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CONTENTS

JUSTICE & FUNDAMENTAL RIGHTS	2
Commission seeking expert help on justice and fundamental rights.....	2
Revision of the Insolvency Regulation – experts sought.....	2
Future EU funding Programmes to strengthen Justice and Rights – UK out	2
CIVIL JUSTICE	3
Common European Sales Law (contract)	3
Cross-border successions – adopted, without the UK.....	4
Brussels I regulation review update.....	5
CRIMINAL JUSTICE	5
Expansion of EU criminal law – the Bar’s response.....	5
Commission consultation on Protecting the EUs Financial Interests	5
Freezing and Confiscation of the proceeds of Crime.....	5
Safeguards for suspects and defendants in criminal proceedings.....	6
Victims Rights update	6
FUNDAMENTAL RIGHTS	7
The EU Charter of Fundamental Rights – an essential tool for UK practitioners	7
INTERNAL MARKET & CONSUMERS	7
Proposed ADR and ODR for Business to Consumer disputes	7
Third Country access to the EU’s Public Procurement market	8
EU FILES IMPACTING ON THE PROFESSION / ITS REGULATION.....	8
Proposals to modernize the EU public procurement rules	8
“Barrier Initiative” on auditors – possible impact on self-regulation.....	8
Review of Professional Qualifications Directive	9
Study on practical experience of EU lawyers’ regime for cross-border practice.....	9
COMPANY LAW	9
The future of EU Company Law – Consultation.....	9
MISCELLANEOUS	10
Enhancing the benefits of EU environmental policy.....	10
European Citizens initiative now live	10

¹ Sources available on request

To assist you in understanding Eurojargon terms, unavoidably used in this newsletter, please go to the Europa website plain language guide, which also links to a more detailed glossary: http://europa.eu/abc/eurojargon/index_en.htm

Bar Council position papers on EU matters are available on the Bar Council's website, under "consultations" or through the link from the Brussels office page: <http://www.barcouncil.org.uk/aboutthebarcouncil/BrusselsOffice/>

JUSTICE & FUNDAMENTAL RIGHTS

Commission seeking expert help on justice and fundamental rights

Planning ahead – The Commission is seeking to update and augment its lists of experts to advise it on its future work in the fields of justice and fundamental rights. That potentially covers everything from private international law, family, personal injury, all aspects of criminal law, increasingly consumer law, data protection, alternative dispute resolution, human rights and many other fields. Expertise in your own field, rather than knowledge of EU law as such, is what is needed, so anyone who may be interested in influencing future Commission output, and being paid to do so, should apply to be on this list. You have time to think about it and inform yourself further - the deadline for receipt of tenders, is some 2 years off, being 31 March 2014. See all documents at:

http://ec.europa.eu/justice/newsroom/contracts/2007_172522_en.htm

Revision of the Insolvency Regulation – experts sought

The Commission is seeking individuals to join a group of experts to advise it on the planned revision of Council Regulation (EC) 1346/2000 on insolvency proceedings (the "Insolvency Regulation"). If the Bar has strong views about what such a revision should achieve, then this is the best, early, opportunity to influence the work. The closing date for tenders is **26 April 2012**. Relevant Bar bodies have been notified directly, but anyone else who may be interested should also look at:

http://ec.europa.eu/justice/newsroom/contracts/2012-insolvency-group_en.htm

Future EU funding Programmes to strengthen Justice and Rights – UK out

Future EU programmes to provide funding for activities in the justice and fundamental rights fields should be simpler, and hopefully, more accessible. So why has the UK decided not to take part?

In *Brussels News 99 – 103*, I reported on the institutional preparations, and eventual adoption of regulations creating two new 5-year EU funding programmes to replace the current ones which end next year. The proposed programmes cover Justice, and separately Rights and Citizenship.

The Ministry of Justice (MoJ)'s end 2011 public consultation asking stakeholders whether the UK should sign up to the proposals reportedly met with a unanimous call for opt-in. Despite this, the MoJ has recently announced that the UK will not opt-in at this stage. Instead, it wants to take part in the negotiations with a view to a later opt in "if it were made clearer that the focus of the activities to be funded demonstrated that the programme truly added value and was worthwhile".

Whilst the UK choosing not to opt-in to certain other measures may be understandable (Succession (see below), Rome II, Matrimonial Property...as covered in earlier issues) this time the justification is rather less obvious. It also sends out a negative political message, both abroad and at home, particularly when interested UK bodies have called for the opposite. Moreover, if the UK stays out, then UK stakeholders will lose the possibility of securing EU funding for worthwhile justice-related projects involving training / publications / seminars etc. Indeed, certain otherwise eligible bodies may even lose access to part or all of their operational funding. Is the possible consequent narrowing of the debate in anyone's interests? Relevant documents, including the two new regulations, can be seen at:

http://ec.europa.eu/justice/newsroom/news/20111115_en.htm

CIVIL JUSTICE

Common European Sales Law (contract)

Readers will know of the decade-long debate on this file, leading to the adoption in October last year of the Commission proposal for a regulation creating the Common European Sales Law. Since my last update in *Brussels News 103*, there are further developments to report:

- CCBE Conference to give the lawyers' view:
The Italian Bar and the Council of Bars and Law Societies of Europe (CCBE) are jointly organising a conference in Rome on **11 April 2012** on "The proposed Common European Sales Law – the lawyers' view. It will cover general questions such as 'Do we need a CESL?', 'Can the CESL achieve what it sets out to do?' and 'The relationship with Rome I and the Vienna Convention'; as well as some specific provisions of the proposal. Fergus Randolph QC, long-standing member of the Bar's Working Group on the file, is among the speakers. The programme and other information can be seen at: http://www.ccbe.eu/fileadmin/user_upload/document/CESL_conference/EN_Rome_conference_on_CESL_-_Programme.pdf
- The Civil Law Working group in the Council is working on this file under the Danish Presidency. In mid-March, the Presidency produced a useful discussion paper, putting all options on the way forward, including those raised in the Commission's Green Paper of July 2011, back on the table.
- The EP's Legal Affairs committee (JURI), which hosted a hearing on the files on which I reported in *Brussels News 103*, will hold two workshops on the file, in May and June, respectively dealing with unfair contract terms, and remedies. I have secured an invitation for the Bar to speak on remedies. A wider hearing with national parliaments is also planned for the autumn.
- It is well known that the Commission and EP see this as a priority project, and indeed the career ambitions of several high-profile supporters are seen as inextricably interlinked. That said, there are signs that the Commission is starting to see that the full ambition of its October 2011 proposal may not be realized in a final adopted text. Different debates are taking place, on material scope, on legal form and many other issues, as well as on the substantive content.

- The Bar is developing a position paper to input into these various debates, as well as to respond to the MoJ consultation, which you will recall closes in late May.

Cross-border successions – adopted, without the UK

The EU is adopting a regulation which simplifies the identification of the law applicable to cross-border successions in the EU for countries where it applies. The UK is not among them. It is difficult to generalize on what this will mean for successions with a UK element, but they are unlikely to be straightforward.

Following 3 years of difficult negotiations, on Tuesday, 13 March 2012, the EP in Plenary adopted the text of this regulation, agreed with the Council, leaving only the requirement of formal Council adoption for it to become law. Against the weight of recent expectation (on which I reported in *Brussels News 101-3*), and despite the efforts made, sometimes behind the scenes, both within the European Parliament and in the Council, in the end the text is being adopted without the UK's participation. It seems that a veritable impasse arose towards the end of negotiations, whereby other Member States sought an undertaking from the UK that it would opt-in, before offering guarantees as regards possible challenges to life time gifts (clawback); whereas the UK insisted on seeing the full text before agreeing to opt-in.

So, where does that leave us? As between the participating Member States (so, not the UK, Ireland or Denmark) this regulation sets the private international law rules applicable to cross-border successions and also creates a European Certificate of Inheritance. As a result, future successions, whether dealing with immovable or moveable property, will be dealt with according to the law of only one country, usually the habitual residence of the deceased, unless they have chosen the law of their (EU) country of origin, where different. The new European Certificate of Succession will document the rights of beneficiaries, for use in any Member State, where for example, parts of the estate are located.

And what of successions involving UK citizens or UK property? There is no simple overview. The conflict rules of England & Wales will continue to be that succession to immovables is governed by the law of the state where the immovables are situated and succession to moveables by the law of the deceased's domicile at death. Sometimes this will produce the same result on applicable law as would the Regulation, sometimes not. The question of whether the deceased made a valid will, and if so, what law was chosen to apply to the estate, will also be key.

Members of the Chancery Bar are looking at the possible scenarios to consider the various ramifications. It may be that a change in the law in England and Wales, to reflect what is best in the regulation, could be considered in the future. There seems to be little appetite for a wholesale opt-in to the regulation itself anytime soon.

For the text of the regulation as agreed with the Council and adopted, so far only by the EP (Council adoption is now but a formality), see:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0068&language=EN&ring=A7-2012-0045>

Brussels I regulation review update

The Danish Council Presidency still seeking a compromise solution before the summer, but the issue of arbitration is making waves again.

I reported in *Brussels News* 101 – 103 on recent EP and Council activities relating to this Commission proposal dated 14 December 2010, for a recast regulation 44/2001 on recognition and enforcement of judgments in civil and commercial matters, into which the UK and Eire have opted. (Procedure reference COD(2010)0383). Long-standing readers will recall that members of the Bar have played a central role in the work of both the Commission and the EP on the file, over the years. Lately, it seems that the issue of the exclusion of arbitration is back at the top of the agenda in negotiations. The Bar would have preferred a total exclusion, but failing that, the solution in the Commission proposal is probably workable. We will have a better idea of what is likely to emerge after the next triologue meeting of the Commission, EP and Council, set for 24 April.

CRIMINAL JUSTICE

Expansion of EU criminal law – the Bar’s response

The Bar’s EU Law Committee has formed an ad hoc Working Group on EU criminal law, that is following developments on the files mentioned below, as well as many others, planned, or previously covered in *Brussels News*. One particular area of interest for the Bar is the expansion of the use of criminal sanctions for breaches of EU law (see *Brussels News* 103 for more detail), which mean that increasingly, practitioners are seeing criminal law points arise in cases in other practice areas e.g. environment, consumer law; financial services regulation (see, for example, coverage of the proposals on Market Abuse, *Brussels News* 101). The Working Group is developing ideas to assist practitioners in the different practice areas to spot these points and to know where to turn for expert input within the Bar. We see potential work opportunities for the Criminal Bar. Watch this space for developments.

Commission consultation on Protecting the EUs Financial Interests

The Commission is consulting the public, though specifically targeting the judiciary and prosecutors, on what it should include in a planned series of measures to improve the protection of the EU’s budget and enhance criminal prosecutions in this area. The deadline for responses is 6 June 2012. A defence orientated perspective would probably not go amiss either. More details are available at:

http://ec.europa.eu/justice/newsroom/criminal/opinion/120307_en.htm

Freezing and Confiscation of the proceeds of Crime

On 12 March, the Commission presented a proposal for a directive (Procedure reference COD(2012)0036 which will simplify and streamline procedures to trace and seize the proceeds of serious and organised crime (defined). The proposal lays down minimum rules for different forms of confiscation orders in the Member States, with a view also to facilitating cross-border enforcement through mutual recognition. Experience shows that Member States are more likely to act on an order which

contains at least certain minimum elements that they recognise. See:
http://ec.europa.eu/home-affairs/policies/crime/crime_confiscation_en.htm

Safeguards for suspects and defendants in criminal proceedings

For a decade now, I have been reporting in *Brussels News* on Commission efforts to balance the European Arrest Warrant (a “prosecution” measure) adopted in 2002 with defence measures. *Brussels News* 103 looked again at some of the background and contained a detailed update, which I will thus not repeat here. Short updates: Measure C1 /D– access to a lawyer

Work continues in both the Council and the EP on this June 2011 proposal for the third roadmap measures on the right of access to a lawyer for suspects and defendants and to communicate with a person of the suspect's choice (Procedure reference COD(2011)0154. The UK has not opted in to the proposal. Unfortunately, negotiations in Council have taken a wrong turn, to the extent that certain key rights for which the legal profession has been pushing, such as dual representation in EAW cases, no longer appear in latest texts. Lobbying efforts continue to try to rectify this, and deal with the other complexities about which I said more last time. The draft LIBE report can be seen at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE474.063>

As to the remaining measures C2, Legal Aid in criminal proceedings; E, Special Protection for vulnerable persons and F, the planned Green Paper on pre-trial detention – the latest word is that the Commission is not expecting to launch a proposal on any of these before 2013, at the earliest.

Victims Rights update

The EP has taken an expansive approach. Will the Council agree?

I reported in *Brussels News* 99 - 103 on the Commission's adoption in May 2011 of this proposal for a directive which would establish minimum standards on the rights, support and protection of victims of crime, and into which both the UK and Ireland have opted. The lead committee in the EP, LIBE adopted its draft report on the proposal on 27 March, having received the opinion of the Legal Affairs committee (JURI), adopted the day before. The EP in plenary should do likewise in due course. The EP's amendments are designed to increase the rights and level of protection afforded to different classes of victims; adapted to their needs where necessary (e.g. translations, special provisions for juveniles), to apply in wider categories of cases (including organized crime) etc. It remains to be seen whether the Council, which will have to endorse the EP's approach for it to become law, will be willing to go that far, especially in these straitened times when the trend can be said to be in the opposite direction in some Member States. See:

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/am/894/894995/894995en.pdf

FUNDAMENTAL RIGHTS

The EU Charter of Fundamental Rights - an essential tool for UK practitioners

On Thursday 29 March, the Bar European Group, together with JUSTICE, co-hosted an intensive evening conference designed to give practitioners unfamiliar with the area, the essentials needed to start using the EU Charter in their practice. I hope that readers were able to attend, but whether or not you did, the message is clear – the EU charter provides for wider categories of rights than have hitherto been enforceable in the English Courts, and they can arise across the range of practice areas. The EU Committee of the Bar Council (and see above under crime), BEG, and other EU focused bodies within the Bar are keen to support other practice areas less familiar with such EU Treaty based niceties – to assist in spotting the point, and once spotted, to direct you where to go and who to speak to in order to pursue it. This is a topic we will be returning to again and again in the future, with more similar events to follow.

INTERNAL MARKET & CONSUMERS

Proposed ADR and ODR for Business to Consumer disputes

Potential problems with the package in practice

In *Brussels News 99 – 103*, I reported on the adoption by the Commission of a legislative package, intended to make available, throughout the EU, alternative means of dispute resolution (including online – hence the “o” in ODR) for contractual disputes between consumers and traders, arising from the sale of goods or the provision of services, whether the complaint is made by the consumer or the trader. B2B disputes are not covered (though the Commission has started looking at them separately).

The Package comprises a Communication and two legislative proposals, for a Directive on consumer ADR (Procedure reference COD(2011)0373) and for a Regulation on consumer ODR COD (2011)0374 – establishing an online platform for resolving consumer disputes arising from a cross-border e-commerce transaction. The package contains a number of practical difficulties which need to be resolved if the overall improvement in access to justice is to be delivered. These include: a general lack of clarity; how to apply in practice the proposed time limits; new duties on lawyers to provide information to clients on the availability of ADR; the establishment of Single Competent Authorities in the Member States – how would that work in a state such as the UK where different sectors already have their own stand-alone systems in place? The competent EP committees, led by the Internal Market Committee (IMCO), are grappling with these and other issues, and members of the legal profession are suggesting amendments. A debate is planned for 30 May 2012, and as things stand, the EP is expected to adopt its resolution on the package in October. Relevant Commission documents can be seen at: http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm
The Bars represented in Brussels are keeping an eye on these developments.

Third Country access to the EU's Public Procurement market

On 21 March, the Commission adopted a proposal for a regulation establishing rules on the access of third-country goods and services to the EU's internal market in public procurement. This proposal, which bucks the longstanding trend to open up such markets, is linked to the broader modernization package on public procurement adopted in December 2011 (see below). See further:

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/international_access/index_en.htm

EU FILES IMPACTING ON THE PROFESSION / ITS REGULATION

Proposals to modernize the EU public procurement rules

Future tendering for publicly funded work may be caught by the new rules

I reported in detail in *Brussels News 102 & 3* on the Commission's adoption in mid December 2011, of a package of reform proposals on public procurement. The Bar's EU Law Committee has advised the Bar Council on the specific issues arising regarding tendering for publicly funded legal work, and what needs to be done to improve the situation. We have been liaising with other national Bars and the CCBE on the file, and there is a general consensus within the profession that legal services should be taken out of the general regime, or at the very least, dealt with in a separate, light-touch regulation category. I refer you to my previous coverage for more background, but by way of reminder, the principle concern is to avoid the situation whereby publicly funded legal work, whether legal aid, or work for different forms of public body, would be subjected to the full requirements of the public procurement regime; inevitably rendering price the key criterion in the evaluation.

In recent days we have seen encouraging signs that the issue is being picked up in the Council working group but we are still a long way from having secured a positive outcome. The Bar will continue its various efforts on this file.

For the proposed directive on **public procurement** (Procedure reference COD(2011)0438), see:

http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/COM2011_896_en.pdf

"Barnier Initiative" on auditors – possible impact on self-regulation

In November 2011, the Commission launched a major shake-up of the Audit market in the EU, with the adoption of two new proposals, for a regulation on the quality of audits of public-interest entities and a directive to enhance the single market for statutory audits. For relevant documents, see:

http://ec.europa.eu/internal_market/auditing/reform/index_en.htm

I raise this here because members of other professions, including the legal profession, are watching developments, and in particular the expected further reduction in the level of self-regulation permitted in the auditing sector.

The EP's Legal Affairs Committee (JURI) held a hearing on the file on 27 March. All details and papers are available at:

<http://www.europarl.europa.eu/committees/en/JURI/events.html>

Review of Professional Qualifications Directive

I reported in detail in *Brussels News 103* on developments on this 2011 revision of the 2005 PQD, and refer you thereto for background. The CCBE is lobbying, with the backing of the legal profession, for amendments to this proposal, with the aim of ensuring that the adoption of the use of professional ID cards is voluntary, and at the behest of the profession itself; to deal with the issue of partial qualifications and that of access to reserved activities. For the proposal itself, go to:

http://ec.europa.eu/internal_market/qualifications/docs/policy_developments/modernising/COM2011_883_en.pdf

Study on practical experience of EU lawyers' regime for cross-border practice

As part of preparations for the planned review of the Lawyers Establishment and Services Directives, which together govern the cross-border provision of legal services by qualified lawyers within the EU, the Commission asked Maastricht University to undertake a study on the practical experience of lawyers operating cross-border under the regime. They have approached and questioned both the CCBE and several national Bars, apparently chosen because they either host a lot of "foreign" EU lawyers, or export their own. The Bar is not among those approached, but may also contribute.

COMPANY LAW

The future of EU Company Law - Consultation

In February 2012, the Commission launched a public consultation under the rather sweeping title "The Future of EU Company Law". The consultation takes the form of an online questionnaire, with a supplementary one popping up when the first is completed, just in case there is more to add.

What is already in place at EU level?

The scope of existing EU harmonisation in the company law field covers: the protection of interest of shareholders and others, the constitution and maintenance of public limited-liability companies' capital, takeover bids, branches disclosure, mergers and divisions, minimum rules for single-member private limited-liability companies, shareholders' rights and related areas such as financial reporting and accounting. The EU has created several new legal forms such as the European Company (SE), the European Economic Interest Grouping (EEIG) and the European Cooperative Society (SCE), though with rather mixed results in terms of uptake to date.

So, the Commission is now looking to see what else needs to be done to further exploit the opportunities in the Internal Market. The present consultation is based on a study produced by a group of academics, which contains a number of recommendations for action. The report can be seen at:

http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

The Bar's EU Law and Law Reform Committee will develop a response, deadline 14 May 2012. For the consultation,

see: http://ec.europa.eu/internal_market/consultations/2012/company_law_en.htm

MISCELLANEOUS

Enhancing the benefits of EU environmental policy

The Commission is looking at ways to help countries “realize the health and economic benefits” of fully applying the EU’s environmental laws. To that end, it has recently adopted a Communication, aimed primarily at the Member States, posing a series of questions and exploring possible ways forward. For the communication, go to:

http://ec.europa.eu/environment/legal/law/pdf/com_2012_95.pdf

It is worth a read through, but I draw your particular attention to page 9 onwards, where attention is specifically focused on enforcement, remedies, ADR and similar, areas which the Bar may find increasingly fertile sources of work going forward.

European Citizens initiative now live

As of 1 April, it has become possible for 1 million or more EU citizens, from at least 7 Member States, together to move the mountain that this the EU machinery to invite it to act on an issue close to their hearts – through the European Citizens’ Initiative.

Details available at: <http://www.consilium.europa.eu/homepage/highlights/citizens-initiative-you-can-set-the-agenda?!lang=en>

For the regulation, go to: <http://eur->

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:065:0001:0022:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:065:0001:0022:EN:PDF)

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