Across the EUniverse

A SIMPLE TOOL TO ENHANCE OUR COMMON UNDERSTANDING OF EU LAW

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Editorial

If we didn't have the EU we'd have to build it.

What is it that concerns so many in the Brussels bubble with the rise of the so called populist parties in many EU member states? It can't be that a large segment of the population have exercised their democratic rights, as we are all democracies.

It can't be that there is a single force building against the EU as the populist movement is a very broad church encompassing everything of the Calvinism of withdrawal from the Euro to the Catholicism of daily gripes.

There is a right to be concerned at a certain degree of ignorance and inexperience of many of these new political movements in the ways of politics and governance. There is inexperience not only at the national level but even more so at the EU level where the governance structures are inherently complex. But experience comes with doing and these movements will be doing and will be learning and will be engaged.

It seems to the editors of Across that the main concern among the 'elite' comes down to the need to change. Change is never easy. And change and decision making in the EU is difficult given the fact that Malta has a vote that is equal to Germany on many constitutional and structural issues.

But what sort of change is being asked for? Are the changes so inherently fundamental such as to undermine the EU or are they something else. Take Italy for example. It seems that the calls are not so much for a withdrawal from the Euro but an end to austerity. There is also a strong call for better burden sharing among member states in relation to the migration crisis. Hungary does not call for an end to the EU but for more restrictions on the movement of peoples into the EU and a greater recognition of Europe's Christian culture. The situation in Poland is a little more complex and concerns the concept of the rule of law, something which is of concern also in Bulgaria and Romania. Each populist movement in each member states has different colours and different demands

Overall, and except for Brexit, these calls for change are not about undermining the four basic freedoms of the free movement of people, capital, services and goods. There is no complaint about the setting of health and safety standards at the EU level, at ensuring that standards are equal across the EU, that roaming charges have been cut down, that the EU should have a single border (even if there is debate about how open or closed that border should be). There are no calls for the ending of the Single Market. This is because EU citizens welcome the benefits that the Single Market has brought.

The EU Single Market is the bedrock of today's Europe. There is still strong support for it across the continent. If we didn't have it we would need to build it.

Added to this strong support for the Single Market is the recognition that, more and more the EU must stand alone in a changing world and be a beacon for the rule of law both within the domestic market and in the international sphere. This will require change. And once again we must work out what the changes must be. But this time round we must not make the excuse of the need to change the governance rules (a new Lisbon Treaty or an EU Constitution) prior to the working out of effective policies that reflect the new political equilibrium among the EU's 500 million citizens. Rather than work out what rules should govern the Euro or a single banking market we have spent too much of this century looking at our constitutional navel. We must work towards solutions that we can be comfortable with, not treaties which look good on paper.

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What's App in Europe

Will the EU get a completed Banking Union?

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Over the past weeks broad agreement seems to be emerging on the creation of a Banking Union within the EU. First Italy and France and then France and Germany seem to now agree on the way forward. The EU has been building the banking union since the 2008 financial crisis. The first two pillars are already in place and include the Single (Bank) Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). What is left to complete is how to deal with non-performing loans, investing in sovereign bonds (Italian banks buy Italian bonds only) and a European deposit insurance scheme (EDIS). Steps on these issues have already been taken at the national level but difference give rise to an unlevel playing field.
What will happen to UK banks and financial institutions remains to be seen.

And will there be a common Eurozone Budget?

There is some confusion over what was agreed when the French and the German cabinets met in a bi-lateral meeting in Meseberg Castle (outside Berlin) in mid-June. The plan is to combine national funds, income from a financial transaction tax and European funds to build a budget which would be administered by the Commission. There was some doubt as to whether there would be a single finance minister for the Eurozone and what the role of that person would be. It is clear that the budget would not be large and would be dedicated to structural support for Eurozone economies. The two leaders left many details vague saying that they did not want to anticipate what might be agreed between the leaders of all the Eurozone states.

Brexit

Brussels is getting more and more frustrated with the lack of clarity from the UK on how it wants to withdraw from the Union and what future relationship it wants with the EU. The EU has set out its red lines which include no cherry picking of the Single Market and no border in Ireland. Internecine wars in the UK Conservative party (and to a lesser degree in the Labour party) have left the UK without a clear position. There are two consequences: i) the EU goes on about its own business and is trying, for example, to complete the banking union or deal with migration) and ii) there is no mood for any form of compromise with the UK to adopt rules to keep, for example, the City of London within the single market. At this stage it looks very like the hardest of hard Brexits and a reinforced border in Ireland.

Macedonia

It is easy to dismiss the agreement between Greece and the Former Yugoslav Republic of Macedonia as a very small step in the complex politics of the Balkans and the eastern Mediterranean. Two issues need to be emphasised. The EU appears to be learning from its mistakes. The EU allowed Cyprus to join the EU despite the requirement that it would solve its domestic impasse between Greeks and Turks on the island before doing so. A solution to this impasse seems as far away as ever. Secondly, words, and in particular names, are important. People identify with names and the willingness to share a name cannot be underestimated. Let us hope that the parliaments and peoples of the two countries are able to follow the courage of their leaders.

Can Salvini be successful in Brussels?

There is an opening in Brussels to address the migration issue differently from the past and thus Salvini can have a strong role in shaping the new policy that most agree needs to be forged. So over the summer Salvini is likely to be seen as one who is doing most to shape this new policy. However the reason that there is an openness is the understanding that many other countries have reached their immigration carrying capacity and so something must be done anyway. The real test of Salvini will be whether he can solve migration without blowing up Schengen, the agreement that allows EU citizens to travel between countries without controls and checks.

Where Salvini is less likely to be successful is in relation to the Euro. The new Italian government wants the EU to shift from an austerity programme to one of expansion. The problem is that there is very little money to do this and to the extent that any money is available, it is clear that Italy does not have it. So overall Salvini is likely to get a mixed report at the end of the year.

The Reform of the Common Agricultural Policy

The EU's CAP has come a long way. When it was first established the EU was a net food importer. Agriculture was underfinanced and undereducated. Farmers were leaving the land in droves prospects looked bad. Today, the EU is still the biggest importer of food but it is also the biggest exporter. We bring in grains and oilseeds and commodities and we export high value cheeses and wines and spirits and delicacies of all sorts. The CAP achieved all of this by subsidising production and innovation. Since 1992 the CAP has been moving away from the subsidisation of production to the subsidisation of farmers. We had to stop subsidising production because we were producing too much and we didn't know what to do with it. However, the slow changeover from production to subsidising farmers (it has taken 20 years) has not addressed some of the big problems facing food production in the EU today.

Farmer subsidies are still linked to land rather than to need. This means that today about 80% of the subsidies go to 20% of the farmers. The next test is to work how the 80% farmers who are more in need of support (the 20% tend to be efficient farmers on good land) should get it if the objective criterion of land is abandoned as the benchmark for payments. The second bit problem facing EU agriculture is climate change. Land use is both a carbon sink and a source of carbon and carbon gas equivalents. The bovine meat and dairy industries, long the backbone of agricultural production in many member states are significant contributors of methane which has four time more heating effect in the atmosphere than carbon dioxide.

In June the Commission came forward with proposals for the reform of the CAP for the period 2021 to 2027. Some attempts are being made to try and redistribute the farmer subsidies away from the larger farmers to the smaller farmers. The is a proposal to cap the total payments any one farmer can receive. The attempts to address climate change are less obvious. Work on cataloguing the impact of land use, land use change and forestry on climate change seems to be going on in parallel without any clear idea of how these changes could impact the CAP.

The Commission proposal is just the kick off. Now the Council and the Parliament will have their say. Possible compromises between all the different interests will not become apparent until early 2019.

The challenges of the GDPR

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Every day, over 250 million European citizens use the Internet. While online, users share amounts of personal data, such as their first and last name, home address, ID card number, credit/debit card number and health information. In particular, 52% of Italians say they do so to access a generic service, while 25%, the highest percentage of the EU, does so to get a service adapted to their needs and 14% to receive targeted offers (poll of the European Commission dated 24 May 2018, on the eve of "GDPR Day"). The European Commission underlined that 8 out of 10 Italians believe they do not have complete control over their personal data, while 6 out of 10 say they do not trust companies that operate online. Scandals like Cambridge Analytica brought the privacy matter even more under the spotlight. From now on users/citizens will benefit from new and greater **rights** (i.e. right to oblivion): if the individual realizes that his/her personal information is used incorrectly, he / she can contact the DPO and exercise the rights.

On the business front, on the one hand, for many large organizations that have long become aware of the value that personal data have in the digital economy, a complex process of general adjustment to the Regulation ended last May 25th - even if further measures to be adopted will be specified in the pending decree of harmonization - on the other hand, many public entities have not still appointed a DPO and many private companies are still away from the full compliance.

This article looks at the new EU Regulation known as the General Data Protection Regulation which aims to address the challenges that this new on-line reality creates for both the regulator, for citizens and for business.

25 May 2018, the "Christmas" of Privacy (or the "Privacy Day")

On 25 May 2018 EU Regulation 2016/679 (General Data Protection Regulation - the famous "**GDPR**") on the protection of individuals with regard to the processing of personal data entered into force. This law replaces the old directive 95/46/EC and it is now both in force and binding in all EU countries. Therefore, 25 May 2018 represents, somehow, the "Christmas" of Privacy. This date marks, in fact, the crucial moment, on the one hand, for a conscious and safer use of data (real information assets) and, on the other hand, for the consolidation and future development of the Single Digital Market of the European Union. This article will provide a **general** and **critical overview** of the regulatory framework outlined by the GDPR, focusing on the main obligations for both data controllers and processors, either public or private, in order to ensure adequate compliance with the new European rules.

It is important to bear in mind that, in order to clarify some aspects of the new legislation and to facilitate companies to be prepared for GDPR, the Article 29 Data Protection Working Party (a Body composed of the representatives of the national Authorities of the 28 EU Member States) has issued, a series of Guidelines (i.e. DPO, One-Stop-Shop, Transparency, etc.). The Italian Data Protection Authority, led by Antonello Soro, did the same by releasing FAQs on DPO, both in public and private sector, and useful indications to address the GDPR-compliance objective.

The Regulation applies to controllers and processors who, both from within and outside the borders of the European Union (i) process data within their own establishment located in the territory of the Union; (ii) offer goods, services - even free of charge - or conduct behavior monitoring activities for interested parties within the EU. The **application** of European data protection standards to a third country entity *vis-à-vis* residents of the European Union can be designated as a real territorial extension of the applicability of the law. This requirement of compliance with the data protection criteria can be brought closer to compliance with certain product requirements (for example, safety standards) deriving from non-European imports. What emerges is a sort of "sticky regulation", with a territorial extension of European data protection law.

A data controller operating in different Member States will be subject to the jurisdiction of a single Data Protection Authority depending on where its main establishment is located. This Authority will act as a "**One-stop shop**" in order to supervise all the processing activities that could have an impact on consumers within the EU borders. However, a complex triangulation is expected to develop between the national Authorities of the States in which the controller operates: the Guidelines of the Article 29 Working Party have tried to guide the criteria for the definition of a single Supervisory Authority. Finally, the possibility to come within the competence of the European Data Protection Supervisor, as a second step, is also provided.

Among the various innovations, the GDPR introduced the figure of the **Data Protection Officer** (**DPO**). The appointment of this figure is mandatory for: public administrations, data controllers or data processors who require regular and systematic monitoring of large-scale data subjects; controllers and processors who deal with large categories of data or personal data relating to criminal convictions and offenses.

The DPO will: monitor correct compliance with the GDPR, perform the risk analysis, make sure that the protection and safety systems are adequate and up-to-date, guarantee the application of privacy measures by design and by default, cooperate with the Data Protection Authority and act as the contact point, keep records of the processing activities carried out under his own responsibility. The GDPR provides the possibility of entrusting DPO's responsibility to either company employees or, externally, by means of a service contract. The Guidelines of the Article 29 Working Group made it clear that, in principle, the DPO should be based in the European Union and should report directly to the highest levels of corporate management.

The fundamental principles of **privacy by design and privacy by default**, together with the principle of **accountability**, are enshrined in the GDPR: whenever there is the development of a new technology, product or service, all the necessary measures have to be taken to ensure full compliance with the data protection obligations set out in the Regulation. The data controllers, therefore, are required to develop only technologies that, from the very beginning of their design (by design) and by default (by default), will give adequate implementation to the principles of data protection, including the minimization, necessity and proportionality of the processing.

Data Privacy Impact Assessment (**DPIA**) introduces the obligation to carry out, especially in the case of use of new technologies, a preventive assessment of the impacts that may derive from processing with a high level of risk for the rights and freedoms of the subjects concerned. According to the Article 29 Working Group, DPIA is a process to build and to demonstrate compliance. The GDPR identifies some non-exhaustive cases in which the DPIA is mandatory *ex lege*.

The Data Controller must put in place technical and organizational measures that guarantee an adequate level of security with respect to the risks that may arise from the data processing. Moreover, in case of violation (for example: destruction, loss, unauthorized modification or disclosure or illegal access to data), the data controller will have the obligation, according to predetermined timing – i.e. maximum 72 hours, save appropriate justification of the delay - to notify in detail the **data breach** to the competent national Authority and, in some cases, to the interested party. Notification may be avoided where the breach does not pose a high risk with respect to the rights and freedoms of individuals.

The Regulation introduces a wide range of administrative **sanctions**. The main news, however, is represented by the duration, entity and severity of some of these penalties, which may be imposed: (i) from a maximum of EUR 10 million or alternatively up to 2% of annual global turnover, under certain circumstances, or (ii) up to a maximum of EUR 20 million or up to 4% of the Group annual global turnover, in the most serious cases. The possible application of criminal sanctions are left to the discretion of each Member State. In this regard, it should be noted that in Italy the European Delegation Law gave mandate to the Government to issue a legislative decree to adapt the national legislation to the new EU Regulation framework. The Decree, which has introduced criminal sanctions, in addition to the administrative ones, is expected to be approved by the Italian Parliament by August 21st and then adopted by the Government.

European Data Protection Supervisor, Giovanni Buttarelli, stated that relating to illicit filing, undue profiling, hidden monitoring or the subtle processing of data on online political platforms, these are important problems and further observations are expected by the Italian Data Protection Authority. It seems, therefore, that the implications behind the data and their protection deepens even in the political scenario. In the last FAQs, the Italian Data Protection Authority explained that also political parties have to appoint a DPO. Next European elections in 2019 are likely to be characterized also by a stronger awareness on how data are processed and for which purpose.

As a matter of fact, Privacy has just moved from the role of 'Cinderella' of Law, to the frontier and center of gravity of Law applied to the New Technologies given the enormous commercial developments linked to Big Data. An informed, aware and organized use of data can represent: a source of development, an opportunity for new businesses, a chance to implement technological progress even in sectors not, yet, fully explored.

The Dignity Act

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On July 2, 2018, the Cabinet issued the so-called "Dignity Act" (in Italian Decreto Dignità) which is the first initiative of the new Government on employment law. In detail, the amendments to the existing employment law concern the rules to be applied to fixed term contracts set out in Legislative Decree no 81 of 2015 and the indemnities granted in case of unlawful dismissal of an employee hired under the so called "increasing protection" system regulated by Legislative Decree no 23 of 2015. Lgs. n. 23/2015.

These amendments were published on the Official Gazette on July 13, 2018 and enter into forces on 14 July 2018.

As the Government decided to set out the new rules by means of an emergency law, the decree will be effective for 60 days and subject to a confirmation process held by the Houses of Parliament. As a result it could be confirmed – with or without amendments – or, rejected. If rejected it will be no longer effective.

The purpose of this note is to draw your attention, in particular, to the new rules in relation to fixed term contracts - that are the subject matter of this comment – as they will immediately affect the use of such contract by many employers.

Fixed term employment agreement

The new rules provide for the decrease of the maximum period available for such contract and the reintroduction, at least in part, of the need to specify in the contract the reasons why a fixed term of duration was agreed.

Term

As a consequence of the new rules, the maximum extent of a fixed term contract will be **24 months** instead of the former limit of 36-months.

The possibility to extend the contract for further 12 months upon authorization released by the Local Labor Office (as set forth by Section 19, par. 3, Legislative Decree no 81 of 2015) will still be available.

Reasons justifying the inclusion of a term

The Dignity Act reintroduced the necessity that - in certain circumstances - the provision of a fixed term in a contract must be based on the **existence of a number of predetermined reasons**.

In particular, the justifying reasons shall be:

(a) temporary and objective reasons for temporary needs
(b) need to replace, on a temporary basis, other employees;
(c) reasons related to temporary, significant and not programmable increases of the ordinary activity.

From a first analysis of the new justifying reasons, it is clear that they are very strict and they limit the possibility to identify, in concrete, any occasion in which a justification in line with the law is effectively foreseeable.

As to the third possible reason under letter (c), the provision according to which the need has to be not only "*related to temporary and significant increases*" but also "*not programmable*" seems to exclude the possibility to manage temporary but predictable needs (for example, in the retail sector, the peak of sales during Christmas period), limiting such possibility only to situations that are not predictable (for example in case of unexpected orders).

Besides, assess when an increase is "significant" is not straightforward and, as such, will trigger disputes and litigation.

When the justifying reason has to be included?

The Dignity Act provides the possibility to enter into a first contract "*without any supporting reason*" (e.g. without the need to indicate a supporting reason) with a maximum duration of 12 months (including also extensions). This means that an employee - without any former fixed term contract with the same employer – may be hired with a fixed term contract "*without any supporting reason*":

– for a period of 12 months;
– for a shorter period (for example, 6 months), with the possibility to extend "*without any supporting reason*" until a maximum of 12 months (including the former contract).

The indication of the justifying reasons will be necessary in the following cases:

- the hiring for a period exceeding 12 months (up to the maximum duration of 24 months);
- the execution of a new fixed term contract to carry out the duties of the same contractual level and legal category as the previous contract (i.e. renewal of the contract), regardless of the duration of the new contract and of the former ones). Therefore, **if the company enters into a fixed term contract with an employee - who, previously, was employed under a fixed term contract – envisaging duties of the same contractual level and legal category as the previous contract, the new contract must always set out the supporting reason;**
- the extension of a fixed term contract without any supporting reason, in which the total duration of the relationship exceeds 12 months.

Extension of a fixed term contract

The Dignity Act has also modified the provisions related to extensions, reducing their number from 5 to 4.

The Dignity Act provides that the extensions may be granted:

- freely (e.g. without the necessity to indicate one of the justifying reasons provided by the Dignity Act) if the relationship, including the extension, lasts up to 12 months;
- in all the other cases, only in the presence of the abovementioned justifying reasons.

Fixed term costs

The rules are generally aimed at discouraging the use of fixed term contracts: indeed, the Dignity Act provides an increase of the social contribution provided by Section 2, paragraph 28 of the Law no. 92/2012 (1,4% of the taxable income for social contribution), **equal to 0.5 percentage points for each "*renewal*"**, applied to any subsequent fixed term contract with the same employee.

It seems that this change in the rules is not applicable to the extensions of the same fixed term contract but just to the renewal.

Time limit for challenging the term

The Dignity Act also provides an extension of the period after which the possibility to challenge the inclusion of the term in the contract is time-barred: the employee who wants to challenge the lawfulness of the term included in the contract has to give notice of this intention within 180 days - and not 120 days as before - from the termination of the relevant contract.

Implementation

The new provisions apply:

- to those contracts that will be executed after the entry into force of the Dignity Act;
- to the renewals and extensions of the contracts currently in place effective after the entry into force of the Dignity Act.

The **effects** of the new provisions are **immediate** and must be respected in case of extensions of contracts already in force. As a consequence:

- if the relationship is entered for 24 months or more, it cannot be extended beyond the current deadline: it has to be converted into an open-ended contract or the relationship has to be terminated;
- if the relationship is entered for 12 months or more (but for less than 24 months), it can be extended if: (i) the new maximum duration of the relationship (including all the extensions) is in total up to 24 months; (ii) the justifying reasons – in line with the law - are clearly stated in the contract; (iii) the contract has not been already extended for 4 times.

Is the EU becoming more unilateralist?

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This article is based on a presentation made to the Montreal/Statale University 2018 Summer School in bilateral trade relations between the EU and North America, given on 28 May in Montreal, Canada.

Trade of meat into the EU

To be able to export meat to the EU, the European Union has to be certain that the meat meets EU internal or single market health and safety standards.
What does the EU do to ensure that meat from third countries meets EU standards?

First. The EU must have confidence in the capacity of the third country competent authority to implement health and safety policies. This means in turn that the competent authority has credible systems of inspections and controls in respect of every step along the supply chain from the source of ova and semen through elevation, feeding, medicines, animal health, transport, slaughter, slaughter house conditions, animal welfare, cutting packaging and transport again.

The standards that have to be met along the chain are EU standards or their equivalence. The country or regions of the country must be free from certain diseases.

For a competent authority to show it is competent it must be a member of the OIE, the Organisation of Animal Health. It must meet that organisation's standards and reporting obligations. It must have a public health programme to monitor not only the elements mentioned above but also residues of veterinary medicines, pesticides and contaminants. Each year the competent authority must submit its system to the EU for review and prior approval.

If the country meets these tests then the EU will send veterinary inspectors (The Health and Food Audits and Analysis Office) out to the country to audit the system and then, if the country is in line with these requirements, to authorise specific slaughterhouses for export of meat to the EU.

The point I want to emphasise is that the EU evaluates and controls the quality of law and its enforcement in third countries. And this is done in an exacting and thorough manner before a good (in this case meat) even approaches the EU border. In other words, before there is trade.

I do not want to go too much into what then happens at the EU border. There are documentary, identification and physical checks. Imports can only take place through approved ports. The EU's General Food Law (Regulation 178/2002) requires traceability which in essence means that the meat must be traceable back to the field and the animal and the ova and the semen.

Supermarkets don't seem to think that this externalisation of internal EU law is inappropriate. On the basis of the needs of their consumers, they impose private standards and require certification to show compliance with the standards.

The Single Market

The system of pre-controls and border controls for the import of meat is an external aspect of the EU's Single Market. External policies are a mere reflection of the internal policies. The EU has policies to ensure that meat coming from Greece or Germany or Malta meets EU standards and it has policies to ensure that third country meat does so to.

General Food Law says that EU food law is based on Science. The EU has two famous food policies that are clearly not based on science. These are the bans on natural hormones in meat production and on certain uses of genetically modified organisms (GMOs). But the EU has internal bans and thus, despite the WTO and the OIE and the Codex Alimentarious, the EU toughs it out on the international level and does not in any way allow international rules to undermine internal policies.

The Single Market is expanding daily. The more we have internal policies the more we have, and will have, external policing policies as we have for food.

Border taxes and Climate Change

The EU has one of the most extensive and costly CO2 reduction policies. There are very strong forces pushing the EU to exceed its commitments under the Paris Agreement. The EU is currently designing the implementation of the policy for the period 2020 to 2030 period. It is clear that the policy will become significantly more expensive in the first half of the next decade.

Current policies which lessen the financial cost on some industries so that they won't relocate production to countries with a lighter environmental cost are being reconsidered and there is a growing consensus, in business, in the Member States, with NGOs, that some sort of Border Tax on imports is necessary to equalise the costs of production of goods in the EU and in third countries and ensure a level playing field for EU industry.

The EU is built on law and not on the traditional power of the sovereign. The EU cannot adopt law unless underlying law allows it. So, in implementing a Climate adjustment policy at the border the EU will want to comply with WTO law.

To be compatible with WTO law a border tax must not discriminate. This in turn that CO2 cost born by the imported good cannot exceed the CO2 cost of the equivalent domestic good.

To implement an equivalence of costs system so as to avoid a charge of discrimination in WTO law, the EU will have to measure not only the quality of the climate policy in a third country but to work out the exact cost of that policy per tonne of steel or aluminium or kilo of beef imported into the EU.

This will require a system of evaluations, controls, monitoring and inspections at least as sophisticated as the system already in place for the health and safety of meat.

As a direct consequence of the Single Market the EU will develop an external policy to enforce standards. This external consequence of the Single Market is distinct from the what might be called traditional trade or environmental policy. Whatever approach the EU takes in further COP climate negotiations or in trade negotiations with Canada or the United States, it will be constrained by the external consequences of its internal policies.

There is now a growing strand of unilateralism in EU trade policy.

The EU is committed to the multilateral trade framework and in particular the WTO. It has completely changed its agricultural policy so as to allow it to be a *demandeur* in future WTO negotiations. Essentially the EU wants the WTO to adopt the Singapore issues and make government procurement part of the single undertaking. But we know the multilateral process is frozen.

The EU has concluded or is currently negotiating trade agreements with most countries around the world. As Canada knows because of CETA, these agreements go behind the border to address technical barriers to trade and social and labour and environmental standards embracing the idea of sustainable development. They are incorporating, more or less, many of the Singapore ideas.

The EU is imposing many of its standards and values on third countries by means of these agreements. The EU can do so because of the attractiveness of the EU market. Most third countries view the prize of access to the world's richest and in some senses biggest market as worth the burden of agreeing to include these new issues.

But to the extent that these FTAs do not include clear provisions on labour, on the environment on social or sustainable goals the EU is moving towards a Unilateral trade policy that will impose these standards anyway.

The Single Market is not under threat

You will all be aware of Brexit and the struggle the UK has in deciding to be in or out of the EU's Single Market. But if you look closely at the other so called Eurosceptic forces in the EU, Orban in Hungary, Law and Justice in Poland, Cinque Stelle and La Lega, Le Pen, AfD, none are calling for a roll back of the single market. There are two core complaints: immigration and austerity. But there is no real challenge within the remaining 27 Member States to the four internal market freedoms, to the setting of most economic and product standards at the EU level, at the increasing power of the EU to set social, labour and environmental standards. This internal cohesion will be reflected in the unilateral implementation of internal policies abroad.

Enforcement of Trade and Sustainable Development chapters in EU FTAs

In addition to the external aspects of the Single Market, the EU is taking steps on the implementation and enforcement of the Trade and Sustainable Development Chapters of existing FTAs.

You will see that the key focus of this relatively recent debate is on enforcement and sanctions. This approach goes beyond the external consequences of Single Market policies which is the core basis of EU unilateralism. But again, it shows that the EU is more willing to put in place policies which control and evaluate third countries policies and will act on the basis of those evaluations.

The future of EU unilateralism

Unilateralism is an expression of power. The EU has never been comfortable with the idea of power. Even if the EU is currently exploring, gingerly, the creation of a European Defence Force within a Common Security and Defence Policy and a European Defence Agency the history of Europe will keep these traditional power initiatives limited.

The EU is, however, becoming more comfortable with and enforcing certain values in a changing world. As Merkel said in May 2018: 'We [Europeans] must take out fate in our own hands'. 'We know we must fight for our future on our own, for our destiny as Europeans'. As the US seems to be abandoning certain values the EU sees the benefits and the importance of its own values. More and more there is the collective will to ensure that the internal, Single Market, expression of our values and ideas is reflected in our external actions.

I chose Health and Safety and Climate Change as the two examples on which to base my understanding of the future of EU trade policy because they show unity of purpose across society. EU citizens firmly believe that the EU has the best health and safety set of rules and policies and will stop TTIP even on the ignorant suspicion that chlorinated chicken might enter the EU. The same is true of Climate change. Business and NGOs are united on the need for stronger and more effective internal and external control policies. These external consequences flow from domestic political agreement.

What does this mean for the EU's North Atlantic trade policy

Besides the problem of the inability of the WTO to adopt rules to reflect the needs of the world's largest trading nations, we are currently faced with the possibly more radical problem of the deliberate undermining of the WTO's functioning. Multilateralism is not in good shape.

Are FTAs in much better shape? CETA got through. But TTIP did not. It seems that if the US does not impose duties on Steel and Aluminium, the quid pro quo will only be a very light tariff-only Free Trade Agreement between the EU and the US and not a revised comprehensive CETA style FTA. Policy makers in Brussels and Washington might see the advantages but most politicians don't seem to have the fight to push it through.

So, from an EU perspective that leaves us with unilateralism. Overall, I don't think this need necessarily be bad for Canada.

Equivalence

I have not mentioned equivalence. Despite extensive provisions on equivalence in the WTO and in FTAs, many countries, and certainly the EU, do not seem to consider that recognition of equivalence in practice and in relation to a specific standard (whether health and safety or social or environmental) is possible.

I see this changing. Particularly in trade between countries with similar economic development and societal values and expectations. In other words, between the EU and Canada.

I see equivalence more problematic in relation to the EU and the United States. It is not just GMOs and Hormones. Canada and the EU differ on these issues too. It is more that there is a lack of confidence among EU citizens that the US shares the same values with the EU in the same way that Canada does.

Whatever the accuracy of this perception it is a common perception and perceptions count.

The EU way to simplify legislation: the revision of Directive 2008/118/EC on excise duty

Will the EU get a completed Single Market?

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The harmonization of excise duties is a precondition for completing the EU Single Market. Directive 2008/118/EC[1] and related EU Law seek to harmonise the general conditions for the changing excise duty.

The REFIT[2] initiative on general arrangements for excise duty, announced in the Commission's Work Programme for 2018, intends to further harmonise and simplify provisions for the export, import and transit of goods subject to excise, inter alia through automation of movement control procedures. Disparities in the application of these rules can result in tax-induced movements of goods, loss of revenue and fraud. So far, EU legislation regulates Member States' excise duties for a defined number of types of alcohol, tobacco and energy products in terms of the structure of duties and minimum rates. Furthermore, it creates the conditions for electronic control of the movement of these types of excise goods[3].

Main objects of Directive 2008/118/EC

Directive 2008/118/EC specifies which goods are subject to it by referring to specific directives, in particular to: Council Directive 92/83/EEC, on the harmonization of the structures of excise duties on alcohol and alcoholic beverages; Council Directive 92/84/EEC on the approximation of the rates of excise duty on alcohol and alcoholic beverages; Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity; Council Directive 2011/64/EU on structure and rates of excise duty applied to manufactured tobacco.

The Directive also covers the structure of excise duty categories and minimum excise duty rates for alcohol and alcoholic beverages, manufactured tobacco, and energy products and electricity. In the first part of the Directive the definition of concepts such as "authorised warehousekeeper" and "tax warehouse" are set out.

[1] Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, In EUOJ L 9, 14.1.2009

[2] The REFIT platform was set up by the May 2015 Better Regulation Communication to advice the Commission on how to make EU regulation more efficient and effective while reducing burden and without undermining policy objectives

[3] The rates levied still vary considerable between EU Member States. On certain other types of products not covered by European legislation some Member States levy further excise duties. In addition to excise duties, Member States also impose their VAT rates on the products

In addition, it establishes the time and place of chargeability, who is liable, the effect of destruction and irretrievable loss, irregularities, refunds, and remissions and exemptions.

Chapters III and IV of the Directive set out the major change concerning the holding and movement of excise goods under duty suspension with the Excise Movements and Control System (EMCS) that monitors movements of excise goods under excise duty suspension between authorised and registered locations electronically.

In particular Chapter IV added two new types of economic operators associated with a location: the “registered consignee”, a type of economic operator that can transport goods under excise duty suspension from a place of importation.

The Directive moreover covers duty paid movements. There are still paper based and represent 1% to 3% of all intra-EU movements of excise duty goods.

Institutional Activities for simplification (REFIT)

1. The Commission

In Annex 2 of its Work Programme 2017 the European Commission announced the revision of Directive 2008/118/EC to align and ensure the uniform application of EU legislation (including impact assessment) as a REFIT initiative.

Consequently, the Commission published in April 2017 a Report[4] on the implementation and evaluation of the Directive in which it concludes that the arrangements for the holding and movement of excise goods under excise duty suspension (Chapter III and IV of the Directive) work effectively and efficiently in the frame of a Union-wide action . However, the Report finds that the coordination of excise and customs procedure is hampered by “significant levels of legal uncertainty and it sees “considerable scope for improving the coordination of technical procedures”. Furthermore, whilst recognising that the introduction of EMCS [5] for the supervision of movement under duty suspension helps to improve the collection of excise duty, the Commission sees “a number of possible legal and technical changes that would further reduce evasion and fraud”.

[4] COM(2017)184

[5] Excise Movement and Control System. The EMCS is a computerised system for monitoring the movement of excise goods under duty suspension in the EU. It records in real time the movement of alcohol, tobacco and energy products for which excise duties have still to be paid.

Concerning the application of the articles of the Directive relating to the "movement and taxation of excise goods after release for consumption"[6], the current arrangements for moving goods already released for consumption to another Member State are considered "inefficient, insufficient to provide for the free movement of excise goods and potentially open to tax evasion and fraud".

The Commission follow-up actions concern:

- Possible legal and technical improvements to the treatment of irregularities and the handling of claims by Member State;
- To explore a "less burdensome regime than either EMCS or the SAAD (administrative documents) system for the movement of excise goods of low fiscal risk, such as denatured alcohol, flavourings, perfumes and certain energy products";
- Examine "legal and technical changes to the arrangements used for the supervision of the import, export and transit of excise goods";
- Analyse "the partial or full automation of the duty-paid B2B arrangements with a view to reducing administrative burden and compliance costs on traders and Member States";
- Check how to improve the arrangements for the cross-border distance selling of excise goods".

2. The European Parliament

- EP Resolution of 3 April 2014 on the Annual Report 2012 on the Protection of the EU's Financial Interests-Fight against fraud agencies

A section of this Resolution is dedicated to EMCS. The European Parliament noted that increased abuse of the EMCS by criminal groups had been observed by enforcement agencies; it believed that physical controls of goods being transported under the EMCS was lacking; that it underlined the benefits of increased inspections and demanded a higher degree of cooperation with tax authorities; Parliament also expressed concern that the Member States had implemented their own EMCS systems based on (too) broadly defined requirements.

- Written questions by MEPs

Numerous questions were addressed to the Commission on specific types of excise duties – or on the exemption from these. Some questions addressed the general arrangements for excise duty, which are the object of Directive

[6] Articles 32-44

2008/118/EC. In particular, a written question by Anna Hedh (Socialist and Democrats Group, Sweden) pointed to the substantial differences in the process of alcoholic beverages in countries such as Denmark, Estonia, Finland, Germany and Sweden, which originate mainly from differences in the levels of excise duty and the provisions of Council Directive 2008/118/EC set out minimum guide levels for how much alcohol individuals are allowed to buy and personally carry on driving across borders without paying excise duty in the country of entry. Hedh asked whether the indicative allowances were not very high, contributed to excise duty dumping between Member States, and therefore were worth focusing on more clearly in the revision of current Directive. Hedh also asked why the reduction in the allowances for cross-border private movement of alcoholic beverages is not already being considered as a policy option in the ongoing revision of the Directive.

The answer to this written question was given by Pierre Moscovici[7] on behalf of the Commission. The Commissioner explained that the guide levels in Article 32 of Directive 2008/118/EC should help the authorities to assess whether the quantity of excisable goods being moved within the EU is for the use of the private individual transporting those goods. He added that Member States may carry out checks on their territory to see whether private individuals carrying goods falling under Directive 2008/118/EC from another Member State are doing so within acceptable limits.

3. Council and European Council

At its meeting of 5 December 2017, the Council (ECOFIN) adopted its Conclusions on the Commission Report[8] on the implementation of directive 2008/118/EC and endorsed its report to the European Council on tax issues.

The Council Conclusions were preceded by discussions in which some of the national delegations initially had reservations against the draft Conclusions, that is also showing the level of detail considered and the reasoning that led to these conclusions, e.g. consideration of the intertwined workings of customs and excise.

In its Conclusions, the Council welcomed the Commission report and agreed that the current arrangements for the holding and movement of excise goods under Directive 20008/118/EC function effectively and efficiently, and in a way that could not be achieved without Union-wide action. However, concerning the arrangements for moving goods already released for consumption to another Member State, the Council noted that the Commission finds these arrangements

[7] Commissioner to the Economic and Financial Affairs, Taxation and Customs
[8] COM (2017) 184 of April 2017, see above.

inefficient, insufficient to provide for the free movements of excise goods, and potentially open to tax evasion and fraud. The Council therefore invited the Commission to further explore whether any improvements can be made in the area of the directive’s efficiency and effectiveness. This notably concerned B2B duty paid arrangements, especially in cases where it can be determined that these arrangements impose a substantial burden on businesses, particularly in the case of SMEs, and are not compatible with the objectives of the free movement of goods and the single market (e.g. excessive use of paper-based documents, variations between national requirements and lack of clear information about national procedures). Furthermore, the Council agreed that EMCS could be adapted to cover movements of excise goods under duty-paid arrangements, but held the position that an extension of EMCS could be justified after a careful cost/benefit analysis, taking into account the aim of maintaining reasonable costs for Member States, and in regard to the benefit of such extension.

The ECOFIN report of 5 December 2017 to the European Council on tax issues provides an overview of the state of play on the most important dossiers in the area of taxation. Its section on excise duties confirms the above-mentioned Council conclusions.

The European Council underlined on several occasions that the fight against tax fraud, evasion and avoidance remained a priority.

4. Court of Justice

On several occasions, the Court of Justice of the European Union has decided on aspects of EU Law on excise duties. Some of these decisions concerned the “General Arrangements for excise duty” in Directive 2008/118/EC.

Two cases are particularly relevant:

1. In Case C-409/14 the Court ruled, inter alia, that the concept of “customs suspensive procedure” laid down in Article 4(6) of Directive 2008/118/EC, must be interpreted as meaning that the placement of specific goods under a customs suspension procedure of arrangements cannot be challenged if the chapter of the Common Customs Tariff, which covers those goods, is correctly mentioned in their accompanying documents, but the specific subheading is incorrectly indicated. In such cases, Article 2(b) and Article 4(8) of the Directive must be interpreted as meaning that there has no importation of those goods, and that they are not excise goods.

2. In Case C-355/14 the Court ruled that Article 7(2) of the Council Directive 2008/118/EC must be interpreted as meaning that the sale of excise goods held by

an authorized warehouse keeper in a tax warehouse does not bring about their release for consumption until the time at which those goods are physically removed from that tax warehouse.

A new Proposal to amend Directive 92/83/EEC

In the light of these considerations the Commission put forward a proposal to amend Directive 92/83/EEC in May 2018[9].

As set out in the explanatory memorandum "several legal acts define the EU system for harmonized excise duties": Council Directive 2008/118/EC sets out the general arrangements for goods subject to excise duty, with particular emphasis on the production, storage and movement of excise goods between Member States. Energy products and electricity are covered by Directive 2003/96/EC and manufactured tobacco is covered by Directive 2011/64/EU.

Directive 92/83/EEC on the structure of excise duty on alcohol and alcoholic beverages sets out the common rules on the structure of excise duty and defines and classifies the different types of alcohol and alcoholic beverages, according to their characteristics, and provides a legal framework for reduced rates, exemptions and derogations in some sectors.

The explanatory memorandum argues that "The Directive has not kept pace with the challenges and the opportunities offered by new technologies and developments within alcohol industry". In a working document[10] the Commission underlines that some problems and inefficiencies have been identified causing possible distortions of the internal market. "The large variation in duty levels between Member States, which provides a strong incentive for tax evasion, and other weakness in the design of taxes necessitate the use of burdensome administrative procedures for both tax administrations and economic operators" and consequently "….these disproportionate administrative and compliance costs for economic operators restrict the participation of small and medium-size enterprises in intra-EU trade in alcohol and alcoholic beverages".

5. Council Working Party

A first Council Working Party on Tax Questions was held in Brussels in June 2018 to discuss the new proposal. The Member State delegates had a very generic exchange point of views.

[9]Proposal for a Council Directive amending Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, COM (2018) 334 final.
[10] Revision 2008/118/EC Horizontal Directive – CNAPA 22/03/2017

Conclusions

The REFIT process in this matter is very important and relevant for stakeholders and industry. Technical and legislative adjustments to the modernization in progress for alcohol, tobacco and electricity are numerous and sophisticated, so the European Commission, Parliament and Council must proceed toward texts which would satisfy the different needs coming from stakeholders.

A new methodology of work could be interesting and applicable in this REFIT case: a WG enlarged with the direct contributions deriving from agriculture, energy and environment Working Parties, a sort of WP enlarged and able to take advanced solutions.

Promoting inland waterway transport in the EU

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This Article is the first of a series of articles concerning inland waterway transport (hereinafter "***IWT***") in the EU. This introductory article focuses on the importance of implementing and further developing inland waterways transport in the EU.

IWT, together with road and rail, is one of the three main modes of land transport.

In Europe there are more than 200 inland ports, with more than 37,000 kilometres of waterways[11]. Half of Europe's population lives close to the coast or to an inland waterway. An important number of European industrial centres can be reached by inland navigation. The Rhine-Danube network alone, with a length of 14 360 km, represents nearly half of the inland waterways of international importance.

The advantages of inland waterway transport are numerous. IWT is a safe mode of transport with low costs, a lot of spare capacity, no congestion, low noise levels and low energy consumption and a low carbon footprint. Barges and pushed barges can transport more and heavier goods per distance unit (tkm) than any other type of land transport and has a significant role to play in reducing road and rail traffic.

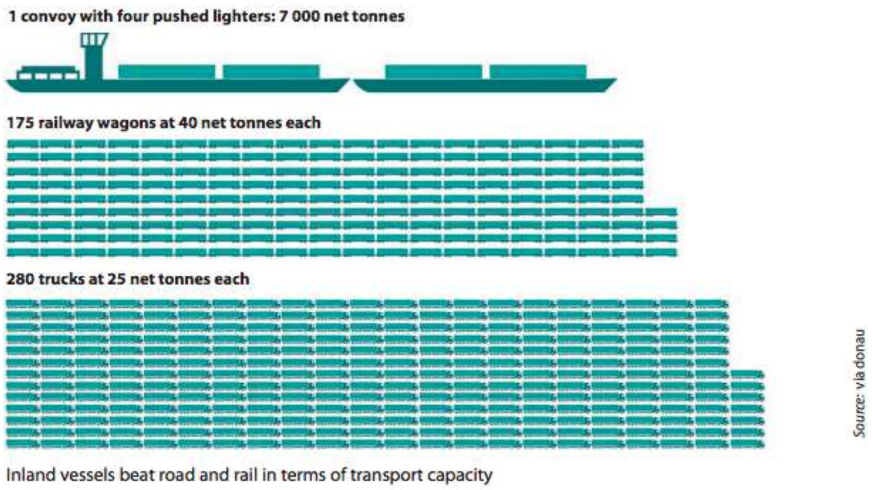

Figure 1 - Source ECA Special Report - Inland Waterway Transport in Europe

The cost of water transport is competitive and the unit cost decreases over long distances. As inland waterway transport is slower than road transport, it is

[11] See https://www.inlandports.eu/

commonly used for goods that do not require fast delivery times, such as metal ores, agricultural products, coke and refined petroleum products, coal and crude petroleum. In the last few years there has also been an increase in container transport, especially in the Rhine basin.

One of the long-term objectives of EU policy is to shift traffic from roads to more environmentally friendly transport modes, such as inland waterway transport, with the idea of helping to reduce pollution and increase transport safety. IWT is, in fact, a sustainable alternative to road, with a smaller carbon footprint and a significant reduction in air pollution. Some of Europe's largest seaports already use inland waterways to tackle increasing congestion and the lack of rail capacity (e.g. Rotterdam, Antwerp and Hamburg).

The European Commission aims to create more favourable conditions for the further development of the IWT, so as to encourage more companies to use this transport mode. In 2006, the European Commission adopted the NAIADES programme. The implementation of NAIADES is supported by the implementation platform PLATINA.

In 2013, the NAIADES programme was updated with the adoption of NAIADES II[12]. This programme was aimed at promoting inland navigation through: (i) new infrastructure, including filling-in missing links, clearing important bottlenecks and port development; (ii) innovation, including the review of the River Information Services; (iii) market development; (iv) environmental quality, through the reduction of vessel emissions; (v) a skilled workforce and quality jobs; and (vi) integration of IWT into the multimodal logistic chain.

The NAIADES II programme runs until 2020 and is to be implemented by the European Commission, the Member States and the industry itself.

The NAIADES project is supported by the PLATINA project. The PLATINA project has received €8.5 million in funding from the European Commission. This project was implemented in order to provide technical and organizational assistance, by ensuring active participation of key industrial stakeholders, associations and Member States administrations. The PLATINA project is also working on further develop the River Information Services (RIS), which is a modern traffic management system enhancing electronic data transfer between water and shore through in-advance and real-time exchange of information.

The European Commission helps funding and financing IWT development through different programmes, such as the Connecting Europe Facility, Horizon 2020, the European Fund for Strategic Investments and the Cohesion policy.

[12] COM (2013) 623 final of 10 September 2013, "Towards quality inland waterway transport – Naiades II"

The European Court of Auditors (hereinafter "***ECA***") has carried out an analysis of the work done so far by the EU. A Special Report[13] shows that the EU tried to implement certain strategies, aimed at eliminating infrastructure bottlenecks that should have been key for the development of inland navigation in Europe. The Report also shows that the goal of shifting traffic from roads and rail to inland waterway transport and improving navigability is yet to be achieved. ECA noted that, between 2001 and 2012, the modal share of inland waterway transport did not increase substantially, remaining at around 6%.

In order to address the difficulties encountered by the Commission in implementing IWT policy, the ECA concluded that, the European Commission and Member States should agree on specific and achievable objectives and precise milestones that should be aimed at eliminating bottlenecks on corridors within the framework of the Connecting Europe Facility. The efforts of the Commission should also take into consideration the TEN-T[14] objective of completing the core network by 2030, the availability of funds at EU and Member State levels and the political and environmental considerations in relation to building new (or upgrading existing) inland waterway infrastructures.

The ECA recommends that the Member States should prioritize IWT projects which are on the TEN-T corridors, rivers or river segments that provide the greatest and most immediate benefits for improving inland waterway transport.

However, none of the projects set quantitative targets to be achieved. Today it appears that the only document that has set quantitative targets for inland waterway transport is the "*Danube strategy*". The Danube Strategy, which obviously has a limited geographical scope, envisages increasing the cargo transport on the river by 20% in 2020 compared to 2010. This goal should be pursued by putting in place both national actions and cross-border co-ordination procedures, in order to respond to the challenges and re-establish optimal and safe navigation conditions.

The work carried until now and that must be carried out in the following years, by both the EU and the Member States is extremely important for an environmentally friendly development of the transport sector in Europe. All the

[13] European Court of Auditors, Special Report, *Inland Waterway Transport in Europe: no significant improvements in modal share and navigability conditions since 2001,* Luxembourg, 2015

[14] The Trans-European Transport Network (TEN-T) is a European Commission policy directed towards the implementation and development of a Europe-wide network of roads, railway lines, inland waterways, maritime shipping routes, ports, airports and rail-road terminals. The 2013 TEN-T Guidelines were adopted in the form of a Regulation and therefore are binding for the Member States. In order to prioritize waterways within the TEN-T network, the new Connecting Europe Facility and TEN-T guidelines of 2013 established a core and a comprehensive network, which Member States have a legal obligation to complete by 2030 and by 2050 respectively. However, for inland waterways there is no difference between the core and the comprehensive network, which does not help with prioritization within the waterways.

stakeholders should be interested and partake in the development of this transport mode.

In this article we hope we have provided the framework for EU policy on inland waterway transport. In subsequent articles we will look at a number of the legal issues that arise, in particular, concerning the particularities of river transport contracts and the litigation of river transport contracts.

Banks, default and public confidence: waiting for a decision from the new Government

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The Italian banking world is currently going through a period of deep-rooted change.

Last year, certain Italian banks took centre stage in the media, namely: Monte Paschi di Siena, a bank having a long tradition and operating throughout the whole of Italy, which has often been refinanced to avoid default; four small banks from Central Italy, previously put into liquidation; two banks from North-East Italy, i.e. Popolare di Vicenza and Veneto Banca, put into liquidation in June 2017, in respect of which Italy awaits a decision of the parliament.

Popolare di Vicenza and Veneto Banca are medium-sized banks deeply rooted in a part of Italy that is economically crucial for the country as a whole. The Veneto has been the powerhouse of the Italian economy in the last decade.

From the point of view of the delicate links between politics and finance, the most sensitive aspects that still need to be resolved concern the responsibility attributable to the Bank of Italy and Consob. In other words, has banking supervision been adequate in the last decade? The question raises concern about the whole Italian financial world with a broader impact on the economy and politics in general.

The Italian and European financial community expects quick and straight answers. The value of the confidence that European citizens may have in the financial world is a pre-condition for the proper development of that world itself. If undue harm is found to have been caused to savers and shareholders, they must obtain adequate compensation; on the other hand, if there is liability on the part of supervisory authorities (i.e. especially, the Bank of Italy and Consob), should there be some sort of punishment?

As noted, the Italian banking world is in turmoil: will there be calm after storm? There is a great deal of interest currently shown by media and operators, primarily because the "populist" Government, based on the combination of the Lega and the Movimento 5 Stelle, has only been in office for a short while and its economic policy strategy is still unclear.

The election promises of the two majority parties made a provision for, on the one hand, accurate determination of liability and, on the other, a legal mechanism of compensation for damage caused to savers and shareholders. So, will a move be made from words to deeds?

Assuming that the new government finds the political strength to design a mechanism of compensation in favour of savers and shareholders, the issues to be addressed can be summarised as follows:

i) Which body will be responsible for determining breach of applicable Italian banking and laws and regulations to compensate savers and shareholders? The most widely held hypothesis is that this task should be attributed to a body of mediation and conciliation with an independent authority, e.g. the National Anticorruption Authority or the Arbitrator for Financial Disputes. This means a new entity must be added to the already complex legal scenario involving banks and financial intermediaries in Italy.

ii) For the purposes of compensation for damage, will protection only be afforded to those having purchased shares in the last 10 years, i.e. within the limitation period for contractual damage? In this case, there would be no compensation for those having purchased shares earlier than the 10 years, now almost worthless. However, from criminal proceedings it is emerging that responsibility for the defaults of the banks is due to the actions of top managers. So is there no compensation for those left with nothing as a result of someone having negligently caused the banks to fail?

iii) Finally, how will the State be able to allocate the sums awarded as compensation without being liable for State aid? Will such sums be public money or monies made available by the banking system itself?

European developments might have a role to play. In the context of the negotiations underway on the banking and capital markets union, which will have a further direct impact not only on banks but also on undertakings, one proposal that is making headway relates to the intent to turn the ESM (European Stability Mechanism) into a mechanism for granting loans for a bank recapitalisation fund (backstop).

While supporting such a role, one should however start from the principle that risk sharing and risk reduction are two sides of the same coin, rather than choosing a sequential procedure aimed at first reducing and only later sharing risk, based on a reduction of bank risk arising from progressive clearance of bad debts and other unspecified criteria.

Falling outside the scope of the proposal is the introduction of a common insurance for bank deposits (CIBD) and the creation of a recapitalisation fund.

These are just some of the issues to be tackled in the short term.

If the new government really wants to overcome the deadlock in which the Italian financial system finds itself, considerable political will shall be required, with strong attention also being given to technical and legal aspects.

This is a very delicate step, and only once it has been completed we will be able to tell whether the banking scene may be stabilised and whether the citizens' confidence may support a growth trend that necessarily involves strengthening the financial system as a whole.

Is it possible to keep the benefits of the Iran nuclear deal even with US sanctions?

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Amending the EU's Blocking Regulation to counter the re-imposition of sanctions by the United States is ineffective and does not ensure that EU enterprises will invest in, or do business with, Iran. The problem this note shows is that more effective measures to protect individual EU enterprises doing business with Iran may not be available. It also shows that action in international law would be difficult and its outcome could weaken the international legal order.

The Iran nuclear deal

The Government of the United States of America has withdrawn from the 2015 Iran nuclear agreement known as the Joint Comprehensive Plan of Action (JCPOA). On 6 August next, it will re-impose one tranche of the sanctions that were lifted pursuant to that deal. This date marks the expiry of a 90 day wind-down period that started on 8 May 2018. The remaining sanctions will be re-imposed after a wind-down period of 180 days which ends on 4 November 2018.

The EU has not withdrawn from the deal and has, along with the signatories other than the US, (China, France, Russia, United Kingdom and Germany), reaffirmed its commitment to its full implementation. The EU will not therefore re-impose the economic sanctions against Iran that were lifted on the signing of the deal. The EU considers the agreement part of public international law as it was endorsed by the UN Security Council.

Iran signed on to the deal to limit its production and use of nuclear materials and to subject itself to inspections by the International Atomic Energy Agency so as to have the sanctions lifted and to allow enterprises and financial institutions to invest and do business in Iran so as to stimulate the local economy.

Many consider JCPOA the most comprehensive nuclear containment agreement ever concluded as it has strict compliance criteria, a dispute settlement provision and the automatic re-instatement of sanctions should Iran not comply with its terms. It is also seen as a success for the very idea of sanctions. Iran's economy had become isolated and starved of investment and had suffered as a consequence.

The chilling effect of US sanctions

Even though remaining signatories including Iran have declared their intention to stick to the terms of JCPOA the re-imposition of sanctions by the United States causes severe problems for EU entities wishing to take advantage of the lifting of sanctions by doing business in Iran.

The United States considers that their sanctions also apply to non-US persons (so called “secondary sanctions”). Therefore, a non-US person (or entity), acting in breach of the US sanctions against Iran, could be sanctioned under US law for such a breach just like a US entity. In addition, secondary sanctions may be enforced if the sanctioned party has business in the US and/or against US persons doing business with the sanctioned person/entity. Examples of the application of US secondary sanctions include the December 2012 fining of HSBC bank of US$ 1.9b, the fining of Standard Chartered of US$ 327m and in July 2014, the fining of BNP Paribas of US$ 8.97b.

Given that many EU enterprises doing business with Iran have investments in, or at a minimum, have business relations with, the US they can be subject to US sanctions. This will most likely cause these entities to stop doing business with Iran (unless, in an unlikely scenario, they obtain a waiver from the US government).

In this scenario how can the EU and the other signatories maintain their side of the bargain.

The EU Blocking Regulation

EU Regulation 2271/96 from November 1996 is a law protecting EU persons and entities from the negative effects of the extra-territorial application of legislation adopted by a third country. The law was originally adopted in connection with the US sanctions (the embargo) against Cuba and sanctions against Iran and Libya.

In May 2018 the European Commission, under delegated powers adopted in 2014, started the process to extend the application of the Blocking Regulation to the re-imposed US sanctions against Iran. Unless the European Parliament or the Council block the changes, they will come into effect on 6 August, the day that the first tranche of re-imposed sanctions come into effect.

Article 5 provides of the Blocking Regulation provides that no EU person (or entity) shall comply with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the annex of the Blocking Regulation, unless specifically authorized by EU authorities according a procedure set out in the Regulation.

There is no recorded case implementing the Regulation or the imposition of fines on EU companies on the basis of the Regulation. This is mainly because the Blocking Regulation is enforced by means of penalties on the EU companies which have complied, including by the payment of fines, with US sanctions.

The Regulation creates a double jeopardy for EU enterprises. Non-compliance with US sanctions results in exposure to possible sanctions under US law. Compliance with US sanctions results in exposure to possible EU sanctions. There is no indication that the EU is taking steps to address this simple but dramatic problem.

Article 6 of the Regulation does provide that an EU enterprise which suffers loss due to the application of the amended sanctions can recover damages in an EU court. Theoretically this could balance out fines imposed by the US but this would require being able to bring the US before a national court, a very difficult task due to the doctrine of sovereign immunity.

Possible damages actions could also be taken against private parties refusing, for example, to finance an export operation from the EU to Iran, or to provide parts for the goods to be exported. However, the level of proofs required for the action to be successful is high and the requirement to mitigate damages, in other words, to use the same resources to export elsewhere, mean that damages, even if available, would be very low to non-existent.

The net practical effect is that EU enterprises are forced to choose between the Iranian and the US market and, more problematically, if the choice is Iran, it will have to ensure that none of its suppliers or financing institutions are themselves active in the US market. Achieving this level of isolation in today's global market is difficult indeed. And because of this stark reality, EU enterprises are likely to choose not to do business with Iran.

Given the severe limitations of the Blocking Regulation, it can be asked why the EU is taking the trouble to include the re-imposed sanctions within its ambit. If the Blocking Regulation does not provide an effective legal remedy, the reason must be political. The EU needs to be seen to be doing something to support the JCPOA in these difficult times. But is that enough? And does the EU have the obligation to take more effective action?

The EU's obligations in International law

The EU has always been a staunch defender of a rules-based system not only in international trade but in international affairs more generally. This is reflected, for example, in the EU's support for the WTO, the Paris Agreement on Climate Change, agreements on biodiversity and the Aarhus Convention. In recent months it is seen clearly in the EU's promotion of the importance of the maintenance of the JCPOA.

This political engagement is reflected in law. Article 3(5) of the Treaty of the European Union provides that in its relations with the wider world the EU shall contribute to the strict observance and development of international law. This same Article makes reference to the EU contributing to free and fair trade. In many cases the EU Court of Justice has affirmed the obligation of the Union to comply with international law.

Does the obligation to comply with and promote the development of international law have consequences for the Union? It can be argued that the EU must take more effective steps to ensure that EU enterprises can benefit from the terms of the JCPOA so that the EU keeps its side of the agreement in the lifting of sanctions. In other words, in addition to lifting the sanctions the EU must create an environment in which EU enterprises are likely to engage with Iran. The failure to do so is not a full implementation of the EU's obligations under the agreement.

Against this can be argued that the EU is faced with a situation of *force majeure,* something outside its control and for which it cannot be held responsible. In that sense the EU has done all that it can: it has reaffirmed its commitment to the agreement and it has taken steps, even if they are very likely to be ineffective, to create the environment in the EU to allow EU enterprises to trade with Iran in the absence of sanctions.

The sanctions to be lifted under the nuclear deal are the UN Security Council sanctions which have in turn been suspended by UN Security Council resolution 2231(2015). Thus, it can be argued that the US, in re-imposing the sanctions, is itself acting in breach of international law and the *de facto* application of those sanctions to EU enterprises is both a breach of the JCPOA itself and out of line with the resolutions of the UN Security Council. It can also be argued that the EU has an ongoing obligation to ensure the application of resolution 2231(2015) in its territory meaning that it must do something effective against secondary US sanctions.

Enforcing international law by EU enterprises

It can also be argued that the EU's political commitment to the development of international law and the legal obligation to comply with it have consequences in the internal market. In its 2015 judgement in Vereniging Mileudefensie the Court of Justice examined when the terms of international law can be relied on to review an act of secondary legislation. While it is well known that the Court is reluctant to recognise the direct effect of international law in the same way as EU law has direct effect in Member State law it found that there could be reliance on international law where 'the nature and broad logic' of that agreement did not preclude it and, secondly, the provisions at issue were, 'as regards their content, […] unconditional and sufficiently precise' (paragraph 54 of the judgement).

Are the terms of the JCPOA unconditional and sufficiently precise. It seems clear that the terms of the agreement are precise in that sanctions are lifted. Precision comes from the fact that sanctions are in place or they are not. Can it also be said that the terms of the agreement are unconditional. The content of the agreement is not conditional. Sanctions are lifted if Iran complies with its obligations to restrain nuclear development. It is clear that if Iran does not comply there are mechanisms, after the exhaustion of dispute settlement procedures, for the sanctions to snap back into place but that is a different type of conditionality which is outside the hands of the EU and enterprises doing business with Iran. The agreement is not conditional in that if both sides comply with its terms EU enterprises can rely on its terms to safely do business in Iran.

If an EU enterprise damaged by the application of US sanctions imposed in breach of the Blocking Regulation were to challenge the legality of that Regulation, what outcome could be expected. Depending on the application to it, he Court of Justice has competence either to annul the Regulation or grant damages against the EU institutions. Annulling the Regulation does not get the EU enterprise very far. To get damages the applicant would have to show that the EU erred grievously in not adopting sufficiently effective public law. This is a high test to be met particularly in the light of Article 6 of the Regulation.

What should the EU do?

The JCPOA requires the EU to remove sanctions so as to allow EU enterprises to do business with Iran. The combination of the re-imposition of sanctions by the US and the effects of the secondary nature of those sanctions means that any EU enterprise with business relations with the US is still subject to sanctions. It can be argued that the Blocking Regulation is not effective and therefore does not ensure that the EU has done all that it can to lift the UN sanctions in compliance with the agreement.

The question raised in this note whether the EU can take better steps to protect the interests of EU enterprises and better comply with the obligations under the JCPOA.

The exposure of individual EU enterprises to US sanctions are likely to arise in a number different ways:

i) a US enterprise refuses to do business with an EU enterprise doing business with Iran;
ii) an EU enterprise refuses to do business with an EU enterprise doing business with Iran as that enterprise might be exposed to US sanctions as it also does business with the US;
iii) an EU enterprise doing business in Iran is sanctioned in the US.

It is not clear how the EU can address the first situation. If the EU were to introduce measures to address it, the US enterprise would simply find other justifications for not doing business with the EU enterprise in question. Nor is it clear how to address the second situation. Again, were measures introduced, the EU enterprise would find ways to avoid doing business other than the Iran issue. In relation to both the first and the second situation it could also be argued that Article 6 already provides a remedy.

In theory, the EU could adopt measure to compensate EU enterprises sanctioned in the US but the many difficulties with such an idea make it unrealistic. Any compensatory measure would ultimately be a US fine on the EU which is neither politically or legally acceptable.

There do not appear to be new practical solutions for individual EU enterprises to the problem of the chilling effect of US secondary sanctions in domestic EU law. If there are no new measures available could the EU improve the Blocking Regulation to make it more effective? It is not clear how this could be done. Consideration could be given to lessening the burden of proof and the making available of punitive damages but these solutions would be complex to agree and implement.

The absence of effective means to protect individual EU enterprises trading with Iran from secondary US sanctions at the domestic level does not address possible remedies in international law. At first sight the US sanctions cannot be based on the UN sanctions as these are now subject to UN Security Council resolution 2231(2015) which has not been abrogated or changed.

Thus the EU could take action to show that the re-imposed US sanctions are not in compliance resolution 2231(2015). However this takes time and the procedures to be followed are not clear. And even if the EU was to be successful there do not appear to be the means to enforce any ruling against the US. And there is possibly a worse result. The inability to enforce a possible ruling might be to weaken the very international law that the EU is bound to uphold and develop.

What has Iran done?

On 17 July 2018 Iran instituted proceedings against the United States before the International Court of Justice in the Hague in relation to the re-imposition of the sanctions. Iran argues that the re-impositions of sanctions breaches six articles of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the US signed in Teheran on 15 August 1955 and which entered into force on 16 June 1957.

Iran not only asks the Court to rule that the US is in breach of international law but seeks provisional measures to stop the US re-imposing sanctions on its own citizens and enterprises but in relation to the secondary application of the sanctions to non-US persons.

At first sight Iran seems to have strong arguments in its favour on the substance of its case. The application of provisional measures is more problematic. Enforcement of any ruling in Iran's favour even more so.

Conclusion

There do not appear to be readily available actions that the EU or EU enterprises can take to address the chilling effect of US secondary sanctions. Iran's action before the International Court of Justice may unlock the situation but it is unlikely to take effect in the short term.

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