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Editorial

On Transparency—but do not mention Brexit!

Brexit; European Commission; Negotiations; Transparency

This may be the last editorial in the Review while the United Kingdom is still a member of the European Union. Then again, it may not be. We do not yet know what the membership of the EU will be when the next issue is published. Given the long and painful/frustrating/stressful/difficult/desperate/miserable/interesting/exhausting/(un)predictable last three years (readers may delete or add adjectives as they see fit), silence may be tempting. After all, a Brexit-free editorial may be the most appropriate way to mark what may be the end of the UK's membership of the EU.

The temptation to write about the B-word is, alas, too strong to resist. Let us, however, take a different tack. In the wake of an intense political and constitutional crisis internally, and with the Brexit deadline of 31 October 2019 looming, the British Government announced its proposal for amending the Withdrawal Agreement of 14 November 2018 and, in particular, the Irish backstop. On 2 October 2019, it handed a 4-page letter to the President of the European Commission, Jean-Claude Juncker.[1] At the time of writing, the fate of this proposal is uncertain. For the purposes of this editorial, what is interesting is the refusal of the British Government to publish the legal analysis (according to newspaper reports, a 40-page document) which would flesh out the proposal. Viewed against the wider context of the British negotiating approach, this position is by no means surprising. After all, it is the British Parliament itself that has regularly criticised the Government's lack of transparency not only regarding its negotiating objectives, but also its domestic post-Brexit preparations.[2] Similar concerns have been expressed about the on-going negotiations to secure roll-over trade agreements with third countries: the lack of transparency about the direction and progress of the process, as well as the content and scope of consultations with the devolved administrations, industry and other stakeholders has been staggering.[3]

The contrast, however, with the EU's negotiating approach could not be any starker: since the beginning of the Brexit negotiations, the objectives of the Union, and the documents setting them out, promptly became public.[4] At first sight, this may come across as surprising, as the EU has often been criticised for its lack of transparency in decision-making in general and its treaty-making in particular. As a matter of course, the EU's negotiating directives, aiming to guide the Commission's negotiations of international agreements with third countries, were not published and, when those adopted by the Council in relation to the Transatlantic Trade and Investment Partnership (TTIP) were leaked in 2013, there was public uproar about the

[1] *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836029/PM_letter_to_Juncker.pdf* [Accessed 8 October 2019].
[2] See, for instance, House of Commons, Public Accounts Committee, *Brexit and the UK border: further progress review* (12 March 2019), HC Paper No.1942.
[3] See, for instance, House of Lords, European Union Committee, *Scrutiny of international agreements: treaties considered on 12 February 2019*, 29th Report (Session 2017/19), HL Paper No.287. See also letter by the Chairman of the Committee to the Secretary of State for Exiting the European Union of 6 February 2019.
[4] This point is made by the EU's lead negotiator, Michel Barnier, who stresses the complete transparency that governs the EU's negotiating position: *https://www.lemonde.fr/festival/video/2019/10/06/rencontre-avec-michel-barnier-sur-le-brexit-le-royaume-uni-a-choisi-d-etre-solitaire-plutot-que-solidaire_6014439_4415198.html* [Accessed 8 October 2019].

perceived scope of the Agreement and its negotiation in secret. This is not the case any longer, as negotiating directives are now published[5] and the negotiating process itself has been opened up.

The above is all the more noteworthy given the charge frequently levelled against the Union for decision-making through unelected bureaucrats which allegedly deprives democratically elected bodies of their right to exercise effective oversight. In fact, the quest for transparency in the EU is not confined to treaty-making but has also had an impact on the functioning of the Union's institutions. Having elected the new President of the European Commission, Ursula von der Leyen, in accordance with art.17(7) TEU, the European Parliament has held oral hearings for the members of the Commission nominated by the Council. These hearings are carried out before the committee(s) for which each candidate would be responsible. Each hearing is scheduled for three hours, is live-streamed and is preceded by an examination of the declaration of financial interests by the Parliament's Legal Affairs Committee. The Parliament does not have power over individuals nominated by the Council, but the Commission as a body is subject to the Parliament's consent pursuant to art.17(7) subpara.3 TEU. At the time of writing, the process has not been completed. It has become clear, however, that it is by no means a mere formality. The Hungarian and Romanian nominees have been rejected by the Legal Affairs Committee, whereas the French and Polish candidates have been asked to appear for a second hearing, as their first performances were considered less than stellar.

Whilst transparency raises different challenges in different contexts, the above examples capture the delicious irony that characterises the ways in which it is manipulated by decision-makers. The call to take back power from an allegedly shadowy and remote transnational structure deliberately ignored the steps that had been taken within the latter to bring in some light. The ensuing quest to endow domestic bodies with authority has shown little regard for transparency and seems to be accompanied by a disconcerting distrust of accountability. Viewed from this angle, whatever the outcome of this sad story, Brexit has shown us that the move from the transnational to the national does not necessarily entail more transparent decision-making.

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[5] See, for instance, Negotiating Directives for the Modernisation of the Energy Charter Treaty (2 July 2019), available at *https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf* [Accessed 8 October 2019].

Articles

Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"
Eleanor Spaventa
This contribution examines the situation of British citizens who are living in the EU 27 at the Brexit date; it challenges the assumption that those UK citizens can be treated as third-country nationals (albeit very privileged ones, should a Withdrawal Agreement enter into force). Instead, this contribution argues that British citizens in the EU 27 must be considered as "former EU citizens", and be protected accordingly. Such protection is demanded by the constitutional nature of EU citizenship; and it is supported by case law and secondary legislation protecting changes in status. To do otherwise is not only to renege on promises made, it is also to consign to history the very notion of EU citizenship.

Towards a Holistic Regulatory Approach for the European Data Economy: Why the Illusive Notion of Non-Personal Data is Counterproductive to Data Innovation
Inge Graef, Raphaël Gellert* and *Martin Husovec
The European Data Economy initiative is built on the belief that the current regulatory environment is not capable of unleashing the full potential of the data-driven economy. The initiative focuses on "non-personal data" as a way to complement data protection rules that regulate the processing of personal data. The article argues that the notion of non-personal data as a starting-point for new data innovation policies is counterproductive for three fundamental reasons: datasets are often mixed and the boundaries of personal data are too fluid to act as regulatory anchor; having two separate regimes applicable to mixed datasets might lead to strategic behaviour of firms exploiting this regulatory rivalry; and data has economic value irrespective of its legal classification, and there is no evidence that an elusive zone of non-personal data is more essential as innovation input. We conclude that a holistic approach to "data" as such, which a priori incorporates data protection considerations in its design, is more likely to deliver a successful innovation policy.

Reporting as a Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive
Olga Martin-Ortega* and *Johanna Hoekstra
This article analyses the EU Non-Financial Reporting Directive (2014/95) and argues that, while non-financial reporting is advocated as contributing to corporate social accountability, the Directive's primary focus is on economic considerations such as stimulating investment. The way the requirements relating to human rights are laid out in the Directive reduces its potential to generate a practice of effective reporting, especially given its divergence with the UN Guiding Principles on Business & Human Rights. The effectiveness of the Directive is further complicated by the due diligence and reporting laws that certain Member States have enacted, as the Directive does not interact with these legislations. These key issues regarding the Directive are framed in the overall uncertainty over the effectiveness of reporting as a means to materialise human rights due diligence.

Sex-Segregated Services: Their Place in EU Anti-Discrimination Law and their Relationship to Positive Action Measures
Maria Lee
This article examines the legal nature of sex-segregated services as provided for in the Equal Treatment Directive 2004/113 and its positioning in relation to positive action measures. The Directive prohibits discrimination in the access to goods and services on the grounds of sex, while allowing the provision "exclusively or primarily to members of one sex" under certain conditions (art.4(5)) and positive action measures to promote equality between the sexes (art.6). This raises questions: do these provisions differ and, if so, how? How do they fit into the system of equality law? The analysis sets off with a general investigation into the principle of equality and then locates positive action measures and sex-segregated services within the equality law structure.

Analysis and Reflections

The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The *Coman* ruling
Alina Tryfonidou
In its recent Coman *ruling, the European Court of Justice held that the term "spouse" includes the same-sex spouse of a Union citizen, for the purpose of the grant of family reunification rights in free movement cases. Hence, a Union citizen can rely on EU law to require the Member State of destination to admit within its territory his/her same-sex spouse, irrespective of whether that Member State has opened marriage to same-sex couples.* Coman *is clearly a landmark ruling of great constitutional importance which changes the legal landscape for the recognition of same-sex marriages within the EU. It is also a ruling that is hugely significant at a symbolic level, as through it, the EU's highest court made it clear that same-sex marriages are equal to opposite-sex marriages for the purposes of EU free movement law. This article will aim to analyse the case, explaining its overall importance but also highlighting the gaps in protection that persist even after the delivery of the Court's judgment.*

Form, Effects, or Both? The More Economic Approach and the European Commission's Decision in *Google Search*
Carsten Koenig
Proponents of a "more economic approach" (MEA) to EU competition law criticise the case law on abuse of dominance as overly form-based—i.e. as being built on categorisations rather than case-specific assessments of competitive effects. While the Commission has largely accepted this criticism, the EU Courts are generally said to be sceptical about effects-based assessments of art.102 TFEU cases. This could pose a problem for the Commission's recent decision in Google Search*, which primarily relies on effects, not form. However, it is argued here that the Courts' reluctance in this matter is mainly driven by worries about the effective enforcement of competition law. Thus, although the Courts have occasionally rejected requiring the Commission to prove effects in addition to the elements of a form-based legal test, it cannot be assumed that they are equally sceptical about relying on effects where such tests are unavailable. In fact, the Courts' treatment of novel abuses, in particular, shows that they do not consider form a defining element of abuse. Thus, it is unlikely that the Courts will find fault with an alleged abuse's lack of form if they are convinced that the practice in question is anti-competitive.*

Squaring the Circle: High-Quality, Deep FTAs with Australia and New Zealand without the EU Member States' Approval?
Christian Riffel
The European Union, on the one hand, and Australia and New Zealand, on the other hand, are committed to concluding high-quality, deep free trade agreements (FTAs) as between themselves. On the part of the EU, the ratification of economic integration agreements is complicated because of the involvement of the Member States with their own constitutional requirements. The European Commission, therefore, seeks to fast-track the conclusion of FTAs with these two countries by designing the agreements in a way that would not require the approval of the Member States. Drawing a comparison to the FTA with Japan (JEEPA), the present article seeks to analyse what triggers the need for Member States' approval, and explicates what changes negotiators would need to make in relation to an EU–Australia/New Zealand FTA. In particular, could such an agreement have chapters on "trade and" topics in the style of JEEPA without making ratification by the Member States a requirement?

The Composition of the European Parliament in Brexit Times: Changes and Challenges
Federico Fabbrini* and *Rebecca Schmidt
The article examines the implications of the delayed exit of the United Kingdom (UK) from the European Union (EU) for the composition of the European Parliament (EP). On the assumption that Brexit would occur in March 2019, the EU had reallocated the seats for the 2018–24 EP term, reducing the overall number of seats, and transferring 27 of the 73 UK seats to other 14 Member States. However, the Brexit extension accorded in April 2019, and the participation of the UK in the EP elections in May 2019, required going back to the previous allocation of EP seats, which applied in the 2014–19 EP term, until Brexit occurs. As a consequence, the EU is now in the peculiar situation that 73 UK Members of the EP (MEPs)

are elected on a resolutive condition (until Brexit occurs) and 27 potential future MEPs are elected on a suspensive condition (only when Brexit occurs). This article examines the legal and institutional challenges connected with this situation, and argues that while the suspensive condition can be regarded as acceptable, the resolutive condition is questionable in light of EU constitutional principles.

Forthcoming in European Law Review

Commercial Speech and Freedom of Expression in EU Law—A Paradigm of a Sliding Scale of Review for the European Court of Justice?
Dimitrios Doukas
Despite the recognition of equivalence of art.11 EUCFR and art.10 ECHR, the CJEU's case-law falls behind the standards of protection afforded by the ECtHR to commercial speech. It lacks a systematic or consistent scrutiny of interferences with commercial speech in the light of freedom of expression and the media, as overall it assumes that commercial speech makes no (significant) contribution to public discourse and constitutes a threat to pluralism. This comparative analysis of the case-law of the ECtHR with that of the CJEU provides a taxonomy of standards, which the CJEU should apply to restrictions on commercial speech from a fundamental rights perspective, whether these interfere with free movement or result from internal market legislation. Such standards are to build upon the ECtHR's case-law, which has produced a fully-fledged set of standards of scrutiny on a sliding scale, depending on the right involved, the medium used and the contribution, if any, of commercial speech to pluralism. The CJEU may even go further and apply more robust or nuanced standards, not least because it is predominantly concerned with economic matters.

The Concept of the Copyright Work under EU Law
Jani McCutcheon
In Levola Hengelo BV v Smilde Foods BV *the Court of Justice of the European Union was asked, inter alia, to make a preliminary ruling on whether EU copyright law precludes the taste of food from being protected as a copyright work. This generated expectations that the ECJ and the Advocate General would clarify the scope and meaning of the copyright "work" under EU law. Instead, both the Court and the AG essentially concluded that taste could not be a copyright work because it could not be identified with sufficient objective precision. The article supplements the Court's reasoning by expanding significantly on why taste must, and yet cannot, be capable of objective identification, and explaining other essential attributes of the copyright work which exclude taste from copyright. The article then interrogates what clues the ECJ has provided on the scope of the copyright work under EU law, and whether it could, and should, have done more to explain the work's concept and boundaries. The article concludes that while* Levola *leaves us no closer to a harmonised definition of the copyright work in EU law, it was too ambitious to expect the ECJ to achieve this, particularly given the difficulty of theorising and conceiving of the work in the abstract, and independent to copyright's shaping filters.*

When Data Protection Met Access to Documents
Sam Wrigley* and *Daniel Wyatt
In the case of Psara v Parliament *(T-639/15 to T-666/15 and T-94/16) EU:T:2018:602, the General Court found that MEP expense reports contained personal data and so could only be disclosed if the applicants showed they were necessary for a sufficiently specific reason, beyond general purposes of transparency or suspicion. While, of course, public officials do not give up their personal rights once they enter into public office, a certain amount of transparency is both desirable and inevitable for people in such roles. This article explores the problems that might arise from the over-protection of EU officials in this way, before discussing the implications of Regulation 2018/1725, which governs the EU's processing of personal data, and concluding that it was a missed opportunity to address these issues. Finally, it explores Regulation 1049/2001, governing access to documents, and offers an interpretation of this law which may help to avoid the problems identified.*

The Shifting State of Rights Protection Vis-à-vis EU Agencies: A Look at Article 58a of the Statute of the Court of Justice of the European Union
Luca De Lucia
Article 58a of the Statute of the Court of Justice of the European Union, introduced through Regulation 2019/629, establishes a filtering mechanism for appeals brought before the Court of Justice against General Court decisions concerning the decisions of the boards of appeal (BoAs) of certain EU offices and agencies. This article analyses the significance and consequences of art.58a. It opens with the background to this latest reform to tackle the problem of the steady increase in the workload of the EU judiciary. It then proceeds with: an

overview of the BoAs; an analysis of the significance of art.58a; an examination of two problematic aspects of the new provision, the first regarding its scope of application, the second concerning the relationship between the subject of the administrative appeal and that of the judicial proceedings; and a discussion on several organisational and procedural shortcomings in the current regulation of the BoAs that have been accentuated by the introduction of art.58a and an account of possible ways to rectify them. The article concludes with an illustration of how art.58a is the latest in a series of legislative acts that have inconsistently characterised the protection of the rights of parties to the decisions of EU agencies and mention of tools that could guarantee greater normative coherence and certainty in this area of rights protection.

The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns
Caterina Molinari
The co-operation between the European Union ("EU" or "Union") and third countries on return and readmission of irregular migrants is increasingly informal, namely enshrined in political or administrative deals rather than formal international treaties. This article explores the effect of the systematisation in the use of informal deals on the rule of law compliance of the Union's return policy. It argues that the systematic recourse to informal deals relates to a strategic avoidance of judicial and democratic accountability of the Union's action. More particularly, EU institutions make use of the distinction between international treaties and non-binding informal deals to sever an area of governance with clear fundamental rights implications, i.e. the EU return policy, from judicial and democratic oversight. This compromises the rule of law compliance of the EU return policy. In fact, as constitutional principle of the EU legal order, the rule of law inextricably connects and encompasses pre-eminence of the law, democratic guarantees, and fundamental rights protection.

Consumer protection in the Brussels I Recast and its Interface with Third States
Tobias Bachmeier
The principle of judicial comity is an essential yardstick in matters of international jurisdiction. Within unilateral jurisdictional systems, however, sovereign states tend to be cautious when reconsidering judicial comity. Nevertheless, strong comity within such systems can mean that different unilateral systems—at least to some extent—de facto intertwine, enhancing the proper functioning of each unilateral system in the international sphere. Since the territorial scope of consumer protection provisions has been broadened in the Brussels I Recast, this Regulation increasingly intervenes with third state jurisdictional systems in matters of consumer protection. This gives rise to the question of whether the principle of comity has been properly respected in the Brussels I Recast. This question is addressed in this article from the perspective of consumer protection in the Brussels I Recast and its interface with third states.

The 2021-2027 EU Rural Development Policy: a New Paradigm of Shared Management?
Luchino Ferraris
The legislative proposal for the new Common Agricultural Policy (CAP) 2021-2027, published by the European Commission in June 2018, introduces a number of important features for the support of European rural areas. While the success of the proposed modifications—inspired primarily by subsidiarity, simplification and the so-called "delivery model"—depends on a number of factors, this paper will specifically focus on one, i.e. the relationship between the institutional actors involved. Consequently, the main question is to what extent the new approach carries with it a paradigm shift in regard to the concept of shared management of rural development between the Commission and Member States. This will also reveal if the post-2020 CAP is marked by a "renationalisation" of rural policy in Europe, or whether the key principles inspiring the reform signify a new step for EU integration. Following a comparative analysis of the current regime and the one enshrined in the new legislative proposal, selected groups of provisions will be taken as case studies to assess both the nature and extent of the change.