JANUARY 30
2021

weekend EU LAW LIVE edition

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Nº45

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Levelling the playing field? Welcome to the TCA!

Holger Hestermeyer [1]

Habemus pactum. After weeks, months – indeed years of insecurity about where the UK-EU relations were heading, on 24 December 2020 the Chief Negotiators of the EU and of the UK announced that the two partners had reached a deal about their future relationship: the Trade and Cooperation Agreement (TCA) (2).

> They took shortcuts on the treaty text, but also on procedure

The agreement came just in time. In the Withdrawal Agreement (3), which entered into force on 1 February 2020, ending the UK's membership in the EU, the two partners had agreed on a transition period until 31 December 2020, during which EU law largely remained applicable to, and in, the UK (4). Without an agreement between the two parties, January 1st would have seen the introduction of tariffs in the trade relations between them (5). The effect would have been disastrous for economies on both sides. Reaching a deal at this late stage caused all sorts of problems for trade and traders, none of whom had time to prepare for the content of the agreement. But it was still preferable to falling off the cliff edge without a deal. And so the parties swallowed hard and did what had to be done to put the deal into effect. They took shortcuts on the treaty text (6), but also on procedure: On the UK side the choice was to ratify the agreement by January 1st. Under UK constitutional arrangements this required passing the implementing legislation and waiving normal treaty scrutiny processes, which could not be completed in the available time (7). Both duly took place (8), resulting in an implementing act that Lord Ander-

1. Dr. Holger Hestermeyer is a Professor of International and EU Law at King's College London.
2. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, of the other Part. OJ L 444, 31.12.2020, p. 14.
3. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7.
4. Art. 126, 127 (1) of the Withdrawal Agreement.
5. Without a trade agreement the two sides would have had to apply their respective WTO most-favoured nation tariffs to goods from the partner under Art. I of the GATT.
6. The text is not legally scrubbed, see on that Art. FINPROV.9. Annex SSC-8 consists, weirdly, of numerous blank pages. It will be populated by Member State notifications as provided in Art. SSC.11 (2) of the Protocol on Social Security Coordination. The translations show that they are rushed, just two examples from German: the translation of 'Trade Specialised Committee' differs in Art. INST.2 (1) (e) and INST.3 (1) (a) and the first sentence of AIRTRN.9 in the German version was not translated and is still in English.
7. See on those procedures Jill Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms', 60 *ICLQ* 225 (2011).
8. European Union (Future Relationship) Act 2020, 2020 c. 29. See in particular sect. 36 disapplying sect. 20 of the Constitutional Reform and Governance Act, which contains the normal treaty scrutiny process.

son of Ipswich quite aptly referred to in a very classic British understatement as a "rushed Bill" in the House of Lords debate (9). On the EU side the European Parliament refused to give its required vote of consent (10) before January 1st, as it insisted on proper treaty scrutiny, and so the Council provided for its provisional application (11), despite a past political commitment to ask for the European Parliament's consent before providing for the provisional application of a trade agreement (12).

The Editorial Board of EU Law Live has already provided a thorough overview of the Treaty in this Weekend Edition no. 45. This Long Read will focus on a particularly contentious part of the Treaty: the level playing field.

The Level Playing Field: An issue beyond UK-EU Trade

Neither the term, nor the issues raised by the 'level playing field' are particular to the UK-

9. Hansard, HL Deb. Vol. 808 col. 1841, 30.12.2020; note in particular his reference to clause 29.
10. Art. 218 (6) (a) (i) TFEU.
11. As an EU-only agreement based on Art. 217 TFEU. Art. 218 (5) TFEU; Art. 12 Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on the provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, OJ L 444, 31.12.2020, p. 2.
12. However, the step was taken with the consent of the conference of presidents of the Parliament. Von der Leyen, Political Guidelines for the Next European Commission 2019-2024 point 5; Statement of the Conference of Presidents of the European Parliament on the EU-UK future partnership negotiations, 17.12.2020, para. 4; EU Law Live, European Parliament on future EU-UK relations agreement: provisional application acceptable but exceptional, Parliamentary scrutiny essential, 29.12.2020.

Regulations have become a core concern for trade, but trade can also put regulation at risk

EU relationship. They stem from a problem that affects international trade law in general. During the early days of international trade law, efforts largely focused on reducing tariffs. This has now changed both due to the success of tariff reductions under the GATT and WTO and the rise of the regulatory state (13). Regulations have become a core concern for trade. They interact with trade in several ways: different regulations can impose barriers to trade, with the case law on free movement of goods providing numerous examples from intra-EU trade. But trade can also put regulation at risk: where regulators want to impose for example stringent environmental standards on factories, the risk arises that the manufacturer cannot compete against imports from countries that are not operating under similar standards. Tariffs can provide a safety net, but with tariffs significantly reduced, that safety net is largely gone. The question of how to both allow the efficiency gains traditionally connected with free trade and yet prevent strong and necessary regulation from becoming a competitive disadvantage has haunted trade lawyers for a while now. One of the luminaries of the field – the late Robert E. Hudec – entitled his contribution to the discussion 'Differences in National Environmental Standards: The Level-Playing-Field Dimension' in 1996 (14).

The circumstances of the TCA are, of course, particular. The TCA is not only a trade agreement between two neighbours engaging in an enormous amount of trade, but a new type of association agreement for the Union – a 'withdrawal association' (15). The negotiation was not about building a closer relationship, but moving away from one. On the UK side it prioritised a broad conception of sovereignty, rejecting the regulatory alignment characteristic of some other association relationships that enables the reduction of regulatory barriers to trade (16). Level playing field provisions were eyed wearily as a possible door-opener to unwanted regulatory alignment. However, the unprecedented zero-tariff zero-quota access to the EU market granted in the TCA made the demand for strong level playing field provisions a *sine qua non* for the Union. The solution the parties found – a strong level playing field along with a rebalancing mechanism for the future – deserves a closer look, as despite the particularities of the relationship it could provide food for thought for future negotiations overcoming scepticism not only relating to environment and labour issues but also subsidies and state-owned enterprises.

The Trade and Cooperation Agreement is a new type of association agreement for the EU - a 'withdrawal association'

13. See Jackon, History, in: Wolfrum/Stoll/Hestermeyer (eds), WTO – Trade in Goods (2011), 1.
14. 5 Minn. J. Global Trade 1 (1996).
15. Up to now scholarship distinguished between association agreements with accession candidates, free trade associations and development associations. Mögele Art. 217 in: Streinz, EUV/AEUV (3rd ed. 2018).
16. Hestermeyer, Written evidence to the Future Relationship Committee of the House of Commons (FRE0008), paras 16 ff. Available here.

A Look at the Level Playing Field in the TCA

The level playing field is found in Title XI of the TCA's Part Two on Trade, Transport, Fisheries and other Arrangements. Apart from general provisions and horizontal provisions including (partly) enforcement through a panel of experts and the novel rebalancing mechanism, it covers competition policy, subsidy control, state-owned enterprises, taxation, labour and social standards, environment and climate, trade and sustainable development.

As for the general provisions, the Title includes, for example, a right to regulate. Noteworthy among the general provisions is the acknowledgment of the precautionary approach (17) that can also be applied in dispute settlement under the agreement (18) and thus should protect the EU's application of the precautionary principle.

The Title then turns to the various areas regarded as important for a level playing field. In each of these areas the Title combines a variety of tools (though not all tools are available for all areas): it lays out disciplines that the parties have to follow, it provides for non-regression obligations, it ensures enforcement and it contains a rebalancing mechanism that relates to future regulatory divergence.

> The strength of the rules and the enforcement varies considerably depending on the area of the level playing field

The strength of the rules and the enforcement varies considerably depending on the area of the level playing field. Providing for detailed disciplines is the tool of choice for the sections on competition policy, subsidy control, state-owned enterprises and trade and sustainability. However, the level of detail of the disciplines and the strength of their enforcement differs significantly. Thus, the section on competition policy is comparatively short and relies on an obligation of domestic enforcement (19). The chapter on subsidy control is, in contrast, extensive. It features not only general principles, but also specific rules for some key sectors. It contains rather detailed rules on domestic enforcement and parts of the chapter are subject to dispute settlement under the agreement (20). The chapter also contains a new right to take unilateral remedial measures regarding a subsidy that causes or risks a significant negative effect on trade or investment – along with detailed procedural rules (21). Such remedial measures are added to the tools already available under WTO law: the TCA explicitly does not exclude the rights relating to countervailing duties (or other trade remedies) available under the WTO Agreement (22). Subsidies are thus the most heavily policed area of

17. Art. 1.2 (2).
18. Art. 1.3. See also Art. INST.10 (2) (e).
19. Art. 2.3.
20. Art. 3.13.
21. Art. 3.12.
22. Art. GOODS.17(1).

the level playing field, making a whole array of tools available (23).

Non-regression clauses are the method of choice for ensuring a level playing field in the area of taxation, labour and social standards and environmental and climate principles. With regard to taxation, the non-regression clause remains de *facto weak*: (24) it relates to only a few areas, such as OECD rules on information exchange and rules on

A trade test is limiting the strength of non-regression clauses

interest limitation, and it is not enforceable in dispute settlement. This might appear surprising, given the concern that the UK might become a low-tax jurisdiction. However, the lack of development of EU tax law allowing for low-tax jurisdictions within the EU limited the Commission's negotiation space. The non-regression obligations are stronger when it comes to labour and social standards as well as environment and climate. Both chapters define the scope of the non-regression obligation rather amply – with regard to climate this includes the future greenhouse gas target, that is, the 40% 2030 target applying both to the Union and the United Kingdom (with regard to its share). Non-regression is then defined as weakening or reducing in a manner affecting trade or investment between the parties, the relevant standards below the levels in place at the end of the transition period, including by failing to effectively enforce a party's law and standards. The required level of domestic enforcement is provided for as well as the possibility of State-to-State dispute settlement through a panel of experts with regard to the relevant obligations. Unusually for the EU the latter can result in the possibility to apply countermeasures. What is, however, limiting the strength of the non-regression clauses is the inclusion of a trade test.

23. Kreier, Enforcement of subsidy provisions in the EU-UK TCA, available here.
24. Even though it is the only non-regression clause without a trade test.

It was a similar trade test that stalled the United States' attempt to rely on the clause relating to labour law in Article 16.2.1(a) of the Dominican Republic-Central America FTA (DR-CAFTA) in a case it filed against Guatemala. The panel in that case rejected the argument that instances of unfair dismissal and unpaid wages by necessity affect trade because they save costs and instead demanded concrete evidence that the failure to effectively enforce labour laws conferred a competitive advantage on the employers in question (25). While the recent report of the panel of experts in a case filed by the EU under the EU-Korea Free Trade Agreement indicates some doubts as to whether the bar has to be put quite as high as the DR-CAFTA panel did, the EU-Korea case concerned an obligation not subject to a similar test (26). In that regard it is worth mentioning that the environmental chapter in particular contains disciplines beyond a mere non-regression obligation, committing the parties not only to an effective system of carbon pricing, but also environmental principles including the precautionary approach and the polluter pays-principle.

Finally, the level playing field obligations of the Treaty contain a novel mechanism on rebalancing (27). That mechanism targets the possibility of future regulatory divergence. The scope of the mechanism is limited to labour and social standards, environmental and climate protection as well as subsidy control. Where the parties diverge significantly in these areas materially impacting trade or investment between the parties as a result, either party may take rebalancing measures. The provision limits such measures to what is strictly necessary and proportionate and imposes a number of conditions as well as procedural requirements that allow for a quick (30 day) arbitration procedure. However, the mechanism also prohibits parties from invoking the WTO Agreement or other agreements against rebalancing measures including the suspension of obligations under the TCA, raising not only the question of how far-reaching such measures will end up being, but also the prospect of a clash with WTO law (28). Where, for example, rebalancing measures are taken frequently, this may under Article 9.4 (4)-(11) lead to a review of Heading One on Trade of Part Two of the TCA and ultimately might lead to a termination of Heading One of Part Two of the agreement, linking the termination of that Heading to that of Heading Two on aviation and Heading Three on road transport (29).

> **That mechanism targets the possibility of future regulatory divergence**

25. In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (2017), see Paiement, 'Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute', 49 *Georgetown J. Int'l L.* 675, 690 (2018).
26. Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement (2021), paras 90 ff.
27. rt. 9.4.
28. On the possibility to diverge from WTO law in a preferential trade agreement see most recently Appellate Body Report, Peru – Agricultural Products, WT/DS457/AB/R (2015).
29. For details see Art. 9.4 (4)-(11).

As the rebalancing mechanism is both novel and unprecedented, it is not easy to predict how relevant it will become. Legally, much depends on the interpretation of 'significant divergence' and 'material impacts on trade or investment'. More significant, however, is the political aspect of the mechanism. UK political debate has framed diverging from EU rules as a major benefit of Brexit. In practice, however, areas of divergence have yet to be determined. Used with political savvy, the rebalancing mechanism allows the two partners to maintain preferential trade between each other in an uncertain political environment characterised by significant mistrust (30). The mechanism would turn into a political tool that applies limited pressure in a politically acceptable way and is rarely applied in practice. Used without savvy, it risks becoming a cause of constant threat and friction that could destabilise the relationship. On the EU side, it is the Commission that has to show this political savvy, as Article 3(1)(c) of Council Decision (EU) 2020/2252 of 29 December 2020 tasks the Commission with the application of rebalancing measures and countermeasures as set out in Article 9.4 of the level playing field provisions of the TCA until a specific legislative act regulating the adoption of such measures enters into force. The fact that the two sides weathered the storm of these complex negotiations gives me some confidence that despite all of the difficulties in the relationship, solutions can be found.

30. Her Majesty's Government's proposal of an internal market bill that, according to the Northern Ireland secretary, breaches the Withdrawal Agreement in a "specific and limited way" was a telling episode in that regard.

The Trade and Cooperation Agreement with the UK: A Hard Brexit in Sheep's Clothing

The Editorial Board [1]

What a Christmas gift for legal academics and practitioners, given to us on Christmas Eve by the European Commission and the British Government: the Trade and Cooperation Agreement between the European Union and the United Kingdom (TCA). The British Prime Minister Boris Johnson called the deal a 'cakeist Treaty' as in 'having your cake and eating it'. Commission President Ursula von der Leyen used less pathos and proclaimed: 'It's time to leave Brexit behind. Our future is made in Europe.' The agreement was largely hailed as a last-minute deal that avoided the cliff-edge of a so-called 'hard Brexit': a withdrawal of the United Kingdom from the realm of EU law without any form of fall-back. Whilst the formula of 'no tariffs, zero quotas' that was used to describe the essence of the TCA has some merit, the agreement as such must be qualified as a 'hard Brexit in disguise'. Let's have a closer look.

> **Market access under the UK-EU Trade and Cooperation Agreement falls significantly short to that provided by the EU internal market**

The core of the Agreement is about trade in goods. It embodies the Agreement's main achievement: the prohibition of custom duties on imports and exports and charges having equivalent effect as well as the prohibition of quantitative restrictions ('zero tariff, zero quota'). Whilst it is certainly true that the EU has not concluded a 'zero tariff, zero quota' trade agreement with any other third country, the market access as provided for by the TCA falls significantly short compared to that of the EU internal market for three reasons: *first*, 'zero tariff, zero quota' only applies to goods 'originating in the other Party', which is determined by rules of origin and extensive annexes to the TCA. For example, cars only benefit from the tariff-free access to the EU if they do not contain more than 45% of materials coming either from the UK or the EU; raw cane sugar from the Caribbean, imported and then refined in the UK, won't qualify for it. Preferential tariff treatment must be claimed and

1. Maja Brkan, Isabelle van Damme, Marco Lamandini, Adolfo Martín, Jorge Piernas, Ana Ramalho, René Repasi, Anne-Lise Sibony, Araceli Turmo, Maria Weimer.

requires proof of origin. *Second*, measures having equivalent effect as quantitative restrictions (or regulatory barriers) might remain largely unaffected by the TCA. Technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures as they are adopted by one party continue to apply to goods from the other party when they intend to enter the market of the former. Product standards remain, in principle, fully applicable to the goods of the other party. Narrow exceptions for specific goods (such as medicinal products or motor vehicles) to this general rule are set out in annexes to the TCA. *Third*, mutual recognition of conformity assessments is not foreseen by the TCA. This means that, for example, a check made by a UK institution as to whether a UK good is in conformity with EU standards is not sufficient for crossing the trade border. Goods might be subject to dual controls.

These shortcomings do not only lead to disruptions within EU-UK trade in goods but also to British-Northern Irish trade in goods. With the end of the transition period envisaged by the Withdrawal Agreement, the Protocol on Ireland/Northern Ireland, which is annexed to that Agreement, starts to apply. According to the Protocol, Northern Ireland remains part of the EU internal market for goods so that the border between Northern Ireland and the Republic of Ireland can remain open. Moreover, the UK remains subject to the EU State Aid rules and control with regard to measures that affect trade between Northern Ireland and the EU. The implications of these disruptions to inner British trade on the unity of the United Kingdom will be one of the most interesting developments to observe in the near future. By December 2025, the Northern Ireland Assembly will have to vote on the continued application of the Protocol on Ireland/Northern Ireland.

The chapter on trade in services is weak. It largely reproduces the UK's and the EU's WTO commitments. It allows for free access to the market of the other, subject however to

lengthy negative lists attached to the TCA in annexes that set out non-conforming measures within each EU Member State that may continue to apply. Market access under the TCA is therefore of rather limited value for UK service providers in practical terms. Moreover and most importantly, the passport for UK financial services is not covered by the TCA. It is ultimately for the EU to open up its market by means of unilateral equivalence decisions, which have not yet been made.

The refusal of the EU to grant the UK what it actually needs the most, unfettered access to the financial services' market, is closely related to the lack of trust that the EU has in the UK and its intentions to enter into harmful competition when it comes to protection standards in the fields of fair competition, taxation, labour and social protection, environmental and climate protection, trade and sustainable development – the so-called level-playing field. The unfortunate episode of the draft UK Internal Market Bill that provided for a legal possibility to breach international commitments only amplified the EU's concerns, which can also be seen in the inclusion of an explicit good faith provision in the final text of the Agreement. The result is an interesting and innovative chapter on ensuring a level-playing field between the UK and the EU.

Level-playing field refers to a situation in which different companies can all compete fairly with each other because no rules or standards in either jurisdiction confers a competitive advantage to businesses operating in that jurisdiction. With regard to the relationship between the EU and the UK, the level-playing field was defined by a broad range of common rules that are part of the EU legal order. In contrast to the usual situation in trade cooperation, in which the level-playing field can only be described by reference to general principles, in the case of the EU and the UK, future divergences from the previous common rules can impact the level-playing field between both trading partners. In order to manage these risks, several issues need to be addressed. Firstly, the previous common level of protection should be secured. This can be done by either defining a common level protection in the agreement's text or by non-regression clauses that prohibit any lowering of previous common standards. Secondly, any such rules must be enforced, which can be achieved by special enforcement obligations and mechanisms within the domestic legal orders of the trading partners or by special procedures and remedies envisaged in the trade agreement. Thirdly and finally, future increases in levels of protection that might lead to divergences should be addressed because otherwise it might discourage policymakers from raising protection standards.

The TCA addresses all three issues with regard to the six areas deemed relevant to ensuring a level-playing field. In the area of labour and social standards as well as environmental and climate protection, the TCA provides for an obligation to establish effective domestic enforcement mechanisms that allow citizens to make sure that protection standards are upheld. Standards in both areas are secured by a comprehensive non-regression clause, the violation of which can be addressed by the trading partners via a special panel procedure that ultimately

allows for the use of trade remedies such as raising tariffs. The bar for effectively making use of these remedies is, however, quite high. The TCA requires that any weakening or lowering of levels of protection needs to affect trade or investment between the Parties. In a similar vein, in the field of subsidies, remedial measures may only be adopted where there is the presence or the serious risk of a significant negative effect on trade or investment between the Parties. A similar limitation can be found with regard to the new 'rebalancing mechanism' that addresses future divergences once a party increases its levels of protection. For the adoption of rebalancing measures there must be material impacts on trade or investment between the parties arising as a result of significant divergences in the areas of subsidies, social and labour standards, and environmental and climate protection (2). The meaning and the scope of this limiting criterion of 'trade relevance' will be decisive for the future effectiveness of the level-playing field rules in the TCA. In relation to a similar provision foreseen by the Dominican Republic-Central America FTA (DR-CAFTA), an arbitration panel in a case on labour standards involving the US and Guatemala ruled against the US claiming that Guatemala violated a level-playing field rule because it 'failed to prove that there were cost savings from specific labour rights violations and that the savings were of sufficient scale to confer a material competitive advantage in trade between the parties'. This decision set a high bar and a high standard of proof for level-playing field violations. Having in mind that there is no 'stare decisis' in trade arbitration, one may wonder whether the future EU-UK expert panels or the arbitration tribunal in the case of disputes relating to subsidies and rebalancing measures will follow the example of the DR-CAFTA arbitration panel. Since the economic relationship between the EU and the UK is more balanced than the one between the US and Guatemala, and since the EU and the UK legal system were once part of the same legal order, it is not ruled out that a lower impact than the one established by the DR-CAFTA arbitration panel is applicable in the EU-UK relations. In any event, the very purpose of the 'trade relevance' is to prevent the use of trade remedies in any deviation of the UK's legislation from the policy choices made or to be made by the EU.

That means that the burden of proof will become decisive in future disputes between the EU and the UK. In this context, it is remarkable to observe the careful drafting of the procedures. When it comes to violations of non-regression clauses, measures may only be adopted after a panel report that has to be requested by the party that considers a violation of these clauses so that the burden of proof for these violations is on this party. In

> **The burden of proof will be decisive in future EU-UK disputes**

2. It's worth mentioning that the Panel of Experts report of 25 January 2021 on violations of the Trade and Sustainability chapter in the EU-Korea Free Trade Agreement (KOREU) discussed the DR-CAFTA Arbitral Panel final report (paragraphs 90-95) and concluded differently on 'trade relevance' without being relevant to the outcome of the panel report. It qualified KOREU not to have the 'same contextual setting of sustainable development' as DR-CAFTA and considered national measures implementing fundamental labour principles and rights to be 'inherently related to trade' (paragraph 95). This looks like a more attenuated approach to understanding 'trade relevance'.

the field of subsidies and with regard to rebalancing measures, the party that claims violations of the TCA subsidy rules or the presence of significant divergences may ultimately adopt unilaterally trade remedies against which the party affected by the remedies has to initiate proceedings on the legality of the trade remedies, which means that this party has to prove that there is no Treaty-relevant violation of the rules. Given that the text of these provisions was probably carefully drafted by their alleged main user, the European Commission, against the background of the draft UK Internal Market Bill, this distribution of the burden of proof and the possibilities of certain pathways towards unilateral remedial measures hints at a prepaved path that the EU intends to make use of in order to implement its high-level policy goal to ensure a fair level-playing field between the EU and the UK. It remains interesting to observe how these procedures will play out in the future.

Remarkably, the rules regarding the areas of competition law other than subsidy control, taxation and trade and sustainable development do not provide for non-regression clauses or remedial measures and do not take part in the rebalancing mechanism. A 'Singapore-on-Thames' with low taxes therefore remains a viable option, which explains why passporting rights for financial services are not included in the TCA but left to the unilateral political discretion of the European Commission to adopt a so-called equivalence decision for certain financial service activities.

Besides the trade agreement, the TCA also contains chapters on judicial and police cooperation in criminal matters (note that cooperation in civil matters is not covered), the coordination of social security benefits, and the participation of the UK in Union programmes. In the latter context it is particularly deplorable that the UK decided to leave the Erasmus+ programme (with the Irish Government stepping in and extending the Irish Erasmus+ scheme to Northern Irish citizens), whilst remaining in the Horizon Europe programme. This decision is once more an expression of the UK Government's goals to make the most radical possible end it can to any sort of facilitated free movement of persons between the continent and the UK. It also represents the spirit that guided the negotiations, which was more about

preventing specific content in the agreement than about constructing something together. The EU succeeded in securing the EU internal market's integrity and the UK succeeded in putting an end to migration and in excluding the EU institutions, and in particular the CJEU, from any sort of influence on the interpretation and application of rules within the UK. The outcome is therefore a hard Brexit in disguise.

With the provisional application of the TCA the relationship between the EU and the UK entered into a new phase. The best news about the TCA is that any agreement is better than a no-deal scenario. Yet, it can only be understood as a starting point for setting up an ambitious trade relationship. The Agreement acknowledges this by allowing the Partnership Council to amend parts of it, and by providing for a general clause calling for a review of the entire Agreement and supplementing agreements five years after its entry into force. The disruptions in trade between the UK and the EU but also between Northern Ireland and Great Britain are already visible. The danger of a strongly diverging UK is however in reality, and regardless of the terms of the agreement, rather small. UK businesses will – irrespective of policy choices made in London – likely align with EU standards simply because they want to keep the access to the EU internal market. The 'Brussels Effect' that Anu Bradford described so well will make the UK soon realise that formally 'taking back control' is not the same as 'having control' in a globalised world.

As for the EU, Commission President von der Leyen was certainly right to put Brexit into perspective: It's done. So, let's focus on how we, the EU, can tackle our problems together. The agenda is long: managing the pandemic together, the economic recovery and setting up a meaningful recovery instrument, the rule-of-law crisis, getting a grip on the digitalisation of the economy, the implementation of the Green New Deal and the cross-cutting greening of policy fields and the revamping of the constitutional framework for these challenges with the Conference on the Future of Europe. In some of these challenges the UK's political wisdom and market-liberal perspective will be missed, in others the absence of its usual veto player-role will make processes smoother. The divorce deal with the UK is only a footnote compared to these challenges. Brexit and the TCA will not be an incentive for other Member States to follow the path taken by the UK. It will rather be a showcase for the advantages of multilateral cooperation over solo national attempts in addressing the challenges of the 21st century.

News Highlights

Week 25 to 29 January 2021

ECB to set up climate change centre

Monday 25 January READ MORE ON EU LAW LIVE

The President of the European Central Bank, Christine Lagarde, announced that the central bank will be setting up a climate change centre to centralise and coordinate the institution's current work on climate issues.

Panel of Experts: Korea is in breach of labour commitments under EU-Korea trade agreement

Monday 25 January READ MORE ON EU LAW LIVE

A panel of experts appointed by South Korea and the EU resolved a dispute by establishing that Korea is in breach of core international labour rights under the EU-South Korea free trade agreement.

Geographical Indications in the EU: public consultation launched by Commission

Monday 25 January READ MORE ON EU LAW LIVE

Geographical indications are the subject of a new public consultation launched by the European Commission, asking citizens, organisations and public authorities how the system protecting 3,400 names of specific products could be strengthened.

Guidance for Recovery and Resilience plans: environmental, digital and social aspects

Tuesday 26 January READ MORE ON EU LAW LIVE

Updated guidance from the European Commission is available on 'draft recovery and resilience plans' pursuant to the Recovery and Resilience Funds Facility, for access to 672.5 billion euros in EU loans and grants to support reforms and investments in the wake of COVID-19.

Proposed EU COVID-19 safety rules on international travellers coming to the EU

Tuesday 26 January READ MORE ON EU LAW LIVE

The European Commission addressed the threat of new COVID-19 strains, proposing 'additional safeguards and requirements' for international travellers into the EU. It also proposed updated criteria on testing and detection, for non-essential travel to the EU from third countries.

Court of Justice rules for the first time on prohibitions on cash payments and Treaty provisions on legal tender status of the euro

Tuesday 26 January READ MORE ON EU LAW LIVE

In *Hessischer Rundfunk* (Joined Cases C-422/19 and C-423/19), the Grand Chamber of the Court of Justice ruled on whether Member States can limit cash payments in euros and the conditions to do so, the first time it rules on the status of euro bills under the Treaties and the exclusive competence of the EU on this matter.

Need for greater international cooperation on climate and energy goals: Council conclusions adopted

Tuesday 26 January READ MORE ON EU LAW LIVE

The Council of the European Union adopted conclusions on 'Climate and Energy Diplomacy', the external dimension of the EU's environmental policy under the European Green Deal, in line with the Paris Agreement and the 2030 Agenda for Sustainable Development.

Consultation on how to protect deposits and prevent bank failures launched by Commission

Tuesday 26 January READ MORE ON EU LAW LIVE

In its review of whether to reform the EU's banking and crisis management framework, specifically the Bank Recovery and Resolution Directive, Single Resolution Mechanism Regulation, and Deposit Guarantee Schemes Directive, the European Commission launched a 'targeted' and 'technical' consultation.

EU agri-food sector study on trade: more exports, fewer imports

Tuesday 26 January READ MORE ON EU LAW LIVE

The European Commission's Joint Research Centre provided 'positive results' projecting the future outcome of the EU's trade agenda on the agri-food sector, based on the cumulative effects of 12 trade agreements on the agri-food sector by 2030.

Court of Justice rules on the scope of Directive 2000/78 on discrimination in the workplace among the same vulnerable group

Tuesday 26 January READ MORE ON EU LAW LIVE

In Grand Chamber judgment *VL* (C-16/19), the Court of Justice ruled on the scope of Directive 2000/78 on whether a difference of treatment *among workers with disabilities* is direct or indirect discrimination based on disability: whether discrimination *within the same vulnerable group*, distinguishing among workers with disabilities, is discrimination under the Directive.

European Court of Auditors highlights insufficient tax information sharing between Member States

Tuesday 26 January READ MORE ON EU LAW LIVE

A special report has been drawn up by the European Court of Auditors examining the exchange of tax information between Member States and cross-border transactions, and highlighting that there is insufficient sharing, putting the ability to fairly and effectively apply tax at risk.

Goldman Sachs Group appeal against ruling holding it liable for a related company's competition law breach due to its 'decisive influence' rejected by Court of Justice

Tuesday 26 January READ MORE ON EU LAW LIVE

The Court of Justice dismissed the appeal of The Goldman Sachs Group Inc in *The Goldman Sachs Group Inc v European Commission* (C-595/18 P), rejecting the request for annulment of a General Court judgment finding it liable for an Article 101 TFEU infringement committed by another company on the basis it had 'decisive influence' over it at the time.

Commission takes next step in rule of law infringement procedure concerning Polish judges

Wednesday 26 January READ MORE ON EU LAW LIVE

An additional reasoned opinion will be sent to Poland regarding the continued functioning of the Disciplinary Chamber of the Supreme Court under a Polish law of 20 December 2019, as the reply the European Commission received to an additional letter of formal notice to Poland has not responded to its concerns.

Equivalence decision for financial services of US central counterparties adopted

Wednesday 26 January READ MORE ON EU LAW LIVE

The European Commission adopted an equivalence decision that the US regime for US central counterparties is equivalent to EU rules. This enables US central counterparties registered under the US regime to be recognised upon application to the European Securities and Markets Authority (ESMA).

Court of Justice rules that under the Authorisation Directive a 'charge for public use of land' can be imposed on telephone and internet access service providers: Orange Espana

Wednesday 26 January READ MORE ON EU LAW LIVE

The Court of Justice ruled in *Ayuntamiento de Pamplona v Orange España SAU* (C-764/18) that the Authorisation Directive 2002/20 (for electronic communications networks and services) does apply to undertakings providing fixed telephony and internet access services, and that a charge can be imposed on them for 'use of public land'.

Eurogroup President's statement on ESM Treaty and the Single Resolution Fund Amending Agreements

Wednesday 26 January READ MORE ON EU LAW LIVE

Pascal Donohoe, the President of the Eurogroup, released a statement remarking on the further development of the Economic and Monetary Union and Banking Union as the ESM Treaty and Single Resolution Fund Amending Agreements have been signed.

European Central Bank hiring Bulgarian and Estonian Lawyer-Linguists

Thursday 28 January READ MORE ON EU LAW LIVE

The European Central Bank posted vacancy announcements for a Bulgarian Lawyer Linguist and an Estonian Lawyer Linguist to work at its Legislation Division in the Directorate General Legal Services in Munich.

Statement of Commissioner Kyriakides on diminished supply of vaccines announced by AstraZeneca

Thursday 28 January READ MORE ON EU LAW LIVE

Commissioner for Health and Food Safety Stella Kyriakides issued a statement on Wednesday concerning the EU's efforts to solve the situation raised by the announcement by the pharmaceutical company AstraZeneca that it will supply considerably fewer doses to the EU in the coming weeks than agreed in August 2020.

Ombudsman closes inquiry into Authority for European Political Parties and European Political Foundations

Thursday 28 January READ MORE ON EU LAW LIVE

The European Ombudsman closed an inquiry into the Authority for European Political Parties and European Political Foundations (APPF), a case concerning APPF's compliance with transparency requirements and disclosure obligations.

ECtHR accepts request for an advisory opinion by the Supreme Administrative Court of Lithuania

Thursday 28 January READ MORE ON EU LAW LIVE

The European Court of Human Rights decided to accept the request for an advisory opinion submitted by the Supreme Administrative Court of Lithuania in late 2020. The request had been made under the new reference mechanism established by Protocol No. 16 to the European Convention on Human Rights.

AG Rantos advises the Court to reverse General Court's compensation award to former Commission official regarding irregularities with regard to criminal investigation

Thursday 28 January READ MORE ON EU LAW LIVE

Advocate General Rantos delivered his first Opinion in a staff case: *Commission v De Esteban Alonso* (C-591/19 P), an appeal by the Commission against a General Court judgment that awarded compensation to a former European Commission official.

General Court clarifies meaning of Protocol 36 transitional provisions for the application of qualified-majority rules

Thursday 28 January READ MORE ON EU LAW LIVE

The General Court rendered its judgment on Wednesday in *Poland v Commission* (T-699/17), annulling Commission Implementing Decision 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions for large combustion plants.

Court of Justice: rights provided by Directive on the Right to Information in Criminal Proceedings do not apply to arrests on the basis of EAWs

Thursday 28 January READ MORE ON EU LAW LIVE

The Court of Justice delivered its judgment in *Spetsializirana prokuratura* (C-649/19), finding that certain rights under the Information in Criminal Proceedings Directive 2012/13 do not apply to arrests made pursuant to an European Arrest Warrant (EAW).

General Court: EIB decisions approving the financing of projects impacting the environment are reviewable in accordance with the Aarhus Regulation

Thursday 28 January READ MORE ON EU LAW LIVE

On Wednesday the General Court handed down its judgment in *ClientEarth v EIB* (T-9/19), annulling the decision by which the European Investment Bank (EIB) declared inadmissible the request by ClientEarth for review of a resolution of the EIB's Board of Directors approving the financing of a biomass power generation plant in Galicia (Spain).

AG Saugmandsgaard Øe: guarding military installations and stand-by presence and of military personnel in barracks is 'working time'

Friday 29 January READ MORE ON EU LAW LIVE

Advocate General Saugmandsgaard Øe delivered his Opinion in *Ministrstvo za obrambo* (C-742/19) on Thursday, advising that the Court of Justice rule that on-call duty in the armed forces must be considered as 'working time' under the Working Time Directive 2003/88, with the exception of certain 'specific activities'.

European Economic and Social Committee: revised Code of Conduct and Rules of Procedure

Friday 29 January READ MORE ON EU LAW LIVE

Revised Rules of Procedure and Code of Conduct of the EESC Members were adopted on Thursday, the first step of a reform process aiming at high ethical standards and transparent working methods, tackling harassment, misconduct and protecting whistleblowers.

Countries on EU's COVID-19 travel restrictions list updated

Friday 29 January READ MORE ON EU LAW LIVE

The Council of the European Union updated the list of third countries for which Member States should gradually lift restrictions on 'non-essential travel', which it first announced in the form of a Recommendation in March 2020 and which has been continuously extended.

State aid and COVID-19: Temporary Framework further prolonged and expanded

Friday 29 January READ MORE ON EU LAW LIVE

The European Commission announced its decision to prolong the State aid Temporary Framework to support the economy in the context of the coronavirus outbreak until 31 December 2021, as well as to expand its scope.

Code of Conduct for the Members and former Members of the Court of Auditors

Friday 29 January READ MORE ON EU LAW LIVE

The new Code of Conduct for the Members and former Members of the European Court of Auditors), adopted on 14 December 2020, was officially published on Thursday.

AstraZeneca-EU COVID-19 Vaccines Agreement published

Friday 29 January READ MORE ON EU LAW LIVE

The European Commission's COVID-19 vaccines agreement of 27 August 2020 with pharmaceutical company AstraZeneca for 300 million doses of the AstraZeneca vaccine was published with redactions of commercial and confidential information.

Insights, Analyses & Op-Eds

Lacatus v. Switzerland: a great judgment at the heart of human dignity

By Sébastien Van Drooghenbroeck READ ON EU LAW LIVE

Analysis of the European Court of Human Right's ruling *Lacatus v. Switzerland* case (application no. 14065/15), finding Switzerland in breach of Article 8 ECHR for having imposed a fine of 400 euros and 5-day detention on the applicant for begging in public, exploring how it combines the principles of the ECHR and related case law on proportionality, not interpreting the ECHR in a vacuum, and intolerance - but also laments how the ruling's pragmatism meant a less application, and excluded the examination other relevant ECHR rights.

Foreign decisions on precautionary measures regarding tax claims are binding for the courts of the requested Member State

By Ivan Lazarov READ ON EU LAW LIVE

Analysis of the Court of Justice's recent ruling *Heavyinstall* (C-420/19), a finding based on narrow exceptions provided in the Mutual Assistance Directive, omitting to address the balance between mutual trust and the obligation to guarantee fundamental rights such as the right to property and the freedom to conduct business.

Setting the record straight on disclosure of a document by a third party and the obligation of EU Institutions to provide access to documents: Leino-Sandberg v European Parliament

By Anastasia Karatzia READ ON EU LAW LIVE

Analysis of the Court of Justice's appeal against the General Court's ruling in *Leino-Sandberg v European Parliament*, by which the latter had dismissed an access to documents case on the basis the documents had already been made available by a third party, finding it notable from the perspective of the EU Institutions' obligation to provide access to documents on the basis of Regulation 1049/2001, and the procedural condition of when an action on the basis of Article 263 TFEU becomes devoid of purpose in the context of access to EU Institutions' documents.

Widening the pool of suitable comparators in EU non-discrimination law? *VL v Szpital Kliniczny*

By Vera Pavlou READ ON EU LAW LIVE

Analysis of the Court of Justice's ruling in *VL v Szpital Kliniczny* (C-16/19) on the notion of discrimination under the Employment Equality Directive where an employer treats two groups of disabled employees differently, and how this may have potential implications for other grounds of discrimination.

Library - Book Review By Anjum Shabbir

Sylvia de Mars

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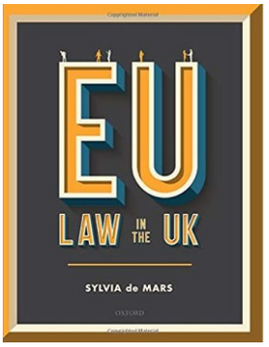

EU Law in the UK

Review of ‘a solid foundational EU law textbook that is appropriately updated for the new reality of the Brexit-divorce that we find ourselves in, useful far beyond the intended audience’.

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