The Bar Council

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[1] Sources available on request

Part I EU-UK RELATIONSHIP

Implementation of the Withdrawal Agreement - EP resolution

I reported in *Brussels News 163* on the Commission's report on the implementation of the Withdrawal Agreement (WA). Just to confirm that in mid-March the EP Plenary followed this with its own Initiative "Implementation report on the Agreement on the withdrawal of the UK from the EU" (Procedure reference 2020/ 2202 INI). Whilst the Windsor Framework was mentioned, the report was already all but finalised when that breakthrough on the implementation of the Protocol to the WA on Ireland and Northern Ireland (INIP) occurred. Accordingly, the final adopted text reflects the levels of concern and criticism that had characterized the debate on the implementation of INIP prior to the agreement, some of which linger. It also reflects the long-standing priority of the EP to safeguard the rights of EU citizens who continue to reside in the UK and expresses significant misgivings about ongoing UK policy

decisions in that regard (see further in *Brussels News 163*). For the final resolution, go to: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0080_EN.html

Windsor Framework – current EU mood-music on the EU-UK relationship

A good insight into the EU's view of EU-UK relations on the back of the breakthrough on the INIP that is the Windsor Framework can be gleaned from the recent keynote speech delivered by Commission Vice President Maroš Šefčovič at the EU-UK Forum Annual Conference 2023 in Brussels in early June. See: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_3211

Implementation of EU-UK Trade & Cooperation Agreement - EP draft report

You will recall from *Brussels News 163* that the Commission adopted a report on the implementation of the TCA in March.

Not to be left behind, and in parallel to its analysis of the implementation of the Withdrawal Agreement (see above), the EP has also taken it upon itself to examine the state of play regarding the ongoing EU-UK relationship as governed by the TCA. Here again, we see the breadth of EU engagement: there are two committees leading the work – Foreign Affairs (AFET) and International Trade (INTA) and no fewer than 12 other executive committees that are asked to provide an opinion in their field.

On 25 May, the two lead committees held a hearing with a panel of four experts, as part of their fact-finding to inform the content of their report. https://bit.ly/3CPgOTh

One of the committees involved in this work is the Civil Liberties Committee, Justice and Home Affairs (LIBE) which is focused on the implementation of Part Three of the TCA — **Law Enforcement and Judicial Cooperation in Criminal Matters.** The Bar Council enjoyed a couple of fruitful meetings with the rapporteur for LIBE's opinion, Katarina Barley MEP just ahead of the publication of her draft opinion in early May and linked to the Chair of the Bar visit to Brussels in late April (on which, see below). The discussion focused largely on extradition arrangements between the EU and the UK, and what could be done to improve them going forward.

However, the focus of Mrs Barley's draft opinion (https://www.europarl.europa.eu/doceo/document/LIBE-PA-746713_EN.pdf) is on the data protection elements of Part Three – hardly surprising since they underpin so much of the EU-UK relationship. Of thirteen suggestions in her short draft, fully eleven relate to data issues. The oft-previously-expressed concerns about the UK's commitment to the ECHR; to data protection standards akin to those of the EU's General Data Protection Regulation (GDPR – as onshored in the UK through the Data Protection Act) (which she considers are now under threat through the UK Data Protection and Digital Information Bill), especially as regards the onward transfer of data to third countries, are again made explicit here. The draft opinion repeats in clear terms that essential elements underpinning EU-UK cooperation, such as the EU's adequacy decisions in favour of the UK, the exchange of passenger name records, the UK's recently-granted access to PRUM, are all contingent upon these two key factors.

HMG assurances that the UK is committed to the ECHR are more credible following the change of Lord Chancellor. However, the EU continues to measure such

assurances against the backdrop of HMG's legislative activity. Ongoing government support for proposed legislation such as the Public Order Bill and the Illegal Migration Bill is noted. Even the Bill of Rights, though we are told it is all but dead. Each of these has been called out, both domestically and by international bodies, for undermining human rights. See, by way of recent example: https://www.ohchr.org/en/press-releases/2023/04/un-human-rights-chief-urges-uk-reverse-deeply-troubling-public-order-bill

Before leaving this important piece of EP work, note that its Environment, Public Health and Food Safety Committee published its opinion in mid-June, the tone of which is fairly positive, but tempered with reminders of pre-Brexit UK infringements and a long list of UK developments that the EP will be closely monitoring. See: https://www.europarl.europa.eu/doceo/document/ENVI-AL-749207_EN.pdf

Implementation EU-UK TCA - Civil Society involvement – UK DAG

As explained in earlier editions of this newsletter, Articles 12 – 14 of the TCA provide for the setting up of a Civil Society Forum (CSF) and Domestic Advisory Group (DAG) to involve stakeholders in the ongoing process of assessing and improving the operation of the TCA Part Two (the main trade elements). The DAG comprises 60+ stakeholder members, divided between the EU and the UK.

The Bar Council successfully applied for a place on the UK DAG and CSF, and I have represented it at the few meetings that have so far been called, the most recent in London on 13 June 2023.

A key agenda item was the setting up of a few working groups to debate specific policy issues arising under the TCA Part Two and make recommendations for UK DAG positions on same, which may translate into substantive / practical changes. The five working groups that are currently foreseen are: Trade and Customs; Regulatory Cooperation and the Level Playing Field; Business & Labour Mobility; Energy and Climate Change, and finally a group focused on regional and devolved government issues. The Bar Council is likely to be represented on most of these. The work will be coordinated within the TCA (Implementation and Review) Working Group that the Bar's European Committee is in the process of setting up.

Implementation of EU-UK TCA –EU DAG – issues tracker

The EU Domestic Advisory Group under the TCA (the opposite number to the UK DAG mentioned directly above, and see https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-domestic-advisory-group-under-eu-uk-tca) produces regular updates of its EU-UK relations issues tracker, which I commend to those interested. The most recent version was updated in April.

One of its striking features is the sheer range of topics that are being followed, and the granular level at which UK domestic legislative changes are analysed when identifying issues of possible concern.

By way of example, the section on workers' rights notes that "a number of UK government announcements or legislative proposals over the past months could

constitute a breach of its non-regression commitments in the Level Playing Field chapter of the TCA if put into place". It then goes on to cite, among others, the Retained EU Law Bill, perceived dilution of the UK's General Data Protection regulations and most specifically, the Strikes (Minimum Service Levels) Bill, tabled by HMG at the beginning of this year. There is no question but that a great deal of work is being done on the EU side to keep abreast of such issues.

The current tracker also includes some encouraging news in that it cites calls from EU Human Rights representatives to allow the UK to accede to the Lugano Convention 2007 (The UK's application is currently stalled – see coverage in this newsletter over the past couple of years.)
For the Tracker, go to: https://www.eesc.europa.eu/en/documents/report/eu-dag-under-tca-eu-uk-relations-issues-tracker

UK in a Changing Europe – Regulatory Divergence Tracker

I have highlighted this useful tool before, but just to note that in May UKICE published the seventh edition of its regulatory divergence tracker, covering developments since January 2023. It provides details, according to sector, of seven cases of active divergence (where the UK, or some part of it, changes its rules); two of active convergence (where the UK, or some part of it, aligns to EU rules); 17 of passive divergence (where the EU changes its rules and the UK, or some part of it, does not follow); and one of internal divergence (changes in rules between different parts of the UK).

Note that UKICE describes the Windsor Framework "as a significant case of 'managed divergence': a UK-EU agreement which alters the regulatory border between Great Britain (GB) and Northern Ireland (NI), as created by the Protocol". See: https://ukandeu.ac.uk/wp-content/uploads/2023/05/Divergence-Tracker-7-FINAL.pdf
Links to earlier versions and other useful UKICE materials can be found here:
https://ukandeu.ac.uk/research-papers/uk-eu-regulatory-divergence-tracker-seventh-edition/

New EU rights to implement and enforce the WA and TCA in force

Brussels News editions during 2022 and early 2023 reported on the legislative progress of the Commission's proposal for a regulation (procedure reference 2022/0068(COD), tabled in March last year, laying down rules and procedures governing the exercise by the EU of its rights to implement and enforce the UK's EU Withdrawal Agreement (WA) and the EU-UK Trade and Cooperation Agreement (TCA), as they relate to the Treaty on the functioning of the EU (TFEU) (there is a separate measure focused on the Euratom agreement) including provisions allowing for retaliation and / or suspension of certain obligations across the agreements.
By way of reminder, it lays the ground for the Commission to act swiftly, effectively, proportionally and with the necessary institutional support should an urgent need arise to e.g. adopt one of the defensive measures provided for in the Agreement. Thus, the Commission could suspend obligations under the TCA if the UK does not comply

with a ruling of the arbitration tribunal established under the TCA or the Withdrawal Agreement. In certain cases, the Commission will be able to act unilaterally to protect the EU's interests without first engaging in an arbitration procedure, for instance, in cases where a subsidy in the UK risks causing a significant negative effect on trade or investment between the parties. Additionally, it gives the EU options beyond the binding dispute settlement arrangements provided by the Agreements themselves just in case a lack of UK cooperation rendered those unworkable.

I reported last time that both the EP and Council formally adopted the final text just a year after the initial proposal was tabled. The resulting Regulation 2023/657 was published in the Official Journal of the EU on 22 March and has been in force since early April. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2023:083:TOC

EU-UK Parliamentary Partnership Assembly (PPA) – 3rd meeting

The 3rd EU-UK PPA meeting is due to take place in Brussels on 3-4 July 2023. The PPA brings together parliamentarians from both the EP and the UK to discuss issues of common interest arising under the TCA – see coverage in issues of *Brussels News* during 2021.

The EP delegation to the PPA has been meeting regularly. Recent agenda items have included cooperation in support of Ukraine; Russian sanctions; the Windsor Framework, how to facilitate youth mobility and most recently, a discussion about UK legislative developments (see above for a flavour of EU views thereon).

Details, and indeed, web streams of those meetings not held in camera, can be found here: https://bit.ly/44lnZhS

Details of previous full PPA meetings, and, going forward, of the meeting in July, can be found here: https://bit.ly/4436MtG

Chair of the Bar visit Brussels, late April 2023

The UK is no longer at the legislative table in Brussels. Soft influence is more important than before. The annual, or sometimes more frequent, visits by the incumbent Chair of the Bar to Brussels is one of the more effective tools we can use to achieve that. The commitment the Bar shows in maintaining its Brussels presence, even while the Law Society withdrew its last year, has been widely welcomed in Brussels. This was palpable during the visit here by the Chair and Vice-Chair of the Bar Council in late April this year.

Programme highlights included a roundtable discussion with representatives of several EU national bars with offices in Brussels; a meeting with the UK Ambassador to the EU; with the Council of Europe's Ambassador to the EU and a dinner with leaders of local Belgian Bars.

The many common challenges facing the legal professions across Europe (e.g. the increasing tendency to see lawyers as client enablers or to require them to take on the role of gatekeepers), and how best to deal with them, provided a common thread through the programme, as well as the basis for constructive cooperation going forward. A detailed report of the visit was provided to the Bar Council.

House of Lords Inquiry on the UK-EU relationship

By way of reminder, the Bar Council was among the many stakeholders to submit written evidence last November / December to the House of Lords' European Affairs Committee in response to its inquiry into the EU-UK relationship. It received 58 written submissions and heard oral evidence from 43 witnesses.

The resulting report was published on 29 April 2023: https://bit.ly/3psfeU8

It focussed on:

- The overall political, diplomatic and institutional relationship;
- the foreign policy, defence and security relationship;
- energy security and climate change; and
- mobility of people – especially young people.

Highlights among the key findings, and recommendations:

Their Lordships found that a reset is needed following years of tension and mistrust. The Windsor Framework provides an opportunity which must be grasped. They called for a considerable increase in engagement between the UK and the EU, across many areas of activity, some covered elsewhere in this newsletter: e.g

- Greater use of existing institutional structures such as the TCA Specialised Committees;
- Regular UK-EU summits.
- The UK's participation in the new **European Political Community** is welcome.

Foreign policy, defence and security relationship:

- Ad hoc approach to (Russian) sanctions coordination between EU and UK should be replaced by a more formal mechanism.
- UK should consider future opportunities for defence cooperation with the EU that are complementary to NATO, as they arise.
- UKGov should approach the EU with the aim of establishing appropriate structured cooperation arrangements on external affairs.

Energy and Climate change

- UK should approach EU re the mutual benefits of linking their respective Emissions Trading Schemes; and UKGov should also engage closely with the EU re the EU proposal for a Carbon Border Adjustment Mechanism (CBAM) – on which, see further below.

Mobility of people

- The HOL wants to see far better guidance and transparency on the new arrangements and for UKGov to prioritise the removal / reduction of post-Brexit barriers to mobility viz a viz young people, whether students, professionals or other. The EU has already signalled interest in this.
- Calls for UKGov to approach the EU about the possibility of entering an ambitious reciprocal youth mobility partnership.

For these various recommendations to work in practice, EU cooperation and engagement will of course be needed. In each case therefore, the questions arise:

- What's in it for the EU?
- Why focus on UK over and above other third countries (obvious answer – it is the third largest EU export market – but does that justify everything)?

- And indeed, under WTO rules, is the EU even free to offer better terms to the UK in these and other areas than it offers others?

EU-UK to conclude a supplementary competition cooperation agreement

Among the many practical signs that EU-UK relations are indeed on the up since the Windsor Framework was agreed, the JHA Council, meeting during the first week of June, adopted a decision authorising the Commission to open negotiations with the UK on cooperation and exchange of information in competition matters related to the application of EU competition law which will supplement the TCA.
https://data.consilium.europa.eu/doc/document/ST-9466-2023-INIT/en/pdf

Retained EU Law (Revocation & Reform) Bill (the REUL Bill) - update

Editions of *Brussels News* over the past year or so have tracked the activities of the Bar's Retained EU Law Working Group (REULWG), both in anticipation of, and following, the tabling of the Retained EU Law Bill in September 2022, itself largely an amendment to the EU Withdrawal Act 2018 (EUWA), which created the concept of REUL. Highlights have included our evidence to the House of Commons Public Bill Committee last November, cited in our later briefing to Peers in anticipation of the Bill's Second Reading in the House of Lords, submitted in February. See: https://bit.ly/3LI9gY7 The Bar's Council's evidence to date has been oft cited during parliamentary debates and in other media.

In early May, in direct response to the House of Lord's overwhelming opposition to the Government's plans to sunset all REUL by year's end, the Government announced a change of approach on that aspect of the Bill, to instead only sunset REUL expressly earmarked. On the day that crucial amendment was published, the (Foreign and Commonwealth Office) secretariat of the UK DAG (see separate item) sent a message to its membership explaining the Government's reasoning. It stated that:

> "This amendment has been tabled in response to the feedback from businesses and other organisations with an interest in Retained EU law during the Bill's passage." It went on to note that "Over the past year Whitehall departments have been working hard to identify REUL to preserve, reform or revoke. However, it has become clear that the default of retained EU law sunsetting at the end of this year unless it is preserved has forced departments to focus on which laws should be preserved, ahead of prioritising meaningful reform."

Hence the amendment. Since the Bar Council was one of many stakeholders to highlight that concern in our initial position on the Bill last September, the implication that the problem was only just coming to light this spring is hardly credible.

Nonetheless, our Working Group was again quick to respond publicly, welcoming the change, but reiterating the Bar's ongoing concerns regarding other aspects of the Bill, notably the Government's continued commitment to the use of Henry VIII powers to change REUL, and the much broader legal uncertainty that will follow if it removes supremacy and the settled principles of EU law when interpreting same going forward. See https://bit.ly/46pniWj

These concerns remain live and continue to be voiced by ourselves, other stakeholders and picked up in parliamentary debates and by the media. Several amendments have been placed before the House of Lords in an effort to further dampen the Bill's worst excesses, though so far with little success when back before the Commons. The Bill is reaching the end of its passage through the Houses of Lords and Commons, with plans that it be enacted this summer. You can track its progress here: https://bills.parliament.uk/Bills/3340

REUL DASHBOARD

I draw your attention to the recently-updated REUL Dashboard, first published on 22nd June 2022 and previously updated in January of this year. The dashboard sets out for each piece of REUL its name, type and territorial extent. It also provides an overview of REUL that has already been amended, repealed or replaced. See: https://www.gov.uk/government/publications/retained-eu-law-dashboard

Broader UK context of the REUL Bill

To coincide with its U-turn on sunsetting, HMG published a paper 'Smarter Regulation to Grow the Economy', the first in a series of updates on its plans to reform sectors across the UK economy by inter alia, reducing the overall regulatory burden. That terminology too has provoked consternation and criticism, in the UK and beyond, since despite repeated government assurances to the contrary, it is hard to see how a drop in standards could then be avoided. Of particular concern are the areas where, under the TCA, both the UK and EU have made "level playing field" commitments, such as consumer, social and environmental protection. The report is available here: https://bit.ly/3NqEKBq

Government messaging in Brussels is that the EU should take its assurances at face value. If it says it will maintain standards, it will do so. How it chooses to do so is up to the UK government alone.

Despite the recent change of tone, the sourness of relations over the past few years is not forgotten, especially, but not only, in the Commission services. Asserting that trust should be sufficient assurance does not outweigh what everyone can see is being passed in the House of Commons.

Civil Judicial Cooperation – UK Hague Convention 2019 accession?

I reported in detail in *Brussels News 163* on the Bar Council's response to the Ministry of Justice (MoJ)'s consultation seeking stakeholder views on whether or not the UK should accede to the the Hague Convention 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. As at the time of writing, the MoJ has yet to publish the results of the consultation, though when it does, it will be reported here: https://bit.ly/3BPWWPX

Meanwhile, in May the MoJ circulated a letter to a select group of UK legal stakeholders seeking input on whether the UK's application to accede to Lugano should be actively pursued or potentially withdrawn. The European Committee of the Bar Council provided an informal response, suggesting that the application be left pending but that, for the time-being, the MoJ focus its efforts on quickly acceding to Hague 2019. Thereafter, we said, it should assess how well the EU-UK jurisdiction and PIL regime, based on existing international as well as domestic measures, is working,

before considering what further steps need to be taken. We anticipate a possible evolution of the existing rules, including of the Lugano Convention itself (which was based on the pre-recast version of the EU's Brussels I regulation), may in time affect this assessment.

UK signs the Singapore Convention on Mediation

Earlier this spring the Ministry of Justice conducted a consultation on possible UK accession to the Singapore Convention, resulting in a rapid decision in favour. The UK signed the Convention on 3 May.

Background

The United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") is a Private International Law agreement which establishes a uniform framework for the effective recognition and enforcement of mediated settlement agreements across borders. It provides a process whereby someone seeking to rely upon a mediated settlement agreement can apply directly to the competent authority, usually a court, of a Party to the Convention to enforce the agreement. Only in limited circumstances can the relevant authority refuse to do so (such as the agreement being void or having been subsequently amended). Note that:

- The Singapore Convention only applies to *international commercial settlement* agreements resulting from *mediation*.
- It does not apply to mediated settlement agreements: - concluded in the course of judicial or arbitral proceedings and which are enforceable as a court judgment or arbitral award; - concluded for personal, family or household purposes by one of the parties (a consumer); - or those relating to family, inheritance or employment law.

Currently there are 11 parties to the Convention and several dozen signatories, including the USA and some Asian, European and Middle Eastern countries, but not the EU. See: https://bit.ly/3r39twG The UK ratification procedure now follows.

Council of Europe – UK's Northern Ireland Legacy Bill undermines justice

I'm reporting on this in this section to illustrate the point made elsewhere that several European bodies are keeping a close eye on UK legislative developments. Of course, the CoE monitors all its members on human rights issues, but UK legislative developments are of greater interest than might otherwise be the case across Europe for reasons oft-rehearsed in this newsletter.

Last week, just ahead of a crucial stage before the House of Lords, the Council of Europe's Commissioner for Human Rights publicly accused the UK Government of ignoring many previous warnings that its Northern Ireland Legacy Bill would violate the UK's international obligations and put victims' rights at risk. See more at: https://bit.ly/3PxujP9

Let us know if you have problems supplying legal services in(to) the EU

The Bar Council maintains its open call for evidence of any problems members of the Bar encounter in cross-border practice with Member States of the European Union or the EEA or with EU institutions and agencies, regardless of whether they are

associated with rights that should be protected by the Withdrawal Agreement, exercise of third country practice rights, mobility issues or other. Please email Anastasia Kostaki AKostaki@BarCouncil.org.uk. This is an open request. Any communication will be treated as confidential.

Part II EU BUSINESS AS USUAL

The Bar continues to engage constructively on EU law developments that may have implications for its clients or practice. Moreover, given the potential impact of divergence between EU and UK law on the EU-UK relationship (including, but not limited to, adequacy decisions, level-playing field provisions) it is important to keep track of the evolution of EU law and policy more broadly as compared to equivalent UK developments.

Bar Council – BRAK event on Responsible private (3rd party) financing of litigation, Brussels, 27 June 2023

Brussels News 157 – 163 tracked the path to adoption by the EP of an own initiative resolution, with attached draft proposal for a directive, intended to counter the risks inherent in third party litigation funding. (https://bit.ly/3yKTrJi) I also informed you that the Commission is interested in the idea but wants to better understand the experience with such funding inside the Union itself before launching a proposal.

With a view to contributing to the information-gathering exercise and debate in a constructive way, the Brussels offices of the **Bar Council and the German Federal Bar** are jointly organizing a panel discussion on the subject in **Brussels this evening, 27 June 2023, from 18h30 CET**. The rapporteur for the EP report, Axel Vos MEP will give a keynote speech, and the Chairs and other members of both the German and our Bar will take part in the discussion, along with a Commission representative and one from a third party funder. It should be an informative evening.

Dates for your diaries: ELI and European Circuit Conferences

- **European Law Institute** (ELI) - Annual Conference and Meetings will take place from 6–8 September 2023 in Vienna, Austria. See: https://www.europeanlawinstitute.eu/about-eli/bodies/membership/mm-2023/

- **European Circuit**, **2023 annual conference,** in cooperation with Czech Bar Association
  When: 21 & 22 September 2023
  Where: Grand Hotel Bohemia, Prague
  Topics: Current issues in arbitration; Collective redress; Legal issues arising from the invasion of Ukraine; Challenges for Trustees when Beneficiaries are in Family Disputes; AI in Legal Procedures; Protecting the environment through legislation and litigation, and more.
  The Chair of both the Bar of England and Wales and of the Bar of Ireland will be among the speakers. Other programme highlights include a reception at the British Embassy; a Gala Dinner as well as a Court Visit.

For more details and to register, please go to:
https://ti.to/the-european-circuit/conference-2023

Pegasus Trust Paris Bar Exchange

Inner Temple's Paris Bar Exchange, of longstanding repute but suspended during the pandemic, is back this year. Four *avocats* will be in London from 3 to 28 July.

The Trust is seeking barristers who have been in practice for up to 7 years to go to Paris from **4 to 29 September,** though you would have to be quick! More details at: https://www.innertemple.org.uk/your-professional-community/pegasus-trust/paris-bar-exchange/

EP *and* Member States moving away from unanimity?

The last couple of issues of *Brussels News* have followed the ongoing efforts of the EP, following the conclusion of the **Conference of the Future of Europe** last year (see e.g. *Brussels News 159*) to push for Treaty change, inter alia in order to allow the EU to react to major crises (pandemics, war) and other events in a faster, leaner and more effective manner.

Much frustration has been occasioned by the plethora of stalemates we have seen over the years in the European Council when faced with macro policy issues (be they budget approvals; enlargement decisions; Rule of Law actions; bailout decisions; more recently financial and other support for Ukraine; sanctions against Russia etc.), due to the exercise of vetoes by certain Member States, especially in the field of Foreign and Security Policy (CFSP).

In the face of this, the EP adopted a resolution on the principle of the need for Treaty change on 9 June 2022. As previously reported, work is now in progress to flesh this out – just what Treaty changes are they seeking? The lead Constitutional Affairs Committee is yet to release its draft report. However, given the importance and potential range of EU competencies that could be affected, it should come as no surprise that no fewer than eleven EP executive committees have provided opinions. As before, all relevant documents are available at: https://bit.ly/3YDxA1h

The current expectation is that the EP in full plenary will debate and vote on the resulting resolution in early October.

All that having been said, no amount of bleating by the EP will change the Treaties if the Member States themselves do not back it. It is thus significant that the Czech Council Presidency (second half 2022) sent a letter to its fellow Member States with a list of specific policy areas that could be switched to QMV together with a list of 11 concrete actions they could progress in the area of Foreign affairs and the Common Security and Defence Policy (CSDP) related to Articles 24, 27, 28, 29, 37, 39, 41, 42, and 44 TEU. And perhaps even more significantly, on 4 May 2023 nine Member States - Belgium, Finland, France, Germany, Italy, Luxembourg, Netherlands, Slovenia, Spain - formed the so-called **Friends of QMV** group to push for a move away from unanimity and towards qualified majority voting on some issues. In a joint statement the group said it was pushing to "improve effectiveness and speed of our foreign-policy decision-making." Other Member States, including Ireland, whilst not officially members of the group, are starting to voice support in principle for its stance.

That said, Hungary continues to use its veto to conditionally block votes in Council, most recently on EU peace facility payments to Ukraine and any further EU sanctions against Russia. There remains little hope that it would give its veto up.

Hence the Friends of QMV group has also indicated that practical steps could be taken using provisions "already provided for in the [EU treaties]." As to which, see the Passarelle update directly below.

EP calls on the EU to implement of the passerelle clauses in the EU Treaties

As noted in the last edition of this newsletter, the EP is under no illusions about the difficulty facing the EU in bringing about Treaty change, so in parallel to those efforts, its Constitutional Affairs Committee (AFCO) (supported by other EP committees, such as AFET) tabled a draft report calling for increased use of the so-called "passerelle" clauses already contained in the Treaties. https://bit.ly/3JxVSnn *Brussels News 163* contains a short discussion on same.

The report was adopted in committee last month and is expected to be formally adopted by the EP in full plenary in early July.

THE EU IN THE WIDER WORLD

European Political Community – second Summit

The European Political Community, the brainchild of French President Macron, met on 1 June for the second time since its launch last year (see contemporaneous *Brussels News*), this time in Moldova. Forty-five European countries were represented, including of course the UK. The EU as a collective was represented by the Presidents of all three main institutions plus its High Representative on Foreign Affairs.

The main topics, unsurprisingly, were first and foremost joint efforts for peace and security and secondly energy resilience, connectivity and mobility in Europe.

The next two EPC meetings are due to take place, respectively, in Spain and the UK.

See further at: https://epcsummit2023.md/

EU-US Trade and Technology Council (TTC), fourth ministerial meeting

Launched by Commission President Ursula Von der Leyen together with US President Joe Biden in June 2021, this Council is intended to facilitate policy coordination between the two.

They met, this time in Sweden, for the fourth time at the end of May. See: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council_en

Progress was made under a number of headings:

1. Trustworthy artificial intelligence

   Results under this heading included implementation of the TTC Joint Roadmap for Trustworthy AI and risk management.
2. Emerging technologies
3. Defending human rights and values, and combatting foreign information manipulation and interference
4. Increasing bilateral trade
5. Sustainable trade
6. Enhanced cooperation for safer global trade

See the resulting joint statement at: https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2992

In parallel, the EU and the US have set up a **Joint Technology Competition Policy Dialogue** that will focus on developing common approaches and strengthening cooperation on competition policy and enforcement in the tech sectors.
Two general observations:

- Some of the issues highlighted under the agreed headings mirror internal EU policy initiatives that are already in place or en route, reflecting the active dialogue that sits behind this initiative.
- Moreover, from a UK standpoint, the mere existence and gradual expansion of this forum is pointed to by some in the EU, and indeed London, as indicative of the UK being left out of key strategic discussions, even on topics which HMG has identified as being ones where it can position itself as world-leading and central to the debate.

Fourth ever Council of Europe Summit – historic agreements

For only the fourth time in its 70+ year history, the Heads of State and Government of the (now, since Russian expulsion) 46 Member States of the Council of Europe met together. The summit, which took place in mid-May in Reykjavik, Iceland, agreed several headline actions, including to:

- establish a *Register of damage* caused by the Russian Federation's aggression as a first step towards an *international compensation mechanism*.
- strengthen the Council of Europe and its work in the field of human rights, democracy and the rule of law by adopting a *declaration on democracy principles*, *recommitting to the European Convention on Human Rights;*
- develop tools to tackle emerging *challenges in the area of technology and the environment*.

In addition, the Summit endorsed a number of other priorities, including the EU's accession to the ECHR (see coverage in recent editions of this newsletter); new standards to safeguard human rights in the digital era online and offline, in particular regarding artificial intelligence; the promotion of social rights in Europe through the Social Charter; and free media and independent civil society. See: https://www.coe.int/en/web/portal/fourth-council-of-europe-summit

WTO: 15th Trade Policy review of the EU

The fifteenth review of the trade policies and practices of the EU took place on 5 and 7 June 2023, based primarily on two reports, one by the WTO Secretariat https://www.wto.org/english/tratop_e/tpr_e/s442_e.pdf and one from the EU itself: https://www.wto.org/english/tratop_e/tpr_e/g442_e.pdf

Policy Reviews are an exercise, mandated in the WTO agreements, in which member countries' trade and related policies are examined and evaluated at regular intervals. Significant developments that may have an impact on the global trading system are monitored. The UK has not had its own trade policy for long enough yet to allow time for such a review to take place.

As regards the EU, the 5- year period under review, 2018 – 2022, is characterized as a time of major change in the EU's development and political goals and priorities, led

by the adoption of, inter alia, the *European Green Deal*, a *Europe fit for the digital age*, and a new political agenda to reinforce the EU's global influence and leadership in the world. While the concrete measures in pursuit of these policy objectives are often still a work in progress (e.g. the **Carbon Border Adjustment Mechanism**, green taxation, and green government procurement), certain new measures have already been enacted (e.g. the **Digital Services Act** (DSA) and the **Digital Markets Act** (DMA)).
The report goes on to examine the impact of three seismic developments that took place during the review period: Brexit, the Covid19 pandemic and latterly of course, the war in Ukraine, with its collateral impacts on energy security and supply; sanctions policy etc. The report provides a lot of data on different aspects of EU trade, both goods and services, and with different regions.
It documents just how important EU-UK trade, including in services, remains for the EU, despite Brexit. The data may well be worth a deep dive for anyone looking for statistics to illustrate any points in that regard.
See generally: https://www.wto.org/english/tratop_e/tpr_e/tp542_e.htm

EU priorities ahead of 13th (WTO) Ministerial Conference 2024.

The Commission is briefing EU foreign ministers on its preparations for the 13th WTO Ministerial Conference, due to take place in Abu Dhabi at the end of February 2024. The EU's focus will be on:

- Dispute Settlement Mechanism/Appellate Body: restoring a fully functioning DSM remains the EU's top priority.
- The extension of the e-commerce moratorium and the e-commerce work programme.
- WTO Reform: the EU has submitted a paper on "Reinforcing the deliberative function of the WTO to respond to global trade policy challenges". It proposes three thematic areas for enhanced work to respond to the global trade policy challenges:
    a) trade policy and state intervention in support of industrial sectors
    b) trade and global environmental challenges
    c) trade and inclusiveness.

Revision of the EU Customs Code

As anticipated in *BN 162* & 3, on 17 May the Commission tabled a proposal for a regulation accompanied by a Communication on a revised EU Customs Code, intended to strengthen the legal framework for customs and better adapt it to today's business environment and technological developments, as well as improving security-related aspects. Comments are welcome until 23 July. See all relevant documents at: https://tinyurl.com/mpbdyd96
The proposal was preceded by a public consultation, the results of which clearly highlight the uneven application and implementation across the EU of the existing code, as well as the need to update it to keep up with technological developments and indeed the activities of those wanting to breach the rules.
I note that the consultation questionnaire made specific reference to Brexit, asking respondents to indicate if it had impacted their interaction with EU Customs. The

American Chamber of Commerce (AmCham)'s response highlighted a risk that the UK could become "a transit hub for IPR infringing goods including parallel imports." See: https://bit.ly/44lowAo

At almost the same time as the EU proposal emerged, HMG published detailed new advice on the current EU-UK customs arrangements, including the phasing in of UK border controls. https://commonslibrary.parliament.uk/new-customs-rules-for-trade-with-the-eu/

It was clear from the discussion among those representing UK goods manufacturers and exporters at the recent UK DAG meeting (see above) that the complexity of having to comply with e.g. the EU's rules of origin, is having profound effects on business operations and choices. It remains to be seen what impact the planned changes to the EU's rules will have on them.

Proposal to define the criminal offence of violating EU sanctions

Accompanying the report in *Brussels News 162* on the adoption of the Tenth package of Restrictive Measures against Russia, I also reported on the Commission's rapid moves to criminalise their breach. This was facilitated by the adoption last November of Council Decision (EU) 2022/2332), which adds the violation of EU restrictive measures (sanctions) to the list of EU crimes defined under Article 83 TFEU. The Commission proposal for a directive under the newly extended Article 83 sets minimum definitions and penalties for sanctions violations and facilitates their investigation and prosecution.

By way of reminder, the objectives of the proposal are to:

(a) approximate definitions of criminal offences across the EU related to the violation of Union restrictive measures;

(b) ensure effective, dissuasive and proportionate penalty types and levels for criminal offences related to the violation of Union restrictive measures;

(c) foster cross-border investigation and prosecution; and

(d) improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions and sanctioning.

The Council of the Bars and Law Societies of Europe (CCBE) adopted a position paper on the proposal at the end of March. https://bit.ly/3Jy54IA

The CCBE's four main points are:

- Article 3(2)(g) of the proposed Directive may be misinterpreted to mean that the provision of any legal advisory services is prohibited in all circumstances. The CCBE proposes an amendment to limit it;
- CCBE welcomes that Recital (7) of the Preamble and paragraph (5) of Article 3 acknowledge that legal professional privilege/professional secrecy applies in the outlined circumstances, and proposes that this should also be expressly acknowledged in Article 5n of Regulation 833/2014;
- CCBE objects to the criminalisation of prohibited acts based merely on "serious negligence" rather than intent, under Article 3(3), and seeks deletion of that phrase;
- CCBE proposes amendments to Article 7 to reflect the fact that it is for the independent bars to regulate the profession, including taking decisions on e.g. disqualification from practice for individual practitioners.

The rapporteur responsible for drafting the EP's Civil Liberties Committee (LIBE)'s draft report on the file is the influential Dutch MEP, Sophie in't Veld. Her report was tabled on 3 May (https://www.europarl.europa.eu/doceo/document/LIBE-PR-746946_EN.pdf) Further amendments have since been filed at: https://www.europarl.europa.eu/doceo/document/LIBE-AM-749179_EN.html
In addition, the EP's Budget's committee has also now published its opinion, calling for increased powers to be granted to the EPPO, and for any assets seized or fines against Russian interests to be used towards compensation for Ukraine. See: https://www.europarl.europa.eu/doceo/document/BUDG-AD-746791_EN.pdf

We await the compromise text and to see what form the final adopted EP resolution takes. As before, the evolution of the file will be tracked here: http://bit.ly/40quIoF
Meanwhile, on 9 June, the JHA Council adopted a general approach on the file, which will form the mandate for its negotiations with the EP once it too has an agreed text. At first blush, the Council text does appear to respect legal professional privilege. See: https://data.consilium.europa.eu/doc/document/ST-10366-2023-INIT/en/pdf
Just to note, the CCBE is seeking input from its member bars on any difficulties practitioners are experiencing as regards whether they can advise / act in sanctions cases. It may hold a training session on these issues, though possibly now only following the adoption of the next EU sanctions package.

Counteracting coercive action by non-EU countries – a robust EU approach

I reported in some detail in *Brussels News 157 - 162* on the background to, adoption of, and institutional reaction to, the late 2021 Commission proposal for a regulation to create a mechanism to allow the EU to address practices by non-EU countries that seek to pressure the EU or its member countries into taking or withdrawing policy measures (Procedure reference COD2021/0406). As previously noted, the expectation, not to say hope, is that the mere existence of the instrument would act as a deterrent.
I note again that this work is parallel and complementary to the work to amend Regulation (EC) No 2271/96, the '**Blocking Statute'** covered in *Brussels News 158 & 159*.
The regulation remains in trialogue between the co-legislators, with the sensitive issue of the extent of Member State involvement in the assessments and decisions to be taken by the Commission under this instrument among the topics being discussed. The EP expects to be able to table an agreed text for plenary adoption by mid-September.
I refer again to the very useful EP background briefing. It not only provides insights on this file, but also helpfully places it in the context the plethora of EU trade and investment initiatives that are contributing to its "open strategic autonomy" policy objective, some of which are covered elsewhere in this newsletter and earlier editions: https://bit.ly/43Y1xLR

Trade & investment – addressing distortions caused by foreign subsidies

A short follow up to earlier coverage in Brussels *News 153 –163* on the adoption of Regulation EU 2022/2560 on Foreign subsidies distorting the Internal Market, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2560

as well as the draft implementing regulation since tabled by the Commission that sets out the procedure for the conduct of proceedings pursuant to it, (See: https://bit.ly/3XuptDW

I note that in early April, the British Chamber of Commerce in Belgium was among 12 international business organisations that together issued a statement listing the unintended consequences for business of the proposed implementing regulation and suggesting ways to remedy them. See: https://www.britcham.eu/news/joint-statement-on-the-implementing-regulation-for-the-eus-foreign-subsidies-regulation/

Istanbul Convention – EU ratification imminent following EP consent

The EU Council of Ministers has adopted a decision formally approving the EU's accession to the Council of Europe's Convention on preventing and combating violence against women, the benchmark for international standards in this field – the Istanbul Convention. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023D1075 This followed the early May grant of approval by the EP in plenary.

Background

As noted last time, the Istanbul Convention:

- is the first international document that contains a definition of gender;
- criminalises offences, such as female genital mutilation, forced marriage, stalking, forced abortion and forced sterilization;
- recognises violence against women as a violation of human rights and a form of discrimination;
- makes states responsible if they do not respond adequately to this form of violence.

The Convention sets out comprehensive legal and policy measures to prevent such violence and protect and assist victims. It also addresses the gender-based violence dimension in matters of asylum and migration.

The EU signed the Convention way back in 2014. However, since then a half dozen Member States strove to block its ratification, despite EP efforts. Fortunately, in October 2021 the CJEU issued an opinion (https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210176en.pdf) confirming that the EU can ratify the Istanbul Convention without securing the prior agreement of all Member States. And here we now are.

The pressure remains on the remaining six EU countries - Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia - to ratify the Convention without delay, so that the full scope of its protection is extended to women throughout the EU.

I also refer you to coverage of progress on the EU proposal for a directive on combatting violence against women and domestic violence, below.

Non-EU nationals travelling to Europe: implementation postponed to 2024

As previously reported, the EU is introducing two complementary automated systems to facilitate and screen the entry and exit into the EU and/or Schengen area of *non-EU nationals*:

- The EU **Entry/Exit System** (EES) is an automated, time-saving IT system for registering all non-EU nationals travelling for a short stay, each time they cross the external borders of European countries using the system, whether or not the traveler needs a short-stay visa. Refusals of entry are also recorded in the system. See: https://travel-europe.europa.eu/index_en
- Within that broader category, for non-EU nationals travelling to Schengen Member States from third countries that do not need a Schengen visa, a further pre-screening system will also become operational – ETIAS - the **European Travel Information and Authorisation System.** ETIAS is not a visa, it is a visa waiver, similar to the U.S. ESTA and Canadian ETA, which must be applied for in advance of travel. EU Passport holders are exempt.

The date for its introduction has been postponed to 2024.
Once it goes live, the UK is one of the countries whose citizens will be eligible – indeed required - to hold an ETIAS before travelling to the Schengen area. See further at: https://etias.com/

Also note this useful one-stop-shop link to EU Visa policy: https://www.consilium.europa.eu/en/policies/eu-visa-policy/

Asylum, migration, including long term 3rd country residents – implications for the legal profession?

I have been reporting in successive editions of B*russels News* since edition *159,* and provided an update in *BN162* on the Commission's April 2022 package of measures – the EU Pact on Migration and Asylum, with a particular focus on two proposals for recast directives concerning:

I. A single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast); (Procedure reference 2022/0131(COD); and
II. The status of third-country nationals who are long-term (EU) residents (Procedure reference 2022/0134(COD) - with the objective of creating a harmonised EU long-term resident status and set out rules on the procedures and rights associated with the status.

The idea is to allow third-country nationals to cumulate periods of legal residence (whether as a student, worker, other) in different Member States to fulfil the minimum stay requirement that would give them long-term resident status. That period is to be reduced from five to three years. There are also provisions that strengthen the right of holders of that status, and their families, to move and work in another Member State.

I have reported on the progressive stance taken by the relevant EP committees to the proposals, treating the two files as interdependent, and together designed to make the EU a more attractive place for skilled persons, including self-employed professionals, from third countries to live and work. A flavour of the work that is being undertaken by the EP on this can be gained though this link, which, though dating from April, allows you to follow subsequent progress on the several related files:

https://www.europarl.europa.eu/news/en/press-room/20230414IPR80131/asylum-and-migration-plenary-to-vote-on-key-reform-proposals

The EP's negotiating positions were confirmed in full plenary and trialogue negotiations are now underway with the Member States in Council. However, there is pushback from some Member States and indeed some stakeholder groups within them, including within the legal profession. A key sensitivity arises from Article 17 and the idea that if the qualifications of a third country national are recognised in the first Member State of residence, and/ or that he she acquires the host title while there, they would also have to be so recognised in a second EU state to which that person moves, regardless of nationality. In the context of the legal profession, national bars, and indeed the CCBE, consider that the EU would be exceeding its competence here as regards the decision to admit or not lawyers to their profession. This is obviously tricky territory. Taken to its limit, could this extend some of the freedoms of the EU lawyers' regime to long-term resident third country nationals & holders of third country qualifications? And if so, doesn't it e.g. give rise to mutual trust issues as regards the "home" bar for the purposes of regulatory control?
There are certainly voices within the CCBE calling for broader consideration of the context and implications of these proposals, seen against the GATS rules and the EU's negotiating position in the context of future FTAs, let alone seen against the EU Lawyers' Regime, the integrity of which should not be undermined by these proposals. Draft CCBE position papers making these points are currently in the works.

To add to the mix, there is broader debate about whether a new EU measure on the recognition of qualifications acquired in third countries is needed, or whether the instruments are already in place but simply need to be more fully employed. For a good overview of the various parallel developments on that aspect (though not looking at legal professional qualifications per se), see e.g. the January 2023 paper by the European Universities Association: https://bit.ly/44f5N9o

I will report further. We may yet see broader practice opportunities for members of the Bar who settle in the EEA's territory.

Unified Patent Court opened for business on 1 June 2023

The Unified Patent Court opened its doors for business on 1 June 2023.
Considering the importance of this long-awaited development, I am reproducing almost verbatim the coverage I provided in *Brussels News 162* anticipating this, which itself built on coverage in successive editions of *Brussels News* between 2011 – 2013 on the road to adoption of the EU Patent Package (See especially *Brussels News 109 & 110*).

The package comprised three related instruments:

- An EU regulation creating the **Unitary Patent**: Regulation 1257/2012, published in the Official Journal of L361 of 31 December 2012: http://bit.ly/UILY3y
- An EU regulation defining the applicable language regime: (Regulation 1260/2012), published in the same official journal: http://bit.ly/Wol3XO

- An *international agreement* establishing the **Unified Patents Court** (UPC), signed in Brussels on 19 February 2013: http://bit.ly/W5k7s2

The UPC was set up to adjudicate on the infringement and validity of both Unitary Patents and classic European Patents. By way of reminder, the Unitary Patent was needed because, despite their name, European Patents do not provide unitary property rights covering the entire EU, but rather are a 'bundle' of individual national patents, enforceable only on individual national territories.

The UPC Agreement, as an international treaty between the participating EU Member States, required ratification in each. According to Art. 89(1) of the UPC Agreement, it was to enter into force once 13 Member States had ratified it, including the three in which the highest number of European patents had effect in 2012, when the original negotiations on the package were sealed (Germany, UK and France). Of course, the UK ceasing to be an EU Member State and then choosing also to withdraw its UPC ratification in 2020 meant that a required element could no longer be met, so the Preparatory Committee for the UPC found a different work around. There were also further delays occasioned by challenges before the German Constitutional Court. However, the threshold was eventually met and exceeded during the summer of 2021 with German ratification, triggering the entry into force of the UPCA and the start of the countdown to both the Unitary Patent and the UPC becoming operational.

The Agreement provided for a Sunrise Period of minimum three months for patent holders to decide to opt-out of their existing European patents. That eventually started on 1st March 2023, and has allowed "future users to prepare themselves for the strong authentication which will be required to access the Case Management System (CMS) and to sign documents". In April the European Patent Office (EPO) issued an updated guide for practitioners on the Unitary Patent: https://bit.ly/3HND1oj

The new court opened its doors on 1st June 2023. As that deadline drew closer, the pressure on the CMS resulted in a few glitches, about which the UPC has been communicating via its website. See: https://www.unified-patent-court.org/en/news
Other preparatory work included the designation and swearing in of presiding judges.

As regards the implications of UK withdrawal, apart from losing one of the hard-won seats of the Court, the basic position is reported to be as follows:

- UK business will still be able to use the Unified Patent Court and unitary patent to protect their inventions within the contracting EU countries.
- UK business could also be the object of litigation before the UPC if they infringe existing rights on the territory of the contracting EU countries.
- On UK territory, both UK and EU business will not be able to use the Unified Patent Court and unitary patent to protect their inventions. They will be able to apply for domestic UK rights as they can now, via the UK Intellectual Property Office and the European Patent Office, and bring proceedings as needed before UK courts.

What of representation rights before the UPC?
According to Article 48(1) of the Agreement on a Unified Patent Court (UPCA), parties can be represented before the UPC by lawyers who are authorised to practice before a court of a Contracting Member State – i.e. a state that has both signed *and* ratified the Agreement. At present, 24 EU Member States have signed the UPCA of which 17 have ratified it. The remaining 7 can upgrade at any time.

Lawyers who fulfill the Article 48(1) requirement can register as representatives before the UPC directly in its Case Management System (CMS) (and see above)

To be clear, members of the Bar of England and Wales who are dual qualified in a contracting state can register on the CMS. For the time being, those called in Ireland await Irish ratification of the agreement. The IP Bar Association has kept its membership well informed on such questions throughout the process.

In addition, the Bar Council continues to pursue its long term objective to facilitate the acquisition of EEA practice rights for practitioners who were not able to avail of the time-limited opportunities provided for by the terms of the Withdrawal Agreement.

EU-Swiss relations – revival of negotiations on a new framework?
The EP's Foreign Affairs Committee (AFET) has recently tabled a draft own initiative report on EU-Swiss relations, in which it welcomes recent Swiss cooperation on security and defence matters, notably in relation to Ukraine; laments the Swiss government's June 2021 withdrawal from negotiations on an EU-Swiss Framework Agreement to replace the existing fragmented set of agreements, some of which are lapsing now (and all of which are helpfully listed here, with links: https://www.europarl.europa.eu/doceo/document/AFET-PR-746735_EN.pdf); and anticipates a possible revival of said negotiations later this year. Among the many specific issues mentioned is the free movement of services.
Given the many parallels to be drawn between UK-EU and Swiss-EU relations, the evolution of the latter is of great interest to the UK and its stakeholders.

EUROPE'S DIGITAL DECADE

Artificial Intelligence Act – EP and Council enter trialogue negotiations
On 14 June, the EP in Plenary adopted the resolution that will form the mandate for its negotiations with the Council to try to agree the final text of this landmark EU legislation laying down a regulatory framework for Artificial Intelligence in the EU, originally tabled by the Commission in April 2021 – (see coverage in this newsletter ever since). You will recall that the Council agreed its common approach late last year. See: https://bit.ly/3Nw3SX8 and https://bit.ly/3plCzXN
By way of reminder, the Commission proposed to enshrine in EU law a technology-neutral definition of AI systems, complemented by rules tailored on a risk-based approach with four levels of risks:

- Unacceptable risk AI - Harmful uses of AI that contravene EU values (such as social scoring by governments) will be banned;
- High-risk AI – This covers AI systems (listed in an Annex) that adversely impact people's safety or their fundamental rights. These would be subject to a range of mandatory requirements (including a conformity assessment);
- Limited risk AI - Some AI systems will be subject to a limited set of obligations (e.g. transparency);
- Minimal risk AI - all other AI systems can be developed and used in the EU without additional legal obligations beyond those contained in existing legislation.

Both the EP and the Council have made significant changes to these categories and definitions in their respective positions. More detail can be found here: https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-regulation-on-artificial-intelligence

The Council of the Bars and Law Societies of Europe (CCBE), of which, I remind you, the Bar Council is a member, has dedicated considerable effort to lobbying in this area over the past several years, and continues to follow the evolution of the three texts (Commission, EP and Council). For a general statement on the CCBE position, including specifically in the contact of the use of AI in the justice system, see: https://www.ccbe.eu/news/videos/
There is a call for greater safeguards to be included, as in the GDPR, and for the EU to place greater reliance on the precautionary principle and legislate for risk even if it is not yet fully defined.
The key MEPs will be holding a series of consultations on the AI Act over the coming weeks to inform the EP's position in the trilogue. The CCBE and certain EU Bars are likely to provide input, attempting to narrow down their priority asks for the final text. The CCBE may also collaborate with the Commission to organise events examining the complex legal issues that will be thrown up by this, possibly on a rolling basis.
I note also that there are localized consultations taking place across the EU on the use of AI in judicial proceedings.

Digital Wallet proposal – and impact for EU cross-border legal services
In June 2021, the Commission tabled a proposal for a regulation establishing the European Digital Identity framework.
At the moment, the 2014 regulation establishing electronic identification and trust services for electronic transactions in the internal market (Regulation 910/2014) (eIDAS) is the only cross-border framework for trusted electronic identification (eID) of natural and legal persons. However, it is based on national eID systems following diverse standards and focuses on a relatively small segment of the electronic identifications needs of citizens and businesses, namely secure cross-border access to public services. Covid19 has highlighted the vastly increased need for such eID to cover other areas, including to identify and authenticate online, as well as to digitally exchange information related to identity, attributes or (professional) qualifications), securely and with a high level of data protection. The 2014 regulation does not require

Member States to develop a national digital ID and to make it interoperable with those of other Member States, which leads to high discrepancies between countries.
The current proposal is intended to address these shortcomings by improving the effectiveness of the framework and extending its benefits to the private sector and to mobile use. See further: https://bit.ly/3PyTxwy

I note that the CCBE and its national Bar members are examining this in the specific context of the increasing need for lawyers to produce eID to gain access to courts or to lodge pleadings before a court. At the moment, the lack of compatibility between Member State systems means that lawyers risk not being able to perform these basic services in cross-border cases within the EU. If this problem is to be resolved using this new digital wallet, the CCBE is keen to ensure that the legal profession retains control of who is digitally designated as a lawyer.

Digitalisation of judicial cooperation and justice

By way of follow up to my most recent of several reports on these related files, Cod52021) 0394 & 5 (*Brussels News 162*) note that trialogue discussions continue between the co-legislators, with the use of video conferencing in civil, and more recently criminal, cases featuring on the agenda, alongside the use of portals, availability of the necessary systems in all the Member States, etc. I will return to these in more detail once the final shape emerges. See: https://bit.ly/44mn7cA and https://bit.ly/43RlsMp

Data Act – home strait?

I reported in *Brussels News 158*, updated in *BN161- 3* on the Commission's proposal for a regulation, known as the "Data Act" (Procedure reference COD(2022)0047), laying down harmonised rules on fair access to, and use of, data. I refer to that earlier coverage for details of the proposal, the broader context and the hard-won EP breakthrough on the file earlier this spring.
The last planned trialogue between the co-legislators to try to agree a final text took place in the last few days. Going into it, there were several contentious issues remaining, including management of trade secrets; and also the rather fundamental question of governance and enforcement – the EP wants it centralized while the Member States want national authorities to hold the whip hand.
While we await the outcome, I note that the EP published a detailed briefing paper on this subject note long ago, full as ever of links to helpful background materials. I commend to anyone wishing to dive a little deeper: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733681

Digital Markets Act – first notifications now due

Brussels News 158 - 162 covered the adoption of the landmark Digital Markets Act (DMA) – Regulation EU (2022)1925 (published in the Official Journal of the EU on 12 October (https://tinyurl.com/26x46brx) which entered into force on 31 October 2022.
The DMA applied from 2 May 2023.

Accordingly, companies that provide core platform services which, *as at that date*, met the quantitative thresholds laid down in the regulation, are obliged to notify the Commission and provide all relevant information within a two month timeframe. The two month time limit is triggered for other companies that provide those services, if, and from the date when, they meet the quantitative thresholds.
The Commission then has 45 working days to adopt a decision designating a specific gatekeeper. The designated gatekeepers will have a maximum of six months after the Commission decision to ensure compliance with the obligations and prohibitions laid down in the DMA.
The Commission's dedicated webpage on the subject is a useful one-stop-shop: https://digital-markets-act.ec.europa.eu/index_en

Digital Services Act – first online platforms designated VLOPs or VLOSEs

I reported in *Brussels News 161* on the formal adoption and publication of the landmark Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market for Digital Services. It entered into force on 16 November 2022.
Online platforms then had 3 months to report to the Commission the number of active end users on their websites. The Commission used this data to assess whether a platform was to be given the status of very large online platform (VLOP) or very large online search engine (VLOSE).
On 25 April 2023, the first set of these designation decisions emerged, as summarized here: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413 The entities listed have 4 months to comply with the obligations under the DSA, again as listed under that link.
EU Member States need to have their Digital Services Coordinators up and running by 17 February 2024, from when the DSA is fully applicable to all entities in its scope.
As for the DMA above, so the Commission has a handy one-stop-shop webpage with links to relevant materials targeted at the different user groups: https://bit.ly/3BRbZJ7

I also remind you that the Commission has tabled draft implementing regulations for the Digital Services Act. See: http://bit.ly/404ieU3

Digitalizing EU Company law

In late March the Commission tabled a proposal for a directive which is intended to promote greater use of digital tools and processes in EU company law, including the Business Registers Interconnection System. The initiative aims to:

- improve transparency on EU companies by making more information available on a cross-border basis;
- enable the cross-border use of trustworthy company data;
- further modernise EU company law rules to make them fit for the digital age.

The Legal Affairs Committee of the EP has begun its analysis of the draft. All documents related to its legislative journey, can / will be found here: https://bit.ly/3r22Drt

JUSTICE, FUNDAMENTAL RIGHTS & RULE OF LAW

New EU PIL Proposal on the protection of vulnerable adults

At the end of May the Commission tabled a much anticipated, and not without controversy, proposal for a regulation on the protection of vulnerable adults, covering those who, by reason of an impairment (e.g. age, infirmity, disability) are unable to protect their own interests. The proposed regulation sets down rules on jurisdiction and applicable law, recognition and enforcement of intra-EU cases involving such interests. It provides, inter alia, for the introduction of:

- Tools to facilitate digital communication.
- A European Certificate of Representation, which will make it easier for representatives to prove their powers in another Member State.
- Interconnected registers that will provide information on the existence of protection in another Member State.
- Greater cooperation between relevant authorities.

As ever, this now needs to be adopted by the co-legislators, so it will be some time before it becomes law. See the proposal at: https://commission.europa.eu/document/6ff766ad-aca6-4b27-a3cd-b7a9afe8857d_en

The draft regulation is accompanied by a separate proposal for a Council Decision that calls on all Member States to become or remain parties to the Hague Convention on the Protection of Adults, dating from January 2000 - of particular interest to the UK as a third country. See: https://bit.ly/4402FhQ

Fighting against corruption in the EU

In early May the Commission tabled a proposal for a directive that aims to update existing EU anti-corruption legislation, making it fit for purpose, by incorporating the United Nations Convention Against Corruption (UNCAC) among other improvements.

The aim is to ensure that all forms of corruption are criminalised in all EU countries, that legal persons may also be held responsible for such offences, and that these offences incur effective, proportionate and dissuasive penalties. The Commission welcomes comments until late July. See: https://bit.ly/3XyWD5G

Cross-border enforcement of road traffic rules

Preceded by a consultation that I covered last year, the approach taken in this proposal for a directive indicates that lessons have been learned in the field of criminal judicial cooperation as regards producing rules that attempt to balance the needs of the prosecution with the rights of the defence. The draft directive should help Member States' authorities to pursue offenders across EU borders, allowing the person behind the vehicle's registration to be disclosed; while also ensuring fairer treatment of offenders, including through providing for linguistic and other clarifications re procedures and penalties. The proposal is now being considered by the co-legislators. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2131-Cross-border-enforcement-of-road-traffic-rules_en

SLAPPS – EP and Member States finalise their respective positions

I have been covering developments on SLAPPs at EU, Council of Europe, and UK domestic level in editions of *Brussels News* over the past couple of years, including the adoption in April 2022 of a draft directive (COD(2022)0117) and Commission Recommendation, accompanied by a staff working document – see *Brussels News 160*. The draft directive aims to protect journalists, media organisations, activists, academics, artists and researchers against unfounded and abusive legal proceedings the only aim of which is to intimidate them.

As noted at the time, the Recommendation stands as tabled.

However, the co-legislators are now making their own changes to the proposed directive. I informed you last time that the Legal Affairs Committee of the EP (JURI) tabled its draft report at the beginning of March. Since then, two committee opinions and further amendments have been tabled. The duly amended draft report is due for adoption by JURI on 27 June. The text as it has emerged includes procedural safeguards against SLAPPs such as the early dismissal of such cases, cost coverage by the claimant, and non-recognition of third-country judgements. All being well, the draft resolution is due before the EP in plenary on 10 July. See links to all at: https://bit.ly/3XHAbaF

Meanwhile, on 9 June the Council reached a general approach on the text, on which it will now negotiate with the EP to try to agree a final compromise text. For the Council text, see: https://data.consilium.europa.eu/doc/document/ST-9263-2023-INIT/en/pdf

The EU legal profession remains vigilant. I will report as this takes its final shape.

While on the subject, I also note news reports of parallel developments in the UK, whereby amendments added to the Economic Crime and Corporate Transparency Bill are set to provide for a swift end to most SLAPP cases through the introduction of an early dismissal mechanism in the courts. It is said to be based on two tests: whether a case is a SLAPP and whether the claim has a reasonable chance of being successful. The onus will be on the complainants to prove that their case has merit, rather than on the defendant. If this is verified, and survives into the enacted legislation, it would appear to avoid placing members of the legal profession in the invidious position of gatekeeper – a key concern that the Bar has been raising.

Safeguarding Media Freedom in the EU

Brussels News 160 - 3 covered the adoption by the Commission of this important September 2022 proposal for a regulation aimed at safeguarding media freedom in the EU, known as the **European Media Freedom Act** (EMFA) (COD(2022)0277).

Since last time, the EP committee draft report, together with a raft of amendments, have been tabled, all accessible through the following link: https://bit.ly/3YAfDRl

The EP is expecting to vote on a resolution on this file in October. Meanwhile, on 21 June the Council agreed a general approach on the file. See: https://www.consilium.europa.eu/en/press/press-releases/2023/06/21/european-media-freedom-act-council-secures-mandate-for-negotiations/

SINGLE MARKET, COMPETITION AND CONSUMER LAW

New EU General Product Safety Regulation in force

Almost exactly two years after the late June 2021 proposal was tabled by the Commission, the EU's new General Product Safety Regulation (EU) 2023/988 has been published in the Official Journal of the EU and has entered into force. See: https://bit.ly/3NMKtmo

The regulation will apply from 13 December 2024. It amends Regulation (EU) No 1025/2012 and Directive (EU) 2020/1828, and repeals Directives 2001/95/EC and 87/357/EEC.

It makes significant changes for nonfood products and brings both product definitions and standards into line with recent technological and digital developments. It imposes quite onerous obligations on economic operators and online marketplaces, in terms of e.g. transparency towards their customer base, and requirements for prompt action when a product is revealed to cause safety or related issues.

As ever, for anyone wishing to have a more thorough understanding of the regulation and the context in which it sits, I refer you to the very useful EP briefing on the subject, delivered in February this year: https://bit.ly/3NoCvhX

IP - Intellectual property – new framework for standard-essential patents

The Commission has tabled a proposal for a regulation intended to create a fair and balanced licensing framework for the protection of Standard Essential Patents (SEPs) (a patent that protects technology essential to a standard). The current system that provides for patent holders to licence their SEPs to users of the standard is not seen as user-friendly. Comments on the initiative are welcomed until 30 June. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en

Competition – New EU Vertical Block Exemption fully in force

Just over a year ago, the Commission adopted a new Vertical Block Exemption Regulation, replacing Regulation (EU) No 330/2010. The preceding public consultation was covered in e.g. *Brussels News 156*. The regulation entered into force on 1 June 2022, but the text itself provided for a transition period for existing agreements that would not qualify to benefit from the new exemption but would have qualified for the old one on 31 May 2022. That transition period has now expired.

Having had the benefit of hearing expert practitioners discuss this development at the recent annual Bar European Group Conference, I can report that this is one of the areas where our practitioners foresee a heightened risk of divergence between EU and UK law in an area where both sides agreed, under the terms of the TCA Part Two Title XI – to commit to a Level Playing Field for Open and Fair Competition (and sustainability).

Practitioners point to the significant differences in approach between the 2022 Vertical Agreements Block Exemption Order (VABEO) in the UK and the new EU Vertical Block Exemption Regulation, with the EU taking a new more lenient approach in

several material respects. It is not thought that the divergence is sufficient to unsettle the TCA itself, but it may mean that companies involved in cross-border business face additional uncertainty and a layer of double regulation or risk of falling between two stools. Uncertainty could come at the price of companies preferring to move their operations to EU States or opt-out of English law or English choice of court for their commercial contracts so they have a one-stop shop for all their European operations.

I also flag other areas of law where our practitioners are keeping an eye on EU / UK developments that may lead to divergence. Topical examples include the application of the EU's new Collective Redress Directive 2020/1828 (see e.g. coverage in *Brussels News 153 - 155*), including evolving CJEU case law thereon; and Digital Markets (see above for the EU Act) where the UK and EU have adopted similar but different regimes.
For more on the risk of EU-UK divergence, see several items under the EU-UK Relationship heading above.

Competition – guidelines on exclusionary abuses by dominant undertakings
In late March the Commission issued a Communication on its plans to provide greater legal certainty in the application of Article 102 TFEU, which prohibits the abuse of a dominant position by undertakings, by drawing on EU case law. The idea is to foster the harmonised application of Article 102 by the Commission, national competition authorities and national courts. A legislative initiative is planned for late 2025.
https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en

Competition – consultation on the Technology Transfer Block Exemption
The Technology Transfer Block Exemption Regulation exempts certain agreements and practices from the EU's general competition rules. It is due to expire on 30 April 2026. The Commission is in the process of evaluating how well it is working in practice, in order to decide whether it should:

- let the Regulation expire
- prolong the duration of the Regulation, or
- prepare a revised Regulation and related guidelines.

It is currently consulting the public on these questions, closing date 24 July 2023.
See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13636-EU-competition-rules-on-technology-transfer-agreements-evaluation_en

Promoting more sustainable consumer products
After so many years in this role, I have developed a pet list of EU initiatives that could be filed under "Such an obviously simple, good idea, why hasn't it happened before?" Earlier contenders for inclusion include most of the EU's Criminal Defence safeguards measures; mutual recognition of the status of parenthood, etc. But this latest proposal is right up there too: the March 2023 draft directive promoting the repair and reuse of

goods, with obligations and incentives for both producers and consumers. I covered the preceding consultation in editions of this newsletter early last year.
The EP's Internal Market and Consumer Protection Committee will take the lead in drafting the EP's resolution. All relevant documents, including the Commission proposal, can be found here: https://bit.ly/3PxOTiq

Revision of the EU general pharmaceuticals legislation

The Commission plans to evaluate and revise the EU's general legislation on medicines for human use, informed by its experience of the Covid19 pandemic, to ensure a future-proof and crisis-resistant medicines regulatory system.
The revision will aim to:

- ensure access to affordable medicines
- foster innovation, including in areas of unmet medical need
- improve security of supply
- adapt to new scientific and technological developments
- reduce red tape.

Comments on the new proposal for a regulation are welcomed until 30 June. I note that representatives of big US Pharma are among those already to have provided input. See: https://bit.ly/3Xw2jNB

EP report on Lessons learned from the Pandora Papers

I have previously reported that the EP Committee on Economic and Monetary Affairs (ECON) launched an own initiative report specifically on "lessons learnt from the Pandora Papers and other revelations" (2022/2080(INI)), which, as one might expect, has both the protection of whistleblowers and the curbing of tax advice and related loopholes, among the several targets in its sights.
The report was debated by the EP in plenary on 14 June and voted on the following day. The adopted report, which as expected, contains several potential trip wires for the legal profession, though has improved under intense lobbying, can be seen here: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0249_EN.html

Taxation – combatting tax avoidance through shell entities in EU

I reported in *Brussels News 157 – 163* on the range of reactions to, and insights on, the Commission's end 2021 proposal for a directive laying down rules to prevent the misuse of shell entities for tax purposes (amending Directive 2011/16/EU) (Procedure reference 2021/0434 CNS). See: https://bit.ly/3L8k5ih
Several non-binding opinions have since been adopted by various EU institutions, though the only one that matters on taxation is of course, the Council, whose position we still await.
Nonetheless, to add to the EP view I reported on in *Brussels News 163*, we now have that of the Economic and Social Committee: https://data.consilium.europa.eu/doc/document/ST-8007-2022-INIT/en/pdf as well as the earlier opinion of the European Data Protection Supervisor: https://data.consilium.europa.eu/doc/document/ST-6220-2022-INIT/en/pdf

CRIMINAL JUSTICE & SECURITY

Preventing and combatting Child sexual abuse (online)

I have reported on this important Commission proposal for a directive (Procedure reference COD(2022)0155) dealing with this very difficult subject-matter over the year since it was tabled. As you would expect, both the EP and the Council are working hard on it but finding it difficult to achieve the right balance between preventing / prosecuting this most heinous of crimes and not over-reaching as regards requiring mass surveillance and mass data retention, undermining client confidentiality etc. So far, the EP has tabled nearly 2000 amendments and expects to be working on compromise amendments over the summer. See: https://bit.ly/3qTGY4r

Even the Council Legal Service is known to be critical, something that we would not normally hear about. The most recent, though surely not the final, Council compromise text can be seen here: https://bit.ly/46mc5pI

I will report as this progresses.

Assessing progress in the fight against Racism in the EU

Just to flag the Commission's recent follow up Communication – part of ongoing efforts to assess the progress made in implementing both its EU anti-racism action plan for 2020-2025, and the national action plans against racism that were called for therein. https://bit.ly/46rWx3U

Effective justice – common conditions for transferring criminal proceedings between EU countries

In April the Commission tabled a long-awaited proposal for a regulation which seeks to establish common conditions under which criminal proceedings initiated in one EU country may be transferred to another. The idea is to make criminal proceedings more efficient and improve the administration of criminal justice in the EU.

It's fair to say that, were the UK still a member of the EU on the same terms as before, it is unlikely that it would have opted into this initiative, not least given the wildly different approaches to all aspects of criminal proceedings, including the gathering of evidence, disclosure etc in the common law system versus those in the civil law systems. Nonetheless, one to watch, not least given longer-term hopes of improving EU-UK cooperation in criminal matters.

Comments on the proposal were welcome until 15 June. See: https://bit.ly/3Pyta9U

Council progress on the collection and transfer of Advance Passenger Information (API)

On 13 December 2022 the Commission published two proposals for Regulations on API:

- Enhancing and facilitating external border controls – see https://bit.ly/3JIe5hE and
- Prevention, detection, investigation and prosecution of terrorist offences and serious crime – see https://bit.ly/43ZXM8G

Since then, both drafts have been the subject of considerable work by the co-legislators. The Swedish Council presidency is hoping to reach consensus on them by the end of this month, allowing negotiations with the EP to begin.

Modernising EU rules on trafficking of humans – Council grabs the nettle

I have previously reported that the Commission tabled a proposal for a directive (part of its Strategy on combatting trafficking in human beings) which would, inter alia, criminalise the use of the services of exploited victims of trafficking.

On 9 June, the JHA Council agreed its position on the proposal, which text will form the basis of its negotiations with the EP to agree a final version. Among other things, the Council text explicitly provides that forced marriage and illegal adoption are types of exploitation covered by the directive. EU countries will also have to make sure that people knowingly using services provided by victims of trafficking can face sanctions. A welcome stretch from the Member States. See: https://data.consilium.europa.eu/doc/document/ST-10350-2023-INIT/en/pdf

Combating violence against women – Council agreement

On 9 June, the Council reached agreement on the draft directive, originally tabled in March 2022, on combating violence against women and domestic violence. Among other evils, it sets out to criminalise across the EU conducts such as female genital mutilation, cyber stalking, or cyber harassment. The proposal also deals with reporting of violence against women as well as measures of support and assistance for victims, including compensation and data collection. To track progress on the file, go to: https://bit.ly/441m3LF

For the full text of the Council's General Approach, see: https://data.consilium.europa.eu/doc/document/ST-10717-2023-INIT/en/pdf

I also refer you to related coverage of EU accession to the Istanbul Convention, above.

Crime - e-evidence – final steps looming

It turns out my headline in *Brussels News 163*, unchanged from that above, was a little premature as regards adoption of a final text following more than two years of intense interinstitutional negotiations, on the proposed **Regulation on European Production and Preservation Orders** (COD (2018)0108) and the accompanying **Directive on the appointment of legal representatives for the gathering of electronic evidence** (COD(2018)0107). That said, it seems the trialogue discussions have proved successful since then. Thus, the text adopted by the EP in plenary on 13 June should be the definitive one: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0225_EN.html

I remind you, and as noted in *Brussels News 162*, the Council has previously indicated that this agreement paves the way for the EU to relaunch negotiations for an EU-US agreement facilitating access to electronic evidence for the purpose of cooperation in criminal matters.

Minimum rules on freezing & confiscation of assets – proceeds of crime

Brussels News 160 - 163 contained coverage of the Commission's early summer 2022 proposal for a directive (Procedure reference 2022/0167(COD)) which is intended to implement some of the plans set out in the EU's 2020 "Strategy to tackle Organised Crime 2021-2025" by providing competent authorities with the means to effectively trace, identify, freeze, confiscate and manage the instruments and proceeds of crime as well as property derived from criminal activities.

At its meeting on 9 June, the JHA Council agreed a general approach on the draft, which will now form the basis of negotiations with the EP to try to agree a final text. If all goes to plan, among other updates, the new rules will oblige Member States to enable the confiscation, under certain conditions, of unexplained wealth.

See the Council general approach at: https://data.consilium.europa.eu/doc/document/ST-10347-2023-INIT/en/pdf

As for many other measures, from a UK perspective, consideration will have to be given to the extent to which the resulting rules differ from those provided for in the EU-UK TCA, and what if any action is needed as a result.

ENVIRONMENT, CLIMATE AND SUSTAINABILITY

EP approves the proposed Corporate Sustainability Due Diligence Directive

On 7 June the EP in Plenary emphatically adopted the resolution agreed earlier this spring within its Legal Affairs Committee (JURI) approving its amended version of the seminal proposal for an EU Directive on corporate sustainability due diligence.

Background

On 23 February 2022 (indulge me - that would have been my mother's 99th birthday – she'd have been 100 this year), the Commission tabled this hugely ambitious proposal, aimed at fostering sustainable and responsible corporate behaviour throughout *global* value chains.

Companies caught by the directive will be required to identify and, where necessary, prevent, end or mitigate adverse impacts (including ensuring compliance with international obligations) of their activities on human rights (such as child labour and exploitation of workers), and on the environment (for example pollution and biodiversity loss). Overall, the proposal establishes an onerous corporate sustainability due diligence duty to address negative human rights and environmental impacts.

It will apply to **EU companies**:

- Group 1: all EU limited liability companies of substantial size and economic power (with 500+ employees and EUR 150 million+ in net turnover worldwide).
- Group 2: Other limited liability companies operating in defined high impact sectors, which do not meet both Group 1 thresholds, but have more than 250 employees and a net turnover of EUR 40 million worldwide and more. For these companies, rules will start to apply 2 years later than for group 1.

It will also apply to:

Non-EU companies active in the EU with turnover threshold aligned with Group 1 and 2, generated in the EU.
Small and medium enterprises (SMEs) are not directly in the scope of this proposal.

National administrative authorities appointed by Member States will be responsible for supervising these new rules and may impose fines in case of non-compliance. In addition, victims will have the opportunity to take legal action for damages that could have been avoided with appropriate due diligence measures.

Apart from complying with the detailed corporate due diligence requirements, Group 1 companies will also need to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement.

Now
The new EP resolution (see: https://bit.ly/3COTh4J) makes several changes to the original Commission proposal, among the most important being to expand the categories of covered entities to include:

- EU-based companies with more than 250 employees and a net annual revenue worldwide of at least 40 million euros;
- parent companies with more than 500 employees and a net annual revenue worldwide of at least 150 million euros; or
- non-EU companies with $150 million net annual revenue if at least 40 million euros were generated in the EU.

The Council having reached an agreement on a general approach late last year (see: https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf) we will now see negotiations between the EU institutions.
However, no one is expecting this to be quick or easy. Striking a balance that does not stifle investment and economic growth and yet encourages the achievement of human rights / climate targets is far from simple, as indeed can be seen from debates taking place today in the EP on the balance between the EU Green Deal and farming / food supply. Another graphic example of the level of challenge can be seen from the fact, and content, of the European Central Bank's recent opinion striking several notes of caution: https://data.consilium.europa.eu/doc/document/ST-10351-2023-INIT/en/pdf
One way or the other, this measure is likely to lead to litigation-a-plenty.

EP adopts legislation to help achieve 2030 climate targets, including CBAM
In mid-April, the EP in plenary formally adopted several texts, previously agreed with the Council, on key legislative measures under the EU's "Fit for 55 in 2030 package". These include:

- **Reform of the Emissions Trading System (ETS)** - increases the ambition of the ETS in several material respects, including by imposing starker green-house gas emissions targets. It also brings emissions from the maritime sector into scope for the first time.

- Creation of a new **Carbon Border Adjustment Mechanism (CBAM)** - aims to incentivise non-EU countries to increase their climate ambition and to ensure that EU and global climate efforts are not undermined by production being relocated from the EU to countries with less ambitious policies.
    - CBAM covers iron, steel, cement, aluminium, fertilisers, electricity, hydrogen as well as indirect emissions under certain conditions. Importers of these goods would have to pay any price difference between the carbon price paid in the country of production and the price of carbon allowances in the EU ETS.
    - CBAM will be phased in from 2026 until 2034 at the same speed as the free allowances in the EU ETS are being phased out.

- Member states are to set up an **EU Social Climate Fund (SCF)** in 2026 to ensure that the climate transition will be fair and socially inclusive.

The texts now need to be formally endorsed by the Council. They will then be published in the EU Official Journal and enter into force 20 days later.
See generally: https://bit.ly/44f7iEy

EU climate Target for 2040

The Commission is currently consulting on its plans to establish a 2040 climate target putting the EU on the path towards climate neutrality by 2050. It intends to table legislation to this effect next year. See: https://bit.ly/46rWRj8

Proposal for a Net Zero Industry Act

The Commission recently tabled a proposal for a regulation which will establish a common framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act). See: https://bit.ly/3CRyy0l

New EU law on global deforestation enter into force

The Official Journal of the EU recently published the new landmark EU Regulation intended to outlaw or at least curb both the making available on the EU market and export from the EU, of certain commodities and products associated with deforestation and forest degradation. The regulation lays down a list of conditions, all of which must be fulfilled, before relevant products (defined) can be placed or made available on the EU market, or exported from the EU, with a view to:

a) minimising the Union's contribution to deforestation and forest degradation worldwide, and thereby contributing to a reduction in global deforestation;
b) reducing the Union's contribution to greenhouse gas emissions and global biodiversity loss.

The regulation enters into force at the end of this month, with dates of application from 2024 and 2025, depending on the provisions. See the official text at: https://bit.ly/44nPE1F

EU proposal to combat greenwashing by companies

As foreseen in *Brussels News 163*, in late March the Commission tabled a proposal for its much-anticipated **Green Claims Directive** (Procedure reference COD(2023)0085), which takes aim at corporate greenwashing by setting rules on what type of environmental claims companies can make, and providing ways in which they should be independently verifiable.

The key objectives of the proposal are to:

- Increase the level of environmental protection and contribute to accelerating the green transition towards a circular, clean and climate neutral economy in the EU;
- Protect consumers and companies from greenwashing and enable consumers to contribute to accelerating the green transition by making informed purchasing decisions based on credible environmental claims and labels;
- Improve legal certainty as regards environmental claims and the level playing fields on the internal market; boost the competitiveness of economic operators that make efforts to increase the environmental sustainability of their products and activities and create cost saving opportunities for such operators that are trading across borders.

For the proposal itself, see: https://bit.ly/46mB641 EP draft reports and other related papers will appear at: https://bit.ly/42Xree5

Note that this proposal complements a couple of related spring 2022 proposals:

- Amending the Consumer Rights Directive to oblige traders to provide consumers with pre-sale, comprehensible information on products' durability and reparability (see further above); and
- Amending the Unfair Commercial Practices Directive (UCPD) to outlaw certain misleading practices relating to a product's environmental or social impact, as well as its durability and reparability.

Environmental Crime Directive

I notified you in *Brussels News 162 & 3* that late last year the Council agreed its mandate for negotiations with the EP on the Commission's December 2021 proposal to upgrade the Environmental Crime Directive (2008/99/EC). You will recall that the proposal aims to improve the investigation and prosecution of environmental crime offences, including by extending the list of environmental crimes from nine to twenty, and including greater precision in their definition. It also harmonises the level of penalties for natural persons and, for the first time, also for legal persons.

In April the EP in plenary agreed to enter into negotiations with the Council based on the mandate drafted by the JURI committee. The EP is very supportive of the proposal, but seeks to make it even more effective, including through a greater focus on the prevention of environmental crime. The EP considers that gaps in the current legislation "created incentives in most of the Member States for offenders to circumvent EU or national legal provisions concerning environmental protection as the risk of conviction was low and sanctions often did not have the deterrent effect. Moreover, environmental crimes are frequently linked with organised criminal activities of cross-border dimension, such as illicit waste shipment or trade in protected

species. For example, the annual revenue of illicit waste market is estimated between 4 billion euros and 15 billion euros".

The EP's approach now, therefore, is to:

- improve the effectiveness of investigation and prosecution of environmental crimes;
- clarify relevant legal terms;
- improve the collection of data;
- ensure effective, dissuasive and proportionate sanction types and levels;
- strengthen prevention measures.

In concrete terms, this includes raising fines for legal persons, so that the maximum limit is not less than 10 percent of the average worldwide turnover of the legal person in the last three business years, which takes it into the realms of EU powers for breaches of Competition Law. In addition, the EP proposes to extend the limitation periods for such offences.

Furthermore, in line with Article 191(2) TFEU, the precautionary principle applies to Union policy on the environment and prevention is key. The polluter should pay and bear the full costs of the environmental harm caused, with targeted fines which in part contribute to measures to prevent other environmental crimes.

Finally, and as noted last time, the EP continues to push for the revised directive to include the (international) crime of **Ecocide**. In addition, consideration is being given to extending the mandate of the European Public Prosecutor's Office (EPPO) to include serious environmental crimes.

The trialogue meetings are ongoing, with the next scheduled for 27 June. For all relevant documents, go to: https://bit.ly/40o03bx

Conservation & enforcement in Northwest Atlantic Fisheries Organisation area

Somewhat niche, but for those interested, note that the Commission has recently tabled a proposal for a regulation updating these rules. Go to: https://bit.ly/3NOIRIR

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