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To assist with Eurojargon terms, please go to the Europa website plain language guide:
http://europa.eu/abc/eurojargon/index_en.htm

SPOTLIGHT ON THE FUTURE OF EUROPE

EU27 Declaration on Future of Europe

This early summer of 2019, the EU is putting the final touches to its vision for its next five years and beyond. These steps are the culmination of several years of reflection.

Preparatory steps

In March 2017, ahead of the 60th anniversary of the Treaties of Rome, the Commission published a [White Paper on the Future of Europe](#). It outlined five possible scenarios for the EU's future at 27. This was the starting point for a major public debate intended to inspire the main policy priorities of the EU's next strategic agenda 2019-24.

In his [2017 State of the Union address](#), Commission President Juncker unveiled a roadmap detailing the main steps to be taken towards a more united, stronger and more democratic Union – a roadmap the EU has been following since then.

More recently, and in anticipation of the EU27 Summit on the future of European in Sibiu, Romania on 9 May, the Commission published a major report on Europe's current and future role, which you can find here:

[Europe in May 2019: Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world](#)

I commend to those interested in gaining an insight into what makes the EU tick just now, a look at the annexes that were attached to said Commission report, links below:

[Progress on the Economic Situation](#)

[The EU's public opinion 2014-2019](#)

[The Top 20 EU achievements 2014-2019](#)

[Unfinished business: the Top 10 EU issues awaiting final agreement](#)

[Key figures for the EU 2014-2019](#)

The Sibiu Summit Declaration

At the much-heralded Sibiu Summit itself, EU 27 leaders unanimously agreed on 10 commitments for the future of the EU, the headlines of which are as follows:

- Defend **one Europe**.
- Stay **united, through thick and thin** – including speaking with one voice.
- **Always look for joint solutions**, listening to each other in a spirit of understanding and respect.
- **Protect our way of life, democracy and the rule of law**, including upholding shared values and principles enshrined in the Treaties.
- Deliver **where it matters most**. Europe will continue to be big on big matters.
- Always uphold the principle of **fairness**, whether it be in the labour market, in welfare, in the economy or in the digital transformation.
- Provide the **means to match the EU's ambitions**.
- **Safeguard the future for the next generations of Europeans**.
- **Protect EU citizens**.
- **Europe will be a responsible global leader**, including making the most of new trading opportunities, jointly tackling global issues such as preserving our environment and fighting climate change.

The immediate specifics of all of this will be set out in the EU's Strategic Agenda 2019-2024 which is to be adopted by the European Council when it meets on 20-21 June – see outline: <https://bit.ly/2JrTvo9>.

That is the same summit at which it is due to discuss the Multiannual Financial Framework for 2021 – 2027 (the one that the UK will be required to contribute to if Brexit is further delayed / transition is extended) and to announce its nomination for the new Commission President – see more on that below.

Not to be left out of this future forward debate, the **new European Parliament (EP)** has also set out its vision of what the EU should be prioritising over the coming years. The Green Party's success in the recent EP elections (see next item) can already be seen to be bearing fruit:

1. Environment and biodiversity, sustainable mobility, fighting climate change and zero waste, food, health.
2. Economic and social policy, jobs, trade, competition policy and industrial policy, taxation, EMU [Economic and Monetary Union] reform.
3. Innovation, digitalization, AI, single market, consumer protection.
4. Rule of law and fundamental rights, security, fight against terrorism, border and migration.
5. Europe in the world, development, defence, multilateralism, EU Africa relations, enlargement.

A look at the European Parliament Election results

The 2019 elections to the European Parliament took place across the EU between 23 – 26 May and results emerged the following day. By way of reminder, the headlines were:

- More than 426 million people were eligible to vote. Turnout last time (2014) was around 42.6 percent. Turnout was over 52% this time.
- In total, 751 seats were filled. Key statistics as of first week of June:
 - EPP (Christian Democrats) have 179 seats, down from 221 in 2014.
 - S & D (Socialists) have 153 seats, down from 191 in the 2014 election.

- Parliament's reconstituted ALDE (Liberals) group has 109 MEPs, up 40 from the previous election.
- European Greens gained 17 seats to take fourth place in these elections with 69 MEPs.
- There will likely be around 450 new MEPs, including quite a few in their early to mid-20s when the final count is in. Another 14 are making a comeback after missing the last Parliament, leaving only about 280 returning MEPs.
- The long-standing dominance of the two centrist parties – the EPP and the S & D is thus over, since neither alone nor together, can they command a working majority. Instead, they will need to court either the EU's Greens or Liberals, and alliances are therefore expected to be much more fluid than in the past, with more scope for external and varying influence. Climate change is also therefore likely to be a more prominent theme across different policy areas (and see above on the EP's new list of EU priorities for the next 5 years).
- Across the EU the populist vote was less than feared, the disparate populist parties having between them won some 112 seats, up 34 on the 2014 showing. Were they to act as a bloc, that would place them third. However, whilst some shifting between camps is occurring, they are not currently expected to coalesce, given their very different political agendas and allegiances.
- Immediately after these results emerged, and in light of them, the European Council held informal discussions about filling the post of Commission President and other top EU appointments (on which see next item). Its nomination for the post of Commission President for the next institutional cycle will emerge at its summit on 20-21 June (see above).
- MEPs and the political groups are now jockeying for the plum roles – group leaders; key committee chairmanships and other positions of power within the House.

What will happen to the UK's MEPs upon Brexit?

In principle, as soon as the UK departs, the 751-seat House will be reduced to 705 seats, proportionate to the EU's reduced population. The UK's seats, proportionately reduced from 73 to 27, will be re-allocated to 14 of the remaining EU 27 countries in order to re-balance the national representation. These countries have already elected their extra MEPs in the May elections, though they will only take their seats when the UK leaves.

Just to note however, there is an interesting debate to be had on whether there is a legal basis for removing UK MEPs who have just been elected to office, but who want to stay on post-Brexit, given the Treaty's silence on the matter. A 2018 report on the institutional implications of a hard Brexit suggested that UK MEPs (and indeed other appointees, including at the CJEU) should stay on until the end of their mandates, as the TEU terms them representatives of EU, rather than UK, citizens. At the time of its writing, the report anticipated Brexit occurring at end March 2019, and the UK therefore not taking part in the May 2019 EP elections. See: <https://bit.ly/2EWXiXs>
The agreed "Flexion" to the Brexit (Article 50(3) TEU) notice period granted by the European Council in its Decision of 11 April (<https://bit.ly/2Wpc3rM>) rather changes the dynamic, though that decision itself is among texts cited as providing the legal

basis for termination of such office if necessary. I will report on this going forward if and when this aspect of the debate develops.

EU Institutional appointments for the 2014-19 cycle

It's musical-jobs time in Brussels, and the main buzz centres on who will be the new Commission President. Traditionally, EPP (Christian Democrat) and P&S (Socialist) candidates are front-runners, coming from the parties that for many years have dominated the EU's political agenda (see above re the EP elections). Their apparent stranglehold on the Commission Presidency post was cemented by the introduction of the Spitzenkandidaten (or lead candidate) system whereby the Heads of State and Government of the European Council nominate as Commission president the lead candidate of the party winning the most EP seats – as happened for the first time in 2014, leading to Jean-Claude Juncker (EPP)'s appointment.

However, the European Council indicated in February 2018 that it did not consider itself bound to repeat that process, and certainly the results of the EP elections (see above) have poured fuel on that fire, with much broader jockeying for position now taking place.

Frontrunners:

Manfred Weber (Germany) (EPP) – Named as the EPP lead candidate, but there are bigger names behind his.

Michel Barnier (F) EPP – not formally a declared “lead candidate” but widely seen as having his eye on the job, and as having used his EU Brexit negotiator platform to good effect in “campaigning” in various Member States’ capitals over recent months. His main difficulties are his age and the fact that he has never held high political office on the national stage. That said, some see Mr Barnier as a potential compromise.

Frans Timmermans (NL) (S&P) Current Vice-President, European Commission and having a high profile on rule of law, fundamental rights issues. He has just been elected to the EP.

Guy Verhofstadt (Belgian) (ALDE) – former Belgian Prime Minister and long-standing high profile MEP. He is perhaps the best known of the 7 Lead Candidates ALDE is putting forward, though the Macron side of the new grouping seems to be pushing him aside.

Margrethe Vestager (Dk) ALDE - current Competition Commissioner and former national Minister, who is popular and would tick the right box on the gender side.

Ska Keller and **Bos Eikhout** are the two most discussed Green party “candidates”.

The names of other incumbent or former heads of national governments are also mentioned, though rarely with much conviction at this point.

However, it is important to note that the Commission Presidency is not the only big EU job that is to be vacated this year. An exceptional alignment of the stars means that the other slots include:

- **High Representative of the Union for Foreign Affairs and Security Policy**
- **President of the European Council** – Donald Tusk steps down this autumn. His successor must be a former head of state.

- **EP President** - must be an elected MEP.
- **Head of the European Central Bank** - Mario Draghi steps down this autumn. His successor must be from a Eurozone country (19 Member States) and be a former Governor of a central bank. The hot tip has been **Jens Weidman**, Governor of the Bundesbank, though having a conservative German at the head of the ECB is not without its critics.
- And of course, the **College of Commissioners** – and within that, some portfolios (trade, competition, agriculture...) are more prized than others.

None of these should be viewed in isolation. Various permutations are possible:

- The EPP remains the dominant political force on the EU stage, albeit not by much. **Angela Merkel may decide she is persuadable to become President of the European Council**, replacing Tusk.
- If she were to do so, that would preclude a German national taking one of the other key roles, so **Mr Barnier** becomes more likely for Commission President, or maybe **Mr Verhofstadt or another ALDE candidate**, if the shift away from the two centrist parties is carried through.
- The Presidency of the ECB, a mightier institution than is widely understood due to the behind-the-scenes support it has provided to Eurozone countries in recent years, would then likely flip to a smaller Member State. Finland, for example, has two well qualified candidates in **Erki Likanen** and **Ollie Rehn**.
- EP President must be drawn from the ranks of elected MEPs. The current incumbent, Mr Tajani is known to want a second term.

Alternative scenario:

- Merkel does not seek European Council Presidency.
- Then President of Deutschebank, Weidmann, could well be tipped for ECB, meaning that Manfred Weber would still lose out in the Commission.
- Messrs Barnier or Verhofstadt for Commission President?
- Socialist Timmermans then might get European Council? Etc.

All of this is fluid of course, so by the time of reading, the picture could have changed. We do have certainty, however, about the next stages:

- Once the EU leaders have proposed their candidate for Commission President in late June, the EP will vote on the appointment in July. Parliament has said that it will not accept a candidate who has not participated in [the lead candidate process](#), so there could yet be a tussle there.
- The EU Member States will then propose Commissioners, in cooperation with the new Commission President. Again, various names are in the fray, with controversy surrounding temporary candidates and other issues.
- The Commissioners-designate will be examined by the EP committees responsible for their proposed portfolios in the early autumn, before MEPs vote on whether to approve (or reject) the *entire* Commission in plenary.
- All being well, the new European Commission should take office on 1 November, the day after the UK is currently scheduled to leave the EU.

Possible influence of Brexit on future EU appointments?

The European Council nominates the Commission President by qualified majority. If the UK chooses to exercise its legal (though arguably not moral, in the current circumstances) right to vote, rather than abstain, it will have a strong say, commanding as it does the third largest bloc of votes based on population.

If Brexit proceeds and the Withdrawal Agreement negotiated with Brussels does indeed shape the next phase of negotiations, then there are some who consider that elevating Barnier to the Commission presidency could be London's best guarantee that the EU will live up to all of its commitments therein. We will see.

Part I BREXIT - NEWS AND VIEWS

BREXIT – where are we now?

As ever, I write this newsletter primarily from a Brussels perspective, on the assumption that readers have more than enough exposure to the UK one. Please refer back to earlier editions for more background, including an insight into the EU's approach to the Brexit negotiations as set out in *Brussels News 140 & 142*.

The status quo:

- There have been 3 defeats in the UK Parliament for the Withdrawal Package agreed last year with the EU, so the deal remains unratified.
- There is no clear majority in the UK House of Commons for any particular course of action, including a no-deal Brexit.
- Flexextension of the Article 50 TEU notice period was formally approved on 11 April, to end October 2019.
- UK Prime Minister has resigned but is caretaking until her successor is appointed.
- The UK's governing party is now focused on electing its own new leader, while the Article 50(3) notice period clock continues to tick. If press reports are to be believed, the frontrunners to replace Mrs May are all Brexiteers.
- The Brexit Party won the day, as a party, in the UK EP elections, but the disparate remain vote was higher.

With time passing and so little clarity on the UK side, Brussels is preparing itself for no deal, possibly happening by default on 31 October. Indeed, it has been doing so for many months – see coverage and links to Brexit preparedness notices in the last two years' editions of this newsletter.

So, what then is the mood in Brussels? You can see from the items under Future of Europe and elsewhere in this newsletter, that the EU has a full agenda going forward.

The longer Brexit drags on, the more it is seen as, at best, an irritating distraction. Thus:

- Traditionally friendly Member States cannot be guaranteed to remain so.
- Brussels folk, be they EU or national officials, are rather bored of Brexit. They want to move on to other EU priorities.
- They are perplexed at, and increasingly distrustful of, the UK political process.
- A further problem is logistics and timing: the longer the first pre-Brexit phase continues, the more it eats up time allotted to the second phase: negotiations on the future EU-UK relationship. No-one is expecting the second phase to be

quick or simple, especially if the UK itself does not know what it wants. Thus, if Brexit happens on a deal basis, the EU is anticipating that the UK will need an extension of the transition period beyond end 2020. However, we then run into other problems such as the budget - Multi-annual Financial Framework. Will UK be willing to contribute? How could that be managed? Etc.

Conduct of the next phase of negotiations – towards a future relationship?

Whether we are facing a hard or soft Brexit, the EU and UK will be back at the negotiating table to discuss their future relationship sooner or later. As things stand though, we do not know how the next phase of the negotiation will be conducted on the EU side.

- Will the TF50, or a successor to it, lead for the Commission under a European Council Mandate? or
- Will the Commission departments traditionally responsible for trade negotiations with third countries take the lead?
- Will the EU27 heads of state, alternating with the General Affairs Council, continue to meet to discuss progress on the negotiations, or will individual subject areas be devolved to the specialist council formations, such as the Justice and Home Affairs, or Competitiveness Councils? Etc.

The informal UK position seems to favour a non-centralised approach on the EU side where possible, not least as the expectation is that, e.g. Justice ministers are more likely to be sympathetic to the argument that civil judicial cooperation is of mutual benefit, than might be an overarching negotiator.

UK legislative preparations for no deal and application of new EU Law

The Bar's EU Law Committee is keeping an eye on transposition into domestic law of EU directives that have recently been adopted and/or are due to be implemented into national law while the UK is still bound by EU law, across a diverse range of practice areas. There are concerns that corners could be cut / standards slip given the burden of Brexit work overwhelming government departments, potentially to the detriment of citizens and businesses. The committee is collecting data on these files. A useful tool in that exercise is Thomson Reuters: Brexit: EU legislation expected to apply or be implemented in UK pre-Brexit and during transition tracker: <https://tmsnrt.rs/2W1YuJU>

Indeed, the need to be vigilant extends beyond this category of instruments, and also covers:

1. Statutory Instruments for no deal.
2. Ongoing application of directly applicable EU law including regulations, in particular where there are elements left to the discretion of the Member State.
3. Emerging issues on equivalence, especially in vital areas such as financial services, and data protection.

Readers are invited to contact me at the address below if they know of problems of this nature which should be brought to the attention of the EULC.

Civil Justice Cooperation in the Future Relationship

You will recall from contemporaneous coverage in *Brussels News 143 & 144* that the joint political declaration setting out the **Framework for the Future Relationship** between the EU and the UK (the Political Declaration, part of the Withdrawal Package that is yet to be, and may never now be, ratified by the UK Parliament) (see: <https://bit.ly/2wJbPkR>) is very light on detail on Civil Justice Cooperation (CJC).

By way of a reminder, there are two catch-alls, one sweeping and the other targeted at family law, that arguably cover it (my emphasis added):

Para 3: "...this declaration establishes the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation. Where the Parties consider it to be in their mutual interest during the negotiations, the *future relationship may encompass areas of cooperation beyond those described in this political declaration*"

Para 58: "The Parties will explore options for judicial cooperation in matrimonial, parental responsibility and *other related matters.*"

By contrast, criminal judicial cooperation and related areas are expressly included:

Para 84: "Noting these commitments, the future relationship should cover arrangements across three areas of cooperation: data exchange; operational cooperation between law enforcement authorities and judicial cooperation in criminal matters; and anti-money laundering and counter terrorism financing."

These commitments are then fleshed out in Paras 88 – 91.

During the first phase of negotiations that led to last autumn's agreement on the Package, the Commission's Task Force 50 (TF50), which was mandated by the European Council to negotiate on behalf of the EU 27, was strict about not singling CJC out for special treatment. Reference was made to both sides' red lines, including the EU's determination to avoid the UK cherry-picking the best elements of the Single Market. The TF50 refused to engage in any real discussion on CJC and indeed future market access for legal services, in the first phase, identifying them as Future Relationship issues. That argument will no longer hold in the second phase, and we may hope to see a more flexible discussion.

HMG, specifically the Ministry of Justice, is examining its approach to these issues now, and we as a Bar are encouraging them to be ambitious, especially if there were to be some flexibility relating to red lines. There is wide agreement on both the EU and UK side regarding the mutual benefit on the *criminal justice and security* side, and we would like to see this extended. MoJ agrees with the Bar that we should ideally seek a bi-lateral agreement between the EU and UK covering CJC too, though realistically, it may only involve the key measures: e.g. Brussels I recast, Insolvency, Brussels IIa, Maintenance obligations.

The UK has played a considerable role in developing the EU acquis, including in the area of CJC, which role is acknowledged and appreciated in many quarters in Brussels and beyond. We hope that HMG will open negotiations with this in mind and be ambitious.

The Lugano Convention is not a fall back and should not be assumed to be. First, it is not clear that the EU / EEA would agree to the UK joining. Secondly, in any event,

even if it may be a partial salve for big business, which can afford enforcement proceedings etc, Lugano does not adequately assist individuals and consumers. The MoJ is seeking concrete examples, ideally in case study form, of cross-border problems affecting citizens and businesses from other Member States (not only UK), which maintaining CJC would help to resolve. Readers are asked to send me such examples to the email address provided at the end of this newsletter.

EU commits to reciprocal visa-free short-stay (non-professional) travel

By way of follow up to the coverage in *Brussels News 147*, just to confirm that Regulation 2019/592 has been published in the Official Journal of the EU: <https://bit.ly/2I2S3rg>

You will recall that it amends Regulation (EU) 2018/1806 so as to add the UK to the list of third countries set out in Annex II to that regulation. The effect is that, following Brexit, UK citizens coming to the Schengen area for a short stay (90 days in any 180 days) will be exempt from the requirement to hold a visa.

Please see *Brussels News 147* for more detailed coverage, including of the reciprocity requirement and re the operation of exceptions for paid activities, which is an issue on which the Bar is focussing.

The regulation should enter into force on the day following that on which EU law ceases to apply to the UK.

Part II EU BUSINESS AS USUAL

The Bar continues to engage on EU law developments that may have an impact on its clients or practice. It bears repeating each time: this matters while we are still members of the EU, while transiting out, and likely thereafter, unless of course, there is a No-deal Brexit, in which case, we are in uncharted territory. Even then though, informed expectation is that the parties would be around the table, agreeing areas where future cooperation was essential, within a fairly short period of the dust settling. And close future cooperation, possibly based on reciprocity, will surely require the UK to, at the very least, mirror a lot of EU rules going forward. So, our BAU work continues.

EU's legislative record for 2014 – 2019

To accompany its "Europe in May 2019" report referred to under "Future of Europe" above, the Commission produced some noteworthy statistics on the EU legislators' track record during the period 2014 – 19. The figures below reflect an update provided by the Commission in the last few days:

"In total, this Commission made 474 new legislative proposals and carried over an additional 44 presented by previous Commissions. Of these, 351 proposals have been adopted or agreed by the European Parliament and the Council during the current mandate. Remarkably, in around 90% of the cases, the final compromise was approved by consensus in the Council of Ministers, and *thus supported by all 28 Member States.*" i.e. including the UK.

I note that the Commission announced last week that, of the 167 tabled proposals that remain to be agreed at this point, it believes that about half have a chance of agreement before 31 of October i.e. by the end of the present mandate. September and October will be busy then!

The European Semester

The European Semester provides a framework for the coordination of economic policies across the European Union. It allows EU countries to discuss their economic and budget plans and monitor progress at specific times throughout the year. Each year, the Commission undertakes a detailed analysis of each country's plans for budget, macroeconomic and structural reforms. It then provides EU governments with country-specific recommendations for the next 12-18 months, *though whether to act on these is left to the national government.*

What is happening currently?

The most recent European Semester Country reports were published in February 2019. These have now been followed, on 5 June, by Commission publication of country-specific recommendations (including for the UK). A discussion of these recommendations is on the agenda for the 20-21 June European Council. See further:

- February reports: https://ec.europa.eu/info/publications/2019-european-semester-country-reports_en
- UK-specific report: https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-united-kingdom_en.pdf
- June recommendations:
- https://ec.europa.eu/info/publications/2019-european-semester-country-specific-recommendations-council-recommendations_en
- UK-specific recommendations : https://ec.europa.eu/info/sites/info/files/2019-european-semester-country-specific-recommendation-commission-recommendation-united-kingdom_en.pdf

Dates for your diary

European Circuit, Annual Conference, Rome, 12 & 13 September 2019

This two-day conference will cover comparative law and procedure; examine English-speaking commercial courts in civil law countries post-Brexit and the future influence of common law within the EU after the British withdrawal. For more details, go to the Circuit website at: <http://www.europeancircuit.com/events2019/>

RULE OF LAW

Reflecting on how to strengthen the rule of law in the EU

Article 2 TEU enshrines the rule of law as one of the foundation stones of the EU. In March 2014, the European Commission adopted [a new Framework for addressing systemic threats to the Rule of Law](#) in any of the EU's Member States. The Framework established a tool allowing the Commission to enter into a staged dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law. Article 7 of the TEU introduced express powers for the EU institutions to act in this

area, about which I have gone into detail in previous editions, notably *Brussels News* 142. However, taking any such action, particularly when it involves express or implied criticism of the structures and institutions that lie at the heart of Member State identity, is by its very nature, politically fraught.

So, despite all of this, regular readers of this newsletter will know that the EU has been grappling with how best to handle the risk of, or actual, breaches of the rule of law within the EU for several years now. Both Poland and Hungary have been the subject of Article 7 TEU proceedings and/or of cases before the ECJ. A serious EU-wide re-examination of what could be done was therefore both timely and inevitable.

Thus, in early April, the Commission launched a process of reflection on the rule of law in the EU. The Commission Communication that forms the centrepiece of this initiative ([Communication](#)) includes the following:

- A stock-take of the available tools to monitor, assess, and protect the rule of law in the EU. As mentioned above, the Article 7 procedure is the cornerstone, but the EU has recourse to other tools including infringement procedures, the [European Semester](#) (see above), the [EU Justice Scoreboard](#) (see below) or the [Cooperation and Verification Mechanism](#) (CVM).
- A look at recent European experience in this area, and
- Discussion of some ideas on how the rule of law could be further strengthened.

The unsurprising conclusions are that there is a need for better promotion of the rule of law, early prevention of risks or breaches to the rule of law, and effective response when such issues occur in the Union.

Possible avenues for the future

The Commission outlines three pillars which could contribute to further the effective enforcement of the rule of law in the Union:

- **Better Promotion** of the rule of law standards and case law at national level. This could be achieved, for instance, through communication activities for the public, common EU approaches that help promote a stronger rule of law culture across institutions and professions, continued engagement with the Council of Europe, and participation of civil society at the regional and local levels.
- **Early prevention:** Greater EU support for Member States in building resilience of key systems and institutions. Regular cooperation and dialogue could contribute to understanding and the early resolution of any rule of law issues.
- **Tailored response:** A diversity of rule of law challenges requires a diversity of effective responses. The Commission will continue to ensure the correct application of the EU law via infringement procedures. Different approaches may also be appropriate in specific policy areas such as the [Commission's proposal on the protection of EU's financial interest](#). In addition, some refinement to the existing Rule of Law Framework could be explored, including early information to and support from the European Parliament and the Council, as well as clear timelines for the duration of dialogues.

All players, be they institutional or civil society, are invited to input their views. The Council of the Bars and Law Societies of Europe, of which as you know, the Bar is a member, is doing so. The Commission will return to this issue with its own conclusions and proposals later this month. It remains to be seen whether real teeth will be added to the EU's toolbox in this area.

EU Justice Scoreboard 2019 - a rule of law tool

On 26 April, the Commission published the 2019 EU Justice Scoreboard. This is the seventh such report, and gives a comparative overview of the independence, quality and efficiency of justice systems in EU Member States.

A new element this time around may come as no surprise given the ongoing rule of law challenges in Poland and Hungary: it provides an overview of disciplinary regimes regarding judges in national justice systems and safeguards in place to prevent political control of judicial decisions. The Scoreboard also presents the management of powers over national prosecution services justice systems, including the appointment and dismissal of prosecutors, which are key indicators for the independence of a prosecution service.

The key findings of the 2019 edition include:

- **Some positive trends on the efficiency of justice systems:** The Scoreboard shows that over eight years (2010-2017) positive developments can be observed in most of the Member States identified in the European Semester (see above) as facing specific challenges. For example, the length of first instance court proceedings has decreased or at least remained stable in most Member States, though there remain some in which proceedings can take two or more years.
- **Challenges as regards perception of judicial independence are growing:** According to a recent Eurobarometer survey in two-thirds of Member States, the perception of judicial independence has improved, as compared to 2016. However, compared to last year, the public's perception of independence has decreased in about three-fifths of all Member States^[1]. Possible political interference or pressure is the main reason for the perceived lack of independence of courts and judges.
- For **national prosecution services**, the Scoreboard shows that there is a tendency in some Member States to concentrate management powers, such as evaluation, promotion, transfer of prosecutors, in the hands of a single authority. I note in this regard the 27 May 2019 ECJ Grand Chamber judgment in joined cases **C508 and 509/18**, on which, see more below.
- **Quality of justice:** Compared to previous years, online access to court judgments has improved, especially as regards the publication of judgments of the highest instance: 19 Member States now publish all civil/commercial and administrative judgments.

Next steps

The findings of the 2019 Scoreboard were already taken into account for the country-specific assessments and recommendations under the 2019 European Semester (see above). For More Information:

[EU Justice Scoreboard 2019](#)

[Summary of the 2019 EU Justice Scoreboard: Factsheet](#)

[Annotated graphs with full figures](#)

[Questions and Answers](#)

[Eurobarometer on 'Perceived independence of the national justice systems in the EU among the general public'](#)

[Eurobarometer on 'Perceived independence of the national justice systems in the EU among companies'](#)

CIVIL JUSTICE

Directive on insolvency, restructuring and second chance informally agreed

I reported in some detail in *Brussels News 147* on the main elements of the final compromise text, adopted by the EP in plenary in March, of the 2016 proposal for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (procedure reference COD(2016)0359). See: <https://bit.ly/2wGLLqP>

On 6 June, the JHA Council formally adopted the text, meaning that all that is left now is for it to be published in the Official Journal, something we should see in the coming weeks, from which date it will enter into force.

Member States will then have the standard two years to transpose it, though certain elements have a longer, respectively five and seven year, lead time.

As noted last time, if the outcome of the current Brexit impasse involves the UK continuing to apply or mirror EU law going forward, even if only over the next couple of years, we will need to pay close attention to how HMG implements / applies / adapts it into national law.

Collective redress - update

I reported in *Brussels News 142 – 146* on the controversy surrounding this April 2018 proposal for a directive on representative actions for the protection of the collective interests of consumers (Procedure reference COD(2018)0089). Most recently, *Brussels News 147* examined the EP resolution, adopted in late March, which went some way, but not far enough, to assuage the concerns of the legal profession about the proposal. The Competitiveness Council, meeting in late May, was informed of progress achieved so far, but noting that the preparatory bodies of the Council are still examining the proposal. Hopefully the whole file will be held over to the next mandate, when lobbying efforts will surely be redoubled, not least through comparison to the online intermediaries' proposal, on which see more below.

See further at: <https://bit.ly/2I27JuG>

CRIMINAL JUSTICE & SECURITY

Recent UK opt-ins to EU criminal justice measures

This spring, the UK has formally notified the EU of its intention to opt into several recent EU criminal justice measures, the adoption of which has been covered in back issues of this newsletter, including revision of Eurojust (see e.g. *Brussels News 144*), ECRIS - TCN (see *Brussels News 145 – 147*), etc. When asked by others why the UK is still opting in, it seems that UK officials are saying that it is indicative of the UK's commitment to continuing judicial cooperation in the criminal justice field. Which of course, it is, if everyone is willing to view this in isolation, and not e.g. against the backdrop of historical pick-and-mix opt-ins, and the infamous Protocol 36 process of yesteryear. Let's see.

HMG consultation: Transposition of Fifth Money Laundering Directive

This time last year, the EU co-legislators were coming to the end of negotiations on the fifth Money Laundering Directive (5MLD) (<https://bit.ly/2IUeq4w>) which eventually came into force on 9 July 2018. Member States have until 10 January 2020 to transpose it into national law. Despite Brexit, HMG quickly confirmed its intention to adopt 5MLD, and is now conducting a public consultation on its implementation, with deadline for responses on 10 June 2019: <https://www.gov.uk/government/consultations/transposition-of-the-fifth-money-laundering-directive>.

What does 5MLD add to the body of EU anti-money-laundering legislation?

In parallel with other recent EU legislation, 5MLD was tabled in reaction to the increased threat of terrorism and revelations from sources such as the Panama Papers that highlighted, inter alia, the links between terrorist financing and money laundering. Key changes it brought in include:

- Extension of scope to virtual currencies and custodian wallet providers and customer due diligence controls apply.
- Use of electronic identification checks for customer due diligence.
- New bank account registers will be introduced to allow law enforcement access to bank account information held in that Member State, enabling them to identify account holders.
- Member States will have to issue and keep up to date a list of “prominent public functions”.
- Enhanced access (cross-border) to beneficial ownership registers to improve transparency relating to the ownership of companies and trusts.
- Enhanced due diligence checks for business relationships or transactions involving high-risk third countries. The Commission created and maintains a list of non-EU countries with deficient money laundering regimes. 5MLD goes further and can prevent the opening of branches in high-risk third countries.
- **Prohibition on** the use of anonymous accounts, safe-deposit boxes and passbooks, with all now being subject to customer due diligence measures.

Plainly, this is going to be a complex exercise for the UK – hence the consultation.

Preventing the dissemination of terrorist content online

With 308 votes in favour, 204 against and 70 abstentions, in mid-April, the EP backed the controversial draft regulation (Procedure reference: COD(2018)0331) to tackle the misuse of internet hosting services for terrorist purposes. The measure has teeth: companies that systematically and persistently fail to abide by the law may face a sanction of up to 4% of their global turnover.

Main elements of the new measure

- Once an internet company hosting content uploaded by users (like Facebook or YouTube), that offers their services in the EU, has received a removal order from the competent national authority, they will have one hour to remove it or disable access to it in all EU Member States.
- There is no obligation on those companies to monitor or filter *all* content.

To help smaller platforms, MEPs decided that, when a company has never received a removal order before, the competent authority should contact it, to provide

information on procedures and deadlines, at least 12 hours before issuing the first order to remove content that they are hosting.

What is terrorist content?

The legislation targets any material - text, images, sound recordings or videos - that “incites or solicits the commission or contribution to the commission of terrorist offences, provides instructions for the commission of such offences or solicits the participation in activities of a terrorist group”, as well as content providing guidance on how to make and use explosives, firearms and other weapons for terrorist purposes. Content disseminated for educational, journalistic or research purposes should be protected. MEPs also made clear that the expression of polemic or controversial views on sensitive political questions should not be considered terrorist content. For the text as adopted by EP in plenary, see: <https://bit.ly/2K2MzPf>

Next steps: The newly-elected EP will be in charge of negotiating with the Council on the final form of the text, so do not expect any further news before the summer break.

ECJ ruling on independence of Prosecutors – trouble for e-evidence?

On 27 May 2019 the ECJ Grand Chamber gave judgment in joined cases **C508 and 509/18**, finding that, inter alia, German Public Prosecutor’s offices do not provide a sufficient guarantee of independence from the executive for the purposes of issuing a European Arrest Warrant (EAW). See further at: <https://bit.ly/2wnI9da>

Quite apart from its immediate context (and see also related trends noted in the Justice Scoreboard, discussed above), this ruling is also relevant in the context of other measures, such as the proposed regulation on **e-evidence** (see *Brussels News 144 – 146*) which involves the cross-border execution of European production and preservation orders that have been issued and validated by prosecutors. It may indeed undermine the legal basis of the e-evidence proposal – are prosecutors considered judicial authorities for the purpose of judicial cooperation as set out in Art. 82(1) TFEU? You’ll recall that the e-evidence proposal was already seen as too prosecutorial minded by some in the EP. Expect to see this picked up on the next legislature.

FUNDAMENTAL RIGHTS

Commission report: 10 years of the EU Charter of Fundamental Rights

On 5 June the Commission published a [report](#) marking the 10th anniversary of the EU Charter of Fundamental Rights. It shows that European policy makers are increasingly aware of the importance of ensuring that initiatives are Charter compliant and the EU has adopted many initiatives protecting people's fundamental rights, notably including the [General Data Protection Regulation](#). More recent initiatives upholding Charter rights include: **establishing whistleblowers protection** at EU level – see *Brussels News 147* ([Minimum standards to guarantee a high level of whistleblower protection](#)), and **fighting illegal hate speech online** ([Monitoring of the impact of the Code of Conduct on countering online hate speech](#)).

National authorities, including the courts, are required to apply the Charter when implementing EU law. From a lawyer’s perspective, the statistics relating to express references to the Charter in judicial proceedings are of particular interest. In 2010 the

ECJ reportedly referred to it 27 times. Eight years later, it merited 356 mentions. National courts are also referring to the Charter in their decisions and increasingly asking the ECJ for guidance, no doubt due in no small part to the increasing awareness of Counsel that it offers additional arguments, grounds for claims and remedies. As so often with beneficial EU law and policy however, public awareness is still low. These issues and more will be on the agenda at the 10-year anniversary conference to celebrate the Charter which will be held in Brussels on 12 November this year, an event to be co-hosted by the Commission, the Finnish EU Presidency and the EU Agency for Fundamental Rights.

INTERNAL MARKET & CONSUMERS

Single Market Strategy update – Competitiveness Council

In a rarefied agenda that included future EU space policy, the Competitiveness Council, meeting at the end of May, also discussed future EU industrial and single market policy. Ministers stressed their willingness to remove unjustified barriers to cross-border trade within the EU, in particular in the services sector. They called for a future single market that is “digital by default, future-proof and centered on businesses’ and citizens needs and cross-border experiences”. The Commission is asked to present by March 2020 a long-term action plan for the better implementation and enforcement of single market rules. See further: <https://bit.ly/2WmeqM5>

Better enforcement and modernisation of Consumer Protection Rules

This proposal, which dates from April 2018, aims to increase consumer protection against unfair and misleading commercial practices e.g. ranking on comparative websites etc. See: <https://bit.ly/2K2gyH5> The EP in plenary adopted a resolution endorsing an amended text on 17 April: <https://bit.ly/2QXijWD>

The Competitiveness Council, meeting at the end of May, noted its informal agreement with the EP for adoption of the directive at first reading. We may assume therefore, that this is one of the files the Commission expects to be able to close before 31 October (see further under EU’s legislative record above).

Directive on cross-border conversions, mergers and divisions

You will recall from coverage in earlier editions of this newsletter that in April 2018, the Commission tabled a package of measures in the company law field – see: https://ec.europa.eu/info/publications/company-law-package_en. The package included a proposal for a Directive introducing comprehensive procedures for cross-border conversions and divisions and providing additional rules on cross-border mergers of limited liability companies established in an EU Member State.

The Competitiveness Council meeting in late May was informed of progress on the file. The Council and EP have informally agreed to the adoption of the directive at first reading, based on a text adopted by the EP in plenary in mid-April. See: <https://bit.ly/2ETMeu4>

Ensuring fairness & transparency for business users of online intermediaries

Following agreement on the text between the EP and the Council in mid-February, on 17 April the regulation was adopted by EP in plenary (Procedure Reference COD(2018)0112). It awaits formal adoption by the Council, where after it will be published in the Official Journal of the EU and enter into force 20 days later.

The new rules require online platforms (social media, comparative websites, search engines etc) to, amongst other things:

- explain the reasons for removing goods or services from search results or delisting them;
- provide a description of the parameters determining the ranking;
- put an end to several unfair trading practices listed in this regulation (“blacklist” introduced in a new article);
- set up an internal complaints-handling system (small platforms would be exempted) and facilitate out-of-court dispute resolution, with mediation highlighted;
- ensure effective enforcement of the regulation;
- give a right to business users to terminate their contracts if platforms impose new unacceptable terms and conditions.

The regulation also foresees recourse to collective redress through the national courts and in line with national law. Interestingly in this latter regard, and in contrast to the consumer collective redress proposal (see above), the criteria applied in order to qualify as a “representative organisation or association” or a “public body” that may bring such collective judicial proceedings centre on the need to have “a legitimate interest” in bringing the case, and e.g. to be an existing, not for profit entity, not set up specifically for the purpose of the claim (see Article 14 and specifically 14(3)). A bit of cross-lobbying to widen the definition in the Collective redress proposal may be called for. See: <https://bit.ly/2KNSE0>

Product liability directive revision and AI parameters

By way of a short reminder, the Commission Work Programme 2019 – (see e.g. *BN145*) foresaw that the Commission, around now, will issue guidance on the Product Liability Directive. It will also report on the broader implications for, potential gaps in and orientations for, the liability and safety frameworks for artificial intelligence, the Internet of Things and robotics. I will keep an eye out.

EU proposal for rules on global electronic commerce

As part of its commitment to transparency and inclusiveness in development of its trade policy, on 3 May the Commission tabled a [proposal](#) for future international rules on e-commerce. Despite the rapid increase in digital trade, there are currently no multilateral rules in this area.

Note that in January 2019, a group of 76 members of the World Trade Organisation (WTO), including the EU, decided to launch [negotiations](#) that should result in a multilateral legal framework that consumers and businesses could rely on to make it easier and safer to buy, sell and do business online.

The rules proposed by the EU itself aim, among other things, to guarantee the validity of e-contracts and e-signatures, strengthen consumers' trust in the on-line

environment, introduce measures to effectively combat spam, tackle barriers that prevent cross-border sales and permanently ban customs duties on electronic transmissions. More information is available [here](#).

Final Texts of the Sale of Goods and Digital Content Proposals

In order to bring to a close my coverage of the lengthy gestation period that led to the recent formal adoption of these two important maximum harmonisation directives, I am now able to provide you with their legislative references and links to the legal texts as published in the Official Journal of the EU on 20 May:

1. **Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services:** <https://bit.ly/2I0buRe>

Introduces a high level of protection for consumers whether they pay, or exchange data, for digital content. In particular:

- If it is not possible to fix defects within a reasonable amount of time, the consumer is entitled to a price reduction or full reimbursement.
- Minimum guarantee period of two years.

and

2. **Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods**, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC: <https://bit.ly/2WoiAmC>

- Applies to all goods, including to products with embedded digital content (e.g. smart fridges).
- Two year minimum guarantee period, during the first year of which the burden of proof is reversed in favour of the consumer.

Member States have two years to transpose the new rules into their national law.

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