" which sets out various policy options to ensure the "human-centric development" of Artificial Intelligence (AI). The Commission is running a public consultation about its ideas and those contained in the accompanying report. The Bar Council's EU Law Committee is finalising a response, looking at several different elements, most notably building on the work we did in responding to a 2017 consultation by the EP in which we focused on the issue of liability for injury and harm arising from the use of AI.

I also bring to your attention a recent CCBE guide on the legal aspects of AI: https://bit.ly/2SRuHJS

European Climate Pact – consultation

As part of the European Green Deal, the Commission intends to launch, by the end of this year, a European Climate Pact to give everyone a voice and space to design new climate actions, share information, launch grassroots activities and showcase solutions that others can follow. It is currently conducting an online consultation, deadline 27 May 2020, details of which should be accessible through: https://bit.ly/3co9ijt

European Data Strategy

The objective of the European data strategy is to set up a single market for data, to unlock unused data, allowing it to flow freely within the EU for the benefit of

businesses, researchers and public administrations. The Commission is gathering feedback on its data strategy. Deadline for responses is **31 May 2020.**

Roadmap on EU competition law, revisiting market definitions

The Commission recently published a Roadmap on EU competition law, revisiting market definitions (both product and geographic). It is open for initial feedback on the mooted approach until 15 May. See: https://bit.ly/2yFsDgZ

The Commission plans to hold a full public consultation on the subject in the coming months. The question of how the EU approaches these definitions going forward is likely to be important for the UK as a neighbouring 3rd country, so the Bar will consider inputting its views, whether independently or with other UK competition practitioners, to the main consultation later this year.

Review EU anti-torture regulation

The Commission is running a public consultation as part of its review of Regulation (EU) 2019/125, which prohibits exports and imports of goods used for capital punishment, torture or cruel, inhuman or degrading treatment or punishment.

Deadline for responses: **13 May 2020** https://bit.ly/2VElo20

Implementation / application of the Charter of Fundamental Rights

Earlier this year, the Commission published a roadmap seeking views on its plans to improve the implementation and application of the Charter of Fundamental Rights, including by increasing public awareness of its existence, content and advantages. See: https://bit.ly/2Ai4DRY

This is part of a longstanding and ongoing discussion, exemplified by e.g. the Commission's June 2019 annual report on the Charter https://bit.ly/3dwhLkL and followed by the debate at the Fundamental Rights Agency (FRA) joint annual conference in November last year, the content and conclusions of which were published here: https://bit.ly/2yKE5bx

The feedback collected will be added to existing material to inform a Communication on the subject that the Commission plans to publish towards the end of this year.

This is a topic of great interest to many of our HR practitioners. The loss to UK citizens of Charter rights, and specifically the unique remedies attached to them, were among the many points the Bar highlighted in the lead up to the 2016 referendum, and since, in our Brexit-related work. Unsurprisingly therefore, the Bar Human Rights Committee did submit comments, which can be viewed through the feedback link.

Trade law

EU's rights – application / enforcement of international trade rules

Late last year the European Commission tabled a proposal for a new regulation amending Regulation (EU) No 654/2014 which establishes a common legislative framework for exercising the EU's rights under international trade agreements in certain specific situations, including under dispute settlement mechanisms provided for in international trade agreements (Procedure reference COD(2019)0273).

A problem that recently arose with the WTO Dispute Settlement Body (DSB) highlighted the shortcomings of the current EU regulation. Due to lack of cooperation

by some WTO members, the DSB has been unable to fill vacancies on the WTO Appellate Body, meaning that since December 2019 it has been unable to hear new appeals. That in turn means that WTO members are able to avoid binding rulings and hence escape their international obligations by appealing panel reports "into the void". To avoid this paralysis, the EU's proposed amendment extends the scope of Regulation (EU) No 654/2014 to allow action to be taken when dispute settlement procedures are blocked. The new EU mechanism should enable it expeditiously to suspend obligations under international trade agreements when effective recourse to a binding dispute settlement mechanism is not possible because the third country has rendered it impossible.

I note, in anticipation of a potential EU-UK FTA or similar, that the proposed amendment caters for similar situations that may arise in e.g. *regional or bilateral agreements*, allowing the EU to take measures to restrict trade with the relevant third country in such cases. Any such restrictive measures would have to be "proportionate to the nullification or impairment of the Union's trade interests caused by the measures of the third country, in accordance with the Union's obligations under international law".

The Commission also envisages a further review of the amended regulation in five years' time, when the efficacy of these changes can be assessed. For the proposal, go to: https://bit.ly/3blrZ5S

Civil and Consumer Law

Updating the EU's Motor Insurance Directive regime

The Motor Insurance Directive enables EU residents to drive anywhere within the EU without needing to buy additional insurance, whilst also providing a high degree of convergence in terms of protection of potential victims of road traffic accidents (RTAs). There have been five EU MIDs since the first was adopted in 1972, each enhancing the protections provided, culminating in Directive 2009/103/EC which consolidated its predecessors. The key elements include, but are not limited to:

- An obligation on motor vehicles to have third party liability insurance, valid across the EU and on the basis of a single premium.
- Obligatory minimum cover in said policy.
- A prohibition on Member States from carrying out systematic insurance checks on visiting EU-registered vehicles.
- An obligation on Member States to create guarantee funds for compensation of victims of accidents caused by uninsured or unidentified vehicles.
- Protection for victims of RTAs in a Member State other than that of their residence.
- The right of policy holders to a 5-year claims history.

In 2016 the Commission launched an evaluation of the effectiveness, efficiency and coherence of the motor insurance legislation, resulting, in May 2018 in the adoption of the current proposal (Procedure reference COD(2018)0168). The five main changes proposed to the existing MID are:

(i) Clarifying the scope of the directive, in line with CJEU jurisprudence, so that any use of a vehicle consistent with its normal function as a means of

transportation, irrespective of the (ownership of the) terrain on which the vehicle is used and whether it is stationary or in motion, would be covered.

(ii) Enhance the protection of RTA victims where the insurer is insolvent.

(iii) Improve the recognition of claims history statements, especially in a cross-border context and ensure that if they are taken into account by a new insurer in another Member State, this is done on a non-discriminatory basis.

(iv) In line with technological advances, provide for non-intrusive, proportionate insurance checks in order to combat uninsured driving, and

(v) Harmonisation of minimum amounts of cover to correct a historical anomaly dating back to transition periods in earlier iterations.

The proposal is now in trilogue, the text being pored over by the EP and Council as co-legislators, with the Commission "adjudicating". A recent publicly-available text shows each of the parties' preferred wording in tabular form. https://data.consilium.europa.eu/doc/document/ST-5501-2020-INIT/en/pdf I will report on the final outcome when we get there.

Consumer Collective redress – update

I have been following developments, or as the case has been, lack thereof, on the proposal for a Directive on representative actions for the protection of the collective interests of consumers (Procedure reference COD(2018)0089), since its adoption in April 2018 as part of a package of measures comprising a "New Deal for Consumers".

You will recall that the legal profession has had several concerns from the off, notably the limitation of the right of action to "qualified entities", defined so narrowly as to exclude lawyers from scope. Beyond that, the co-legislators have also been batting back and forth between them on issues such as the overall scope of application (does this expand to become the horizontal instrument foreseen in days of yore, covering actions for environmental damage, breaches of data protection etc, as well as more prosaic consumer actions?); should it cover both domestic and cross-border claims and if so, should the applicable rules be the same (answers so far, respectively yes and sort of); should Member States be able to keep any existing collective redress mechanisms they may have in parallel (again, yes); and how to prevent abuse of the procedure.

As noted, most recently in *Brussels News 150*, the legal profession, through the Council of the Bars and Law Societies of Europe (CCBE), continues to argue that the effective exclusion of lawyers from bringing proceedings is a restriction of access to justice, citing inter alia Article 47 of the Charter of Fundamental Rights. One restrictive element is that the current proposal does not provide for an alternative means of bringing an action in the event that there are no "qualified entities" willing or able to bring the particular consumers' collective redress action, thus depriving otherwise eligible citizens of their rights.

The CCBE is thus also suggesting that the co-legislators enable lawyers, on a subsidiary basis (and noting all the guarantees of independence and expertise attached to their profession), to deal with situations in which consumers have not found any qualified entity willing to bring an action. It is also suggesting that qualified entities be advised and represented by lawyers in the bringing of proceedings.

Though some technical discussions have taken place this spring between the co-legislators, it is too soon to say whether any of these suggestions will be taken up.
Recent publicly available texts include a table showing the different approaches taken by the Commission, EP and Council as of February to the entire text as of late February https://bit.ly/2zoKfy2, and to the specific questions of defining qualified entities in domestic and cross-border proceedings https://bit.ly/35QOXR6.

Environmental law and Climate Change

Access to justice in environmental matters – Aarhus regulation

The Commission is due to table, by 30 September 2020, a proposal amending Regulation (EC) N° 1367/2006 the Aarhus Regulation, which imported the three pillars of the "Aarhus Convention" into the EU acquis (access to information, public participation and access to justice in environmental matters). If the Commission decides not to table such a proposal, it is to inform the Council of other measures it proposes to take to address difficulties with the regulation's application in practice.

Background

As reported in *Brussels News 146*, about a year ago, the Commission conducted an online public consultation as part of its review of this regulation, examining available options. A predictable range of views emerged among stakeholders. Environmental lobbyists supported an expansion of the types of legal acts that can be reviewed / challenged under the regulation, to include e.g. state aid decisions; and for an extension of scope beyond EU institutions and bodies, to also apply to national administrations. In contrast, (chemical) industry bodies considered that the restriction in scope of the existing regulation to "administrative acts of individual concern" is justified.

Still other stakeholders considered that a soft law option would be preferable, to avoid potential conflicts with other areas of EU law; or overburdening small businesses and landowners with litigation, as well as introducing legal uncertainty into the system.

The Commission produced a report covering the above last October https://ec.europa.eu/environment/aarhus/pdf/Commission_report_2019.pdf. Since then it has narrowed down the range of options at its disposal to the following:

1. The Aarhus Regulation currently covers only administrative acts of individual scope (as opposed to acts of general scope). This has proved to be the main limitation for environmental NGOs seeking internal review of administrative acts at EU level and may be ripe for expansion.
2. The Regulation covers acts 'under' environmental law, whereas the relevant passage of the underlying Convention covers review of acts that 'contravene' law 'relating to the environment', i.e. the reviewable act does not itself have to have an environmental purpose. However, the existing regulation's deadlines are too short for the necessary assessment.
3. The Commission is also concerned about access to justice in the environmental field at Member State level, in particular as regards the standing required in order to seek an Article 267 TFEU reference to the CJEU.

So, keep your eyes open this autumn for a package of measures which looks likely to include a legislative proposal amending the regulation as above, together with a Communication on access to justice in environmental matters. I will report.

New European Climate Law

At the beginning of March, the European Commission tabled a proposal for a new European Climate Law – a regulation which sets in law the pathway to climate neutrality by 2050. The key objectives of the proposal, which is part of the Commission's flagship "European Green Deal" (see *Brussels News 150*) are to:

- Set the long-term direction of travel for meeting the 2050 climate-neutrality objective through all policies, bolstered by shorter-term goals
- Create a system for monitoring progress and taking any necessary further action
- Provide predictability for investors and other economic actors
- Ensure that the transition to climate neutrality is irreversible

See: https://bit.ly/35M4Jgn and more generally: https://bit.ly/2WkpPiz

Interestingly, the EP's legal service is reported to consider this proposal to be legal overreach because it includes provisions giving the Commission greater powers to push through emissions cuts after 2030 without the usual checks and balances. There is talk of delaying the proposal.

CRIMINAL JUSTICE, SECURITY AND FUNDAMENTAL RIGHTS

New EP fact sheet on Criminal Judicial cooperation

The EP has just issued an updated fact sheet summarising EU legislation in force in this field and including short introductory overviews of both Eurojust and the EPPO. See: https://bit.ly/2zulu3m

CCBE guide for (EU) defence practitioners

The CCBE recently published a useful guide for defence practitioners. Though aimed at EU Member States, there is much of value to UK practitioners too, including information on:

- Procedural safeguards for suspects and accused persons
- European Arrest Warrant: includes CJEU caselaw
- EU Pre and Post-trial measures
- Detention – Criminal Detention Database
- Evidence issues
- Case Law from the European Court of Human Rights (ECtHR) in the area of defence Rights and links to related "Factsheets"
- CCBE Factsheets on defence rights and the criminal process in all EU Member States.
- Charter of Fundamental Rights
- European Public Prosecutor
- CCBE Guides on appearing in Preliminary reference cases before the CJEU and before the European Court of Human Rights in Strasbourg

For the CCBE guide, go to: https://bit.ly/2xS1De5

Conditions for extradition from EEA to third countries

In early April, the Grand Chamber of the CJEU, in case C-897/19 ruled that when an (EU) Member State is required to rule on an extradition request by a third State concerning a national of a State of the European Free Trade Association (EFTA), which is a party to the Agreement on the European Economic Area (EEA):

- It must verify (in accordance with Article 19(2) of the Charter of Fundamental Rights) that that EEA national will not be subject to the death penalty, torture, or other inhuman or degrading treatment or punishment in the third state.
- In the context of that verification, a particularly substantial piece of evidence is the fact that the person concerned, before acquiring the nationality of the EFTA State concerned, was granted asylum by that state, precisely on account of the criminal proceedings which are the basis of the extradition request.
- It must also give the EEA state of which the person is a national, notice of the extradition request, so that it may seek the surrender of its national.

Among the elements of interest is the expanded application of the Charter of FR across the whole EEA territory. See the judgment at: https://bit.ly/2Vteht2

European Arrest Warrant – application of the double criminality rule

In a judgment from early March, the Grand Chamber of the Court of Justice gave a ruling on the interpretation of Article 2(2) of Framework Decision 2002/584 which provides for possible execution of a warrant, without reference to double criminality, for certain categories of offences, provided that specific sentencing criteria in the issuing Member State are met. The full judgment is available at: https://bit.ly/2AafOMi

Miscellaneous

Latest House of Commons overview of key CJEU decisions

On 3 April, the House of Commons Library published a briefing paper summarising a selection of Court of Justice of the EU (CJEU) judgments handed down between 1 January and 31 March 2020: 2020 CJEU Judgments in Summary

The cases included were ostensibly chosen because they clarify or advance an aspect of primary EU law or secondary EU law of general interest, or because they address a point of EU law that is relevant to the Brexit/Future Relationship negotiations.

Evanna Fruithof
evanna.fruithof@barcouncil.be
Twitter: @EvannaF1
Consultant Director,
Bar Council of England & Wales, Brussels Office