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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](http://europa.eu/abc/eurojargon/index_en.htm)

**Bar Chair Brussels visit, late January 2019**

The Chair of the Bar of England and Wales, Richard Atkins QC spent 24 hours in Brussels at the end of January, co-hosting a reception with other national Bar leaders and attending a series of bi-lateral meetings with officials and politicians from the EU institutions. The visit was encouraging and useful, despite the inevitability that Brexit dominated the agenda. We used the opportunity to reinforce the Bar’s key Brexit messages: a commitment to maintaining judicial cooperation in both the civil and criminal justice spheres, as well as in other areas, and to maximising market access for our members in the interests of continuity of representation and choice for the benefit of clients.

We also reiterated our intention to remain engaged on EU business as usual issues, independent of the influence of government. This was well received as ever, with several meeting targets confirming their respect and appreciation for our expertise on EU matters, whatever the status of Brexit. We were also encouraged to seek new alliances to maximise our influence.

A full report of the visit has been provided to the Bar’s General Management Committee.

Part I           BREXIT - NEWS AND VIEWS

**Brexit: still at the cliff edge?**

It hardly seems possible, but here I am, finalising this on the first day of March 2019, with less than a month to go before the formal end of the Article 50 TEU notice period, at which point the UK is due to leave the EU, and yet there is still no real clarity on whether it will leave on that date, or at all, and if it does, on what terms.

In *Brussels News 145* I examined the state of play and foreseeable outcomes as they stood just pre-Christmas, on the draft **Withdrawal Agreement (WA)** <https://bit.ly/2Ptr90V> and political declaration setting out the **Framework for the Future Relationship** between the EU and the UK (the Political Declaration) (see: <https://bit.ly/2rCaf4o>). Together, these documents form the **Withdrawal Package**, though the WA alone of the two has the full status of a treaty.

In the event, we had to wait until **29 January** for the, as it turned out, first, Commons' "meaningful vote", postponed originally from **11 December**. The date coincided with the one and a half day visit to Brussels by the new Chair of the Bar as to which, see more above. The sense of frustration felt by many in the institutions was palpable at our meetings. The EP has a Brexit Resolution ready to go, subject of course to tweaking in light of any minor amendments that may yet be agreed to the Withdrawal Package and depending on what the UK Parliament finally decides to do. It will surely be tabled at the first plenary following any such moment of clarity, so maybe late March?

I refer you back to *Brussels News 144* for a pretty comprehensive overview of the possible ways forward. Here, I'm simply updating you on continuing activities in anticipation of a possible no deal Brexit on 29 March 2019, as well as outlining next steps in the tortuous process within the House of Commons to get us to that date.

Depending on how events unfold over the next fortnight or so, I may be examining plans for a second referendum, a possible Norway ++ model, or other permutations, in future editions.

#### **The Prime Minister's statement to the House of Commons on 26 February**

This seems to be the most authoritative recent UK Government statement of what to expect in the coming weeks. As the plan it contains was not derailed by the vote on the motion in the House of Commons (HoC) on 27 February, I'm taking it as current. HMG is still seeking an arrangement to avoid the full Irish backstop kicking in. The arrangement proposed seems to rely on arrangements being put in place during the transition period to safeguard the position in Ireland, so that even if all the details of the future UK-EU relationship are not yet finalised by the end of it, there is no need for the backstop.

HMG is also working on other issues, including to ensure that Brexit will not lead to any lowering of standards on workers' rights, the environment and health and safety.

In terms of the next meaningful vote, HMG has committed to the following timing:

- 1) By 12 March at the latest, the HoC to vote on the WA, as amended since the last meaningful vote.
- 2) If the WA is rejected, on 13 March, the HoC is to vote on whether it is willing to leave the EU without a deal on 29 March. Thus, a no deal departure *on 29 March* (my emphasis) would not be possible without the HoC's consent.
- 3) If both the WA and no deal Brexit on 29 March are rejected, the HoC is to vote on 14 March on whether or not the UK should seek an extension of the Article 50 notice. The Prime Minister does not want to extend beyond June, but you'll have seen press stories indicating that it could be for as long as two years.

Given the uncertainty around the upcoming EP elections (see below), with debate continuing on the position and representation of the UK in the EU institutions if it remains a member through that period, an extension beyond June but for less than, say, a year, might be seen by the EU as more trouble than it's worth.

### **No deal Brexit Contingency planning**

With less than 30 days to go to the end of the Article 50 TEU 2-year notice period, and still no ratified agreement in place, preparations for no deal continue on both sides of the Channel.

I refer you to *Brussels News 145* for insight into the EU's "No deal Contingency Action Plan" [package](#) . For ease of reference, here again is the link to its ever-expanding list of sector-specific preparedness notices [https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices\\_en](https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices_en)

In addition, Member States are being encouraged to plan, since the absence of a deal binding the EU and its Member States would mean that many issues become matters for bi-lateral negotiation, subject to national law.

### **Practice rights in EU Member States in the event of no-deal**

A prime example of an issue that falls to national competence in the event of no deal is the retention of practice rights for UK lawyers before the courts of another Member State (and vice versa), and by extension, rights of audience before the Court of Justice of the EU as well as legal professional privilege when acting for / advising clients on EU law outside the UK.

At a general level I refer you to the recent UK Notice (22.2.2019) <https://www.gov.uk/government/publications/uk-eu-and-efta-legal-professionals-after-brexit/uk-eu-and-efta-legal-professionals-after-brexit>

At a more specific level, many members of the Bar of England and Wales are in the process of being, or have been, called to the Bar in another Member State, most commonly Belgium or Ireland, though there are others too. It has come to light that some EU jurisdictions will only grant full practice rights (and thus rights of audience before the CJEU and the benefit of Legal Professional Privilege (LPP), to those holding the local nationality, or by dint of the paramountcy of EU law, an EU nationality. There are quite a number of UK nationals who will fall foul of that rule if Brexit occurs on 29 March with no deal. Many were relying on the transition period to amass sufficient residency to acquire the relevant EU nationality. If there isn't one, they will be in difficulty. Negotiations are ongoing to try to find solutions with each relevant Bar / Member State.

### **Advice to practitioners**

If you are already, or are about to become, a member of another EU Bar, either on a long-term basis, or for example, short term to allow you to appear in a particular case, do check that you are entirely up to date and compliant with that Bar's full membership requirements, including any applicable national law, by Brexit date.

If you are experiencing difficulties, check the Bar and Law Societies' Brexit webpages (links below) for advice and let us know if you have a particular issue that could usefully be raised on a bi-lateral basis.

<https://www.barcouncil.org.uk/media-centre/brexit/>

<https://www.lawsociety.org.uk/support-services/brexit-and-the-legal-sector/>

**UK No deal contingency planning** – again, *Brussels News 144 & 145* provided links to HMG no deal preparation documents, and instructions on how to sign up for updates. There is a constant flow of new technical notices, and draft statutory instruments being added on a daily basis. For convenience, here is the link again: <https://www.gov.uk/government/brexit>

The Bar's Brexit Working Group and various Specialist Bar Associations continue to track these activities; provide briefings and give evidence to Parliamentary bodies, and are generally contributing their expertise (time and other work-commitments permitting), to try to identify and head off any problems.

#### **"No Deal" Brexit: Practical advice for chambers – web stream available**

In *Brussels News 145* I notified you of this seminar hosted by the Bar's Brexit Working Group at the Bar Council's London offices on 22 January. This well-attended and successful event involved a group of Bar experts giving their up-to-date insights and advice on issues as diverse as Data Protection; Tax and VAT; Provision of legal services to the EU27; Continuity of contracts; EU lawyers working in chambers and immigration matters. The Ministry of Justice was also represented and contributed to the wealth of information shared. For those who could not attend in person, but would like to see the discussion, please go to: <https://vimeo.com/313389965>

#### **Diary date: 19 March: Wanderers above the Sea of Fog? An update on Brexit**

The Bar European Group is organising this pertinent this panel discussion and reception on **19 March 2019**, 17h30 in the Inner Temple, London.

It will be chaired by Joshua Rozenberg QC (hon) with panelists including Lord Anderson of Ipswich KBE, QC; Professor Andrea Biondi; The Rt. Hon. Geoffrey Cox QC, MP ; Marie Demetriou QC ; Lord Pannick QC and Jessica Simor QC

Those wishing to attend should email [bareuropeangroup@gmail.com](mailto:bareuropeangroup@gmail.com)

#### **Reviewing EU-Swiss relations: a foretaste of things to come for the UK?**

Brussels folk are pointing to the state of play in EU relations with the **Swiss Federation** as providing an insight into the EU's likely negotiating stance on its future relationship with the UK as a Western European third country, going forward.

##### Background

Negotiations between the EU and the Swiss Federation began in May 2014 on a "common institutional framework for existing and future agreements, with a view to consolidating the bilateral approach and developing the EU-Swiss comprehensive partnership to its full potential". It is well known that the EU has been unhappy with the plethora of agreements entered into between the two over the years (20 main agreements supplemented by 100 others) and is keen to simplify and consolidate.

##### The draft agreement

Negotiators reached agreement on the text<sup>1</sup> of an Institutional Framework Agreement at the end of last year, which the EU describes as achieving "fair and balanced

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<sup>1</sup><https://www.fdfa.admin.ch/dea/en/home/verhandlungen-offene-themen/verhandlungen/institutionelle-fragen.html>

solutions in areas such as the rules for dynamic take-over of [the] EU acquis by Switzerland, the mechanism for independent dispute settlement and the provisions to ensure increased legal certainty, as well as a level playing field for our citizens and economic operators.”

The dispute settlement procedure proposed is one of the main sticking points from Switzerland’s point of view. Under the current arrangements, the so-called joint committee, a technical rather than judicial body, is responsible for resolving disputes. By Article 10, Protocol 3 of the new draft agreement, “if the joint committee cannot find a solution within three months, either party may request that the dispute be referred to an arbitration panel composed of arbitrators appointed in equal numbers by Switzerland and the EU. If resolving the dispute requires clarification of a question concerning the interpretation or application of EU law, the arbitration panel refers the matter to the CJEU. The arbitration panel then resolves the matter based on the CJEU’s interpretation”. No prizes for guessing what anti-EU Swiss politicians are saying about that.

### **Status quo**

Following clear Commission statements in January that the EU is not prepared to reopen negotiations on the text, the General Affairs Council of the EU, meeting on 19 February, adopted further conclusions, which contain a sort of shopping list of all the areas in which the EU and Switzerland cooperate; all the benefits that accrue as a result; and reminding Switzerland, inter alia, that “the free movement of persons is a fundamental pillar of EU policy and that the internal market and its four freedoms are indivisible”. See: <https://www.consilium.europa.eu/en/press/press-releases/2019/02/19/council-conclusions-on-eu-relations-with-the-swiss-confederation/>

The Council goes on to express strong regret that “the Swiss Federal Council did not endorse the [negotiated text] in December 2018” and calls on it to do so “as soon as the consultation of stakeholders is completed in spring 2019.” To give the Swiss time to complete this exercise, the EU has extended equivalence to Switzerland to the end of June 2019 but has made it plain that further extension is conditional upon signature.

The message to others on the brink of entering into similar negotiations, is clear.

## **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. 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, however, the 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.

If (a variation of) the UK Withdrawal Package is ratified by the UK Parliament, such that Brexit proceeds on the basis of that deal, EU initiatives that are in the legislative

pipeline, or even those that will be proposed in the first year or so of transition, will probably bind us, at least for a while. Moreover, for files such as directives, where the UK legislator needs to implement the EU measure for it to take effect in national law, there are concerns that the lack of UK parliamentary time available may lead to gaps and problems in the law. This is thus another element that the Bar is keeping an eye on.

Beyond that, if the stated ambition to have a close future partnership, possibly in the form of an Association Agreement, is followed through in the negotiations on the Future Relationship, then UK law will necessarily mirror EU law in many key areas going forward. Thus, opportunities to anticipate, understand and possibly influence new EU initiatives should be seized on for the foreseeable future.

Finally, as noted above, a message that came through during the Chair's recent visit to Brussels is that many of the EU interlocutors would welcome our continued input in any event. They encouraged the Bar to remain engaged and to find new ways of doing so. Third country lobbyists are plentiful in Brussels, and indeed, many is the UK body that is increasing, rather than decreasing, its Brussels footprint in anticipation of Brexit.

As noted in *Brussels News 145*, the Commission, Council and EP are working hard to try to complete work on open legislative files ahead of the EP Parliamentary elections this May, which will also herald the change of Commission. They are seeing some success, as you will see from reports below.

### **EU institutional and political concerns this Spring**

As indicated above, Brexit is far from being the only political challenge on the EU's horizon just now. One of the most immediate ones is the possible shift of power within the EP following the May elections, and the knock-on effect that that could have, not only within the EP itself, but also on the other institutions. Within the EP, there could be shifts in the composition of political groups; the appointment of committee chairs and even in the types of issues that might be the subject of EP resolutions. Since, post the Lisbon Treaty, the EP plays a central role in the appointment of the College of Commissioners and the President of the European Commission itself, there are repercussions for the Commission too. A significant shift to populism or other political forces could have major repercussions for EU policy positioning down the line.

For those interested in reading into this further, an informative analysis of the issues can be found at: [https://www.ecfr.eu/specials/scorecard/the\\_2019\\_European\\_election](https://www.ecfr.eu/specials/scorecard/the_2019_European_election)

### **Artificial Intelligence – the EU's Coordinated Plan.**

"Artificial Intelligence (AI) will be the main driver of economic and productivity growth and will contribute to the sustainability and viability of the industrial base in Europe. Like the steam engine or electricity in the past, AI is transforming the world". With these short sentences, the Commission introduced the annex to its December 2018 "EU Coordinated plan on Artificial Intelligence", intended to orchestrate activities at Member State as well as at EU level, with the aim of placing the EU firmly at the forefront of investment, training, innovation, job-creation, standard setting for data,

ethics, etc in this vital new field. The Communication itself can be seen here: <https://bit.ly/2EHCofn>

The aforementioned annex details activities planned at both Member State and EU level for 2019-2020, as well as outline planning for activities in the following years, and should be read by anyone interested in understanding the direction of travel <https://bit.ly/2Em2yTn>. It will be reviewed and updated annually.

In mid-February, the Commission Communication received (Member State) Council endorsement. See: <https://bit.ly/2S9quhF>

A first phase of work, on the fundamental issue of ethical challenges posed by AI, is already nearing conclusion. Last spring the Commission appointed a 52-member High Level Expert Group on AI (AI HLEG), drawn from academia, civil society, industry: <https://ec.europa.eu/digital-single-market/en/high-level-expert-group-artificial-intelligence>. One of its first tasks was to produce draft **Ethical Guidelines for trustworthy AI**, which it published just before Christmas 2018 (see: <https://bit.ly/2EoIIa>). This was followed by a very short public consultation, the results of which are now being pored over by the AI HLEG with a view to publishing final ethical guidelines in March. I will return to this in the next edition.

For those interested in engaging more closely with this work, it is possible to follow and interact with the AI HLEG (and indeed other Commission expert groups) through the Commission's online stakeholder platform Futurium: <https://bit.ly/2SwKyuw>

## **PUBLIC CONSULTATIONS**

### **Competition: Evaluation of Vertical Block Exemption Regulation**

This cornerstone block exemption regulation, which exempts certain agreements and practices from the EU's general competition rules, expires on 31 May 2022. The Commission is conducting an evaluation of the regulation ahead of that expiry, to see whether it remains effective, efficient, relevant, in line with other EU legislation and adds value. Depending on the outcome of this assessment, it will decide whether to let the Regulation lapse, to prolong or to revise it. Deadline for responses: 27 May 2019. Links to the roadmap that sets out more detail about the regulation and the current evaluation process, as well as to the consultation itself, can be seen at: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en)

Given its importance, it should come as no surprise that many competition lawyers in Brussels and beyond, are exercised about this and are seeking input from their clients on the efficacy of the regulation. Any UK company trading in the EU will still be affected by any change to these rules, regardless of Brexit. Accordingly, the Bar plans to respond to the consultation.

A key issue is whether the rules on online distribution will be changed, in light of the Commission's eCommerce report of last year (<https://ec.europa.eu/digital-single-market/en/news/digital-economy-and-society-index-2018-report>). The EU's broader Digital Single Market Strategy seeks to maximise consumer and business access to the



online market place, as a way of unifying the EU single market. The expectation is that the Commission will continue to facilitate online over high street.

For an overview of wider EU developments in this area, see: <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce>

### **Intellectual Property – evaluation of design protection in the EU**

In *Brussels News 145*, I announced the launch of this Commission online consultation, deadline for responses of 31 March 2019, to gather stakeholder evidence and views on the evaluation of Directive 98/71/EC on the legal protection of designs ('Design Directive') and of Regulation (EC) No 6/2002 of 12 December 2001 on the Community designs ('Community Design Regulation') with a view to establishing the degree to which that legislation works as intended and can still be considered fit for purpose. All relevant documents can be found at: <https://bit.ly/2rNLzDp>  
The Intellectual Property Bar Association (IPBA) is preparing a Bar response.

### **EU implementation of Aarhus: access to justice in environmental matters**

In *Brussels News 145* I drew your attention to the Commission's online public consultation, deadline for responses of **14 March 2019**, prompted by a finding by the Aarhus Convention Compliance Committee (ACCC) that the EU does not comply with the access to justice provisions of the Convention because of insufficient mechanisms to ensure review of EU acts. Relevant documents can be found at: <https://bit.ly/2Slmnds8>

The question being of broad interest, the Bar's EU Law Committee is preparing a response, as is the Council of the Bars and Law Societies of Europe (CCBE).

### **Evaluation of the Consumer Credit Directive 2008/48/EC**

Another open Commission consultation, this one primarily aimed at consumer organisations and their ilk, but of potential interest to the Bar, forms part of a wider evaluation of the Consumer Credit Directive of 2008, **deadline 8 April**. It is intended to assess whether the 10-year old directive, its approach and remedies, is still fit for purpose, notably in the context of the vastly changed online shopping and information technology landscape and given the evolving consumer and financial services EU acquis. Of particular interest are the following aspects:

- design and distribution phases of credit products
- cross-selling of credits with other financial products
- creditworthiness assessment
- credit registers
- information disclosure
- rights of withdrawal
- right of early repayment.

The evaluation should also cover elements of national regulatory practices that may be of relevance in a cross border context but are not currently covered by the Directive, including for example rules on usury or predatory lending and authorisation and supervisory requirements. See: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049/public-consultation_en)

## CIVIL JUSTICE

### **Liability for Artificial Intelligence – revision Product Liability Directive**

In *Brussels News 143*, I reported in some detail on the Commission's review of the Product Liability Directive 85/374/EEC (PLD) as modified by Directive 1999/34/EC, followed in BN 145 with coverage of discussions within the legal profession around adapting the rules to the wider legal challenges posed by Artificial Intelligence (AI) and other advances in technology.

Just to reconfirm therefore, that the Commission is expected to issue "guidance on the Product Liability Directive and a 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" by the middle of this year.

I will report on those developments contemporaneously.

### **Family law - revision of Brussels IIa – nearly there**

I reported in some detail in *Brussels News 145* on the JHA Council agreement, reached in early December 2018, on the text of the 2016 proposal to revise the Brussels IIa Regulation (on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction) (Procedure reference CNS 2016/0190)

The Council General Approach (<https://bit.ly/2NzyebY>) was endorsed by the Legal Affairs Committee of the EP in late January, and is due to be adopted by the EP in plenary on 14 March.

All other things being equal, this means that it is likely to enter into force in April 2019. Will UK families benefit from it? Well, that all depends....

### **Directive on insolvency, restructuring and second chance informally agreed**

In *Brussels News 145* I reported on the December 2018 informal agreement between the Council and the EP on a final compromise text on 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) For the compromise text, go to: <https://bit.ly/2ED9ZXu>

The Parliament is due to adopt it at its plenary session on 26 March, just ahead of the ostensible Brexit date. If all goes to plan, the Member States will then have just over two years to implement it into national law.

If the outcome of the current Brexit impasse results in some permutation involving the UK continuing to apply or mirror EU law going forward, even if only over the next couple of years, then this will be one of the files on which close attention will need to be paid to how HMG implements / applies / adapts it into national law.

### **Collective redress - update**

I reported in *Brussels News 142 – 145* on the controversy surrounding this April proposal for a Directive on representative actions for the protection of the collective interests of consumers (Procedure reference COD(2018)0089), in particular from the point of view of the legal profession, the exclusion of lawyers from being or joining

qualified entities which can launch and conduct collective actions under the proposed directive. The Council of the Bars and Law Societies of Europe (CCBE) has been lobbying on our behalf, so far with mixed results.

*Brussels News 145* contained details of the EP's legal affairs committee report, which is due to be voted on by the EP in plenary on 26 March.

Meanwhile, the Council Working Party on Consumer Protection and Information discussed the text at a meeting on 27 February. However, it is not yet publicly known what the Council's view is likely to be.

The preferred outcome for now, given our difficulties with the text, would be for consideration of the whole file to be postponed to the next mandate – i.e. after the EP elections and under the new Commission.

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

### **Concerns for in-house lawyers: Protection of Whistleblowers**

As previously reported, in April 2018 the Commission tabled a package of measures, including a proposal for a directive, aimed at complementing the piecemeal protection for Whistleblowers that is already provided for in sector-specific EU instruments.

*Brussels News 145* covered the EP Legal Affairs Committee (JURI)'s report on the proposal for a directive intended to enhance the protection of persons reporting breaches of Union law (Procedure Reference COD(2018)0106), which is due to be voted on by the EP in plenary in mid-April.

As for the collective redress file, so here too, the legal profession is unhappy with the approach taken, particularly by the EP this time, which could potentially place in-house counsel in the invidious position of being made liable under the new measure simply for doing their job.

The Council published a progress report on the file on 25 February (see: <https://bit.ly/2tHsnZ4>) which refers back to its own most recent text, which dates from the end of January (see: <https://bit.ly/2tKe0TK>)

Whilst both the Council and the EP are publicly aiming to complete the negotiations before the EP elections, it is again to be hoped that the file will be delayed, allowing time for the legal profession to try to secure the necessary protection for lawyers going about their lawful business.

## **CRIMINAL JUSTICE & SECURITY**

### **Progress on Combating fraud & counterfeiting non-cash payment**

*Brussels News 145* contained a report of the December 2018 provisional political agreement between the Council and the EP on the Commission's 2017 proposal for a directive to establish minimum rules concerning the definition of criminal offences and sanctions in the area of fraud and counterfeiting of non-cash means of payment (Procedure reference: COD(2017)0226).

By way of follow up, I can confirm that said text is expected to be adopted by the EP in plenary in mid-March. Note too that it appears that Member States will have only one year in which to implement it into national law. Another potential challenge for HMG should the UK continue to be bound by EU law hereafter.

### **Reform of ECRIS - Exchange of criminal records of third country nationals**

*Brussels News 145* contained a report of the December 2018 provisional agreement between the Council and the EP on the 2017 proposal for a regulation reforming the European Criminal Records Information System (ECRIS) so as to incorporate a centralised database with information on convictions of third country nationals and stateless persons (so-called ECRIS-TCN) (Procedure reference COD(2017)0144), thereby complementing the existing system for EU nationals. The compromise text can be seen at: <https://bit.ly/2BAamiQ>

Just to note that the EP is due to debate and potentially adopt the text in mid-March. This is yet another new piece of EU legislation that is likely to be in force in the very near future, with implications for the UK one way or another.

### **Online Terrorist content - update**

I reported in some detail last time around on the Council's remarkably rapid agreement on a general approach on the Commission's September 2018 proposal for a Regulation (Procedure reference COD(2018)0331) intended to prevent the use of the internet for the dissemination of terrorist content, and complementing related existing measures and initiatives. See: <https://bit.ly/2QHfmwx>

Meanwhile, the Civil Liberties, JHA (LIBE) Committee of the EP is working through a list of amendments to the proposal (<https://bit.ly/2XvjVdc>) and has yet to adopt its own report, though I note that the file is on the agenda for adoption at the EP plenary in April. Let's see what happens.

### **Electronic Evidence in Criminal Matters – production & preservation orders**

I reported in *Brussels News 145*, on the JHA Council agreement, achieved in early December, on a text of the controversial April 2018 proposal for a regulation on European production and preservation orders for e-evidence in criminal matters. You'll recall from coverage in *Brussels News 144* that the EP is rather less than impressed with the proposal, with the result that negotiations to find a compromise have, sensibly, been postponed to the next parliamentary mandate.

International context – you'll recall from coverage in *Brussels News 142* that the Council and Commission want to see a common approach developed at EU level in this area which would also pave the way for a multilateral arrangement, including the US (following its adoption of its Cloud Act last year). The Commission wants to proceed with the multi-national negotiations despite the lack of clarity on the EU side due to the absence of agreement on its own, internal measure. Efforts are thus underway to try to persuade the EU institutions to complete work on the eEvidence proposal first.

## **INTERNAL MARKET & CONSUMERS**

### **Spotlight on Copyright in the Digital Single Market**

As reported in *Brussels News 143* the EU is amending its copyright legal framework for the first time in twenty or so years, ostensibly to make it fit-for-purpose in today's

digital environment. The EU legislators' aim seems simple enough - to set up a "well-functioning digital single market that encourages the development of new content-based businesses, unlocking the opportunities of the digital world, both for creators, whose rights should be fully respected and for the European citizens, who should take advantage of the benefits brought by the Digital Single Market". Revising the Copyright Directive to achieve that aim, is however, proving anything but simple.

A provisional agreement was recently reached on the text between the Council and the EP following several trilogue discussions. See: <https://bit.ly/2NzyAzk> However, controversy continues. The central problem lies with Article 13 of the text, by which any online community, platform or service that hosts uploaded content is to be held responsible for ensuring that no user ever posts anything that infringes copyright, even momentarily. The only exception is for sites that have existed for less than three years, have an annual turnover below €10 mio and receive less than five million unique monthly visitors.

Critics say that this is too expensive (the only practical way to fulfil the requirement would be to install automatic upload filters); would be impossible in practice to apply for all but the biggest players; will create loopholes to be taken advantage of by fraudsters and will stifle growth within the EU as the incentive is strong to stay below the thresholds.

The other element that is attracting considerable criticism is Article 11 of the provisionally agreed text, which introduces the so-called "link tax". It has the effect that press publications "may obtain fair and proportionate remuneration for the digital use of their press publications by information society service providers," though how much of the content would need to be so linked to trigger the payment is just one of the issues that is causing concern.

#### What is happening now?

The controversial text was adopted by a qualified majority in Council on 20 February, though five Member States voted against (Italy, Poland, Netherlands, Finland and Luxembourg) and two others, Belgium and Slovenia reportedly abstained. The text is now due to go back to the EP for adoption in plenary, either in late March or April. Pressure groups are focussing their attention on MEPs therefore, many of whom will be running for re-election in May. A public petition opposing the directive has already amassed over 4mio signatures. I will return to this in a future edition.

#### **EP and Council agreement on Sale of Good and Digital Content Proposals**

I have been reporting on progress on the Commission's related proposals, dating from 2015, for directives on the supply of Digital Content and Digital Services, and Online and Distance sale of goods (**Procedure references: COD(2015)0287 and 0288** respectively) for several years now. They are key elements of the Commission's [Digital Single Market Strategy](#).

In *Brussels News 136* I reported on the Council General Approach, reached in early summer 2017, on the digital content proposal, where after negotiations began in

earnest with the EP to finalise that file. [Council adopts its position on the Digital content directive \(press release, 08/05/2017\)](#)

Most recently in *Brussels News 145* came news of the Council General Approach on the related Sale of Goods proposal ([Directive on certain aspects concerning contracts for the sales of goods - General approach](#)), which you will recall had been extended, in 2017, to cover offline sales of goods, thus avoiding the illogical scenario that consumer goods purchases would attract different protection based purely on the shopping media used. Issues of consistency and overlap with the digital content proposal were also clarified, leading to the expectation of rapid agreement on the Digital Content proposal.

And so it has proved. On 29 January, it was announced that the EP and Council had reached a provisional agreement on both proposals. Thus we can now add a “final” text on Digital Content: <https://data.consilium.europa.eu/doc/document/ST-5857-2019-INIT/en/pdf> If, as expected, it is adopted unchanged by the EP in plenary on 25 March, that will almost certainly lead to immediate formal Council adoption.

The Commission is, perhaps understandably, vaunting its success in having more or less completed the long slog to get these two key elements of the [Digital Single Market Strategy](#) onto the EU statute books. This follows the successful formal adoption last year of the [regulation to end unjustified geoblocking](#) (see coverage in *Brussels News 141 & 144*) that entered into force in early December 2018.

Assuming that these final steps go according to plan, I will provide an overview in a later edition of this newsletter.

### **Employment - minimum rights for new categories of worker**

In early February the EP and the Council reached provisional agreement on a proposal for a directive establishing minimum rights for workers in previously unprotected forms of “employment”, such as on-demand, voucher-based or platform jobs, such as Uber or Deliveroo, provided they work a minimum 3 hours per week and 12 hours per four weeks on average.

This is a catch-all measure, intended to cover anyone who has an employment contract or employment relationship as defined by law, collective agreement or practice in force in each Member State.

Where needed to ascertain the status of worker, recourse should be had to the case law of the Court of Justice, which defines a worker as one who “performs services for a certain time for and under the direction of another person in return for remuneration”. In this way, variations in national law cannot be hidden behind in order to avoid compliance. Paid trainees and apprentices are among the groups to be covered.

Just to be clear however, genuinely self-employed workers would be excluded from the new rules.

The new rules will also require employers to provide information, within the first week of engagement, on essential aspects of the worker’s employment contract including a job description, remuneration, and standard working day / reference hours. See: <https://bit.ly/2GWve9c>

The informally agreed text should be formally adopted by both the EP and Council this spring.

### **Agreement on use of digital tools and processes in company law**

In early February, the EP and the Council informally agreed the text of a proposal for a directive (Procedure Reference: COD(2018)0113) establishing new rules which will make it easier to set up and run a company electronically / online.

These include:

- **improved online procedures**, from setting up companies to registering their branches and filing documents;
- **user-friendly information** is provided on registration portals, free of charge and in a language broadly understood by a majority of cross-border users;
- **“once-only principle”**, meaning a company needs to submit information only once during its lifecycle;
- **transparent rules on fees**, applied in a non-discriminatory manner.

Negotiators agreed that while all steps to set up a business can be completed online, it should also be possible to request face-to-face interaction on a case-by-case basis. They also insisted on including the possibility to verify if persons applying for director positions are currently disqualified from such a position in another Member State.

The provisionally agreed text should shortly be formally endorsed by both the Council and the EP. See further: <https://bit.ly/2IK0j1B>

### **Background information**

In its 2017 resolution on [EU e-Government action plan](#), Parliament called on the Commission to consider further ways to promote digital solutions for formalities throughout a company’s lifecycle and underlined the importance of interconnecting business registers. Last April, the Commission proposed to revise and update Company Law rules and introduced a [package of proposals](#) on digital tools and processes in company law and on cross-border conversions, mergers and divisions.

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