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Editorial

Cassis at 40

Economic and monetary union; EU law; Mutual recognition principle

The ruling in *Cassis de Dijon* has recently turned 40.[1] In 1979 the Court famously held that Germany could not prevent the sale of Cassis de Dijon blackcurrant liqueur imported from France, despite the fact that the product did not comply with the German requirements on minimum alcohol content. The Court held that the German rules restricted free movement of goods and were not a proportionate way to serve the interests of public health or consumer protection. In the view of the Court,

> "[t]here is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State."[2]

Cassis was seen by many as a breakthrough.[3] Equally applicable national rules were now caught by the Treaty. The leading principle was mutual recognition. Outdated or irrational national practices could be challenged under free movement of goods even in the absence of discrimination—an idea that soon spread to the other freedoms as well. Further, a radical rethink of the Community political organs' failing programme of detailed harmonisation appeared feasible: if many national rules could not be applied to foreign products as a result of *Cassis* in any event, perhaps they did not need to be harmonised in the first place. Indeed, according to Lord Stuart Mackenzie, a judge at the Court between 1973–1988, *Cassis* was the most important decision made by the Court during his tenure,[4] while Lord Cockfield, the internal market Commissioner between 1984–1988, is reported to have considered the exportation of *Cassis* from the Court and goods to the single market 1992 programme his greatest achievement.[5]

Despite the undoubted substantive and institutional significance of *Cassis*, from today's perspective its actual impact on the ground should not be overplayed. It did not introduce an unqualified system of home country control; rather it explicitly acknowledged the power of the importing country to apply its rules if they were justified in the public interest and complied with proportionality. Therein lies its weakness: a qualified principle of mutual recognition can only create an equally qualified and incomplete internal market. In practice, national authorities routinely assume the validity and legitimacy of their national laws, unless directly told by a court that this is not the case. For businesses, the time, expense and uncertainty involved in legal challenges often means that it is easier to obey national rules than to insist on European rights. Empirically, while the internal market has outstripped free trade areas in terms of its impact on costs and competition,

> "trade between European countries is estimated to be about four times less than between US states once the influence of language and other factors like distance and

[1] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (C-120/78) EU:C:1979:42; [1979] 3 C.M.L.R. 494. This editorial was inspired by the Workshop "40 years of Cassis de Dijon" held at Cambridge in April 2019.
[2] At [14].
[3] Most importantly, in the Commission Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon') [1980] OJ C256/02. See L. Gormley, "Cassis de Dijon and the Communication from the Commission" (1981) 6 E.L. Rev. 454.
[4] Reported in P. Craig and G. de Búrca, *EC Law*, 1st edn (Oxford: Oxford University Press, 1995), p.614.
[5] Reported in K. Nicolaïdes, "The Cassis Legacy" in F. Nicola and B. Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), p.279.

> population have been corrected for. For goods, non-tariff obstacles to trade are estimated to be around 45 percent of the value of trade on average, and for services, the order of magnitude is even higher."[6]

In the case of Brexit, it is striking that the long term negative economic impact of a no-deal Brexit is usually predicted to be relatively modest, all things considered: for example, the UK Government's projection of the impact on GDP of reverting to trade on WTO rules is -7.7%—a serious blow for sure, but not an apocalypse.[7] This again reflects the fact that the single market remains incomplete. Trading on WTO terms is significantly worse than under internal market rules, but not catastrophically so.

Perhaps we should be content with an incomplete internal market. Europe is diverse and so are its rules. Those rules reflect local and national preferences. *Cassis* allows such rules to be maintained, provided that a sensible justification can be offered. Further, even if there is a finding that free movement provisions have been breached, this does not mean that the national law becomes void. It can still be applied to national products, given that purely internal situations are not covered by the free movement rules of the Treaty.[8] *Cassis* is a judgment that manages diversity; it does not impose uniformity.

Unfortunately the move to the single currency, euro, makes it difficult to continue to accept such an incomplete model of market integration. The benefits of a monetary union are felt through a well-functioning internal market where trade and investments flow between the countries. The resilience of a monetary union depends on things such as labour mobility and integrated capital markets that can cushion economic shocks. Divergences between countries that are perfectly acceptable in a single market may prove highly problematic and damaging in a monetary union. It is no accident that proposals for the reform of EMU often call for the strengthening of the internal market but also for much greater harmonisation than today. Qualified mutual recognition à la *Cassis* does not produce the convergence between national business environments that an economic union needs.[9]

At 40, it is not yet time for *Cassis* to retire, even if its best days may be over. Mutual recognition undoubtedly still has a place in the market integration project. It just cannot take the leading role anymore if we hope to move towards a genuine economic union capable of supporting the single currency.

[JS]

[6] V. Aussilloux, A. Bénassy-Quéré, C. Fuest and G. Wolff, *Making the best of the European single market*, Policy Contribution, Issue 3 (Bruegel, 2017), p.4.
[7] The various studies are usefully summarised in G. Tetlow and A. Stojanovic, *Understanding the economic impact of Brexit* (Institute for Government, 2018).
[8] See recently *Ullens de Schooten v Belgium* (C-268/15) EU:C:2016:874; [2019] 2 C.M.L.R. 7.
[9] See e.g. *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*, available at *https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en*, pp.7–9 [Accessed 5 August 2019].

Articles

The Legal Nature and Character of Memoranda of Understanding as Instruments used by the European Central Bank
Anastasia Karatzia* and *Theodore Konstadinides
In recent years the use of instruments characterised as "atypical acts" or "soft law" has proliferated in EU law. Memoranda of Understanding (MoUs) provide a good case in point as they comprise a convenient way to conclude what are perceived as non-binding agreements negotiated and adopted bilaterally by EU Institutions and third parties. This article will focus on the nature, characteristics, and legal effects of MoUs signed between the European Central Bank (ECB) and third parties. The ECB has been selected as the institution of study for two reasons: first, owing to historically making active use of MoUs and, secondly, owing to its new role of banking supervisor for the Euro area and the specific role accorded to MoUs in banking supervision. For instance, the ECB's central role within the EU Banking Union, which requires a high level of co-operation between the ECB and national supervisory authorities, has increased the use of MoUs as co-operation tools. Taking stock of these developments, the article will provide the first comprehensive mapping-out exercise of the legal nature and character of MoUs as instruments used by the ECB. It will provide an empirical analysis of the respective MoUs and will establish a legal framework that should assist our understanding of their nature, operation, and legal consequences.

Does the EU Commission Really Hate the US? Understanding the *Google* Decision through Competition Theory
Matthew Cole
This article analyses EU competition law to identify its theoretical influences. It finds that there are two distinct periods. The first, the "mono-theoretical period", is influenced by Ordoliberalism. The second, the "poly-theoretical period", has a number of influences, not least the Chicago School, post-Chicago analysis and behavioural economics. These new theories refine the way the law is used to achieve Ordoliberal aims, in particular, the aim of protecting economic freedom. This insight is then used to analyse the EU competition law approach to software markets. This reveals that software markets have characteristics that allow dominant, up-stream software firms to conceal the choice consumers have (choice evasion) and undermine competition. Recommendations on how to avoid this abuse are made.

Damages Liability for Non-material Harm in EU Case Law
Katri Havu
*This article analyses EU case law concerning damages liability for non-material harm. The focus here is on recent case law, most of which concerns EU liability. The contribution first provides an overview of cases that deal with non-material damage. Secondly, it explores important themes that emerge from the case law, such as the necessity of monetary reparation, the conditions for harm and causation, and the amounts of compensation granted. Particular attention is paid to the topical notion of reputational harm. Claims concerning damage to reputation or image have frequently emerged in EU liability cases, but compensation has not been readily awarded. The European Court of Justice has, however, relatively recently upheld a decision awarding damages for unjustified and prolonged inclusion on a "sanctions list" (*Safa Nicu *(C-45/15 P)). The problem of distinguishing between non-material and economic harm under EU law is also discussed.*

Brexit, Discrimination and EU (Legal) Tools
Tawhida Ahmed
The European Union (EU) is premised upon a project of inclusion: in this regard, it commits itself and its Member States to the acceptance and tolerance of all members of the Union and their citizens and residents. The UK's Brexit saga eclipsed these ambitions, and highlighted an increasingly vivid anti-immigrant atmosphere. Brexit brought to the fore not only acts of discrimination against EU citizens and others seen to be outsiders in the UK, but also emphasised the existence of strong underlying sentiments of discrimination against them. The intensification of such sentiments surrounded the eventual 2016 referendum vote in favour of leaving the EU, and this arguably demonstrates the significance of (failing in) addressing such

sentiments. This in turn raises questions relating to the suitability of the EU's choice of tools for addressing discrimination. There has been a mismatch between the tools adopted and the types of discrimination prevalent in the UK. EU legal tools of anti-discrimination and equality focus primarily on tackling visible individual "acts" of discrimination, leaving almost untouched concerns of underlying "sentiments" of discrimination. This is a result not only of weaknesses in the legal tools themselves, but on an over-reliance on them, arguably to the neglect of embracing non-legal initiatives as a means of addressing underlying societal sentiments. While the example of the UK and Brexit is used in this article, discrimination of this nature is a Europe-wide concern.

Analysis and Reflections

What Effect on Trade? A Balancing Act in Circumscribing the Notion of State Aid
Gjermund Mathisen
"Effect on trade" is seeing a renaissance in decisional practice in the field of state aid. The Commission is refining its approach to assessing whether potential aid measures affect trade between Member States such as to engage art.107 TFEU. The present contribution analyses the systemic implications of this shift, and argues that the refined approach re-balances the application of the "liable to affect trade" test as developed in case law. This test, and thus the outer limit of the notion of state aid, is analysed in light of related rules, especially de minimis rules in state aid law, and competition law rules on effect on trade. In this light, the Commission's reasoning in relevant cases is assessed as robust, whereas the general approach is seen as coming with some challenges, especially for use at the national level. However, the approach is promising enough that it deserves the support of the Courts in Luxembourg, the first signs of which are now showing.

***Minister for Justice and Equality v RO*: Brexit Means Nothing Has Changed … Yet**
Cristina Sáenz Pérez
This case note analyses the judgment delivered by the CJEU in Minister for Justice and Equality v RO *(C-327/18), which examines the possibility of executing European arrest warrants (EAW) issued by the UK after giving notice of its withdrawal according to art.50 TEU. In this case, the Court prioritises the functioning of the EAW despite the uncertainty surrounding the fundamental rights and legal framework governing the relationship of this country with the EU after Brexit. It clarifies issues such as whether mutual trust continues to apply to a Member State after the triggering of art.50 TEU and the implications of the loss of access to the CJEU for current EAWs. However, it also leaves many questions unanswered, such as what happens if the UK unilaterally modifies the rights assisting those surrendered prior to Brexit or what happens to EAWs which have not been executed before Brexit.*

Beyond Procedural Protection: Information Technology, Privacy and the Workplace
David Mangan
There has been an unproductive artificiality in the current understanding of information technology in employment law which focuses more on procedural hurdles than deliberating upon the substance of the rights in question. This procedural approach has increasingly shown signs of obsolescence as contemporary innovations in information technology contest the more traditional boundaries relied upon in law. This article uses the decision in Bărbulescu v Romania *as a tool for uncovering the legal considerations regarding the intermingling of information technology, the workplace and employees' private lives.*