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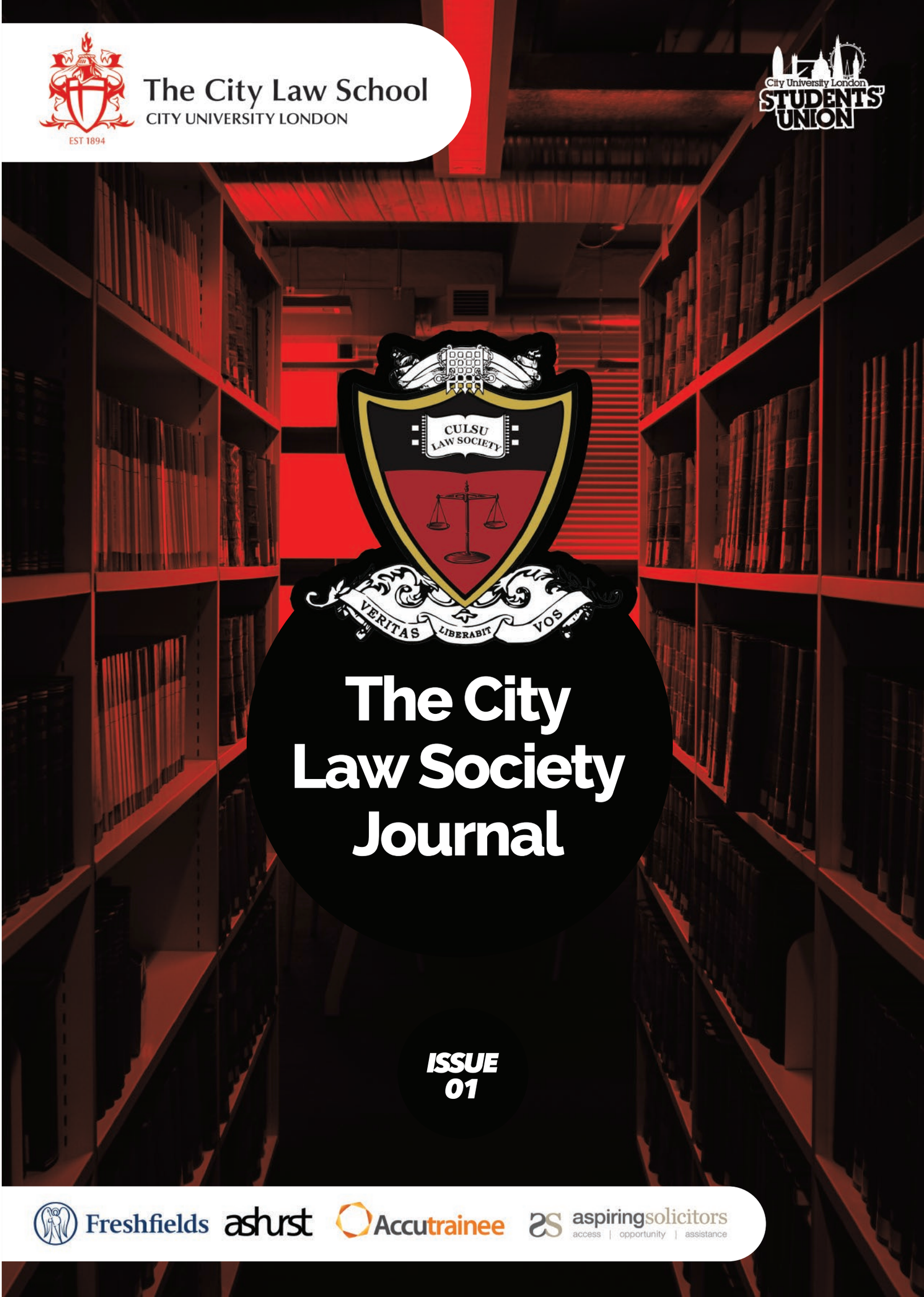

The City Law Society Journal

ISSUE 01

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Editors Note

It is no exaggeration to say that The City Law School, City University London, has a strong reputation in the world legal education. With courses ranging from International Human Rights, to Public International Law, to International Banking and Finance, City has deservedly earned its reputation as one of the world's leading institutions focussing on academic excellence for business and the professions. The inaugural issue of The City Law Society Journal is the foundation of what we hope to be a longstanding publication and the centrepiece of critical legal thinking touching upon a broad spectrum of thought provoking articles relating to contemporary legal, political and commercial issues.

The Journal is an independent publication. It is edited, reviewed and published entirely by City students, with the support of The City Law School. Although our University prides ourselves on expertise in business and the professions, The City Law Society Journal exceeds these borders and touches on issues across the globe. We hope that The City Law Society Journal will inspire and facilitate intellectual study, discourse and debate between students, academics and practitioners from all corners of the world.

I would like to express the utmost gratitude to the Academic Editorial Board for providing their guidance to a group of bright-eyed law students and the Managing, Senior and Student Editors, who courageously undertook the challenge of supporting this project. I would also like to thank the City University London Students' Union for their unwavering support and their inspiration for our wealth of critical thinking. Finally, I would like to thank our sponsors; Freshfields, Ashurst, Accutrainee, Aspiring Solicitors and The City Law School for their continued support and efforts throughout our mission, not forgetting our fantastic journalists!

You may have your article reviewed for publishing in further Issues by contacting the CULSU Law Society at **lawsociety@city.ac.uk**.

Yours sincerely,

Zain Ismail

Zain Ismail
Founding Editor-in-Chief
The City Law Society Journal

Contents

A 'Double Lock' With Only One Key

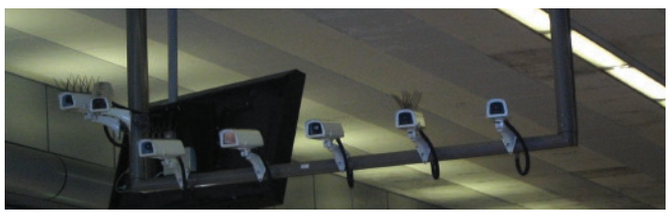
When Theresa May praised the draft 'Investigatory Powers Bill' from the dispatch box, the backbench rumblings of 'hear hear' were not nearly as determined as the ministerial nods in front. One sympathizes. For despite the Home Secretary's promotion of the IP Bill as a "double lock" procedure with "world-leading oversight arrangements", in reality the proposed legislation falls woefully short of delivering adequate protection against excessive infringements of privacy.

One of the key controversies surrounding this Bill is the issuing of warrants which would allow the security services to intercept internet communications and read their contents. Since security ministers are largely unaccountable and the staff whom they direct even less so, it should be uncontentious that the issue of warrants is only possible with stringent oversight procedures which inhibit unjustifiable invasions of privacy.

If the claims of the government are to be believed, the oversight provided by the Bill will be sufficient. The procedure for warrants is set out as first requiring approval from the Secretary of State, and then from a Judicial Commissioner, a position filled by judges from the High Court upwards. Hence the so-called "double lock" description by various media outlets. Yet examination of the Bill reveals that the actual impact of the Commissioners has been exaggerated, and real safeguards are in fact in short supply.

The crucial provisions are sections 14 and 19. The power of the Secretary of State to issue a warrant is contained in section 14, subsection (3) of which states the grounds for a warrant. The most important of these grounds are the first three: national security, preventing or detecting serious crime, and the UK's economic well-being so far as it relates to national security.[1]

Section 19(1) details the role of a Judicial Commissioner. Namely, to review the Secretary of State's decision as to whether the warrant is necessary on the grounds of 14(3) and whether the conduct authorized is proportionate to what is sought to be achieved. Most important of all, subsection (2) of section 19 states that a Judicial Commissioner must apply judicial review principles to proceedings.



The section 14 grounds are shockingly broad. In the post-Snowden era it is not difficult to imagine unjustified invasions of privacy enabled by flimsy assertions of national security.

In fact, in the very unveiling of the Bill, Theresa May revealed that UK intelligence agencies had been given warrants to intercept telephone communications data since 2001 using section 94 of the Telecommunications Act 1984, legislation which befits its Orwellian year of enactment. This Act gave the Secretary of State the power to make "general directions" in regard to interception of telecommunications data, so long as it was deemed "in the interests of national security".[2]

The opaque provisions of the 1984 Act reveal, for all to see, the historically poor record of the executive in the surveillance of its citizens. It should therefore be a cause of grave concern that the section 14 grounds are also so broadly construed.

Further, the vagueness of the section 14 grounds has the consequence of minimizing the section 19 "review" role of the Judicial Commissioner. The wider the section 14 grounds for the necessity of a warrant, the more likely a Judicial Commissioner is to find the warrant necessary. Since the section 14 grounds are so wide, the question of whether a warrant is 'necessary' could be answered over the Judicial morning coffee. It is ambitious to suggest that a Commissioner will demur from the conclusion of an ostensibly well-informed minister, whose decision was based on broad policy

concerns. The 'lions under the throne' will have been robbed of their teeth.

There is also a risk of the Commissioner's role merely becoming an exercise in formality, considering the repetitive nature of the decisions they are to measure. If issuing such a warrant is deemed to be proportionate once, as is likely with the expansive notion of national security, approval will probably become common practice.

Paramount to these considerations though is the 19(2) provision for judicial review. As every fresh-faced and wide-eyed law student knows, the three grounds of judicial review are illegality, irrationality and procedural unfairness, but each of these are likely to prove ineffective in holding the executive to account in respect of internet warrants.

The classic format for an illegality challenge is to define the powers of the decision maker, then to argue that the decision maker has exceeded them. The statutory basis for the issuing of warrants is clear in section 14(1) of the Bill, namely, "if the Secretary of State considers that the warrant is necessary on grounds falling within subsection (3)"[3](Mr Liversidge would pale at such draftsmanship!).[4]

However, the discretionary nature of such powers will make it extremely difficult to demonstrate that the Secretary of State has exceeded them. For a claim of illegality to be successful, it will need to be proved that the Secretary of State has acted *ultra vires*, yet the power to issue a warrant relies upon wholly subjective motivations which need not be explained to the court.

Note that this will remain the case regardless of which form of statutory interpretation the court employs. If the literal approach is used, the Secretary of State likely will not have acted outside her conferred powers, since such powers are discretionary, and the mischief rule or the purposive approach similarly would favour the Secretary of State since the legislation is clearly designed to combat terrorism.

As to irrationality, a challenge is even less likely to succeed due to both the nature of the doctrine and the substance national security concerns. As is well-known, the doctrine finds its basis in *Wednesbury*[5] 'unreasonableness', which Lord Greene MR defined as "something so absurd that no sensible person could ever dream that it lay within the powers of the authority".[6] Later, in the famous GCHQ case[7] Lord Diplock introduced the terminology of 'irrationality', and, equating it with *Wednesbury* unreasonableness, described it as "so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it".[8] The strength of their Lordships language indicates that a decision must be extremely perverse to attract the charge of unreasonableness or irrationality. Hence to argue irrationality against the issuing of an internet communication warrant, in favour of which many would assert measured rationales, will be extremely problematic.

More significantly, the courts have been very reluctant to interfere with decisions in select areas of public policy, the foremost being national security; this applies both to irrationality and procedural unfairness.

Again in the GCHQ case, Lord Diplock considered that national security "is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems it involves".[9] The position of the courts in relation to such areas of policy was summarized in *R. v Ministry of Defence ex p. Smith*[10]:

> *"The greater the policy content of a decision…the more hesitant the court must necessarily be in holding a decision to be irrational…Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test".*[11]

The decision of the Secretary of State to grant an internet warrant would therefore not be vulnerable to a challenge on the grounds of irrationality or procedural unfairness since both grounds only concern justiciable issues, from which are excluded policy areas such as national security.

It is on account of the severe limitations above that the Bill's judicial oversight has been branded "a rubber-stamping exercise" by Shami Chakrabarti, director of Liberty. Ben Emmerson QC also criticized the Bill for "fall[ing] short of the putting the power to issue a warrant in the first place into the hands of an independent judge, which is where it belongs", and further condemnation was voiced by the libertarian pressure group Big Brother Watch.

One may challenge, as did a Guardian editorial, the *a priori* view that such warrants are a good trade-off for intrusions into private life. There are also arguments to suggest that interception does not necessarily lead to foiling terrorist plots; there is evidence that the French authorities had watched the *Charlie Hebdo* gunmen since 2005, and Yves Trotigon, a French former-counter terrorism official has questioned

efficacy of communication surveillance in the wake of the November Paris attacks. However, what is critically important to the UK *is* that if surveillance legislation is to be adopted, it be with judicial oversight which carries equal authority to the decision-making of the executive. Anything less will be insufficient if the potential for incremental, totalitarian invasions of privacy is to be averted.

By Ravi Jackson
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1 The remaining ground relates to mutual assistance warrants with EU member states.
2 Telecommunications Act 1984 section 94(1
3 Investigatory Powers Bill section 14(1)(a)
4 Liversidge v Anderson [1942] AC 206
5 [1948] 1 KB 223
6 ibid. at 229
7 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
8 ibid. at 410-411
9 ibid. at 412
10 [1996] Q.B. 517
11 ibid. at 556

TTIP - THE MODERN 'PANDORA'S BOX'?

How the greatest trade agreement between the EU and US will affect UK business: the advantages and disadvantages.

TTIP Myths

TTIP will force government to privatise the public sector

TTIP will force the EU to import hormone-treated beef

TTIP will let US firms sue EU governments at will

TTIP will weaken EU standards

Big business is calling all the shots in TTIP

Tariffs between the EU and US are already low. TTIP is just a pretext for dismantling EU regulations

TTIP will spell the end of European cinema and other creative industries

TTIP will mean a race to the bottom on the environment and people's rights at work

TTIP will help US and EU importers - but developing countries will suffer

Background

Many journalists and commentators described the Transatlantic Trade and Investment Partnership (TTIP) as being 'The Trojan Horse Treaty'[1] after one of the drafts of the negotiations text was leaked. People have feared it will give special privileges to foreign investors and giant corporations at the expense of British citizens, whilst pretending to be beneficial for the economy.[2] I prefer to look at it from a different perspective: TTIP may play a role as a modern 'Pandora's Box' which, according to Greek mythology, was a giant box given to Pandora containing all the evils of the world. Nowadays its reference means even though one may begin something small and seemingly innocent, the result may be detrimental with severe consequences, and this is how the public perceives this trade agreement.

The first question that must be answered is 'what is TTIP all about?' The Transatlantic Trade and Investment Partnership is an agreement between the European Union and the United States, to create the world's largest free-trade zone. This agreement has been in a drafting stage for several years, but the problem is that it lacks transparency, having been negotiated behind 'closed doors' for a long time. This is why TTIP has created many misconceptions. The most recent debate in the House of Commons on TTIP was on 10th

December 2015, where Geraint Davies MP raised the issue of the 'regulatory chill' effect, amongst other important issues.

What are the concerns?

TTIP will not overrule or amend any existing EU legislation and all the changes to the EU regulations and laws will have to be approved to liberalise trade.[3] The EU sets very high standards to protect the environment, consumers and human life, so the risk of diminishing these standards frightens the public. The EU Commission, the table of negotiations on behalf of the 28 Member States, promises governments will be able to set standards as high as they wish since no one wants to undermine years of hard work.

But what about, for example, the import of hormone-fed beef? Although the purpose of TTIP is to erase trade barriers by harmonising regulations, the EU will keep the food safety regulations that prohibit these growth-hormones because the US will keep its rules on microbial contaminants.[4] The policy regarding genetically modified organisms (GMOs) works in the same way: these products will not be allowed unless agreed upon by all EU Member States. This is an entirely separate topic from trade negotiations because of the level of its seriousness. Moreover, the EU is overall the largest importer and exporter of agricultural products in the world[5], and the EU-US trade deal may create a competitive disadvantage since the market could be flooded with cheap US food. Recent currency exchange rates indicate that this fear is questionable at the least; the Euro is almost equal to the US Dollar. However, the export rates to the EU and non-EU countries from the UK have fallen in 2015 and the risk of further adverse effects to the UK farmers is raised.[6] It is highly in doubt that the EU will allow this to happen: the import quotas will be negotiated as in other free trade agreements.

With regards to public services, the TTIP does not have a clause to force governments to privatise public services, which is a major concern. As for the UK, the National Health Service, public schools or prisons will not be privatised unless the government expressly decides so, even though this practice is popular in the US.[7] Even if this does happen, the decision to buy services from private providers can be reversed, while respecting the terms of the contract agreed.

What are the benefits?

TTIP will likely cut costs for consumers without cutting corners. Dominic Watkins, trade law expert and partner at DWF LLP, commented: "There are some myths and urban legends about what TTIP will do. However, it is an enormous opportunity. There is potentially a big prize there".[8] Not only can TTIP create more business opportunities which will lead to more jobs, but it would also potentially lower prices since there will be more choice of products for consumers. Healthy competition would be good for the market. One of the projected benefits would be a boost for British car exports, Americans would be able to purchase more British cars. At the moment there is a difference in car safety testing between the US and the EU, which is a significant obstacle. At a time of continuing economic crisis, this would bring benefits to the European firms since they will be able to sell their services in the US. The UK Federation of Small Businesses favours TTIP as it would be much cheaper and easier for them to access the US market if the tariffs are abolished and customs process sped up.[9] Furthermore, it is still expensive for the US consumers to purchase EU's products, such as cheese, oil and spirits, because tariffs at US customs can be as high as 30%. Lowering or eliminating customs duties will make these goods affordable which, in turn, would most certainly increase the number of sales. In total, the aligned standards set up by the EU and the US can provide global standards for the rest of the world and provide an opportunity for other exporting countries to comply with only one set of regulations. This will be beneficial for people in other nations.

What are the disadvantages?

Even though there are positive aspects of the TTIP agreement, there are also disadvantages. Some critics argue that increased international competition will lead to fewer jobs in certain sectors. This may indeed become true. For example, NAFTA led to the loss of 1 million jobs although promising to create thousands of new employment opportunities. Independent research has shown that jobs will be lost among producers and exporters of machinery and meat. However, the largest disadvantage may be the downfall of democracy. The introduction of the Investor - State Dispute Settlement (one of the main aims of TTIP) would allow companies to sue governments if the legislation or government's policies caused a loss of profits. Can we really allow giant transnational corporations to dictate their own lines and rule democratically elected governments? This may be not as scary as it sounds since the procedure is not new and already exists in other bi-lateral trade agreements across the world. One of the most famous cases is the Phillip Morris case, where a tobacco company sued the Australian government for loss of profits caused by regulations as to labels on packaging.

From one perspective the foreign investor should not be placed in a disadvantaged position when investing its own money in another country's economy, but at the same time the government should be free to perform its functions. This is clearly a very sensitive issue to argue about.

There are currently around 500 similar cases of businesses challenging states and they are all taking place before 'arbitration tribunals' made up of corporate lawyers appointed on an ad hoc basis, which according to *War on Want's* John Hilary, are courts with "a vested interest in ruling in favour of business." This is, of course, a very harsh position because statistics reveal the opposite (less than 30% of cases are ruled in favour of private companies), but it would be better to have these disputes heard by courts with judges and to be open to the public in order to ensure greater transparency.

"It takes two to Tango"

A final moral from Greek mythology: man lived in the world without worry, until the box was opened. The final thing left in the bottom of the box was 'hope'. There are two views: saving 'hope' for mankind or keeping it away from humanity. As for TTIP, we should not assume the worst, and make prejudicial criticisms before analysing all its aspects. As with NAFTA, only time will reveal the true face of this partnership agreement, which had both positive and negative consequences. It should be always remembered — "it takes two to Tango".

By Kseniia Samokhina
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1 euobserver.com
2 Steven Poole, 'Language has the power to disarm the concerned citizen' (2014)
3 ec.europa.eu
4 European Commission's Report on food safety and animal and plant health in TTIP (2015)
5 WTO: International Trade Statistics (2014)
6 UK Food and Drink Export Performance (January 2015)
7 www.gov.uk
8 www.foodnavigator.com
9 CBI Report 'A New Era For Transatlantic Trade' (2014)

A Rabbit, a Bear and Four Fingers, but how does the Thumb turn?

On December 2nd 2015, Reese's Peanut Butter Cups responded to social media concerns that the brand's festive Peanut Butter Tree had a non-tree-like shape. Defending the product, the Hershey-owned brand posted a message to their twitter feed that, 'REESE'S celebrates trees of all shapes and sizes,' and it's not how it looks, 'it's what it tastes like.'[1] While Reese's took the attention as an opportunity for a public relations offense under the 'hashtag' '#AllTreesAreBeautiful', a brand's choice of shape and consumer impression during the holidays and throughout the year is big business. Monopolistic competition between non-identical, but closely related confectionery products and, specifically chocolate, has increased the influence of brand identity, and how consumers choose to express their preferences.[2] In order to create distance between competitors, brand owners are engaging in defensive strategies to ensure that their products remain distinguished. As brands search for more refined ways to communicate the identity of their goods, product shape has emerged as an important but difficult component of trade mark protection. I will seek to review trademark 'registrability' in the UK and European Union, and examine the European Union Court of Justice's confirmation in *Société des Produits Nestlé SA v Cadbury UK Ltd* (Case C-215/14), and the recent cases involving Lindt's rabbit and bear shaped ranges in consideration of product distinction and the free movement of goods.

In 2014, the Office for Harmonization in the Internal Market (OHIM), which manages the protection of community trademarks across the twenty-eight member states received 117,464 trademark applications.[3] The UK was the third highest applicant country behind Germany and the United States.[4] In the European Union (EU), trade mark protection covers any sign capable of being represented graphically through words, design, letters, numerals, the shape of goods or their packaging.[5] In similar goods such as grab-and-go chocolates which compete at the same level of consumer contact, the use of trademarks, and the related protection can enhance a consumer's ability to differentiate between products. In addition to the OHIM register, applicants may apply through a member state's national office. A registered community trade mark is protected and enforceable

across all member states but will be void if refused by a single member. An applicant of a refused community trade mark application may choose to convert the application into individual national applications, leaving out those members which have raised objections. A trade mark applicant thereby retains the filing date of the community trademark application, and has an opportunity to build rights in a number of member states which could be used in later arguments of acquired distinctiveness. The adoption of a strategy testing trade mark 'registrability' within more lenient, or open EU member states may further negotiations with pre-existing owners in the member states where registration has been refused, and block further expansion.

Of the nearly 80,000 trade mark applications OHIM receives annually, approximately one in five is opposed by an owner of a trade mark that is already on the market.[6] Third parties have an opportunity to oppose the registration of new applications through the entry of written submissions, and if no opposition is entered, an application is likely to proceed to registration. Prior to filing, the applicant may consider the 'registrability' of their trade mark in relation to the mark itself, and the goods it is to be used in connection with. Research prior to filing may indicate whether the proposed mark is a term of industry, such as 'CHIPS' used for chocolate chips, or if the applied-for trade mark is descriptive, such as 'UNITED KINGDOM CHOCOLATE' in which such a mark could prove deceptive if the chocolate is sourced outside of the UK. One may also discover whether the trade mark is likely to be confused with an earlier filed mark such as 'UK-CHOCO,' and 'CHOCOUK'. For trade mark shapes, the same process of consideration applies. The grounds for refusal of registration in the UK are listed in Section 3-8 of the amended Trade Mark Act 1994. Included in the absolute grounds for refusal are those trademarks:

- 1(b) devoid of distinctive character,
- 3(a) contrary to public policy,
- 3(b) of such a nature as to deceive the public,
- 6 applications filed in bad faith.[7]

The registration of a shape trade mark is to be absolutely refused where the sign consists exclusively of a:

- (i) shape which results from the nature of the goods themselves,
- (ii) shape of goods which is necessary to obtain a technical result, or
- (iii) shape which gives substantial value to the goods.[8]

Trademarks refused for distinctiveness, indicative nature or industry basis, may rely on the acquired distinctiveness defence to prove that through extensive use and promotion of the mark, consumers now directly associate the mark with the applicant as the source of those goods.[9] However, trade mark shapes which meet one of the above three conditions for refusal may not be overcome by evidence of acquired distinctiveness, a key point of reference made by the CJEU in Société des Produits Nestlé SA.

In July 2010, 'KitKat' owner Société des Produits Nestlé S.A., filed a three-dimensional trademark application in the United Kingdom for an unmarked four finger shape, designating class 30 chocolate goods under the UK classification of goods (class 1 – 34).[10] The application followed a 2002 registration for a three-dimensional single finger shape marked 'KitKat'.[11] Where the 2002 registration, also for class 30 goods, would prevent other chocolatiers use of the 'KitKat' mark in connection with the one-finger shape, registration of the unmarked four-finger shape would entitle Nestle to protection over the shape alone for chocolate products - a serious bar to competitors (pun intended). Opposing the application, Cadbury UK Limited cited the interpretation of EU Directive 2008/95/EC article points: (3)(1)(b) 'trademarks which are devoid of any distinctive character',(e) (i) 'the shape which results from the nature of the goods themselves' and (ii) 'the shape of goods which is necessary to obtain a technical result' under the Trade Mark Act 1994.[12]

Seeking clarification of the directive, the High Court of Justice of England & Wales, Chancery Division (Intellectual Property) referred the matter to the Court of Justice of the European Union under TFEU Article 267. The CJEU issued their conclusion on 16th September 2015. The court acknowledged the UKIPO examiner's analysis that the applied-for shape consisted of three features:

(1) the basic rectangular slab shape
(2) the presence, position and depth of the grooves running along the length of the bar, and
(3) the number of grooves, which, together with the width of the bar, determine the number of 'fingers'.[13]

Of the three elements, the court concluded that the first resulted from the nature of the goods themselves (e)(i) and that the second and third were necessary to obtain a technical result (e)(ii). As such, the CJEU took the opinion that Nestle's unmarked four-finger shape was invalid for trade mark registration. While Nestle argued that the shape had acquired distinctiveness under article 3(1)(b), the CJEU was unconvinced that the shape in itself was significant to identify in the minds of consumers, that the chocolate goods originated from Nestle alone.[14] Though the 'finger' shape has been in use with Nestle's chocolate since 1937, it is unclear whether the four-finger shape as opposed to the 'KitKat' mark, or red and white packaging which is present at the point of sale, is enough for consumers to identify and rely on a specific undertaking from which the goods originate.[15]

The decision in Nestle indicates that the criteria for the distinction of a shape itself is likely to be used in combination with other source indicators. A basic test to determine the significance of shape to the consumer is whether a particular good is so materially different from common or expected shapes that it enables a consumer to identify the goods just by their shape.[16] In its own efforts to secure a position in the market, Chocoladefabriken Lindt & Sprüngli filed a community trade mark application in 2004 for a three-dimensional rabbit-shaped chocolate wrapped in gold foil and a red ribbon.[17] Having received a distinctive refusal under Article 7(1)(b), Lindt argued that the article did not apply where under Article 7(3) a trade mark had become distinctive, by the use which had been made of it in relation to the goods which registration was requested for.[18] In review of OHIM's decision, the CJEU found that although Lindt's rabbit was already registered in 15 member states, the elements of the shape lacked distinctive character. The court considered a rabbit-shaped chocolate wrapped in gold foil to be a common market phenomenon to the confectionary industry.[19] In an analysis of the Lindt chocolate rabbit's shape, colour and decoration, the court held the elements to be both individually and cumulatively devoid of distinctive character.

More recently Lindt faced another challenge to its chocolate shape as the defendant to infringement claims by Haribo, the owner of German trademark 'Goldbear.'[20] Haribo, a manufacturer of fruit gum products, alleged that Lindt's 'Teddy,' a gold foil-wrapped chocolate in the shape of a seated bear with a red ribbon, caused injury to their brand through unfair imitation.[21] The German court held that there wasn't sufficient similarity between the Haribo brand bear-shaped fruit gums and the three-dimensional bear-shaped chocolate offered by Lindt. While Haribo's claims were dismissed as unfounded, the case highlights the opportunity for comparisons of word and shape, and raises future considerations of whether the two elements can form a similarity in meaning by the use which has been made of each, the related channels of sale, and the likelihood of confusion among consumers.

Enforceable trade mark protection of brand elements is a costly albeit attractive effort, as Nestle reports that 150 'KitKat' bars are consumed every second worldwide.[22] Without strict requirements in place, it would be possible for a single player within a market, using their rights relative to an unmarked shape or design, to form an extensive monopoly with the potential of covering similar configurations of shape, and restricting the registration of future word marks derivative of its protected form or meaning. Strict implementation by member states and interpretation by the CJEU protect the rights of brands to sell competitively, and consumers' freedom to express their preferences within a diversified market. While the thumb would seem to turn downward for the distinctive character and likeliness of protection for Nestle and Lindt's unmarked chocolate shapes, such stringency allows for the protection of future innovation, such as frozen vegetables in the form of a crocodile, or Kinder's Happy Hippo.[23] As companies streamline their manufacturing processes in line with technological advancement, it will be interesting to see whether confectioners' end products are perceived as indicative of the means of their production, or if the two will be seen as distinct elements within trade mark law. Regardless of whether multi-national confectioners are successful in their challenge to a closed market, or manage to strong-arm competitors using their trade mark rights - it has to be said, that the pursuit's still pretty sweet.

By Brooke Andersen
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6 https://oami.europa.eu/ohimportal/en/registration-process)
7https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476173/Unofficial_consolidated_version_Trade_Marks_Act_1994_as_amended.pdf
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18 http://oami.europa.eu/en/mark/aspects/reg/reg4094.htm

19 https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/Guidelines/05_part_b_examination_section_4_absolute_grounds_for_refusal_en.pdf

20 https://www.tmdn.org/tmview/welcome#, HARIBO GOLDBEAR Registration number VR 1994 01669

21 http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2015&Sort=3&nr=72297&pos=2&anz=164

22 http://www.nestle.com/brands/allbrands/kit-kat

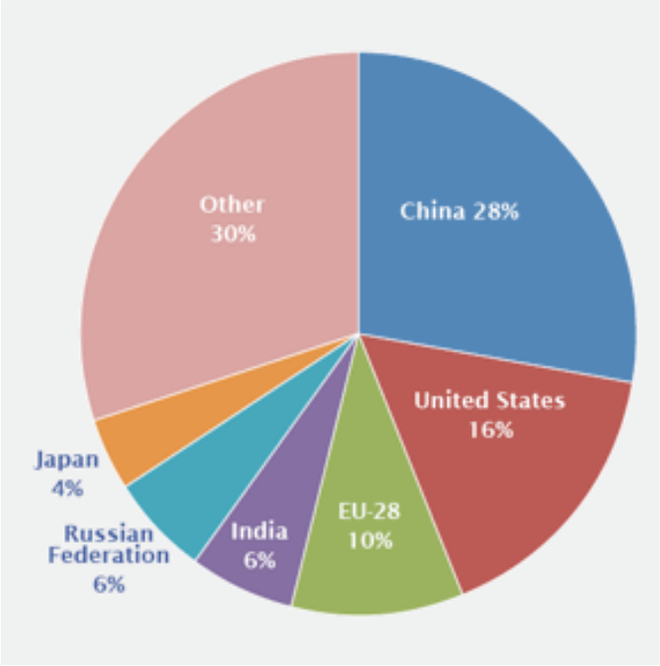
23 https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/Guidelines/05_part_b_examination_section_4_absolute_grounds_for_refusal_en.pdf

Can international treaties solve issues of climate change?

Climate change is the most significant environmental and global challenge of our time, and few topics provide a better example of the importance of a globally inclusive regulatory regime than climate change and atmospheric pollution. Particularly in relation to the precautionary principle and preventive approaches to a public matter.[1] However, solutions to global climate change are hard to achieve through legal measures, because the root causes are deeply embedded in economic growth. International agreements may only offer targets or partial solutions due to the inherent disparity between greenhouse gas emissions (GHGs) and the economies of the signed nations.

The development of modern international environmental law began in the 1960s, and has expanded at a remarkable rate, comparable to human rights law and international trade law.[2] The 2015 UN Climate Change Conference took place in December in Paris and was the 21st session of the Conference of the Parties (COP21) to the 1992 UN Framework Convention on Climate Change (UNFCCC) as well as the 11th session of the Meeting of the Parties to the 1997 Kyoto Protocol.

The original Rio Convention of 1992, adopting the UNFCCC, set out a framework for action aimed at stabilising atmospheric concentrations of GHGs to avoid dangerous anthropogenic interference with the climate system. The UNFCCC, entered into force on 21st March 1994, has a membership of 195 parties. The aim of COP21 was to achieve a universal, legally binding agreement on climate to keep atmospheric interference "well below" 2°C by 2050 compared to pre-industrial levels – a temperature that, if exceeded, would threaten life on Earth. Around 50,000 participants, including 25,000 official delegates from government, intergovernmental organisations, UN agencies, NGOs and civil society, attended the conference.[3] The result was the adoption of the Paris Agreement, signed by 195 nations.



2011 Global CO2 Emissions from Fossil Fuel Combustion and Some Industrial Processes

Source: Boden, T.A., Marland, G., and Andres, R.J. (2015). National CO2 Emissions from Fossil-Fuel Burning, Cement Manufacture, and Gas Flaring: 1751-2011, Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, U.S. Department of Energy, doi 10.3334/CDIAC/00001_V2015. From http://www3.epa.gov/climatechange/ghgemissions/global.html

This disparity means nations may have to set vastly different targets to reach a collective temperature target. Furthermore, is a "well below 2°C compared to pre-industrial levels" even an achievable result?

In the 2015 Netherlands case of *The Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, C/09/456689/ HA ZA 13-1396, the Hague District Court ordered the Dutch government to take more action to reduce emissions in the Netherlands. By starting from an emissions target for 2020 of less than 25% compared to 1990, the Dutch Government acted negligently and unlawfully towards the plaintiff in the proceedings. Neither the Netherlands nor the European Union have strived to achieve a 25–40% emissions reduction by 2020 relative to 1990. This means the Netherlands will not be meeting the basic condition that it previously acknowledged as essential for achieving the climate target to avert dangerous climate change. Urgenda considered this to be unlawful negligence by the state because it endangered Dutch society and the territory. Many of the dangers of climate change will not manifest for decades, increasing over time due to the inherent time lag of the atmospheric system. A looming threat exists based on the actions of the past and present.[4] This is not only the case in the Netherlands but in many other countries, including the UK, where failure to reach at least a 25% emissions reduction by 2020 is likely. Like COP21, the UK Climate Change Act 2008 commits to reduce emissions by at least 80% by 2050 from 1990 levels.[5] If this target cannot be feasibly reached it may also be considered negligent of the state, and unlawful that unfeasible promises were made to the nation, and unlawful that a binding statute was breached.

Learning from Air Pollution to protect us from Climate Change

International treaties have seen some success in tackling air pollution. Both the 1979 Convention on long-range Transboundary Air Pollution and the 1985 Convention for the Protection of the Ozone Layer were more than paper, progressively evolving to what now represent two of the leading examples of international regulation.[6]

The legal issues of climate change share parallels with those of stratospheric ozone: the effects of the emissions are respectively the same upon each nation, regardless of which country releases them. Ozone depletion, like climate change, is an international problem. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the 1985 Convention for the Protection of the Ozone Layer) is an international treaty designed to phase out the production of numerous substances that are responsible for ozone depletion, such as chlorofluorocarbons (CFCs) and other halogenated hydrocarbons.

The Montreal Protocol is often celebrated as one of the major success stories of international environmental law, and one of the most successful international treaties that effectively achieved its target over time.

CFCs were synthesized in the 1930s and used initially for refrigeration, but by the 1970s, CFCs were produced in large quantities for aerosol cans, air conditioning, insulation foams and cleaning solvents, amongst other uses. Studies in the 1970s suggested CFCs could deplete stratospheric ozone if use continued - the compounds are chemically stable and do not break down until they are exposed to ultraviolet radiation in the stratosphere. Depleting stratospheric ozone encourages more ultraviolet light to penetrate the Earth. This causes skin cancer and cataracts, harm to crops, plants, animals and ecosystems.[7] Many ozone-depleting substances are, in fact, also GHGs which contribute to increasing global temperatures. The Montreal Protocol crafted an international framework to reduce the use of CFCs and similar ozone-depleting substances. Since the Montreal Protocol was enforced there has been a marked shrinking of the ozone hole over the Antarctic, which will continue to shrink over time.

Negotiating an international treaty to mitigate climate change will be a greater challenge than for CFC emissions. The ozone problem involved only a small number of firms and production was concentrated in industrialized nations. Although the international response to ozone depletion provides a model for how to respond to climate change, it will continue to be a greater challenge due to the nature of GHGs from fossil fuels accounting for a significantly larger share of the world economy. But experience in resolving the problem of ozone depletion shows it remains possible to combat a global environmental issue through international legal measures.[8]

A highlight on the 2015 UKELA Garner lecture

On 19th November 2015, Freshfields Bruckhaus Deringer LLP hosted the UKELA's annual Jack Garner Lecture, one of the leading events in the UK environmental law calendar. The guest speaker, James Thornton, CEO of ClientEarth, talked

about how he thought the UK was falling behind in environmental law, in terms of accessibility to courts and judicial review.

Thornton recalled the facts of the US case of *Marbury v Madison* (1803) 5 U.S. 137, establishing that it was the Supreme Court which had the ultimate authority in determining the law. In American law, this case is a foundation for the rule of law. The UK case of *ClientEarth v Defra* [2015] UKSC 28 had not dissimilar qualities to *Marbury v Madison*.

In the English legal system, courts do not often write injunctions against the government and statutory legislation, but in *ClientEarth v Defra* the Supreme Court asserted authority over the government: *ClientEarth v Defra* [2011] EWHC 3623 (Admin) was brought to the Supreme Court in an attempt to stop the government breaking air-quality laws. After an unsuccessful cause for action in the High Court and the Court of Appeal, it was in the Supreme Court that the appeal demonstrated how citizens could bring action to a breach of EU law in relation to air-quality. The supremacy of EU law indicates that it cannot solely be expected that the European Commission will deal with such environmental concerns, but that these laws must be enforceable in the domestic courts of member states.[9]

Thornton highlighted how the UK has "fallen behind China" in environmental law. Courts in China are opening themselves to citizens, allowing more than 30 cases to be lodged since new legislation was enacted earlier in 2015. Thornton believes the UK proposals on new costs rules, currently out to consultation, creates barriers that prevents the public body from accessing courts to tackle air-quality problems.[10]

The attitude towards environmental law and its enforcement in Beijing has improved dramatically, even if, in previous decades, this enforcement was weak or ineffective. The government has made emissions information from polluting factories available online to the public, and around Beijing all major coal-fired power stations will be closed by the end of 2016. In China, the Environmental Protection Law 2015, which came into effect in January this year, allows Chinese citizens, through NGOs, to bring cases against polluting companies. Almost 500 Chinese environmental groups already have the power to gain standing. Premier Li Keqiang described this new law as "a secret weapon in the war against pollution".[11]

European experts in environmental law, including Thornton, were invited to advise the Chinese Supreme People's Court on drafting laws and regulations, and training judges in deciding such cases brought to the Supreme People's Court. Because of new laws, the NGOs are now able to sue polluters directly, including companies owned by government, and the Supreme People's Court is building the capacity for NGOs to do so. In the UK, corporate polluters generally cannot be challenged directly apart from through private law claims or if laws are broken leading to criminal offences.[12]

Yet pollution across Chinese cities is far worse than the air-quality of London. Beijing's smog levels have a reputation of being so high that on the worst days citizens cannot even see the landscape's skyscrapers or a mile in front of them. China's urgency in providing citizens with access to environmental justice, and allowing courts to hold polluters accountable, is therefore not unrelated to the extreme desperation its citizens seek for cleaner air.

Air pollution in China is a contributory cause of death for approximately 4,000 people daily.[13] Pollution this high may affect the economic sustainability of the entire country: in 2005 the estimated total resource and environmental costs amounted to 13.5% of GDP. This figure is substantially higher than that of the UK or other developed nations, including the US, Germany, and Japan.[14]

So it is with a melancholic sense of irony that this level of atmospheric devastation led to thousands of citizens demonstrating in protest against environmental concerns, such as over the expansions of coal-fired power plants in Guangdong. As a result, the Chinese government is now tightening laws and improving enforcement.[15] Perhaps the UK can learn from this example, in a legal sense, without waiting for atmospherically devastating emission levels to be reached before acting to improve the accessibility of English courts to environmental challenges.

By Natalie Page
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1 Patricia Birnie, Alan Boyle & Catherine Redgwell, International Law and the Environment, 3rd ed. (OUP, 2009) 335
2 See note 1, p1
Image Source: this page, https://www.youtube.com/watch?v=l9bjHLihq9I
3 http://www.cop21paris.org/about/cop21
4 Roger Cox, 'The Liability of European States for Climate Change' (2014) 30(78). Utrecht Journal of International and European Law 125-135
5 https://www.theccc.org.uk/tackling-climate-change/the-legal-landscape/global-action-on-climate-change/
6 See note 1, p335
7 http://www.rff.org/blog/2009/successful-international-response-stratospheric-ozone-depletion#sthash.tMfMk5bK.LtTTsh40.dpuf
8 See note 7
9 James Thornton, Garner Lecture 2015. PDF available at: http://documents.clientearth.org/wp-content/uploads/library/2015-11-19-james-thornton-garner-lecture-speech-2015-ce-en.pdf
10 http://www.ukela.org/rte.asp?id=116
11, 12, 13, 14, 15 - See note 9

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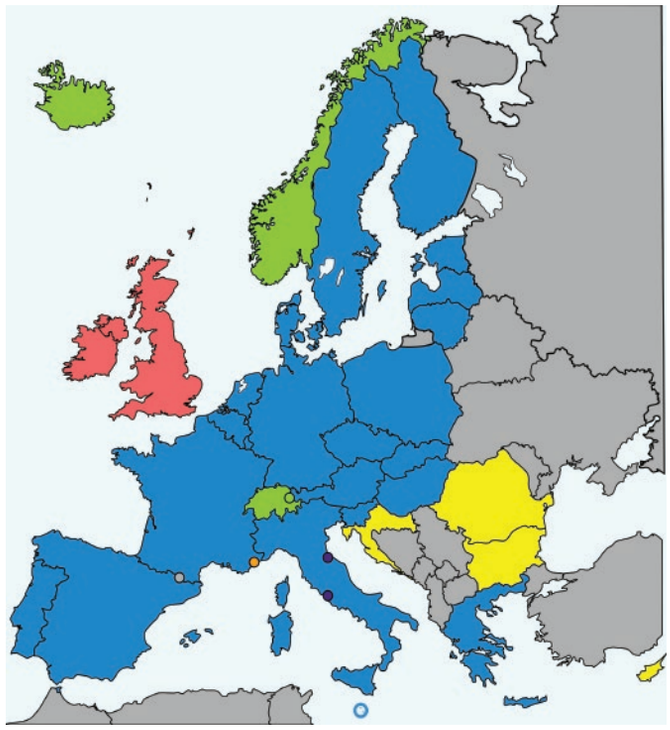
What effect would leaving the European Union have on the British workplace?



Divorces invariably raise questions of ownership. When a marriage breaks down, both parties are forced to deal with the unpleasant task of deciding who owns what, what they are prepared to part with, what they are unwilling to say goodbye to. Should Britain choose to leave the EU, it will have to decide whether it wants to preserve or repeal the laws that have entered its books as a result of 40 years of membership. EU law has left a deep mark on the UK's legislation. Nowhere is this legacy more evident than in employment law. The British workplace today is unrecognisable from what it looked like in 1972, primarily because of the EU regulations and directives that have shaped or created domestic legislation. Anti-discrimination rules, equal pay, working time, parental leave, minimum paid annual leave are all rights that have all found their way into British legislation as a result of EU membership. These laws are all intricately woven into domestic legislation. Repealing all of them could have disastrous effects on individual rights, creating innumerable lacunas in Britain's legislation. Keeping all of them would be counter-intuitive: the purpose of leaving the EU would at least partly be so that Britain could extract itself from the cumbersome yoke of Brussels.

The EU shapes British law in two ways: primary legislation (Treaties) and secondary legislation (Regulations, Directives, Decisions). Treaties, Regulations and Decisions are directly applicable, meaning they take direct effect and do not have to be implemented by any Act of Parliament. This is by virtue of s. 2(1) European Communities Act 1972 ('ECA'), which acts as a 'gateway', directly incorporating EU legislation into domestic law. Directives are indirectly applicable, and must therefore be implemented by domestic legislation.

Parliament may well see fit to repeal the ECA should Britain opt out of the EU. Were this happen, a swath of EU Regulations would no longer have effect. Employment regulations, such as the Working Time Regulations 1998 and the Fixed Term Employees Regulations 2002, would disappear overnight. The resulting gaps in domestic law would be disastrous. Parliament would have to rush legislation through so as to fill the numerous lacunas created by the sudden disappearance of established rights and regulations. Such an outcome is highly undesirable, and would threaten countless individual rights that have developed over the past four decades.

Indirectly applicable EU legislation primarily exists in UK law in two forms: Acts of Parliament implementing EU Directives (such as the Equality Act 2010), and statutory instruments which have been implemented under s. 2(2) ECA. Leaving the EU would not affect the validity of the primary legislation, allowing Parliament to repeal, preserve or adapt any piece of primary legislation that implements Directives as it sees fit. The statutory instruments are likely to prove more problematic. As is the case with EU Regulations, these would lose all legal effect were their parent legislation (the ECA) to be repealed. Again, this would leave disastrous gaps in domestic law.

In his paper 'Zero Plus: The Principles of EU Renegotiation'[1], Martin Howe QC offers a solution to this conundrum; Parliament, he suggests, could "press into service the existing regulation-making power under s. 2(2)" so that existing Acts and Regulations would be preserved after the exit, and be replaced, repealed or modified as Parliament sees fit at a later stage. As a result, both primary and secondary EU legislation would remain in place post-exit, allowing

Parliament to dismantle it or re-shape it as it sees fit in due course. Such an approach, often referred to as a 'Henry VIII clause', would enable primary legislation to be amended or repealed by subordinate legislation. A Henry VIII clause would be problematic, however, as it would allow established EU rights to be withdrawn or amended with little or no parliamentary scrutiny. In a 1997 House of Lords debate concerning an EU Withdrawal Bill, Baroness Shirley Williams declared such clauses to be a "profoundly unparliamentary and undemocratic way to bring about changes to legislation".[2] How EU laws would be upheld, interpreted or repealed post-exit therefore remains an unanswered, but pressing question.

Precisely which EU laws the government will chose to reform or repeal is an exercise in speculation. However, certain laws seem more likely candidates than others. The Working Time and Temporary Worker Directives are wildly unpopular with certain groups and commonly seen as undermining the flexibility of the labour market and increasing the cost of hiring staff. While the current systems might not be done away with entirely, a drastic overhaul seems likely.

Another likely candidate is the CRD IV, which imposes a bonus cap on bankers. Though the current government is still in the process of implementing the Directive, it may choose to do away with this legislation so as to reassure nervous banks, such as Deutsch Bank and HSBC, who have been threatening to leave the UK.

Free movement of people within the EU is an increasingly toxic issue, one which both the 'Out' and the 'In' camp are seeking to address, as was made clear by Prime Minister David Cameron in his Chatham House speech on Europe in November 2015. While EU workers would certainly not be deported *en masse*, restrictions on immigration from the EU would likely signal and radical change in the British workforce. It is possible that a 'special deal' could be entered into regarding EU migrants currently working in the UK. It is worth noting that a recent study from UCL found European immigrants who arrived in the UK since 2000 have contributed more than £20bn to UK public finances between 2001 and 2011. Furthermore, as of the first quarter of 2015, 1.9 million EU nationals were working in the UK[3], this represents approximately 8% of the labour force in the UK.[4] Deporting the EU workers from the UK therefore seems as catastrophic as it would be unfeasible.

The rights granted by anti-discrimination rules and the Equality Act are now largely viewed as inherent to British society. Public perception of equality and discrimination has changed a great deal since 1972, and doing away with such rights would likely be viewed as regressive and cause a significant degree of public outrage. Nonetheless, Alexander Ehmann, the Institute of Directors Head of Government and Parliamentary Affairs, has said that the Institute of Directors would argue for a "substantive simplification of discrimination laws".[5] While it seems unlikely that the Equality Act 2007 or associated anti-discrimination rules would be done away with altogether, such legislation is also a possible candidate for reform.

Whichever laws the government may choose to repeal or alter post-exit, change is not likely to be as swift as some may wish it to be. Employment contracts and company policies, which tend to be drafted with EU legislation in mind, would remain binding long after the relevant laws are repealed. In order *to* remove the relevant terms, it is likely that companies would have to re-hire their workforces under new employment conditions. This solution seems as unlikely as it is impractical.

Of course much depends on how Britain decides to position itself in relation to Europe should it choose to withdraw from the EU. Alternatives to a cut and dry exit from the EU have been bandied about by both the 'In' and the 'Out' camp. Britain's enduring fascination with all things Scandinavian has led to the popular opinion that it should be 'more like Norway'. This would mean leaving the EU but remaining within the European Economic Area ('EEA') and the European Free Trade Area ('EFTA'). However, this arrangement would result in Britain being bound by many of the same directives and regulations it was subject to as a member of the EU, except without the added benefit of having a say in drafting. This 'pay with no say' alternative would be a step backwards for those wishing to disentangle themselves from the EU's grip.

Even if Britain chooses to stay in the EU, the future for the British workplace is uncertain. David Cameron has made clear that his renegotiations with the EU are likely to include an opt-out from EU employment social protection laws. It is therefore a possibility that no matter the outcome of the referendum, Britain may see itself bowing out of a good deal of EU employment legislation. Regardless of whether Britain chooses the continent or the open sea in 2017, there are likely to be rough waters ahead for British employees.

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1 M. Howe QC, Zero Plus: The Principles of EU Renegotiation (Politeia, 2014)
2 HL Deb 31 January 1997 vol 577 cc1329-428, at 1412
3 http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/EU%20Migration%20to%20and%20from%20the%20UK.pdf
4 http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/august-2015/statistical-bulletin.html
5 http://www.personneltoday.com/hr/how-leaving-the-eu-would-affect-uk-employment-law/

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How can the European Union respond to the current Migrant Crisis?

The Migrant Crisis engulfing Europe is the biggest threat to the stability of Europe since the end of the Second World War. There is currently no end in sight to the influx of migrants and the situation is unlikely to improve in the immediate future. The issue is divisive between member states as some are disproportionately affected and feel the other states are not doing enough to take responsibility.

According to estimates from the International Organisation for Migration (IOM), around one million migrants and refugees arrived in Europe in 2015; three to four times more than in 2014.[1] The most interesting aspect of these statistics[2] is they appear to show that applications are concentrated, in spite of the Dublin Regulation, with Germany, Sweden, Italy and France receiving most applications.[3] The Dublin Regulation states that the member state responsible for an asylum seeker will be the state through which they first entered the EU. This disproportionately affects member states with external borders. The trend of targeting represents around two-thirds of the total number of asylum applications submitted to the EU, in spite of the fact many migrants would have had to travel through multiple other member states to reach Germany or Sweden. This explosion in numbers is mostly down to Syrian refugees fleeing Daesh, however, they are joined by other nationalities fleeing persecution, particularly Eritreans. The numbers of refugees arriving at Europe's borders looks set to grow further during 2016 and beyond.

Across the EU, the crisis has been divisive. Particularly in the hardest hit southern and eastern border states which are simultaneously suffering an economic whirlwind of high unemployment and debt levels, and attempts by some member states have been blocked by other members. An example of this is the recent quota system "forced" through by Qualified Majority Voting (QMV), to the ire of the Slovakian Prime Minister. Although these attempts were far from forced through and are within the EU's powers, it is unusual for the Union to use QMV on such a contentious issue. His resistance may be justified but nonetheless his attempts to challenge the legality of the measure are disturbing.

Migrants are being welcomed by some countries but are viewed with suspicion by others. Chancellor Merkel, a popular national politician, is suffering divisions in her Government. Her allies, particularly Finance Minister Wolfgang Schäuble and Interior Minister Thomas de Maizière, are calling for tougher policies to slow the refugee influx.[4] In the Scandinavian countries the outcome has been different with the rise of right wing nationalist parties in the most recent elections, particularly the Danish People's Party. On the other hand, David Cameron, the UK Prime Minister, has said that the crisis is a worrying issue that may force a Brexit[5] even though Britain has already taken in some refugees under the quota system.

The security concerns of member states have seemingly been justified in the wake of the Paris attacks. One of the bombers at the Stade de France - Ahmad Al Mohammad – had a Syrian passport. This document is thought to be false but showed him as arriving on the Greek island of Leros on 3rd October posing as a refugee and then allowed him to travel on to Paris. This discovery has raised concerns about how to manage the distinction between genuine refugees and potential covert Daesh operatives. Unfortunately, the attacks

have stirred distrust and have created a climate of fear for EU citizens concerned about the safety of the Schengen area.

Nevertheless, the EU is unique in its make-up and therefore its capacity to respond. The EU is an inverted confederation, created by a treaty which formed the basis of a political union for common actions, with the central government providing provision for its members. In the EU, power is concentrated at the national level (the secondary level) with certain powers being passed upwards to the EU institutions. Their capacity to deal with this crisis is spread between the primary and secondary levels, but because of the widespread nature of this crisis, action is being taken by the primary (EU) level.

The EU has explored two options for a response that can be conducted under EU Law – implementation of quotas and restrictions on free movement. However, some members have additionally tried to form a military response. The Union and its member states have toyed with all of these options to a greater or lesser extent over the past year.

Firstly, the EU has introduced migrant resettlement quotas through QMV. This measure was introduced in September at a meeting of interior ministers. Germany is one of main supporters of the measure, along with Mediterranean countries that are keen for the other member states to share a more even portion of responsibility. It remains to be seen how effective these quotas are, especially when the total number of the migrants concerned is only a proportion of the ever increasing population. However, the internal divisions among members are preventing effective implementation of the quotas. While Slovakia has been the most vocal, there was fierce opposition from the Central and Eastern European member states. Slovakian Prime Minister Robert Fico has launched a legal challenge to the plan to distribute 160,000 asylum-seekers among member states under a quota system. While it is within its rights to challenge the measure, the EU Court of Justice is unlikely to find in its favour.

Secondly, many Members in Schengen have experimented with closing their borders this year. Austria has begun the construction of a barrier along its border with Slovenia, but the stated aim of the fence is to control immigration; not completely obstruct the flow of migrants. As both these countries are in the Schengen Area, this can be seen as a direct attack on a cornerstone of EU policy – the free movement of people. But even Germany, the driving force behind the EU's

humanitarian efforts, has ordered temporary border restrictions at times due to the sheer quantity of refugees arriving every day. The closure of borders, even between Schengen countries, is a clear sign of members struggling to cope with the crisis, in spite of their differing views.

With Germany urging countries to keep their borders open whilst other countries are stubbornly refusing to, it is hard to resist drawing the inevitable comparisons between Germany's post WW2 situation and the current crisis, and the way in which this may have had an effect on Germany's willingness to welcome refugees – in stark contrast to the reluctance in other members. Germany suffered deeply in the aftermath of WW2 with refugees fleeing away from the Red Army. Holocaust survivors, displaced peoples and soldiers were trying to return home. This period of German history has instilled a collective consciousness of responsibility over refugees and this thread of humanitarianism has been a part of German Foreign Policy ever since.

A way of preventing the disproportionate effects of the crisis would be to reform the Dublin Regulation. Migrants cannot choose where to apply because the Regulation states they must apply in the first country they enter. However, if they are able to evade the relevant authorities and remain unregistered in their country of entry they may travel on to the targeted country and apply there. Nevertheless, if the Dublin Regulation

was reformed, and the processing and resettlement of refugees spread more evenly through the effective allocation of quotas, this could result in a severe reduction of the trend for targeting applications. This may ease tensions between the external border countries who feel that the internal countries aren't doing their bit to support their efforts. In particular Italy and Greece who struggled with the burden on their Coastguards, but the EU has already gone some way to addressing this with Operation Triton, funded by voluntary contributions from 15 other European nations (both members and non-members). Ultimately, it is difficult to say what should replace the Dublin Regulation. What is clear is that it needs to be fairer and more proportionate in the way it allocates refugees.

Thirdly, there is a military response which has been explored by some member states - not at the EU level - as a preventative measure rather than a solution. Britain and France have been bombing areas where Daesh are fighting, displacing many people. The aim of this is to weaken Daesh and reduce their ability to displace people, preventing the creation of more refugees. It remains to be seen whether the policy of preventive bombing will be effective.

For the sake of completeness, a definitive solution, would be the closure of all EU internal and external borders and the reinstitution of crossings and check points. While this will be attractive to some member states to stem the flow of refugees, this is highly unlikely and impractical because it will significantly hinder the internal market. This solution is unlikely, however, because of the way it flouts EU principles.

Overall, it is clear that whilst the EU can react to the migrant crisis, it cannot solve it. All options that have been explored in this article have been in operation to some effect. It is clear that these approaches are not the only solution. The biggest hindrance to an effective EU policy response to the migrant crisis is the division between countries on the simpler issues. If an agreement can be reached on who to help, how to help them, who is funding the help and most crucially which countries they will be relocated in – then the EU may be able to repair its damaged reputation and create a coherent response to the largest humanitarian crisis of our generation.

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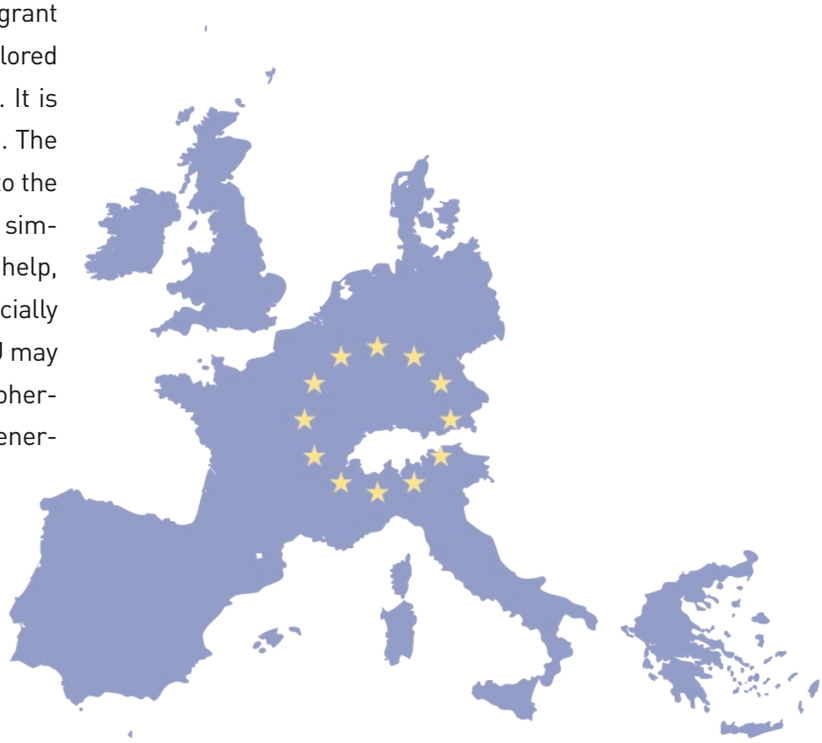

UK immigration rule tears families apart – but are they a breach of our fundamental human rights?

As they remain very much at the centre of current discussions, the rule set out by UKBA for spouse and partner visas is causing anguish to many families across Britain. With ongoing court hearings, and one heard early January at the Supreme Court, the question is being raised continuously whether the requirements of these visas are in breach of Article 8 of the ECHR.

Non-EU Partners of British Citizens are not able to join them, for reasons which many believe are unjustified, affecting thousands of Britons since the minimum financial requirement was introduced for the sponsoring spouse in 2012. And the list of requirements only keep growing. The conditions introduced were described as "unjustified" by the High Court in 2011, but to no avail. The Court of Appeal upheld the government's appeal in 2012 deeming it "lawful".[1] So what are the conditions of this visa, and why is it causing so much distress amongst British families?

The 'sponsor' has to be a British Citizen, have the right of settlement in the UK or have refugee status. Since in many instances the foreign spouse will have never worked in the UK before, they will be solely financially sponsored by the British spouse. This is where the financial requirement comes into play. The sponsoring spouse must be earning at least £18,600 to sponsor their Non-European spouse's visa. However, this requirement increases to £22,400 for families with one child, and a further £2,400 per extra child.[2] Some might say it is almost primitive or immoral to place a price on a family or on an individual. The requirement came from the Independent Migration Advisory Committee (MAC). MAC is a public body that provides evidence-based advice in order to direct the Government on migration issues. It is comprised of economists and migration experts. Before this recommendation was made, a UK based sponsor required a post-tax income of only £105.95 a week – a total of £5,500 a year.[3] This figure was determined following a decision in 2006 maintaining that the income of the sponsor (or partner) must at least equal what the family could potentially receive on income support. The spouse's potential earnings were also considered. This therefore included taking into

consideration income previously earned outside of the UK. With the concern that this would cause uncertainty and assumptions, the rules changed to only including income earned within the UK. In most situations the foreign spouse resides abroad, thus in many cases the only income that could be considered is the British spouse's.

With many jobs currently falling under the amount required such as teaching assistants at a median pay of £11,805[4] and office administrators at £16,587[5], it is easy to see why this is proving to be an issue. The minimum income requirement (MIR) is now being challenged across the country by protestors and activists who say that it is an interference and breach to Article 8 of the European Convention of Human Rights (ECHR). This is the right to a private and family life. For the purpose of my article, it is imperative to understand exactly what is meant by Article 8 of the ECHR, and the right it confers upon citizens.

Essentially, there are four rights which are expressly protected. These are private life, home, family and correspondence. The requirement on the member states has shifted from merely asking that they do not interfere with these rights, to actually imposing a positive obligation. This came following the Strasbourg case of *Y v Netherlands*, obliging the states to take further measures to ensure that these Article 8 rights are not interfered with.[6] Article 8 is fairly broad and open-ended, however subsection two provides for certain explicit exceptions. Namely, a member state may limit Article 8 rights "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[7]

The Home Office's argument is that the MIR is necessary to ensure that people entering the UK are not a burden on the state and exploiting the country's resources. Therefore, it promotes the 'interests of national security' in a democratic society. Immigration and Security Minister James Brokenshire stated that Non-EU spouses were welcome in the UK, but that it should not be 'at the taxpayer's expense' and that 'family migrants must be able to integrate'.[8] It is however an understandably difficult position to be in for those families, who often go without any idea of when they will be able to see their wife or husband, or better yet – settle down as a proper family.

Yet just how far do the rights in Article 8 extend? An example can be found in the pivotal case of *Abdulaziz, Cabales, and Balkandali v UK*.[9] The applicants argued that Article 8 meant being allowed to establish their home in their lawful place of residence and being forced to move abroad or be separated violated this principle. The Government's argument was that Article 8 did not apply to immigration control. The court held that Article 8 alone had not been violated. It seems that for a long time the court has held the view that Article 8 does not provide a right to choose where to live, rather the family must show why they cannot reside in the other country. This could be a difficult interpretation to reverse.

More and more families across the UK are being left with no option but to live their relationships online. As already suggested by Anne Longfield OBE, could this be a new generation of 'skype families'? Furthermore, an estimated 15,000 children are separated from their parent.[10] This raises questions in relation to the rights of the child, as the presence of both parents in a child's life is undoubtedly one of importance which should not be overlooked.

For example, Take Guy and Stacey Bailey. Their online romance blossomed over their shared love of the British indie rock band The Smiths. Nine years after meeting in 2004, they have a five year old son and are happily married. An average family, some might say. But after deciding to live in Britain, this family was soon torn apart by the immigration rules that applied to Mrs Bailey, as she was forced to remain in the US. She missed her son's first day at school, whilst her husband actively looked for a job.[11]

The Surinder Singh route, named after a landmark case in EU law, is an option being pursued by families in these difficult circumstances. Under freedom of movement, the British spouse can enter an EEA country and exercise his or her treaty rights by bringing their spouse to join, provided that the British citizen works in the EEA country for three months. This is because EEA citizens have stronger migration rights than UK citizens and it is suspected that around 20,000 non-EU family members join the UK in this way.[12]

Immigration Minister Mark Harper issued an announcement stating that 'The EEA family permit is not a loophole'.[13] Essentially, this means that the case must be genuine and someone must be seeking genuine employment. They cannot avoid the immigration rules by travelling abroad to another EU country. Any suspicion that it may be for this reason would result in the application being denied and ultimately not being able to travel into the UK with a non-EU spouse. It must be said however, that most people are able to successfully follow the Surinder Singh route, so this poses the question: If non-EU citizens are able to join the UK this way – what is the actual purpose of the financial requirement? Evidently, it can be easily avoided.

A pivotal case in shaping the understanding of the UK Government's attitude is *MM v Secretary of State for the Home Department [2014]*. The case was a challenge to the minimum income requirement and it went in favour of the Secretary of State by allowing its appeal. This was a devastating verdict to many families. In this case Aikens LJ said that a "constitutional right" is not granted upon British Citizens by the 1971 Immigration Act to reside in the UK with their spouse who is not an EEA citizen. This surely would cause concerns to British Citizens regarding what their rights are. As it stands, the UK is one of the member states of the European Union (EU). This means that it follows and complies with European law, along with the other member states that form the EU. The UK does not have a clear and codified constitution. This means that English law follows the principle of Parliamentary Sovereignty which means that the legislative body (parliament) is supreme over the executive and the judiciary. However, Britain must follow Article 8 of the ECHR because of the Human Rights Act 1998 and the European Convention. Therefore, the law on the minimum financial requirement would undoubtedly have to change if it is found to be in breach with Article 8 of the European Convention on Human Rights.

There are only two exceptions to the minimum income requirement. As stated on the Government website "You won't need to prove you have this money if you or your partner get certain disability benefits or Carer's Allowance, but you'll need to adequately accommodate and support yourselves and any dependants".[14] This means that someone who is

looking after a person with disabilities, or if someone has mobility issues or other problems that impede with their quality of life, they could make a claim as long as they can prove they are eligible for this. Of course this only affects a handful of people, and provides no solution to the many thousands of citizens who still continue to be faced with the daunting prospect of living life without their family.

To summarise, whatever the decision of the upcoming court hearing will be, it will surely leave a great impact on UK immigration law and on British families. It will create a precedent for future years, as well as reaffirming the strength of the ECHR (if it is decided in the respondents favour). Nonetheless it has the capability of reuniting families and invoking joy, or doing the complete opposite. It will be an anxious lead up towards this date, as for many families it is truly an all or nothing situation.

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Wellesley Partners LLP v Withers LLP: concurrent liability and an end to 'pick and mix' remoteness.

Introduction

Wellesley Partners LLP v Withers LLP[1] identified the appropriate test for remoteness of recoverable damage where a claimant has concurrent causes of action in tort and in contract. At trial, Nugee J regretted that the prevailing case law left the claimant open to elect the wider test for remoteness in the tort of negligence, whether the damage had been reasonably foreseeable at the time of the breach[2], in place of the narrower contractual test, whether the damage had been within the reasonable contemplation of the parties at the time of contracting.[3] The Court of Appeal unanimously rejected this 'pick and mix'[4] approach in favour of a single test for damage flowing from the breach, that of reasonable contemplation.

The Facts

The defendant solicitors negligently drafted the claimant head hunters' partnership agreement so that a crucial investor was able to withdraw its capital contribution within 41 months, rather than after 42 months per Wellesley Partners' instructions. As a result, Wellesley Partners was unable to open a new American office and claimed, *inter alia*, for loss of a chance to win a particularly lucrative contract in New York. The question before the court was whether it was sufficient for that lucrative contract to have been reasonably foreseeable in order to be recoverable, or whether the court had to be satisfied that the damage had been within the reasonable contemplation of the parties at the time of contracting. In theory, at least, the damage could be reasonably foreseeable, and therefore recoverable in tort, yet highly unusual or unlikely, and therefore irrecoverable in contract.[5]

The Decision

This article will argue that the Court of Appeal's unanimous decision to restrict the claimant to the contractual test for remoteness is sound in policy and in principle.

The existence of distinct tests for remoteness in contract and negligence is partially a matter of policy. In contract, each party has had the opportunity to protect itself by directing the other party's attention to risks for which it is unwilling to take responsibility; and as such if a party does not highlight a risk within its reasonable contemplation it has impliedly elected to bear that risk. But the party's liability goes no further: to suggest that it has impliedly accepted all highly unusual yet reasonably foreseeable risks by not mentioning them would be to deny the ideal of contract as an agreement, and would lead to unworkably extensive terms. By contrast, a party injured as a result of negligence - in a road traffic accident, for example - has usually had no such opportunity to protect itself by flagging up risks in advance, and so each party must bear the wider burden of avoiding reasonably foreseeable risks.[6]

This policy distinction melts away in cases of concurrent liability in contract and tort. All three judgments in *Wellesley Partners* cite the observation in *McGregor on Damages* that,

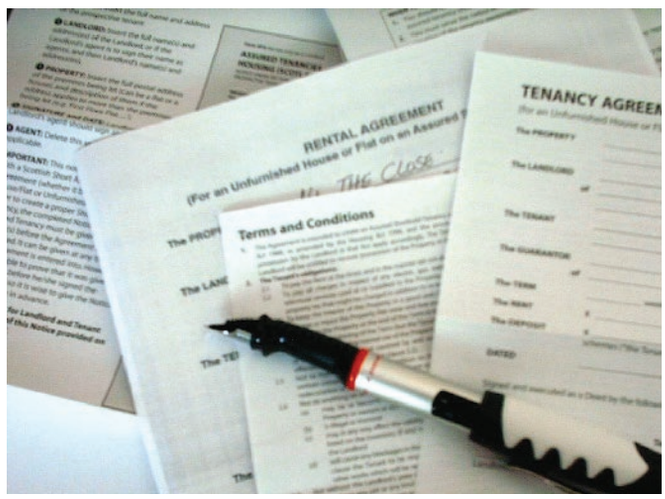
> 'Where the claim in tort is in the context of a contractual relationship, the parties are not strangers, as most tortfeasors and tort victims are, and they should be bound by what they have brought to their contractual relationship in terms of what risks have been communicated by the one and undertaken by the other'.[7]

In other words, there is no policy justification for offering the injured party in cases of concurrent liability the same added protection afforded to victims of pure negligence: in concurrent liability the injured party *has* had the opportunity to draw unusual risks to the ultimate tortfeasor's attention at the time of the formation of the contract, and *has* impliedly agreed to shoulder any risk within his reasonable contemplation not specified in the contract.[8]

In addition to there being no policy argument in favour of the 'pick and mix' approach, a careful analysis of principle supports the exclusive application of the contractual test for remoteness in cases of concurrent liability. First, we must consider the principle behind selecting the appropriate test for remoteness. Lord Hoffmann, first in *SAAMCO*[9] and then extra-judicially,[10] encouraged the delineation of remoteness in tort by the scope of the duty of care on which the liability in question is founded. In *SAAMCO*, the losses at issue were not recoverable because, although reasonably foreseeable, they did not fall within the scope of a property valuer's specific duty of care.

In line with this approach, it is necessary to identify the scope of the duty of care in cases of concurrent liability before selecting the appropriate test for remoteness. All the judgments in *Wellesley Partners* concur that in concurrent liability the tortious duty of care arises out of an assumption of responsibility under the contract.[11] As such, the scope of duty is essentially contractual, and, following *SAAMCO*, so too should be the test for remoteness. The reasonable contemplation test, elsewhere confirmed to be intimately linked with the parties' assumption of responsibility[12], best reflects the nature of concurrent liability. Therefore, in principle as in policy, the outer limit of recoverable damage should be that which was in the parties' reasonable contemplation when they both undertook their respective responsibilities on formation of the contract.

It is tempting to complain that the decision in *Wellesley Partners* has added another proliferation to the already splintered law of remoteness. On the contrary, by applying *SAAMCO* in this context, the Court of Appeal has further cemented Lord Hoffmann's approach as a clear guiding principle for remoteness: the scope of the duty, whether it be purely tortious, contractual, concurrent or statutory,[13] offers a starting point for identifying the appropriate test for remoteness. In purely tortious negligence liability, for example, there is a broad duty not to cause foreseeable harm, which is then reflected in the reasonable foreseeability test for remoteness. This simple, principled approach must then be filtered by a consideration of policy, which in cases of concurrent liability solidifies an exclusive application of the reasonable contemplation test.



Residual issues

Roth LJ is right to highlight various factual anomalies thrown up by this decision.[14] Following *Wellesley Partners*, a claimant may be able to recover more from a barrister with whom she has no direct contract than her solicitor with whom she does have a contractual relationship, since in the former situation she can avail herself of the wider tortious test. The same vulnerability would be faced by a solicitor who gives gratuitous advice compared to a solicitor acting under contract. However, *SAAMCO* may once again hold the solution: since the scope of the duty in these cases is 'equivalent to contract'[15], the contractual test for remoteness should apply here as well, triggered by the assumption of responsibility from which liability arises. This was the approach suggested, *obiter*, by *Roth LJ*[16], but will ultimately be a question for future cases.

Conclusion

The practical importance of this decision may in fact be limited: the appreciable difference between the two tests is sufficiently slight that the outcome of most cases will remain unaffected. Indeed, the Court of Appeal unanimously held that the damage suffered by Wellesley Partners was within the reasonable contemplation of the parties as well as reasonably foreseeable, thus dismissing Withers' appeal. However, it is of considerable academic significance that this case has clarified the analytical process in cases of concurrent liability and further confirmed the *SAAMCO* approach as a guiding principle in the law of remoteness.

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1 [2015] EWCA Civ 1146
2 Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388
3 Hadley v Baxendale [1854] 8 Exch 34
4 [2015] EWCA Civ 1146 per Longmore LJ at [186]
5 Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 AC 61 per Lord Hope at [31-32]
6 The Heron II [1969] 1 AC 350 per Lord Reid at [386]
7 Harvey McGregor, McGregor on Damages (Sweet & Maxwell 2014), paragraph 22-009
8 [2015] EWCA Civ 1146 per Floyd LJ at [80]
9 South Australia Asset Management Corp v York Montague Ltd [1997] AC 191
10 Leonard Hoffmann, 'Causation' 121 LQR 592
11 [2015] EWCA Civ 1146 per Floyd LJ at [80], Roth LJ at [157] and Longmore LJ at [185].
12 Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 AC 61 per Lord Hope at [31-32]
13 For an obiter discussion of this possibility see Rubenstein v HSBC Bank plc [2012] EWCA Civ 1184
14 [2015] EWCA Civ 1146 at [163]
15 Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 per Lord Devlin at [530]
16 [2015] EWCA Civ 1146 at [163]

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Loss of Control, Domestic Violence and Murder

In this article I will seek to establish two claims; firstly, the 'loss of control' partial defence of murder should be abolished and secondly, a new partial defence covering killings of abusive partners should be created. The old defence of provocation generated a large amount of criticism from academics and women's rights advocates for its perceived gender bias both in theory and practice. This led the Law Commission to recommend reform in its Partial Defences to Murder report. In my view the Law Commission was wrong to conclude that there is a sound philosophical foundation for a partial defence to murder based on loss of self-control. I will begin by examining the ethical intuitions that are used to justify the loss of control defence and then go on to propose a partial defence that reduces the criminal liability of defendants that have killed their abusers, founded upon the special wrongness of domestic violence.

In the Partial Defences to Murder Report 2003[1] the Law Commission assessed the philosophical foundation of the old provocation defence, which was widely considered to be inadequately articulated in the case law. The Law Commission agreed and set out its own view on the rationale behind the partial defence as part of its argument for reforming rather than abolishing the defence. It stated that: "the moral blameworthiness of homicide may be significantly lessened where the defendant acts in response to gross provocation in the sense of words or conduct giving the defendant a justified sense of being severely wronged".[2] The issue at hand then became a choice between whether this moral judgement should be recognised in the classification of the offence or in the sentencing of the offence. In lieu of wider reform of the law on homicide, the Law Commission and others recommended that it should be recognised by the first method, which would involve maintaining a reformed provocation defence. This eventually came into being in the Coroners and Justice Act 2009 and was labelled the 'Loss of Control' partial defence.[3]

Much has been written on the gender bias[4] of this moral sentiment[5], but my focus will instead be on its inadequacy as a philosophical foundation for the loss of control defence. I think the Law Commission erred in two ways. Firstly, it overstated the significance of provocation as a factor which diminishes the moral blameworthiness of killing. Secondly, it was wrong to conclude that the difference in blameworthiness should be recognised through classification rather than sentencing.

Homicide is in all cases a tragic event and any attempt to reduce liability for the perpetrator must be grounded in a strong ethical judgement. In the case of provocation, this requirement was traditionally met by the argument that the victim's conduct had displaced reason from the mind of the defendant, as expressed by Devlin J in *Duffy*.[6] Mitchell has argued convincingly that this claim lacks clarity as it does not specify whether the defendant had failed to exercise self-control or lacked the capacity to exercise self-control.[7] The Law Commission also recognised this problem in its report, but came to the conclusion that the distinction raised an 'impossible moral question' regarding the mental processes of the defendant and was beyond the reckoning of medical science. This traditional understanding of provocation is misguided and unreasonably favours the defendant. The diminished responsibility partial defence already covers cases where the defendant lacked the capacity to make rational choices. The loss of control partial defence is specifically focused on cases where the defendant failed to exercise their self-control. Loss of control is never so involuntary that it provides a normative justification for reducing liability. The 'choice' element in loss of control situations can be identified by the relationship between possessing superior force and losing control.

As noted in the Law Commission report, loss of self-control occurs far more frequently where the person losing control possesses a physical advantage over the victim. Men who lose control towards their female (and generally physically smaller) partners and rarely do so towards other men.[8]

This indicates that losing self-control is a choice. It is an instinctive choice (the defendant has not fully articulated his reasons to himself at the time of choosing), but it remains a choice. It may be the case that a defendant makes a choice which is incongruent with their general behaviour, but this should not diminish the extent to which they are held responsible for their choice. The description of the effect of provocation by Devlin J is incorrect, provocation does not displace the defendant's reason and cause the defendant to lose control, rather the defendant chooses to lose self-control in the face of provocation. Once the process of losing self-control is understood in this way, the effect of provocation on the moral blameworthiness of the defendant's actions is clearly much smaller than assumed in the case law and Law Commission's report. This analysis accords with the intuition that we have a general moral duty to maintain our self-control and refrain from reacting violently, even in distressing situations.

The second error in the report was the conclusion that a difference in moral blameworthiness merited a different classification of offence rather than a different sentence. This is related to the first error, because a large difference in the moral blameworthiness of two acts would be a reason to favour a different classification to indicate a different level of moral condemnation. Given the difference in moral blameworthiness is much smaller than assumed by the Law Commission, there is reason to think that both provoked and unprovoked killings should be classified as murder. In its analysis of this matter, the Law Commission balanced the practical benefits of considering the difference in a sentencing hearing against the damage to public perception of the criminal justice system if judges were seen to be handing down smaller minimum custodial sentences for murder. Although the matter in contention is technical rather than substantive, the debate should not be limited to weighing up the practical benefits of the alternatives. There should also be consideration of whether provocation alters the nature of the defendant's act to an extent which requires a separate classification. As I have argued above, I do not think that there is a fundamental difference between a provoked and an unprovoked homicide.

An important development of the law in the Coroners and Justice Act 2009 was the extension of the loss of control defence to defendants that had acted from fear of serious violence by the victim towards themselves or others. This was an attempt to deal with the perceived injustice done to victims of serious domestic violence who had killed their partners, who could not access the old provocation defence.[9] I think this was a positive, but incoherent development in the law. The law should offer sympathy to defendants in these circumstances, not because of a false claim that victims of domestic violence have lost control[10], but rather because society has failed to protect these victims of serious domestic violence. As part of abolishing the loss of control defence, it would be necessary to establish a new partial defence for victims of domestic violence, which could be given a coherent philosophical foundation by the special wrongness of domestic violence. The new partial defence should take the form of that put forward by Rights for Women in their response to the Law Commission's consultation report on the partial defences to murder.[11] Jonathan Herring has set out four factors that contribute to the serious wrongness of domestic violence: the use of violence to gain/maintain control in a relationship, the importance of intimate relationships to the human good, the presence of children and the patriarchal power structures within which domestic violence takes place. Herring's work can be repurposed to suggest that domestic violence is not just a serious wrong, but also a special wrong that can partially justify the killing of the abuser. The two are related; one of the reasons that domestic violence is especially wrong is that it is often so serious. But there are also further reasons, particularly the patriarchal structures that the violence occurs in. The presence of patriarchal power structures ensures that a subset of the population is especially vulnerable to violence committed by the rest of the population. Society has ordered itself in this way and bears partial responsibility for placing victims of domestic violence in this position. In practice, this vulnerability denies escape routes for women; they must remain to care for children, to avoid social stigma or fear of an escalation of the violence. Victims of domestic violence have heavily restricted access to the options one can usually resort to when faced with regular violence, such as fleeing to a safe property or calling the police, so resorting to serious violence is understandable, albeit still morally wrong. Killing an abuser is wrong and should be punished by law, but it is partially justified by the lack of alternative options available to victims of serious domestic violence. This partial justification should be present in the law through a partial defence to murder for defendants that have acted in response to serious domestic violence.

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2 p. 45, Partial Defences to Murder Report 2003
3 Coroners and Justice Act 2009, Part 2, Chapter 1, Partial defences to murder: Loss of Control [54-56]
4 The bias arises because men typically react to provocation with instantaneous, angry violence, whereas women typically pursue more considered action and therefore fall outside of the partial defence.
5 Edwards, S., "Loss of self-control: when his anger is worth more than her fear", in A. Reed & M. Bohlander (eds), Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives (Aldershot: Ashgate, 2011
6 [1949] 1 All ER 932
7 Mitchell B., "Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!" in A. Reed & M. Bohlander (eds), Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives (Aldershot: Ashgate, 2011)
8 The focus here is on the male-female partner situation, but the same analysis applies between men where one party is physically larger or otherwise advantaged i.e. the presence of accomplices.
9 R v Ellis (Ruth) [2003] EWCA Crim 3556, although by the time of the reform the common law had adjusted to accommodate some 'slow burn' provocation cases i.e. R v Thornton (Sara Elizabeth) [1996] 2 All E.R. 1023.
10 Generally, these cases involve considered violence using acquired weapons and therefore would fall outside of the rationale for the loss of control defence; moreover, a loss of control has no normative relevance when assessing a killer's liability for murder.
11 http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Partial-defences-to-murder-.pdf

Reflections on Corporate Manslaughter and Criminality in Light of the Samarco Disaster

What happened in Brazil? The Samarco story

The Brazilian state of Minas Gerais lies in the south east of the country and is second in population size only to Sao Paolo. The English translation of 'Minas Gerais' is 'the general mines', an apt description rooted in the region's history as a plentiful, resource rich land. Samarco Mineração is a joint venture owned by industry giants Brazil's Vale and Australia's BHP Billiton, each with a 50% share. It is a major global producer, accounting for 1/5th of the world's iron ore supply in 2014, with a corresponding reported gross revenue of 7.6 billion reals (£1.3B). One of their sites is an open-cut iron ore mine positioned on the periphery of Bento Rodrigues in the Mariana district of Minas Gerais.

Crushed rock and fluid waste remaining after the extraction process is generically known as tailings. These are deposited in a nearby three tiered tailings dam complex. The use of such disposal systems is common practice in the trade, largely to prevent the formation of surface dusts.[1] A unique feature of tailings dams is that they aren't often constructed with intended finality. Instead their dimensions are incrementally built upon to increase storage capacity in line with the output of its feeder mine.[2]

Indeed, one of the three dams in the complex, the Fundão dam had been subject to over a tenfold increase in its volume between 2012 and 2015 from five million cubic metres to some fifty-five million cubic metres.[3]

Shortly after 4pm on November 5th 2015 the Fundão dam burst its banks, causing a breach of the connected Santarem water dam too. Liquid waste and sediment sluiced down into Bento Rodrigues, killing seventeen people with two still unaccounted for. The survivors have uncertain futures, facing the crushing simultaneous loss of their livelihood, community and homes. The region has suffered extreme environmental consequences. The detritus from the failed dam leached into the major local waterway, the River Doce, contaminating the drinking water of hundreds of thousands of Brazilians and poisoning marine life over the rivers' 500km journey eastward to the Atlantic Ocean. Scenes of rescuers using ropes to pull exhausted animals out of the viscous sludge were beamed the world over. Deutsche Bank have estimated the potential clean-up bill could run to $US1 billion.

What was the pathology of the disaster?

In the wake of the initial grief and shock has risen some

loud, acerbic commentary. How did this happen? Was the event an unforeseeable act of God? Or rather was an attitude of utter indifference and deliberate ignorance to a known risk, set in the context of lax domestic regulations to blame? Much of the dialogue has focused on a 2013 publicly available technical report commissioned by the State Ministry, which was prepared leading up to the revalidation of Samarco's operational license. The report was produced by the Instituto Pristino, a not-for-profit group under the auspices of the Federal University of Minas Gerais. It recommended that the license renewal be conditional on several interventions. Specifically, it suggested Samarco should implement more rigorous monitoring of its waste storage facility and that a contingency plan should be drawn up in case of accidents. It explicitly stated "evidence of the effectiveness of the contingency plan is conditional...given the population of the Bento Rodrigues community".[4] The recommendations were not implemented and Samarco's license was renewed on October 29th 2013, eight days after the report was published.

Samarco is already liable for millions of dollars in government imposed fines and will be the subject of innumerable civil suits in the years and decades to come. Yet with seventeen people dead is this enough? Should there be negligent conduct, are there options beyond the predictable pecuniary punishment for what is effectively classed as *mala prohibita* infringements?

Where are we with corporate manslaughter in England and Wales?

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) was the eventual legislative response to address the ineffectiveness of using the common law to prosecute corporate entities responsible for negligent conduct causing fatality. Prior to the Act the charge of gross negligence manslaughter was used. It had repeatedly failed to deliver successful prosecutions for a long line of disasters that blighted the late 20th century. Notably these included the capsize of the *Herald of Free Enterprise ferry* at Zeebrugge and the rail crashes at Southall, Hatfield and Ladbroke Grove.

The distinct flaw in the old law was the 'doctrine of identification'. The prosecution had to prove a specific individual in 'senior management' was directly aware of and responsible for the gross breach of duty which lead to death. Naturally, 'senior management' of bigger outfits are far more removed from the coalface than that of smaller ones. It was all too easy for the defending party to obfuscate and deflect.

If no single member of senior management was shown as directly implicated, the entire conviction against the corporation for manslaughter would fall down. In practical terms, the potential for conviction was inversely proportional to the size and complexity of the offending corporation. This apparent impunity of large corporations has been compared to the 'benefit of clergy' in the Middle Ages.[5] As wryly put by Celia Wells "Corporations are lined up with animals, infants and the insane as non-accountable".[6]

The 2007 Act endorses a version of the 'aggregation principle', whereby responsibility for the breach of duty does not have to rigidly be ascribed to one outlier employee who is sufficiently 'senior'. Rather fault was shared collectively between multiple players in the context of poor workplace culture. The bones of the CMCHA are as follows: The defendant organisation must owe a duty of care to the deceased under the normal rules of negligence. Then, the breach must be a result "of the way the activities of the organisation were managed or organised" and, in a slight echo of the old law, "a substantial element of the breach (must lie) in the way the senior management of the organisation managed or organised its activities".[7] Penalties include unlimited fines, remedial orders and publicity orders. Like the old law, an individual director cannot be prosecuted and gaoled under the CMCHA. That remains common law domain. Charges can be simultaneous however, as in the Huntley Mount Engineering case.[8]

Some feel that stipulating that 'senior management' be a 'substantial element' of the breach invites the same difficulties that beset the common law offence forerunner. This has led to debate over whether the *raison d'etre* of the entire Act is truly fulfilled. Taylor regards the Act as making a strong "symbolic statement" about corporate responsibility "which will struggle to fulfil in practice".[9] The line of cases which have emerged from the CMCHA suggest old problems persist. From the 16 cases that have been tried there is a clear pattern: they are almost exclusively against smaller companies with simple staffing structures, where the act or omission of a 'senior manager' is obvious and undisputed and the defendant has pleaded guilty from the outset.[10] Though this generalisation is not absolute. CAV Aerospace case was found guilty this year of the charge, a company with 460 employees and a turnover of over £73 million.

Broader issues with the concept of corporations and criminality

The Samarco story throws into sharp relief the universal problems encountered in the field of corporations and criminality.

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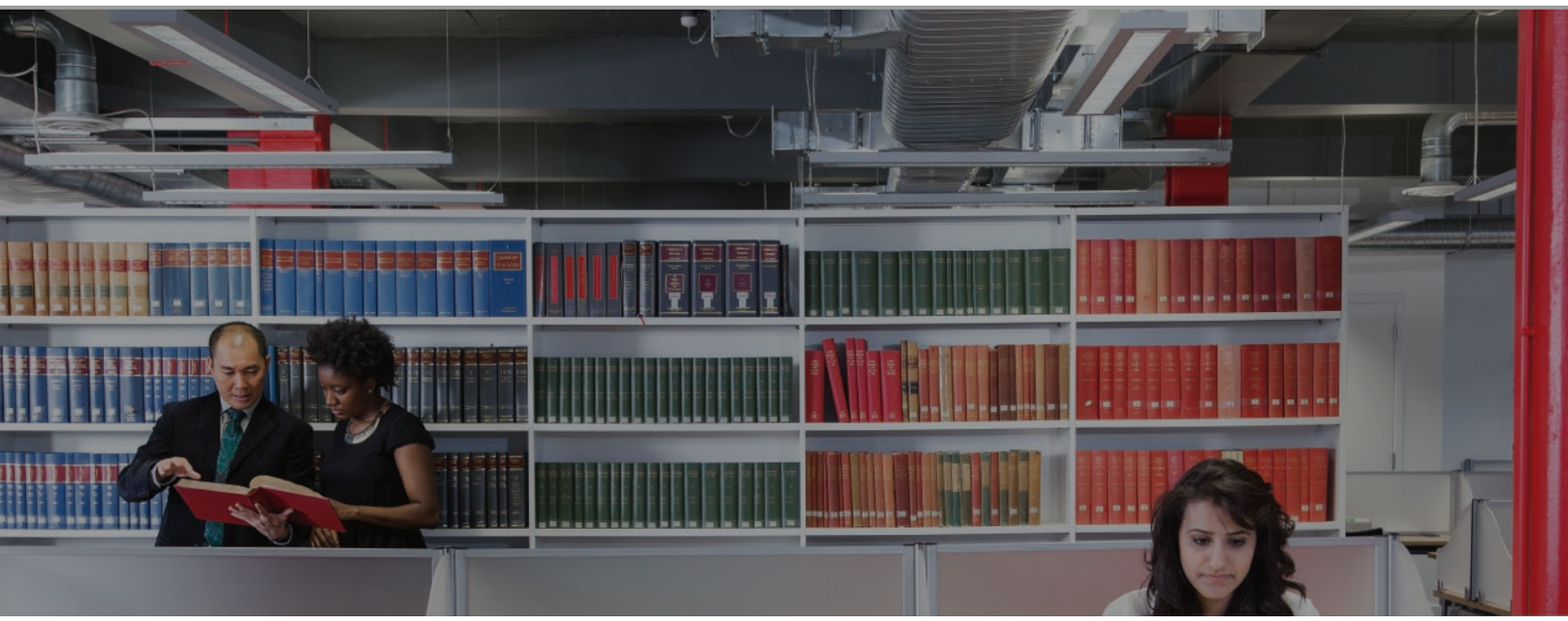

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Such problems are especially pronounced in the resources sector, where there are often high risk ventures taking place in a domestic setting that may have underdeveloped and poorly enforced safety standards. Safety standards may be secondary to the attractive economics of hosting a multinational operation: they employ local people, pay tax and are perhaps willing to grease the wheels of action with tactical donations.

Greasing the wheels is a necessary part of doing business in some markets. While commonplace it does not follow that this is a comfortable reality. It has emerged that Samarco had donated to the electoral campaigns of half of the congressman sitting on a commission to preserve the basin of the River Doce. This is one example of mining's close links with and influence on Brazilian politicking. Certainly the murky relationship between politics and industry is not unique to mining, or to Brazil or any emerging economy or otherwise for that matter but it does not inspire great confidence that the system of regulation and control is independent. The Extractive Industries Transparency Initiative (EITI) and the recently enacted section 1504 of the Dodd-Frank Act show there is some international impetus to address this, though neither have any direct bearing on Brazil.

Another broad issue is the appropriateness of transposing elements of individual criminality which require the fault element, or *mens rea*, onto a corporate body.[11] There is a dislocation in trying to make corporate criminal prosecution fit into a model that was derived from common law principles.

The jurisdictional problem is also a pertinent consideration in this modern day and age where multinational corporations operate from innumerable sites and use highly complex structures. It is mostly a tax avoidance strategy but has implications in this area too, in terms of the logistics of mounting and running a prosecution case, and whether parent companies can be made liable for crimes of its subsidiaries. This is the live issue with Samarco at the moment. BHP have stressed "Samarco is the operator of the joint venture", with Vale adding that it has "a management team that is completely independent from its shareholders and responsible for technical and financial matters." Both owners are keen to stop an upwards rot from touching their own coffers. It will be of great interest to see in the fullness of time who is exposed to civil and criminal liability in this incident.

Closing remarks

Ironically, the somewhat laissez fair climate of regulation in which Samarco had successfully operated may come to work against it during the prosecution stage. The strict, objective checks and balances necessary to maintain adequate safety standards were (arguably) not enforced. But there can be unchartered risks associated with doing business in markets where the rule of law is not a crystal clear concept embedded in the fabric of the politico-legal system. Governments in this context can be a little creative and bullish when it comes to achieving their aims. Shell learnt this bitter lesson back in 2006, when the Russian government effectively bullied it into ceding control of the Sakhalin-2 oil and gas project to the state-controlled entity, Gazprom, after sustained state pressure.

The mudslide disaster has created a crisis in Brazil. It brings into direct conflict the interests of the powerful resources sector with the palpable anger of the voting public. The events of November 5th are considered by the Brazilian government as the biggest environmental tragedy in history. People are rightly frustrated with the perception that big businesses seems to make its own rules with implicit immunity from any real consequences for serious incidents. Latest developments in the Samarco saga do indicate though a true resolve to exact the truth and meter out punishment. Seven company executives and engineers were indicted as well as consulting company Vogbr who was engaged by Samarco to produce reports on the dam's stability. Additionally, a judge in December declared Samarco's assets 'unavailable', which is essentially a freezing order preventing the sale or transfer of mining assets.

A concluding philosophical point regarding the current English position on corporate manslaughter regards the decision on 28th January by Justice Coulson to halt the trial of a case against Maidstone and Turnbridge Wells NHS Trust for the post-partum death of a mother, Frances Cappucini, in 2012. Justice Coulson ordered a stop to the concurrent trial of an individual doctor, Errol Cornish, for gross negligence manslaughter and of the Trust for corporate manslaughter. He had some acute criticism of the Crown Prosecution Service, calling some of the arguments against the Trust "perverse" and pointing out that parts of the doctor's actions had "been about as far from gross negligence as it is possible to be".

It is galling that Nadim Azeez, the anesthetist responsible for the primary care of the deceased fled to Pakistan and has avoided prosecution entirely. Azeez was universally agreed to have been at fault. It would seem that in the storm of emotion and public debate in the wake of Mrs Cappucini's death an attempted prosecution under the CMCHA was inappropriately mounted despite a glaring lack of evidence. Successful prosecutions under the Act remain scant. This most recent failure highlights the issues inherent within the area. It hardly seems to serve justice that the doctor universally agreed to have been chiefly at fault for Mrs Cappuccini's management is out of the reach of the law, while instead a prosecution was mounted against Dr Cornish, whom Justice Coulson has effectively exculpated.

Returning to the Samarco incident, when we reflect on the highly unlikely chances of achieving a hypothetical conviction against managers of Samarco/BHP/Vale in this country, some troubling questions arise. We have a system that will carry to full trial a prosecution against a doctor and a Trust on evidence so insufficient proceedings were stopped by the presiding judge, but is unable to hold potentially guilty corporate actors responsible for they are shielded within complex, opaque staffing structures making them invulnerable to the charge of corporate manslaughter. It is an uncomfortable state of affairs.

By Elizabeth Wark
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2 Lottermoser Mine Wastes: Characterization, Treatment and Environmental Impacts (2007)
3 Paul Kiernan 'Brazil Prosecutors Narrow Probe of Vale, BHP Billiton's Samarco Dam' WSJ 24/11/15
4 Laudo Técnico em resposta ao Parecer Único No 257/2013 www.meioambiente.mg.gov.br/images/stories/URCS_SupramCentral/RioVelhas/69/9.1-laudo-tecnico.pdf
5 Sutherland 1940 p4 of Rethinking Corporate Crime Gobert & Punch
6 Wells Corporations & Criminal Responsibility 2nd edition p65
7 CMCHA 2007 S1 (3), and Explanatory Notes S1 (14)
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9 Ormerod & Taylor 'CMCHA 2007' (2008) CLR 589
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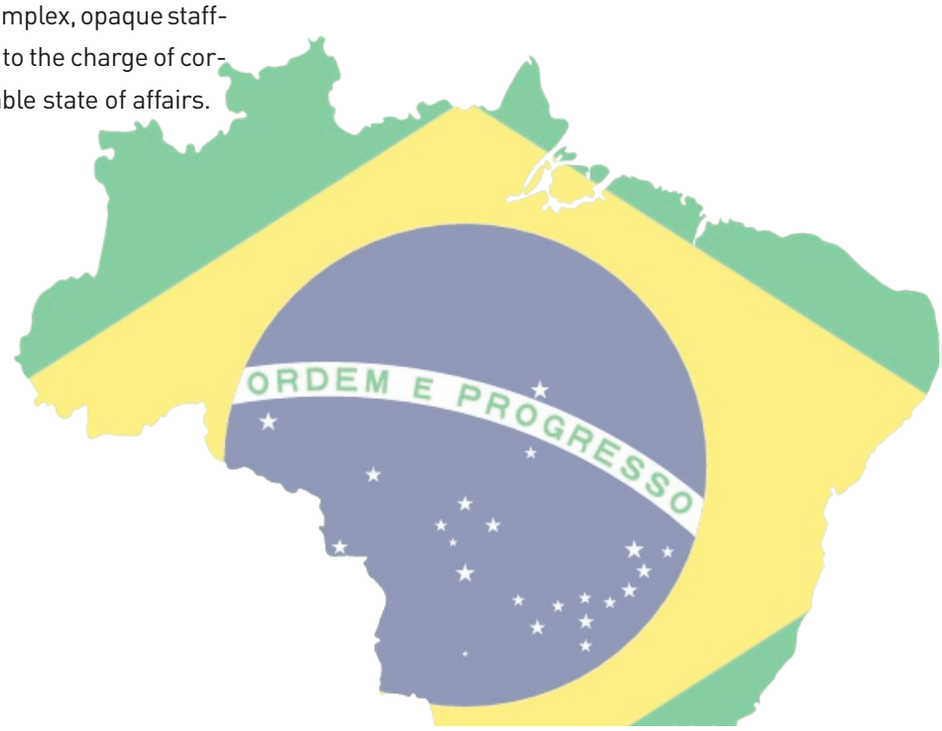

Chevron v Ecuador – What is Ecuador's stance?

"What I have now is cancer of the uterus... and it is because of the water. We are suffering. They tell me that the water is contaminated"[1] stated Maria from the Lago Agrio Region yet Chevron claims this case is "The legal fraud of the century". However, last November there was a lecture held at University College London by the Ecuadorian government where Ecuador's Attorney General Diego Garcia Carrion explained Ecuador's defence regarding the Chevron case. The Chevron v Ecuador is a very complex case as it involves different aspects of the law. It is an investment arbitration case that was brought by Chevron and it intends to place liability to the Ecuadorian state for any activities that occurred in the Amazon region called Lago Agrio. Furthermore, it is an environmental and human rights case. It was further highlighted by Mr Carrion that unlike any other international arbitration disputes, the case and its arguments are constantly changing as they evolve as the case proceeds."

Chevron-Texaco

Ecuador granted exploration and exploitation of hydrocarbons in the Amazon region to Chevron's predecessor Texaco Petroleum Company (Texpet) in March 1964. Moreover, in 1977 Texpet signed a consortium with the Minister of Natural Resources, the Minister of Finance, Corporacion Estatal Petrolera Ecuatoriana (CEPE) where Texpet agreed to invest 31 USD million in Ecuador. The CEPE was later dissolved and became Petroecuador. On June 1992, the concession agreement between Ecuador and Texpet came to an end and Texpet decided not to proceed with any further investments.[2]

Memorandum of Understanding

Petroecuador and Texpet signed a memorandum of understanding in December 1994 were Texpet would be discharged from environmental damages. It stated,

> 'Art. 1 (d) Establish the mechanism pursuant to which Texpet must be released from every claim that the Ministry [of Energy and Mines] and Petroecuador could have against Texpet with respect to the environmental impact caused as a result of the operations of the former Petroecuador-Texaco consortium'.[3]

Chevron claimed that the memorandum was limited only to personal injury claims by third parties however it remains unclear. Furthermore, the Ministry of Energy and Mines Petroecuador and Texpet established the 1995 Implementation and Release Contract where it is important to emphasise that it stated 'through this contract, the Government and Petroecuador shall release, absolve and forever exempt Texpet... from all claims of the Government and Petroecuador against the beneficiaries of the releases of liabilities for adverse environmental effects'.[4] The Ecuadorian state reveals that this contract is only applicable to the parties of the contract. Texpet consequently released 3.8 USD million as a settlement for infrastructure works. In 2000, Chevron and Texaco merged and became one single company. This memorandum was later used as the basis of Chevron's arbitration argument against Ecuador as it was conceived to be a violation to the international arbitration treaty since Ecuador did not protect the investors from other litigations.

Aguinda Litigation

After the 1993 investment of Texpet in Ecuador, there was a civil law suit that was brought before the United States District Court for the Southern Judicial District of New York. The claim was brought by a group of Ecuadorian citizens that resided in the Amazon region where oil explorations were taking place. The claim sought for indemnification and sanctions against Texpet for damages that occurred in the region in which they inhabited additionally, to pay compensation for environmental and property damages. During the proceedings, Texaco proclaimed that Ecuadorian courts were capable of handling the litigation rather than proceeding in US courts and would receive an equivalent remedy to the environmental issues raised. However, the court favoured Texaco's position and granted the dismissal of the claim in 2002 on the grounds of *forum non coveniens* as it determined that Ecuador's courts would provide impartial grounds. The dismissal led for Ecuadorian citizens and residents to bring a new claim before national courts in 2003 known as the Lago Agrio Litigation. They demanded for Chevron Texaco to be liable for the health case of residents that were affected due to contamination, for the cleaning of the region and for repair of environmental damages. In February 2011 the provincial court of Lago Agrio found

Chevron liable for environmental damages which totalled to 9.5 USD billion.[5] It is important to note that this decision is not parallel to the Ecuador v Chevron litigation as it was brought by citizens which are considered third parties and not directly involved with the state.

Environmental Devastation in the Amazon Region

In order to determine environmental damages, the attorney general's office partnered with the environmental experts from the Louis Berger Group (LBG) to examine the contaminated area and file various reports in 2013, 2014 and 2015. Their reports noted the damage caused by Texaco/Chevron still remains in Lago Agrio. Mr Carrion notably included Chevron's strategy by carrying out inspections by their own experts, which avoided samples that show greater soil contamination for the minimisation of environmental devastation.[6] Moreover, Chevron/Texaco alleged that the Ecuadorian state violated the Bilateral Investment Treaty and for the state's failure to provide effective remedy regarding Chevron/Texaco unfair and discriminatory investment treatment. The National Court of Justice granted Chevron a cassation[7] of the case. It was further noted by Mr Carrion that 'These arbitral proceedings are no more than an attempt by Chevron Texaco to avoid the enforcement of a legal judgment that was reached in the Lago Agrio case, that ordered the company to pay damages for the contamination that its operations caused in the eastern part of Ecuador'.[8] Hence, why the attorney general's office alleged the filing of these claims as premature as the BIT predates Chevron. It is important to realise that it was submitted by the Ecuador that Chevron bought off judge Guerra for his cooperation and placed him under their own witness protection program that allowed him to move to the USA. This was included in a testimony by Diego Borja whom received financial benefits from Chevron.

Notwithstanding, Chevron claimed that the environmental case was brought by the state of Ecuador for the purpose of bankrupting the company however reports by the Louis Berger Group analysed that activities by Texpet caused "serious and lasting to the ecology of the Amazon region, with direct and secondary effects".[9] Chevron stated that Ecuador was not been able to demonstrate direct responsibility to the contaminated concession area as it did not accord with investigations done by Louis Berger Group and that Ecuadorian health experts were incapable of presenting true harmful effects.

Conversely, Ecuador brought a lawsuit to the USA determined to be in possession of "privileged documents" between Chevron and its contractors called "1782 actions". These documents demonstrate how Chevron manipulated evidence in the Lago Agrio region. It also revealed that there were inspections carried out without permission and prior to judicial inspections for the collection of clean soil from areas where there was no contamination. Consequently, the tribunal after several years of this case finally performed a site visit between June 6 and 10 of 2015. Granted, Chevron strongly opposed a site visit as it regarded it as useless and that the visit would require excessive security measures. Furthermore, Chevron proposed for the site visit to be done virtually from a hotel in the city of Guayaquil. The site visit provided first hand evidence regarding persistent oil contamination in the Lago Agrio region. Mr Carrion expressed that 'the Arbitral Tribunal, by agreeing to Ecuador's persistent petition that it visit the area of the contamination, has incorporated Chevron's environmental liability into elements of the discussion of the case, which is, without a doubt, a very impotent development in these arbitral proceedings'.[10]

Chevron Case Today

Given these points, the Chevron v Ecuador case is still on going. Mr Carrion determined it would be years before a decision is reached. Chevron is constantly re-litigating judgements that were already concluded in Ecuadorian courts. Moreover, Chevron resiled from paying the $9.51 billion to the citizens of Ecuador and it was further brought before Canadian courts. I find it should be duly noted that people that live in the sites where the contamination has occurred is not included in the arbitration proceedings and therefore the human rights of many citizens have been ignored as neither the state or Chevron has provided remedy. Nonetheless, the Ecuadorian state requests for the Tribunal to dismiss the Claimants' complaints on the denial of justice by the state or any claim based on the Bilateral Investment Treaty, the fact that the claimant did not exhaust domestic remedies and to find Ecuador was

not in breach of the 1998 Final Release, 1996 Local Settlement Agreement and the 1995 Contract of litigation relating to the Lago Agrio. Additionally to deny any reparations requested in regards to the BIT.

By Ambar Nicole
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Junker rolls out the red carpet for capital markets

On 30th September 2015, the European Commission published Action Plan for Capital Markets Union (CMU), setting out the actions needed to put into place the project of a classic pan-European single capital market by 2019.

The Action Plan comes at the end of a public consultation, launched 18th February and ended 13th June, on the measures aiming at unlocking investments in the EU and creating a single capital market, which were spelled out in the context of the Green Paper *"Building a Capital Markets Union"*.

In the explanation of the Action Plan, the Commission starts from the observation that in recent decades the European markets have been radically transformed due to different triggers, such as, financial innovation, economic crisis, globalization and introduction of the single currency. The free movement of capital is a long-standing target and a fundamental freedom of the European Union. Strong capital markets are needed to provide new sources of funding for business, to increase options for savers and to make the economy more resilient. Nevertheless, Europe's capital markets are fragmented along national lines and European economies remain heavily reliant on the banking sector, making them more vulnerable to the tightening of bank lending.

One of the fundamental objectives of the European Commission is to strengthen Europe's economy for all 28 Member States and stimulate investments to create long-term jobs. The CMU constitutes the third pillar of the 'Investment Plan for Europe' and seeks to solve one of the problems of deficiency of investments in the EU. This can be achieved in the long-term by increasing and diversifying sources of funding for European enterprises and infrastructure projects as well as by unlocking investment in the EU and making the financial system more stable.

The Commission's communication *"An Investment Plan Europe"* of 26th November 2014, had already identified a number of initiatives in order to overcome these problems. These initiatives include the adoption of Regulation 2015/760 on *"European long-term investments funds"* (ELTIF), the promotion of markets of high-quality securitization (STS), research on solutions to the lack of standardized information on credit to SMEs, a wider spread of private placement regimes and a review of measures already in force such as the Prospectus Directive (2003/71/EC). Such issues are discussed in the *Green Paper* and in the *Commission Staff Working Document "Initial reflections on the obstacles to the development of deep and integrated EU capital markets"* reflecting on and analysing the factors that have hindered the development of integrated and efficient EU capital markets.

The public consultation undertaken by the Commission on the *"Green Paper"* was intended to publicise the problems and define a programme on the initiatives to be taken and it acquired particular relevance. The consultation enjoyed a high response with hundreds of replies from enterprises, investors and important figures of the financial and political world. The majority of consultees have supported the importance of building a Capital Markets Union and were in favour of a pragmatice "step-by-step" feasibility approach. From the Green Paper consultations and from a following conference on *"Next steps to build at CMU"*, held 8th June 2015 in Brussels, it emerged that a single market for capital could actually help support cross-border sharing-risk, create more liquid markets and diversify the sources of funding to the economy.

The Action Plan of CMU is, therefore, a long-term project that will develop over several years with interventions in different sectors. Taking into account the evidence gathered, the Action Plan is based on the following key targets:

- creating more opportunities for investors: the CMU should mobilize capital in Europe and channel it to companies, including SMEs, towards infrastructure projects and create new jobs and better options for retirement;
- connecting finance to real economy: the CMU is a project of the single market that will benefit all 28 Member States, removing barriers to cross-border investment within the EU and promoting closer relationships with the capital markets world;
- promoting a stronger and reliable financial system: an opening to a wider range of funding sources and increasing long term investment, ensuring that European citizens and businesses are less vulnerable to financial shocks;
- deepening financial integration and competition: CMU should lead to more cross-border risk-sharing and make the most liquid markets achieve a better financial integration, cost reduction and the strengthening of the EU competitiveness.

Among the significant proposals that have been listed in the timeline of the Action Plan, highlighted actions are: *(i)* the proposal on regulation to create a European framework for simple, transparent and standardised securitisation; *(ii)* the proposal for amending Regulation (EU) No. 575/2013 (CRR) on prudential requirements for credit institutions and investment firms; *(iii)* the proposal for amending Solvency II concerning the calculation of regulatory capital requirements for several categories of assets held by insurance and reinsurance undertakings; (iv) the consultation document review of the European Venture Capital Funds (EUVECA) and European Social Entrepreneurship Funds (EUSEF) regulations; *(v)* the consultation document on Covered Bonds; *(vi)* the proposal for a modernization and repeal of the "Prospectus Directive" 2003/71/EC; *(vii)* the Green Paper on retail financial services and insurance. Further operations in support of SMEs will consist of an assessment of the MIFID II provisions concerning the Multilateral Trading Facilities (MTF) which are registered as a growth market (SME Growth Markets) and where the SMEs are listed. The Commission, after having noted that currently there is no European regulation on crowdfunding, has promoted an assessment of the national schemes and actual best practices. Further possible and appropriate measures will be considered for the development of this alternative financial channel.

In such a context, building on the work (begun in 2014) of the European Parliament and the international bodies like G20, Financial Stability Board (FSB) and Basel Committee on Banking Supervision, the Commission launched, in parallel to the Action Plan of CMU, a *"Call for evidence - EU Regulatory Framework for Financial Services"* to assess the overall consistency of the framework of financial legislation. The *Call for evidence* is a public consultation through which the Commission has invited all citizens and organisations to provide feedback on the evidence of benefits, negative effects, consistence and coherence of financial regulation adopted in response to the recent international financial crisis. So, it is noted that recent years have been characterized by a period of intense regulation which allowed the EU to adopt relevant measures in order to restore financial stability and trust in the financial system. Many of these measures – more than 40 in total – have been adopted, albeit in difficult circumstances and in a brief period of time. Although this period of intense regulation has produced an objective improvement of supervisory actions and financial markets, it must be noted that the number of interactions and overlaps between the regulations adopted, might have triggered some unintended consequences as a collective impact.

At the moment, it is difficult to evaluate positively or negatively the concrete actions of the Commission, concerning the way in which they dealt with the financial crisis. The targets of CMU are definitely important even though it has only been a few months since the launch of such a project. Through analysis of the results of the consultation regarding the financial crisis measures, the Commission aims ultimately to

identify *(a)* any discrepancies, inconsistencies and gaps in the financial rules as unnecessary regulatory burdens and *(b)* the factors which negatively affect long-term investments and growth. This will assist the Commission in undertaking initiatives that are suitable for the implementation of the CMU. For these reasons, the results at the end of the consultation period of *Call for evidence* will have particular importance as they will provide the first response and evaluation of the public, which will be considered by the Commission in the evaluation of the EU regulatory framework of financial services and the realization of CMU.

The CMU project is a bold one and no doubt will be subject to the inevitable political compromises that await the introduction of new EU regulation. Hopefully, over a period of time more sources of finance will open up particularly to SME's with less dependence on traditional bank finance. The EU may approach the US to open up wider sources of capital in order to provide the stimulus for economic revival in the EU. This Action Plan certainly requires the full attention of legal firms working in this field to try and avoid any adverse, unintended consequences for their clients.

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At First Glance: Law and Globalisation in the 21st Century

Globalisation is not a new phenomenon.[1] It has existed in the form of internationalisation, liberalisation, universalisation, Westernisation, or Europeanism, for many centuries. Its continued evolution has, unsurprisingly, led to inconclusive definitions of what it is and what it means for the world. It is creating a world where our decisions, whether economic, social or legal in nature, reflect ideas shared by the vast majority of the world, and such ideas are manifest because they seek to achieve a common goal. This has been made possible by technological developments that have forced integration at an unprecedented scale at an unprecedented pace.

David Held observed that 'virtually all nation-states become part of a larger pattern of global transformations and global flows. Goods, capital, people, knowledge, communications, and weapons, as well as crime, pollutants, fashions and beliefs, rapidly move across territorial boundaries. It has become a fully interconnected global order'.[2] The irony of globalisation is that despite the fact that states are becoming interdependent via an increase in global trade, global markets and global communication, it has forced societies to create their own social and cultural identities.

Despite, or because of these observations, the cause of globalisation's development and the power of its influence is hotly debated. It has been argued that the tripartite underpinning of the phenomenon rests on culture, politics, and economics.[3] Law is often only referred to in the area of international law when discussed on the global stage. However, domestic law encompasses the very same space as globalisation. Constitutional law has granted states the power to create the institutions that catalyse and shape globalisation.For example, the need for states to meet their domestic objectives for their respective economies has forced governments to use their constitutional authority to grant them access to a global market, which has been achieved through the signing of treaties. The decision to have international trade regulated by one body (World Trade Organisation) is not something that has been forced upon nations by more powerful countries, but a decision made upon legal foundations that has granted them the freedom to do so. In choosing to, they have facilitated or at least accelerated the process of globalisation. Similarly, the Internet is not external to the state in the sense that even though it possesses a quality that allows it to have the most freedom from government regulation - especially in the Western world - it is ultimately not outside a government's jurisdiction. Its functioning and relative independence is governed by numerous legal regulations, particularly in the EU. Globalisation did not develop independently to law, but rather, the two have shaped each other equally. It is much a product *of* law as it is an influence *on* law.

Economists have long argued that capitalism can have variations and still maintain its laissez-faire principles.[4] This means that the world seeks to implement its own system for

'laissez-faire' economics whilst working towards a universal economic vision, further supporting the process of globalisation. The same is true for law in the sense that countries can still have their own domestic policies whilst also retaining global values and objectives. A basic principle of law is that laws, in general, are always open to the interpretation of a given jurisdiction, either established by precedent or a common understanding of the law. Therefore, even laws that facilitate international law will require domestic interpretation and domestic guidance to help achieve worldwide integration.

The U.S. Constitution greatly influenced the French Revolution, which in turn influenced its European partners and introduced them to the ideas of liberty, equality, and fraternity. The 'Americanisation' of law in constitutional law is evident in countries such as Malaysia where concepts such as the separation of powers into three branches of government; the principle of federalism, and the supremacy of the constitution. In particular, the US Constitution is often referred to in Malaysia's Supreme Court, legal cases, and textbooks. Nonetheless, in other areas - most significantly in commercial law - we do not have a consensus that can be classed as distinctly American in nature. Just as the English language and Caucasian ethnicities were once dominant but have now given way to a hybridized evolution, the same can be said for law in the globalised world.

It may be an obvious statement when it is said that a state is separated from another by its borders or by geography. In a globalised world, one may be forgiven for believing that the importance of borders has subsided. In the past, it would have been possible to restrict information by simply closing borders or censoring the press, as is currently the case in China. Despite the efforts of international law, freedom of information is the key development of the digital age.[5] Today, given the global character of the Internet, and the omnipresence of blogs, Facebook, and Twitter, the restricting of information by virtue of established borders has become much harder for countries and the law.

However, to a great extent the law has taken the position of imposing and maintaining the respect for borders through international law. Territorial integrity and sovereignty are perhaps the most important characteristics of a state. Newer ideas of what constitutes sovereignty have been used to justify 'shared sovereignty' (as in in the EU). States are more and more entitled to regulate extraterritorially when conduct concerns a justifiable interest.

For example, anti-trust laws are used for regulating the conduct of multinational corporations because their violations affect the state, even if the violation takes place outside its jurisdiction; the American tech company Qualcomm is one such example. This has led countries, such as the United States, to promote its laws extraterritorially to meet its interests in areas concerning the press, the prosecution of religious groups, human rights, and economic freedom. Although the U.S does not possess jurisdiction in such areas, it applies its influence as a superpower, especially during trade negotiations. The U.S imposed tough economic sanctions on Russia for its aggression in the Ukraine (which was contrary to US interests), whereas the EU was less aggressive in doing so as it is more dependent on Russia's resources as an economic partner, but felt compelled to do so in deference to the US as an ally, and its own democratic values.

Globalisation has brought much prosperity and understanding to the world, but there is a growing backlash to its effects. The rise of far right groups in the EU and especially the rise of nationalist parties in countries such as Macedonia (VMRO-DPMNE), Poland (Law and Justice Party), and Denmark (Danish People's Party)[6] have demonstratively presented the world with the scepticism and fear through which they look at the world. Globalisation has brought insecurity to many

millions across Europe over their country's constitutional and economic sovereignty, together with a perceived inability to protect its borders from immigration.[7] The fact that many countries, such as Scotland, seek to embrace their own economic, cultural and social identity by achieving independence - similar to fellow Europeans in Catalonia - highlights globalisation as something we cannot control, but something to which we only react.

In law, globalisation is reflected in an idea of a world law and a world court. Such ideas were popular in the beginning of the 20th Century as a response to the horrors of the World Wars, but they may have lost their unifying ability as we have accepted the potential of mutually assured destruction. Globalisation is certainly an economic phenomenon which will continue bringing together a world market. There is a strong effort to achieve this through the TTP and TTIP deals which will take multinational corporations - the key players in economic globalisation – outside the remit of state regulation and public scrutiny.

Globalisation may bring cultural and social ideas that some embrace and others do not. The point is that the law possess a greater importance than ever before to allow countries to make the choice between what they want from globalisation and what they do not. Multiculturalism and diversity is important and essential to maintaining our values for tolerance, but we must also recognise that we equally value individual identity, tradition, sovereignty, and religion. The law can be used as a shield to guard against globalisation's overreaching potential, as well as a sword with which to cut through the boundaries that restrict human and social progress.

Law is as important as ever.

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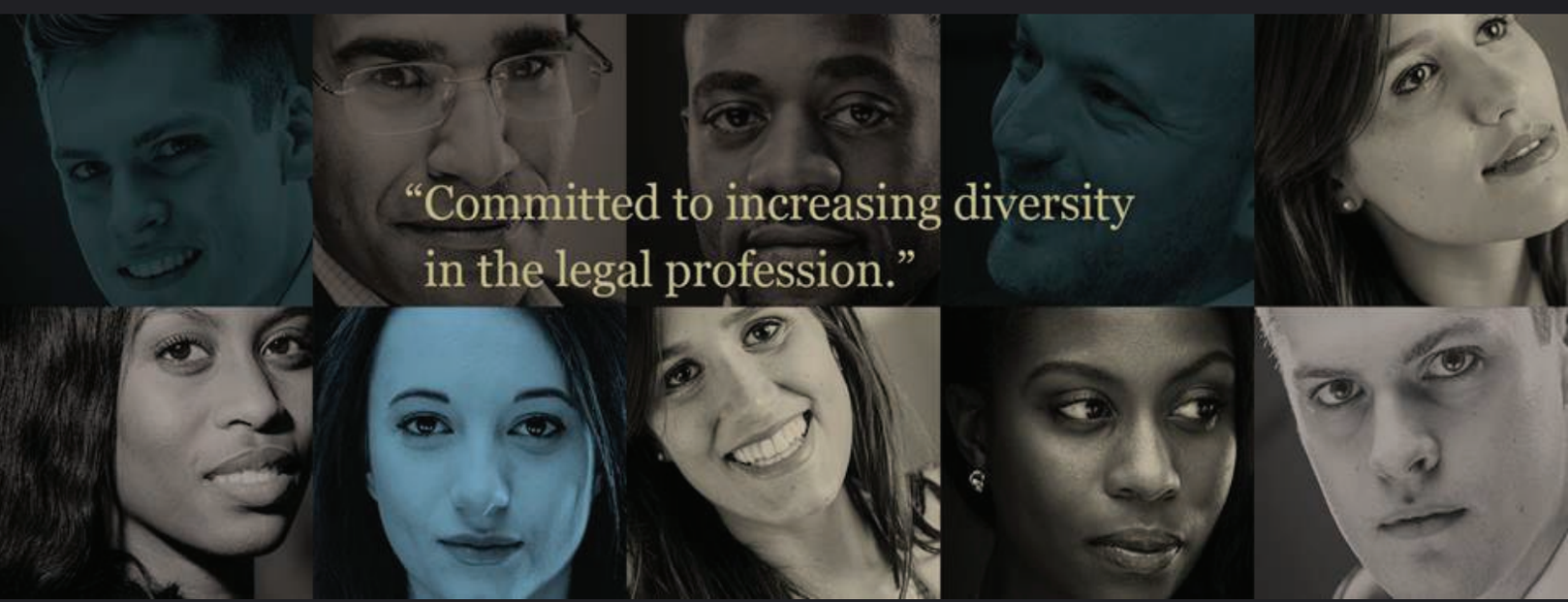

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The Pursuit of Criminal Space Law

Between 1998 and 1999 the Russian Institute of Biomedical Problems carried out the most prominent study on the effects that Outer Space has on human behaviour. The subjects of the study were a crew composed of seven Russian and Japanese males and one Canadian female, who spent 110 days on a Mir replica - the first modular space station owned by Russia. Episodes of battery, assault, attempted murder and sexual harassment occurred on board, confirming that the state of isolation imposed by outer space has a strong effect on human behaviour.[1]

One may question why that is a concern at all, considering the limited volume of human activity in outer space. However, this study is significant because a strong commercial interest has arisen in outer space, given by new developments, which suggests that the human activity in space will start growing at a steady pace.

New studies by Larry Page's Planetary Resources forecasted a high presence of platinum and other valuable metals and minerals on asteroids and other celestial bodies.[2] This presents a considerable potential in economical terms that becomes even more attractive and viable to investors due to the increasingly lower expenses of space exploration. For example, on December 2015 SpaceX was able to cut down the total price for the launch of their Flacon9 type rocket by 70%, which is representative of how cost efficient space ventures may become.[3]

According to Elon Musk "when Henry Ford made cheap, reliable cars people said, 'Nha, what's wrong with a horse?' That was a huge bet he [Ford] made, and it worked".[4] Whilst outer space exploration may be regarded as a field for visionaries, if not dreamers, and it may represent a very big gamble, the presence of important corporations established by successful entrepreneurs such as Musk and Google's co-founder Page seems to provide solid ground on which to forecast the establishment of such a thriving market, and with it the growth of human activities and presence in outer space.

Accordingly, considering such a growth and the effect that this harsh environment has on individuals, one can induce the need for a clear body of law able to govern potential space crimes.

The next natural step in this analysis is to consider the

existing legal framework dealing with space, and no other authority is more important than the Outer Space Treaty (1967). Defined by Von Der Dunk, one of the main experts on Space Law, as the 'Magna Carta' for outer space, the 'Outer Space Treaty' represents the first agreement dedicated to space activities and it outlines the main principles governing this field.[5] The main provision of this treaty is so important that it is even quoted by the main character in the recent blockbuster 'The Martian'[6]: "outer space is not subject to national appropriation by claim of sovereignty, by means of use, or by other means".[7]

From the existence of such a treaty provision, one could assume that potential developments in outer space exploration driven by commercial interests may be nothing but a pipe dream. Nevertheless, as explained by Von Der Dunk, the treaty was signed during the Cold War by the USSR and the USA, presumably in order to prevent outer space from becoming an additional battleground.[8] Most of the positive developments in space exploration were triggered by this struggle for supremacy; however, this resulted in considerable costs and repercussions on the economy of the two superpowers. Therefore, it could also be inferred that such a treaty came into existence to prevent a further waste of capital and drawbacks on both economies.

However, these new resources may now represent a viable solution to the economic struggle of recent years and potentially provide a new set of opportunities. Recent legislation enacted by states support this idea. The U.S. Commercial Space Launch Competitiveness Act (2015) would be one such example, as it provides the required regulatory framework for corporations whose aim is to invest and enter into this potential market.[9]

While the Outer Space Treaty (1967) incorporates the main principles governing outer space activities, it fails to address possible criminal disputes. Although other treaties on outer space exist, they also fail to mention and cover criminal affairs.

Under the UN's committee for the Peaceful Uses on Outer Space, five treaties have been successfully signed, including the 'Treaty on Outer Space' (1967). They cover matters such as the liability of signatory States for damages caused by their space vehicles, their obligations in regards to the rescue of astronauts and provisions on the mandatory registration of objects launched into Outer Space.[10] While none of these treaties provide a specific legal framework for crimes committed in space, one of them, the 'Convention on Registration of Objects Launched into Outer Space' (1974)[11], could be interpreted so as to allow international law principles to apply. According to Von Der Dunk, jurisdiction could be assigned to the state that has registered the space object in question, as is custom under the "flag of convenience" principle for regular aircrafts and ships.

Article VIII of the 'Convention on Registration of Objects Launched into Outer Space' (1974) provides that the state of registration of the vessel "shall retain jurisdiction and control" over it.[12] This could be broadly interpreted to include crimes, thus providing a viable solution. As a space object is required under the treaty to be registered in a state in order to be legally launched, in the event of a crime, the national courts of that state would adjudicate on the matter, applying national law through its procedural processes.

However, such an international law principle would not be capable of providing the flawless body of law for space crimes that is clearly necessary. If a crime was committed outside the registered space object while astronauts were collecting minerals of an asteroid the state of registry would not be able to claim jurisdiction over the crime in question since the incident would have occurred outside the space object.

In order to determine the jurisdiction for a crime committed in a place free from state appropriation, two other international law principles may be employed; namely the nationality principle, where a State can claim jurisdiction for crimes committed by its nationals[13] and the Passive Personality principle, under which a State may request jurisdiction where one of its citizens has been the victim of a crime committed by foreign individuals. [14] However these principles clash and their application would lead to different results.

Consequently, interpreting these treaties in a manner that allows for the use of international law principles renders the legal framework surrounding outer space exploration highly complex and uncertain. In addition, the juxtaposition between these different principles may be capable of creating considerable frictions between states. Questions of jurisdiction are very challenging to address because of their political nature. A recent example is given by the Enrica Lexie case, where two Italian marines mistakenly killed two Indian fishermen, assuming they were pirates, generating diplomatic fallouts between Italy and India.

Nevertheless, international law principles have already been considered and employed for outer space activities. States have agreed to employ the nationality principle for crimes committed on the International Space Station (ISS).[15] Therefore states would retain jurisdiction over crimes committed by their nationals. While this may suggest that international law principles are in fact a concrete option for the governance of possible space crimes, the effectiveness of the arrangement has yet to be tested, as no crimes have been committed in outer space since the introduction of this agreement. In addition, as states have retained the right to invoke the passive personality principle in the event of unsatisfactory trials, the agreement is not completely free from possible frictions generated by potential debates as to who shall eventually exercise jurisdiction.

Therefore, at least in principle, an ideal body for the governance of space crimes should not only be capable of addressing crimes in virtually any possible occurrence, including the example of 'space miners' on an asteroid, but also one that is capable of bypassing jurisdictional issues between states.

Although it has never been employed for such a purpose, the International Criminal Court (ICC) embodies a suitable option, as it is able to potentially satisfy both requirements. Set up by the Rome Statute in 2002, the ICC is the first permanent international criminal court ever established.[16] While at present its jurisdiction deals exclusively with the most serious type of crimes, this establishment proves that cooperation between states on matters of criminal law is possible. Therefore, this may be the most feasible solution. By delegating further powers to such an independent court, political tensions arising from matters of jurisdiction may be avoided. Additionally, by delegating such powers through a treaty, states would be able to retain their sovereign rights, as in the event of dissatisfaction they may 'sign off' at any time.

In conclusion, when considering the likelihood of human involvement in outer space stemming from the growth of commercial interest in its resources, one can appreciate the importance of creating a solid legal framework capable of covering this new area. While there are a few viable alternatives, the delegation of further powers to the ICC or the establishment of a new neutral criminal court seem to be the most desirable of options as they avoid questions of jurisdiction. This would also bypass the uncertainty given by the juxtaposition of different principles and laws, leading to a clear and certain authority able to legitimately govern criminal activities in space.

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Brexit or fix it?

"You have the charisma of a damp rag and the appearance of a low-grade bankclerk", fired the United Kingdom Independence Party (UKIP) leader and European Parliament member Nigel Farage, as he described[1] the European Council's president Herman Van Rompuy in Brussels in 2010. This raging debate took place almost six years ago, but only few could imagine Farage's long-standing ambition to have a membership referendum would actually be realised. This signifies why it is unlikely that the Eurosceptic parties and pro-European establishment will ever find any common ground.

To analyse the current situation we need to take a broader perspective and look at recent European political changes. The crux of the matter is the EU is strongly led by ideological objectives, in conjunction with strong ambitions, therefore making it extremely difficult to take action if needed. It became painfully apparent during the Russian military intervention in Ukraine, the EU had a role of a bystander watching the victim in a playground being picked on, as Western services couldn't detect Russian military deception '*Maskirovka*' (Маскировка) until too late. The Joint Nato-Ukraine statement[2] of the Wales Nato Summit in 2014 seemed largely positive from it's lexical choice but didn't promise direct military assistance. Whatever the reason, the EU's unanimity and strength were too limited. It is also interesting to note the Eurosceptic parties of UKIP and the *Front National of France* have not been very eager to condemn Russia's military intervention in Ukraine.

The rise of Euroscepticism in Central Europe

The new Polish government illustrated their Eurosceptisim by shelving the EU flag from its official premises.[3] As reported by the Financial Times,[4] *"Poland returns as the most rightwing parliament in Europe"*. The Polish elections in the autumn of 2015 did nothing to strengthen positive EU sentiments and is unclear how Poland will play its cards if the UK and the EU start to negotiate.

For Cameron however, the new Polish government might be unnerving. Considering how Cameron plans to cut social benefits even from EU citizens this will do nothing to appease the Polish minority in the UK, therefore making Poland a hard nut to crack.

In Germany the eurosceptic rookie *Alternative für Deutschland* (AfD) broke through the scene in 2013 claiming a 4.7% vote

share, coming within a hair's breadth of the 5% threshold required to take seats in the Bundestag. The AfD took seats in many of the state elections, as they stole 11.2% in Brandenburg, for example.

In France the *Front National* made a final breakthrough last year. Their result in the EU elections in 2014 and in the regional elections in 2015 was 24.86% and 28% respectively. In many European countries we have seen a similar development. Lastly, the *Schweizerische Volkspartei* (SVP) won parliamentary elections in Switzerland in October 2015 by having a 29.4% vote share.

Implications on the UK

As stated before, the political climate in Europe has dramatically changed. It would be unprofessional to analyse a possible *Brexit* without understanding the new political climate in many other European countries. With this in mind, the UK will not be negotiating with a united EU but instead with a colourful and dispersed palette of countries with different interests. It seems apparent that France is reluctant to make any changes to treaties.[5] It is very likely that all the member states are prepared to compromise only as long as their national interests are well protected. This means that finding the common denominator for 28 countries would answer to the question what the outcome of the negotiations will likely be. As stated by Professor Chalmers, "The scale of self-government which could or would be recovered is unclear".[6]

The UK, in contrast has made 4 objectives, and Cameron has highlighted these in his letter[7] to Donald Tusk. These objectives are: economic governance, competitiveness, immigration and sovereignty. The UK will be always able to keep the pound, the EU is trying to reduce overregulation, and giving additional powers to national parliaments would require further changes in the treaties. The most pressing and controversial area seems to be immigration as it is very unlikely that other member states will allow an opt-out for the UK concerning this area.

Impact on the UK's Immigration & Trade

There are 3 million[8] EU citizens living in the UK a large proportion would be affected by a waiting period before getting social benefits. The legal issue is whether the 4 years waiting time is retrospective or would every EU citizen be immediately subject to it? In addition, thousands of British citizens are claiming benefits in other EU countries.

The EU and USA are currently negotiating a free trade agreement with the White House warning in May 2015 that it is very unlikely[9] to have a separate deal with the UK [if the UK left the EU]. If the UK chooses to join the European Free Trade Agreement (EFTA) it would be anyway bound by the *acquis communautaire (free movement of goods, persons, services and capital)* as Norway does. A research of The House of Commons[10] summarised the options as follows: "The UK might seek to rejoin the EFTA and remain in the European Economic Area (EEA) in order to benefit from the single market. This would mean a continuation of free movement of people, capital, goods and services. Alternatively, it might decide to go it alone like Switzerland (which is in EFTA, but not the EEA) and negotiate bilateral agreements with the EU on a case-by-case basis"

7 options - is one of them satisfactory?

The Multiannual Financial Framework runs until 2020 and if the UK left, all the other member states would have to contribute more than 10 billion GBP per annum.[11] According to Piris[12] there are basically 7 [Brexit] options for the UK, the legal framework being the art. 50 of TEU. According to Piris, "From paragraph 1 of that Article, it is clear that, in EU law, the decision of withdrawal is of a unilateral character". Piris discusses how none of these options could be satisfactory for the UK. The first option is described as follows: "establishment of a new structured relationship between the EU and the UK would be provided for in a withdrawal treaty, which would establish custom-made arrangements". The second one would be for the UK to join Iceland, Liechtenstein and Norway as a Member of the EEA. The third one would be to become a member of the EFTA. As Piris writes, "This option would not be an adequate answer to the UK's needs. It would mean that the UK would, like Switzerland, become a member of EFTA, but without becoming a member of the EEA." The fourth option would be to frame the relations by a series of bilateral treaties similar to Switzerland. The fifth option would be to negotiate a free trade agreement or an association agreement with the EU. The sixth option would be for the UK to negotiate a customs union with the EU, along the lines of the existing Association Agreement between Turkey and the EU. The seventh option would be that, if no agreement were to be found in terms of any of the six options examined above, the UK would simply become a third State vis-à-vis the EU.

Regardless of the outcome of the negotiations, the UK will have to secure its trade interests and The City's unique position in the financial market. Reaching a compromise might

be extremely difficult and require a lot of work and effort. Although the UK is too big to be left alone and it is a fact that as much as the 27 other EU countries need the UK, the UK needs them. Essentially, Cameron is between three fronts when he has to satisfy the right wing of his party and the silent Eurosceptic opposition of the Labour and the businesses. Mission impossible? Perhaps, but Europe has seen worse and Brussels is famous for being a very compromising city.

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Section 214 of the Insolvency Act 1986: Is the wrongful trading rule necessary anymore?

Introduction

A fundamental issue with the separation of ownership and control in companies is the agency problem, where the motivation of the director in control is to act in his own interest rather than the interest of the shareholders. The agency problem persists when a company becomes financially distressed, but the duties of the director shifts from acting in the interests of the owners to the company's creditors. Insolvency law prioritises creditors' interests above all else, and thus the director of a financially distressed firm must conduct his duties in accordance with a core objective of insolvency law: the collection of assets and raising the most value out of them for the benefit of creditors. However, when a company enters into the twilight zone of insolvency, its director may be motivated by self-interest and continue trading with the company's assets when insolvency law requires cessation of trade instead. As the company's finances become progressively distressed, the motivation to take on speculative projects rises because the cost of failure for an already bankrupt firm diminishes whereas the benefit of realising a profit that can rescue the company becomes increasingly attractive.

To solve the agency problem, many jurisdictions around the world institute a wrongful trading rule in an effort to align the interests of the director with those of the creditor. In the UK, Section 214 of the Insolvency Act 1986 imposes personal liability on directors found not to have taken every step with a view to minimise potential loss to the company's creditors. This provision was established after the Cork Committee produced a report concluding the need for the wrongful trading rule, insisting that the risk of director misbehaviour was rife.[1] However, the scarcity of claims that have arisen since the provision came into force has brought into question the validity of that conclusion.[2] Much of this can be explained by the provision's inherent issues[3], but a more simple reason may be that the incentive to engage in wrongful trading is not as prevalent as previously thought.[4]

The Wrongful Trading Rule

When a company enters into the twilight zone of insolvency, its director is faced with three options. The director can decide to continue trading with a small probability of returning the company to financial health, he may restructure the business or he may commence formal insolvency proceedings. The interest of the creditor is to maximise the pool of assets for the full repayment of debt. Thus the wrongful trading rule seeks to discourage the director from choosing the first option when he knows it would result in a reduction of assets available to the company's creditors. The rule penalises a director who continued to trade when he should not have by making him liable to make such contribution (if any) to the company's assets as the court thinks proper out of his personal assets. Some jurisdictions go further by supplementing the wrongful

trading rule with criminal liability in the form of a fine and/or imprisonment.

Rather than continuing trade, insolvency law stipulates that a director should instead restructure the company, or commence insolvency proceedings and wind it up. In the UK, the only formal restructuring process available is administration, where control of the company is given to an administrator who must act in the interests of all the company's creditors and attempt to rescue it as a going concern. Alternative, non-statutory restructuring processes are available such as pre-pack administration, and schemes of arrangement. The former is an attractive option for small-to-medium sized enterprises with a single large creditor, whereas the high cost and time required to utilise the latter restricts its use to larger companies.

Section 214 of the Insolvency Act 1986

Many argue that there have been few section 214 claims made since the provision came into force because of its many inherent restrictions which limit its efficacy.[5] Such restrictions include the fact that only liquidators have standing to raise a wrongful trading claim. Additionally, in cases where such a claim fails, the claimant must bear the cost of the proceedings. This means that only claims with a high probability of success would be pursued, but measuring such success is itself difficult due to the ambiguous standard of liability for directors.[6] Indeed, empirical evidence shows that successful wrongful trading claims are few and the ability of the provision to act as a deterrent to wrongful trading is questionable.[7]

Yet despite the many limitations of the provision, a simpler reason for the scarcity of claims is that the motivation to engage in wrongful trading is not as strong as initially believed. Where a jurisdiction provides an attractive restructuring option for directors, the incentive to engage in wrongful trading diminishes considerably. What is necessary is the ability for the director to remain in control of the company when it is restructured. As noted above, a director is faced with three options when his company becomes financially distressed. The interest of the director as this time is the preservation of his job. Particularly for directors that have a close, personal attachment to their companies, there is a great reluctance to give up control of the company and lose their life's work. Thus, the incentive to engage in wrongful trading to the detriment of the company's creditors manifests. However, where there is a restructuring option available that leaves control with the director, it is a much more attractive option for the director to restructure the company than to continue trading.

In the UK, administration is not an appealing option for directors because control is lost to the administrator. However, business practice has evolved to create restructuring options such as pre-pack administration and schemes of arrangement that provide what administration does not. Such options allow directors to negotiate with creditors for a restructuring, under an agreement that control of the company is left in the hands of the director. Given the availability of these attractive restructuring options, it stands to reason that section 214 claims are rare because the incentive to engage in wrongful trading is no longer present.

Conclusion

The UK government has made recommendations for section 214 to be reformed.[8] Improvements include expanding standing rights and introducing the ability to assign rights to wrongful trading claims to third parties.[9] Yet these reforms are unlikely to increase the amount of wrongful trading claims in the UK because a stronger mechanism has been introduced into the insolvency regime that supplants the role of section 214. For a company that is in financial distress, the underlying interest of the director is the preservation of his job. Thus a restructuring option that preserves control of the company with the director is a much more effective mechanism of aligning the director's interests with the interests of the company's creditors. The rise in popularity of pre-packs and schemes of arrangement marks a shift of the UK insolvency regime towards a more debtor-friendly system. Mechanisms such as the wrongful trading rule were designed for creditor-friendly systems, and this shift means that provisions such as section 214 will only become increasingly obsolete.

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Can the government do more to protect individuals from counterfeit goods?

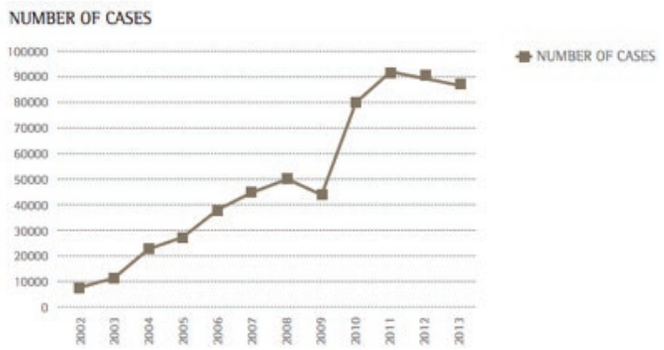
Making, advertising, selling and distributing counterfeit items has become increasingly popular in recent years, raising questions around the effectiveness of the law regarding these goods. Although the Sale of Goods Act 1971 and the Fraud Act 2006 provide some protection to individuals, is the law providing adequate consumer protection and can it shield businesses and the UK economy against loss?

Cheap prices and high demand have made counterfeit goods increasingly popular. Individuals who cannot afford expensive designer items often seek out cheaper alternatives, knowingly purchasing replica products as substitutes.

Alternatively, some consumers innocently purchase cheap, counterfeit items, often online. The skillful work of counterfeiters in copying major designs means that it has become increasingly difficult to differentiate between a genuine product and a forged item. The scale of this problem is considerable with some estimates suggesting that UK consumers spend at least £90 million every year on a variety of imitation products.[1] Counterfeit goods are not limited to designer clothing and shoes, or even pirated DVDs. Easy duplication of coins and notes has also led to more counterfeit money in circulation. Indeed, there are replica versions of most products in the UK.

Perhaps most troublingly, this problem only seems to be worsening, as counterfeit products are increasingly sold online. Online sales of household goods, for instance, climbed from 37% to 44%, a rise of 7%, from 2012 to 2015, exacerbating the potential for exposure to poor quality and dangerous products.[2] Like all counterfeit goods, these products are characterised by bad quality components and poor design. While it may be merely disappointing to receive a substandard imitation designer handbag, however, low quality, illegitimate electrical items such as hair straighteners, blow dryers and food processors are not subject to the same vigorous safety checks as genuine products. Therefore, these products pose real health and safety risks to the public. Allergic reactions, electrocution, and overheating, which can lead to fires and severe burns, put homes and lives at immediate risk. Around half of all domestic fires in Great Britain arise as a result of electrical problems (with the majority caused by electrical products), at an estimated cost of £1 billion.[3] There has also been an increase in online sales for other departments from 2012 to 2015; a 4% increase in buying other electrical items including cameras and a 5% increase in buying medicine online.[4] But are consumers aware of the direct effect of these products and should they be illicit?

Buying counterfeit goods is not only dangerous to individuals; however, it is also harming the UK economy and small and medium-sized enterprises (SMEs). The European Union (EU) estimates that fake goods cost the UK economy £30 million and 14,800 jobs.[5] The UK government estimates that it loses £1.3 billion in unpaid taxes from the sale of fake goods.[6] Indeed, the mounting scale of the problem and its impact on the British economy is apparent in recent statistics on the importation of counterfeit goods. The UK Border Force reported that it detained over 1.6 million Intellectual Property Rights (IPR) infringing items with a value, based on retail cost of the genuine equivalent, in excess of £56 million.[7] The graph below represents the amount of counterfeit goods detained in the EU by the customs office. From 2009 to 2010, the amount of illegal goods entering the EU has doubled from 4000 to 8000. In 2013, the Office for Harmonisation of the Internal Market reported that national customs authorities had opened almost 87,000 cases, resulting in the detention of nearly 36 million articles, compared with 7,553 in 2002.



Imitation goods are, at their heart, violations of IPR and the government has taken practical steps to address this problem. In 2013/14, border officials detained 21,494 consignments of IPR-infringing goods at the UK border.[9] In addition, the UK Police Intellectual Property Crime Unit (PIPCU) is currently investigating IP crime that has been worth over £28 million since September 2013.[10] The coalition and conservative governments have also made significant legal changes in this area. The Hargreaves Review of Intellectual Property Rights 2011 was commissioned by the government in response to concerns that the current intellectual property framework was not sufficiently well designed to promote innovation and growth in the UK economy.[11] This review resulted in the creation of the Intellectual Property Act 2014, which amended the Copyright, Design and Patent Act 1988. The new legislation sought to create a significant deterrent effect against the deliberate copying of intellectual property by introducing criminal sanctions to better protect the IPR of UK businesses, both in the UK and abroad.[12] The Minister for Intellectual Property, Lord Younger, highlighted the economic importance of these measures when he said 'continued investment in intellectual property is vital to all businesses, as it contributes £16 billion to the UK economy each year. It is essential that we continue to work hard to create the right environment for them to flourish so we can benefit from their creative designs, inventions and ideas'.[13]

The Act created new powers, which enable the UK to implement the Unified Patent Court agreement, a focal part of implementing a single patent across the EU. The government

predicted that it would lead to savings of up to £40 million per year for UK Businesses.[14] The Intellectual Property Act 2014 provides new protection for designers by introducing online services to aid businesses to better manage their intellectual property. Another key aspect of the new legislation is its expansion of the existing Patent Opinions Service. This is designed to give businesses involved in potential patent litigation an impartial view on the strength of their case on a wide range of issues. In 2009, UK businesses invested over £15 billion in design.[15] The Act aims to protect this valuable industry and deter those who intentionally copy UK registered designs.

Although the Act received Royal Assent on 14th May 2014, it is yet to be fully implemented. Since the legislation has come into existence, it has reduced the level of fake goods being sold, but only very slightly. The maximum penalty for production, possession and reselling of counterfeit goods is up to 10 years imprisonment or an unlimited fine. This should be sufficient enough to deter those involved with counterfeit goods. According to the Ministry of Justice, 456 people were found guilty of offences under the Trade Mark Act (TMA) 1994 and 61 under the Copyright, Designs and Patents Act (CDPA) 1988 during 2014, compared with 469 and 100 in the previous year.[16]

Not all counterfeit goods are produced in the UK. Many are imported from other countries. New methods of product delivery such as 'drop-shipping,' allow producers of such items to deliver counterfeit goods to each consumer rather than the main buyer of the stock. This development makes it difficult to determine legal responsibility for imported goods, as ownership is hard to establish. 'Drop-shipping' also protects the main buyer of the items, as one would not be caught holding possession of the goods themselves as they are delivered to the consumer directly from the producer (as opposed to being delivered to the buyer, for them to deliver to the customer). This method leads to difficultly for the consumer, as they are unaware who is to be held accountable for the counterfeit goods.

These statistics seem to suggest that intellectual property crimes of counterfeiting are gradually decreasing, as the statute now provides more comprehensive protection. However, it is yet to constitute an impenetrable shield against the risks to the UK economy and consumer safety posed by counterfeit goods.

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The Consumer Rights Act 2015 – Changing existing consumer law

The Consumer Rights Act 2015 (CRA 2015)[1] is a significant piece of consumer law legislation. The Act came into force on 1st October 2015 amending the majority of legislation relating to consumer rights. The CRA 2015 not only rectified existing laws, but also introduced new provisions affecting businesses and unfair terms.

The CRA 2015 is split into three parts; each of them applies solely to the contracts between consumers and traders. Part one affects consumer contracts for goods, digital contents and services; Part two deals with unfair terms; and Part three covers miscellaneous and general provisions.

The purpose of the newly enacted legislation was to simplify and clarify existing laws. Its primary effect is to consolidate the principle consumer rights into one single Act. The Act rectifies previous legislation only partially, the earlier provisions not mentioned by it remain in force. Consequently, the Act functions as a new piece of legislation alongside previous Acts instead of merely replacing them. Furthermore, the CRA 2015 affects only contracts formed after the 1st of October 2015.

Introduction

Chapter 1 both clarifies the issue of application of the Act and adopts existing terminology introduced earlier by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.[2] A 'trader' is defined as "a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf."[3] Accordingly, 'consumer' means "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession."[4]

The emphasis on the above terminology shows that the Act is mostly concerned with the interactions between businesses and consumers. However, although the Act was designed to consolidate and update existing laws, it does not contain all of the provisions relating to traders. Therefore, for instance, the right to cancellation in "distance contracts" remains in force under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, however, there are relatively few provisions outside the scope of the CRA 2015.

Goods, Supply of Services and Digital Content

Under the CRA 2015 'goods' are defined as "any tangible moveable items, but that includes water, gas and electricity if and only they are put up for supply in a limited volume or set quantity."[5] Section 3(2) of the Act lists which contracts related to goods are covered by the provisions of Chapter 2. According to the above section, if a contract is a sales contract; a contract for the hire of goods; a hire-purchase agreement or a contract for the transfer of goods, it remains covered by the Act. Additionally, the Act lists contracts to which it does not apply.

Under the CRA 2015 contracts to supply goods will have certain implied terms, which largely follow previous legislation. Section 14 of the Act introduces a new implied term concerning compliance goods with a model seen or examined. It is particularly significant that under section 31, liability arising under any of the implied terms cannot be restricted or excluded.

The key change introduced by the CRA 2015 concerns remedies in consumer contracts. The Act implements amendments to the notion of the right to reject, giving consumers whose goods are within a breach of the statutory implied terms tiered remedies. These are the right to reject within 30 days, the right to repair or replacement, the right to a price reduction or a final right to reject. The right to reject

within 30 days replaced the existing 'reasonable period'. The notion of a final right to reject introduced by the Act applies only after one attempt at repair or replacement by the trader.

It is worth noting that the rights introduced by the CRA 2015 are additional to existing rights to damages or any other remedy in common law.

Chapter 4 of the CRA 2015 concerns services. It has a significant impact on financial services firms. As the Act applies to all business to consumer contracts, financial services firms entering into them have to adhere to certain provisions introduced by the legislation. Therefore, financial services defined now as 'traders' will be obliged to deliver the new remedies if statutory rights under a services contract are not met. Under sections 54 to 56 of the CRA 2015, consumers are eligible for statutory remedies, such as Repeat Performance and Price Reduction. The price reduction is available in circumstances where repeat performance is impossible or the trader has failed to re-perform.

Consumers purchasing digital content now have statutory rights, introduced for the first time by the CRA 2015. The Act provides information about the regulation of the supply of digital content, providing that the digital content must meet the same quality standards as required for goods and services. The supply of digital goods is regulated if it is supplied for either a price or for free with goods and services which the consumer has paid for. Before the Act, the protection of digital content sold on tangible goods (e.g. CDs) was much greater than that sold on intangible goods. Thus its aim is to address this inconsistency by extending the certainty of the consumer laws.

Unfair Terms

The CRA is one of the most important pieces of legislation in consumer law since the Unfair Contract Terms Act 1977 (UCTA 1977).[6] Part 2 is entirely dedicated to the notion of the unfair terms, amending and consolidating existing laws related to business and consumers. It replaces the unfair terms in the Consumer Contracts Regulations 1999 (UTCCR 1999)[7] by better protecting consumers' rights. Although, the Act mostly consolidates the existing laws, it introduces some significant changes.

The major change is replacing the UCTA 1977 'reasonableness' test with the UTCCR 1999 'fairness' test in all business to consumer contracts. The test provided by Regulation 5 in the UCCTR 1999 can now be found under Clause 63(4) of the CRA 2015. The wording remains the same with the exception of the phrase 'under the contract' (clause 63(6)) which has been removed. While the test for fairness mirrors the one set out in the UTCCR 1999, the CRA 2015 amends it by excluding it from the 'relevant terms.' These terms concern the main subject matter of the contract or the price and they do not fall into the scope of the 'fairness' test provided that they are transparent and prominent. The additional 'prominence' requirement set out by section 64(4) ensures that the main subject matter terms and price have to be presented in such a way that the average consumer would be aware of their existence.

Like earlier legislation, it applies to consumer contracts, but now with the addition of consumer notices. The rules apply to both negotiated and standard term contracts. The newly enacted legislation is now a leading authority in the notion of unfair terms in regards to business and consumers. It not only repealed the UTCCR 1999 but also set aside the 'reasonableness' test from the UCTA 1977, replacing it with the 'Fairness' assessment. Moreover, the CRA 2015 introduces three terms to the indicative and non-exhaustive list of terms, which may be regarded as unfair. The so-called 'grey list' can be found under Schedule 2 of the CRA 2015.

Conclusions

The main purpose of enacting the CRA 2015 was to simplify consumer law and make it easier to understand as the biggest objection against the old law was the complexity and lack of clarity. In order to find the relevant provision, a consumer had to refer to multiple statutes. The CRA 2015 consolidates existing acts, both amending and replacing them.

Firstly, it extends the level of certainty in the area of consumer law. It aims to make consumers more confident and comfortable with claiming their rights. With the Act being broadly discussed in the media and guides released on governmental websites, it is likely to succeed and increase customer awareness. In my opinion, the new provisions of the Act are being visibly displayed as an addition to existing retail business policies. Additionally, store staff are now required to be familiar with the provisions concerning rejection of faulty goods. It is definitely a step towards clarifying existing laws and familiarizing consumers with their rights. Alternative Dispute Resolution, which earlier functioned only in selected sectors, is now available to all businesses. Now, disputes which cannot be settled directly with the consumer, can be addressed to the

Ombudsmen. However, it is worth noting that only businesses which are required by the legislation to offer Alternative Dispute Resolution are bound to use them.

As the CRA 2015 brings significant change into existing consumer law it will definitely impact the rights of consumers. However, as it only applies to contracts signed before 1st of October 2015, it is hard to say now how it works in practice. Certainly, any way to clarify the law which relates strictly to all ordinary citizens, is a good attempt to make people confident with using it to execute their claims. The introduction of the wider availability of Alternative Dispute Resolution is another good way to simplify the procedures and cut costs by avoiding the courts. Additionally, under the CRA 2015, courts are now under a duty to consider the fairness of a term even without the party's claim. It is a great step forward to make the law consumer friendly and to actually fulfill the aim of protecting them in business to consumer dealings.

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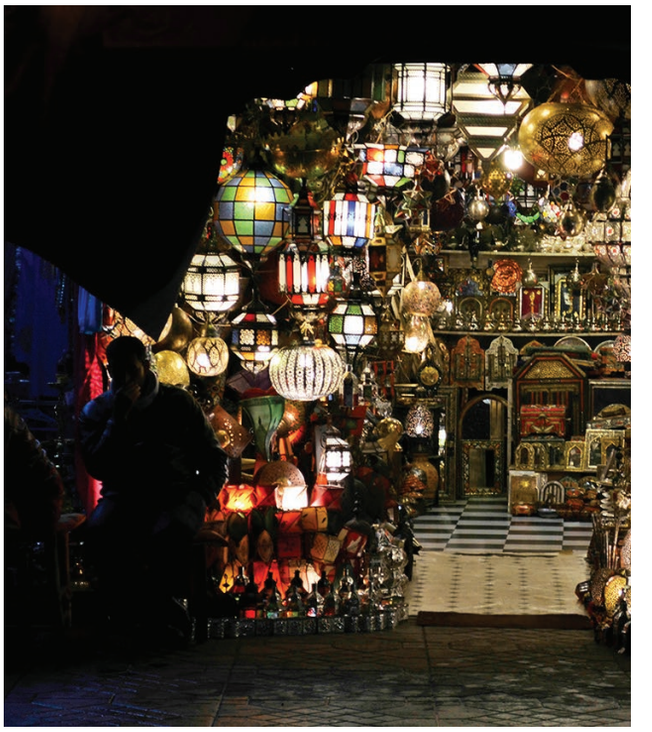

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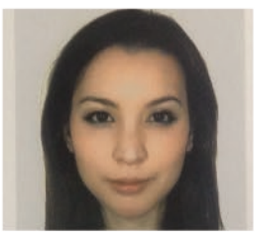

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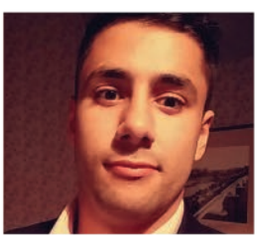

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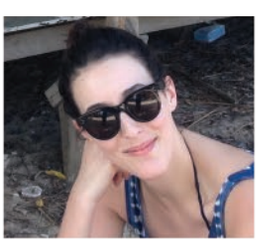

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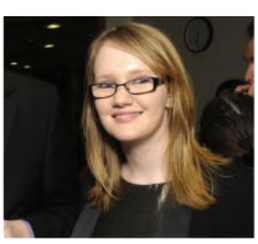

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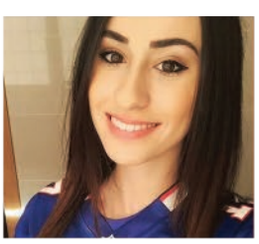

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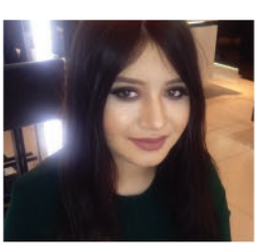

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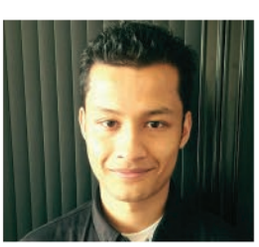

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