K&L GATES

BRUSSELS REGULATORY BRIEF 2018

A YEAR IN REVIEW

INTRODUCTION

REGULATORY BRIEF 2018: A YEAR IN REVIEW

K&L Gates is pleased to present its “Regulatory Brief 2018: a Year in Review”, which highlights significant EU regulatory and antitrust matters and developments over the past year and includes a diverse collection of articles from our Brussels practitioners. These articles address important industry and regulatory trends.

This edition covers important multidisciplinary topics including EU antitrust and competition issues, EU financial services developments as well as EU internal market trends in the transportation, consumer protection, energy, security and technology sectors. It also contains a specific section reporting on international trade and Brexit.

As we publish this edition, the EU takes stock of the events of this past year and looks forward to 2019.

The New Year 2019 starts afresh with the first Romanian presidency of the Council of the European Union and the May 2019 European Parliament elections and political challenges to follow. This year started with general uncertainty towards the implications of the imminent Brexit. To address these challenges and succeed in these fast changing times, businesses need to be prepared to deal with legal issues involving new policy and regulation as well as government enforcement. In this context, K&L Gates is strategically positioned to assist clients in dealing effectively with complex issues.

We hope that you will find our “Regulatory Brief 2018: a Year in Review” to be a useful resource. If you have any questions, our EU Regulatory Team would be pleased to assist.

"At the beginning of this mandate, we all collectively promised to deliver a more innovative Digital Single Market, a deeper Economic and Monetary Union, a Banking Union, a Capital Markets Union, a fairer Single Market, an Energy Union with a forward-looking climate policy, a comprehensive Migration Agenda, and a Security Union. And we—or at least most of us—resolved that the social dimension of Europe should no longer be given Cinderella treatment, but should be geared towards the future."

European Commission President Jean-Claude Juncker's State of the Union Address 2018 (Strasbourg, 12 September 2018)

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ANTITRUST AND COMPETITION

THE FIGHT AGAINST CARTELS REMAINS A TOP ENFORCEMENT PRIORITY FOR THE EUROPEAN COMMISSION

On 21 March 2018, the Commission also announced it had imposed fines totaling approximately EUR 254 million on eight producers of capacitors for their involvement in a cartel spanning 14 years.

The Commission found that the companies exchanged commercially sensitive information, such as future prices, pricing intentions, future supply and demand information. The anticompetitive conduct was made possible through multilateral meetings, bilateral or trilateral contacts, and price agreements.

The investigation was triggered by the application for immunity of one of the cartelists under the leniency program. Under the Commission's leniency policy, a company involved in a cartel can come forward and inform the Commission about it and, as a result, receive a full or partial immunity from fines. In this case, one company was awarded immunity, while others who cooperated with the Commission received reduced fines.

This case provides helpful examples of incriminating language, which are likely to attract the competition authorities' scrutiny and expose the company to breaches of competition rules. The Commission indicates the following examples of language used in communications: "Discard after reading", "After reading this email, please destroy it without stowing it away" and "Since the gathering should not be disclosed to the public, please be careful when handling the contents of the present report".

In addition, the cartel involved Japanese companies, which met and were in contact mainly in Japan. However, it was implemented globally, including in the European Economic Area. It is a useful reminder for companies that, even if their anticompetitive contacts take place outside the European Union, their behavior may still be caught by EU competition rules if the collusion has effects on the EU territory. This was confirmed by the EU Competition Commissioner, Margrethe Vestager, who stated that: "[W]e will not tolerate anti-competitive behavior by companies that may affect European consumers, even if the coordination takes place outside Europe."

GUN JUMPING ATTRACTS INCREASED SCRUTINY BY THE EUROPEAN COMMISSION

The European Commission continues its scrutiny against breaches of the procedural obligations in the framework of the EU merger control regime. On 24 April 2018, it announced that it had imposed a fine of EUR 124.5 million on a multinational cable and telecommunications company. The Commission found that the company had implemented its acquisition of a Portuguese telecommunications operator before the transaction was notified and approved by the regulator.

The EU is a suspensory merger control regime. This means that, once it is ascertained that the parties must notify a transaction to the Commission because it meets the EU merger notification thresholds, they must not implement it before obtaining clearance from the Commission (the so-called "standstill" obligation under the EU Merger Regulation). If companies "jump the gun", by either not notifying the transaction or implementing it before it is authorized, they risk a fine of up to 10% of their aggregated turnover in the last financial year. The seriousness of this breach is illustrated by the statement of the EU Competition Commissioner Margrethe Vestager who stressed that gun jumping: "*undermine[s] the effectiveness of our merger control system*".

In this case, the company did notify the proposed transaction to the Commission in February 2015 and the regulator approved it conditionally in April of the same year. However, subsequently the Commission notified the company of its suspicions that it had implemented the acquisition before it was cleared and in some instances even before it was notified for approval.

The Commission found, in particular, that the purchase agreement granted the acquirer veto rights over decisions concerning the target's ordinary business. In addition, the acquirer issued instructions regarding a marketing campaign and sought and received commercially sensitive information about the target outside of a confidentiality agreement. The Commission concluded that the breach by the acquirer was "at least, negligent".

The Competition Commissioner has stated in relation to this case that: "There's a difference between the day to day decisions a company makes, and the ones that really change the whole nature of the business. And if buyers want to be sure they don't jump the gun in a merger, they shouldn't have control over decisions in the ordinary course of business." This decision sends a stark reminder for companies to be particularly careful when drafting the transactional documents and with their conduct prior to clearance of the transaction, as they may face significant fines in case of breach of the "standstill" obligation.

COMPETITION AUTHORITIES MAY USE THEIR OWN ALGORITHMS TO DETECT COLLUSIVE BEHAVIOR

The question of algorithms and competition has become a subject of discussion of growing interest among academics, practitioners and antitrust enforcers in the past years.

Algorithms are commonly used by companies. They present a number of benefits, such as the possibility to process quickly large amounts of data and allow quicker adaptation to market conditions. The EU Competition Commissioner Margrethe Vestager has also stated: "[…] I don't think competition enforcers need to be sus*picious of everyone who uses an automated system for pricing."*

However, algorithms also raise a number of questions in relation to competition law. In particular, some of the concerns raised relate to the potential use of algorithms in order to implement collusive practices or make them more effective, the responsibility for collusion involving algorithms, and the adequacy of the current antitrust enforcers' toolbox to apprehend the possible anti-competitive scenarios involving algorithms.

In this respect, a note from June 2017 from the EU on algorithms and collusion, prepared for the Organization for Economic Cooperation and Development, explored the different potential issues from a competition law perspective of the use of algorithms. It discussed, in particular, the implications in both a vertical and horizontal context. These included the use of algorithms to monitor prices that competitors have previously agreed, the implementation of explicit collusion by means of algorithms and use of algorithms in order to engage in explicit or tacit collusion. There is also a concern that the use of price monitoring software may enable manufacturers to use pressure against retailers who do not respect the manufacturer's recommended prices, thus engaging in illegal resale price maintenance. In addition, automatic price monitoring and adjustment practices were noted as a growing phenomenon in a number of industries during the sector inquiry into e-commerce conducted by the European Commission between May 2015 and May 2017.

In this context, it appears that some competition authorities have themselves started using algorithms as a detection tool for collusive behavior.

Given the relative novelty of these issues and the challenges raised by algorithm-based conduct, the Commission and other competition authorities can be expected to continue exploring different enforcement tools in this regard and increase scrutiny on the use of algorithms by companies.

THE COURT OF JUSTICE OF THE EU BRINGS CLARITY REGARDING GUN-JUMPING

The European Commission and many other antitrust authorities operate 'suspensory' merger control regimes, which impose strict prohibitions on parties taking any steps which could be construed as premature implementation of their transaction. 'Suspensory' merger control regimes require the merging parties to notify any reportable transaction and secure approval by the competent antitrust authority before engaging in any form of integration ("gun-jumping"). Any involvement by a buyer in a target's business before a deal is cleared may result in heavy financial penalties (in the EU, up to 10% of the notifying party's global turnover in the last financial year). Recently, the Commission imposed a EUR 124.5 million fine on a multinational cable and telecommunications company (see our previous publication).

On 31 May 2018, the Court of Justice of the EU found that the termination of a cooperation agreement between an auditing and accountancy firm and an international network of independent auditing companies did not constitute gun-jumping in circumstances where the Danish Competition Council had established that: (i) the measure in question was irreversible (as the notice of termination could not be rescinded); (ii) the behavior was merger-specific as the terminating party would not have served the notice of termination absent the merger; and (iii) the notice of termination had an inherent potential for market effects before clearance of the proposed transaction.

The CJEU held that serving notice to terminate the cooperation agreement did not constitute gun-jumping under Article 7(1) of the EU Merger Regulation ("EUMR"). The CJEU clarified the benchmark for assessing whether a measure amounts to gun-jumping as follows: "A concentration is only implemented by a transaction which, in whole or in part, in fact or in law, contributes to the change of control of the target undertaking". The Court also considered that the occurrence of market effects (or the lack thereof) is not a suitable criterion, in and of itself, to determine whether a measure may constitute gun-jumping.

Although the assessment of gun-jumping requires a careful assessment on a case-by-case basis of the facts in every case, this judgment sheds some light on this grey area. According to the CJEU, there has to be a "contributing [factor] to the change of control" over the target. This test remains vague but appears to provide more freedom for the merging parties to take such pre-merger preparatory measures which are clearly unrelated to any change of control. In principle, pre-merger preparatory measures such as purely unilateral measures by the target taken with a view to the upcoming merger even if there are certain market effects would be defensible on the basis of this ruling. By contrast, it is clear that any measures which give the purchaser the ability to influence the target's operations before clearance will constitue gun-jumping (e.g. if the purchase agreement confers decision-making rights on the purchaser enabling it to influence the ordinary course of the target's business).

However, between these two ends of the spectrum, there are measures that are more difficult to categorize under the test established by the CJEU.

Accordingly, merging parties should be cautious when negotiating their transactional agreements and carefully assess pre-clearance business behavior. It is worth noting that also national antitrust authorities have been increasingly scrutinizing and sanctioning instances of gun-jumping. The UK Competition and Markets Authority announced it had imposed a GBP 100,000 penalty on a company for failing to comply with its order.

BEST PRACTICES CODE FOR STATE AID CONTROL ADOPTED BY THE EUROPEAN COMMISSION

On 16 July 2018, the European Commission adopted a Code of Best Practices for the conduct of State aid control procedures ("Best Practices Code" or "Code"). This Code follows the adoption of a number of other instruments in the past years (e.g. Notice on the Notion of State Aid, General Block Exemption Regulation, and revised Procedural State Aid Regulation).

Under the EU State aid rules, it is generally prohibited for national public authorities to confer an advantage on a selective basis to companies doing business in the EU. In particular, to be State aid, a measure needs to have these features: (i) intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.); (ii) the State intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions; (iii) competition has to be distorted; and (iv) the intervention is likely to affect trade between Member States. Aid measures can only be implemented after approval by the Commission. At the heart of the Commission's powers lies the notification procedure which - except in certain instances - requires Member States to notify all new aid to the Commission, which cannot be implemented unless approved by it. If the aid is incompatible but has already been paid out, the Member State is ordered to recover it from the beneficiary.

This new Code provides a practical guidance on the EU State aid procedure with the purpose of making it "*as transparent, simple, clear, predictable and timely as possible*". In particular, it gives information on the pre-notification contacts between Member States and the Commission, useful especially in cases presenting novel aspects or features or complexity, or in case of projects of common interest with high EU relevance. It also discusses the possibility for Member States to indicate the cases which are of priority for them and to agree with the Commission the investigation timeline. It goes on to explain the conduct of the preliminary examination of notified State aid measures, including the gathering of additional information from the Commission services, as well as the application of a streamlined procedure for cases which are straightforward and of the formal investigation procedure for more complex cases.

Finally, the new Best Practices Code includes information about the handling of complaints by the Commission and stresses the importance of cooperation between the Commission and Member States.

TRANSACTIONS IN THE DIGITAL SECTOR AND ACQUISITION OF DATA CONTINUE TO ATTRACT SCRUTINY IN EUROPE

On 6 September 2018, the European Commission cleared without conditions the proposed acquisition of a UK developer and distributor of music recognition applications by a U.S.-based global technology company.

The Commission had accepted to review the proposed transaction in February 2018, after a referral request from seven Member States (see our publication of March 2018). The transaction was notified to the Commission on 14 March 2018 and subsequently reviewed in-depth given the alleged competition concerns it raised in the European Economic Area ("EEA").

Initially, the Commission had voiced concerns that the transaction may lead to a reduction of choice of music streaming services for users. However, the in-depth investigation made possible to conclude that the acquisition would not raise competition concerns in the EEA or any substantial part of it.

In this case, the Commission was reassured about the impact on competitors of the possibility of the acquirer to access commercially sensitive information about customers of other music streaming services providers. It also found that the music recognition application's importance as an entry point to the music streaming services providers was limited, which was related to initial concerns that the acquirer may prevent the referrals from the application to its competitors. Finally, regarding integration of the two companies' datasets on user data, the Commission concluded that this: *"would not confer a unique advantage to the merged entity in the markets on which it operates",* because the target's data was not considered to be unique and competitors of the acquirer would continue to have access to similar databases.

In relation to this case, the EU Competition Commissioner Margrethe Vestager stated that: *"data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including potentially commercially sensitive ones, to ensure they do not restrict competition."* In addition to being yet another example of a transaction in the digital sector which has ended up being closely reviewed by the Commission despite not meeting the EU merger filing thresholds but referred to it following the referral request made by seven Member States, this case also illustrates the growing focus by competition authorities on the acquisition of data while reviewing transactions in the digital sector.

The Commission concluded that the two companies were not close competitors but that their services were complementary. The acquirer operates the second largest music streaming service in Europe, whereas the target offers a music recognition application.

ONLINE SALES RESTRICTIONS IN EUROPE ATTRACT INCREASED SCRUTINY AT BOTH COMMISSION'S AND NATIONAL EU MEMBER STATE'S LEVEL

The past few years have seen a renewed and strengthened interest in vertical restraints and in particular in restrictions to online sales in Europe. There has been more scrutiny towards such issues by authorities at national level and from the European Commission.

The Commission has recently opened a new investigation into the online commercial practices of a platform reseller with respect to the exclusivity terms it imposes on fashion retailers. Under the contested exclusivity terms, retailers are required to list their inventory with the company and not on competing platforms. This new investigation has been prompted by a complaint lodged by a competitor and signals once more how online practices need to be carefully designed in order to prevent antitrust scrutiny.

More broadly, this antitrust complaint intervenes in the context of stronger enforcement activity with regard to commercial practices by companies online. At EU level, the Commission concluded a sector inquiry into e-commerce in May 2017 and has launched a number of investigations into practices covered in its inquiry. Recently, it imposed fines totaling more than EUR 111 million on four consumer electronics manufacturers. It found that the companies had imposed fixed or minimum resale prices on their online retailers and one of them had restricted retailers from selling cross-border.

Under EU competition rules, resellers must determine their resale prices themselves. Suppliers may only issue recommendations or provide maximum resale prices but they should not impose fixed or minimum resale prices as this is considered as illegal "resale price maintenance" or "RPM".

Similarly, at national level, vertical restraints in general and restrictive practices in the online environment in particular have also attracted significant attention. A case is currently pending in the UK opposing an online cosmetics retailer and a French cosmetics company. In particular, the dispute concerns a requirement for authorized online retailers to have a physical shop. Also, earlier this year, the Italian competition authority closed an investigation against a stove company and its parent companies which concerned alleged restrictive practices in relation to online distributors, such as imposition of minimum resale prices, limitations to the validity of the warranty of products sold abroad and a ban on delivering products sold online outside Italy.

All this shows that companies need to be particularly careful when engaging in sales online as this is a sales channel which is under scrutiny at the moment. However, this does not mean that companies have no means to control how their products are sold on the Internet. There are tools which allow manufacturers to achieve a certain degree of control over who and how their products are sold online without breaching competition rules. In particular, this can be achieved through the setting up of a selective distribution system where authorized resellers are selected on the basis of objective criteria of a qualitative nature which can apply with regard to physical and online stores. The Court of Justice of the EU has also recently upheld the imposition of restrictions on the use of online marketplaces in the framework of a selective distribution system. Such distribution model is particularly suitable for companies wishing to have more control over the distribution of their products online or the protection of their brand image.

EUROPEAN COMMISSION TO CONSULT ON EXEMPTION REGIME FOR VERTICAL AGREEMENTS

The European Commission has indicated it will launch a wide-ranging public consultation on the Vertical Block Exemption Regulation ("VBER") and its Guidelines in the first quarter of 2019. This public consultation will define the future legal landscape applicable to supply and distribution agreements in the EU.

The 2010 VBER exempts vertical agreements from EU antitrust rules. Vertical agreements are those "entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".

In particular, it provides for a safe harbor if the parties' market shares do not exceed 30% and the agreements do not contain any of the hardcore restrictions set out in the VBER (e.g. resale price maintenance, customer and market allocation). When supply and distribution agreements satisfy these conditions, they benefit from the block exemption provided by the VBER. Antitrust block exemptions provide important legal certainty for companies whose practices fall within their scope as they contribute to more clarity and predictability for companies who need to assess the legality of their distribution practices.

In May 2017, the Commission concluded a sector inquiry into e-commerce which looked into companies' practices regarding consumer goods and digital content. With respect to the impact of the Commission's findings on the review of the VBER, the Commission noted in its Final Report that: "[t]he VBER expires in May 2022, and the results of the e-commerce sector inquiry confirm that there is no need to anticipate its review. The large amount of data and related information gathered in the course of the e-commerce sector inquiry and any guidance that results from follow-up enforcement action will however serve as an input for that future review process." Indeed, in the context of its sector inquiry, the Commission has initiated a number of investigations into vertical restraints imposed by companies in a variety of sectors and has recently concluded some of these investigations, imposing fines on four consumer electronics manufacturers for fixing online resale prices. These investigations, coupled with the recent ruling of the Court of Justice of the EU on online marketplaces restrictions, will be at the heart of the debate on the review of the VBER.

As the VBER is set to expire in 2022, the Commission will invite all interested stakeholders (e.g., companies, consultancies, trade associations, consumers) to express their views on the current regime and therefore contribute to the debate and the shaping of the rules which govern restrictions to the resale of products in the EU.

SMART CARD CHIPS CARTEL: THE COURT OF JUSTICE SETS ASIDE THE FINE IMPOSED ON INFINEON

In its judgment of 26 September 2018, the Court of Justice reminded the principle that EU courts are bound to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not proportionate to the gravity or the duration of the infringement. In addition, the factors to be taken into account for the assessment of the fine include the number and intensity of the anticompetitive infringements.

In this case, the European Commission issued a decision on 3 September 2014, imposed fines totaling approximately EUR 138 million on several companies for having coordinated, from 2003 to 2005, their pricing policy in the smart card chip sector in the European Economic Area. According to the Commission's findings, the five companies involved colluded through a network of bilateral contacts during which they discussed and exchanged sensitive commercial information on pricing, customers, contract negotiations, production capacity or capacity utilization and their future market conduct. Infineon obtained a 20% reduction because its participation was limited to arrangements with two other participants and was therefore fined EUR 82.784.000.

In an appeal filed with the Court of Justice against the General Court's judgment of 15 December 2016 which dismissed the recourses, Infineon notably complained that the General Court reviewed only five of the eleven allegedly illegal bilateral contacts found by the Commission. As the recourse disputed all those contacts, this amounted, in Infineon's view, to an incomplete judicial review of the decision, leading to an insufficient review of the fine.

Since Infineon had initially disputed each of the eleven bilateral contacts and contested the calculation of the fine, the Court found that it had in effect requested a complete review of its actual participation in the infringement and the precise extent thereof. The Court of Justice also ruled that, although the General Court is not required to rely on the exact number of bilateral contacts for the purpose of assessing the gravity of the infringement and setting the fine, this element may constitute a relevant factor among others.

Therefore, according to the Court of Justice, the General Court failed to exercise its full jurisdiction by not responding to the argument that the Commission infringed the principle of proportionality by setting the amount of the fine

Commission found this to amount to a restriction of "passive sales" as broadcasters are restricted in their ability to accept unsolicited requests from consumers outside the licensed territory.

without taking into account the limited number of bilateral contacts in which Infineon participated. Furthermore, the General Court only confirmed five of the eleven bilateral contacts found by the Commission, leaving open the question of whether the Commission had also established the existence of the others. As a result, the Court of Justice decided to refer back the case to the General Court to assess the proportionality of the fine in relation to the number of bilateral contacts, if necessary by examining whether the Commission established the other six bilateral contacts.

EUROPEAN COMMISSION CONSULTING ON A NEW SET OOF COMMITMENTS IN PAY-TV INVESTIGATION

On 9 November 2018, the European Commission announced it was seeking comments on commitments proposed by a film studio in the framework of its pay-TV investigation.

In 2015, the Commission sent a Statement of Objections to six US film studios and a pay-TV broadcaster in an investigation regarding clauses in bilateral agreements for the licensing of output of films in Europe. Under the contested clauses, the broadcaster allegedly could not allow EU consumers outside UK and Ireland to access pay-TV services in these countries. Under some clauses, the studios had to make sure that other broadcasters did not make their pay-TV services available in the UK and Ireland. The Commission found this to amount to a restriction of "passive sales" as broadcasters are restricted in their ability to accept unsolicited requests from consumers outside the licensed territory.

Under EU competition rules, companies under investigation by the Commission can decide to offer commitments in order to address its concerns. If the Commission makes the commitments binding, it does not conclude on the infringement and does not impose fines. However, a breach of a binding commitment may result in fines up to 10% of the company's global turnover in the last financial year. In 2016 the Commission already made legally binding commitments submitted by another film studio which was also investigated.

This new set of commitments provide that the studio will not (re)introduce contractual obligations: (i) preventing or limiting a pay-TV broadcaster from responding to unsolicited requests from consumers who are not in its licensed territory; or (ii) requiring the film studio to prohibit or limit other pay-TV broadcasters from responding to unsolicited requests from consumers within the licensed territory. As far as the existing agreements are concerned, the studio's commitments provide that it would not seek to bring actions before a court or tribunal for the violation of a broadcaster and/or studio obligation and that it would not act upon or enforce such obligations.

Before taking a decision to make the commitments binding, the Commission will market test the proposal inviting comments from interested third parties. The Commission has also published a summary of the commitments in the Official Journal of the EU in order to solicit the comments from any third party which have one month from the date of publication to do so. Should the market test feedback be positive, the Commission will adopt a decision making the commitments binding.

PUBLIC PROCUREMENT: THE COURT OF JUSTICE RULED THAT PARTICIPANTS CAN BE ORDERED TO DISCLOSE CARTEL DECISIONS AND MEASURES IMPLEMENTED AS PROOF OF TRUSTWORTHINESS

By its judgement of 24 October 2018, the Court of Justice of the European Union ruled that a public procurement contracting authority is allowed to ask an economic operator previously involved in cartels to disclose the competition authority's decision and to describe appropriate measures adopted for the re-establishment of its reliability as proof of the operator's trustworthiness. The Court also clarified that the maximum period during which an economic operator can be excluded from public procurement proceedings is calculated from the date of the competition authority's decision, and not from the end date of the cartel.

In this case, the German Federal Cartel Office ("Bundeskartellamt") imposed a fine in March 2016 on the company Vossloh Laeis, a manufacturer of railway material, for having taken part in a cartel concerning switches until 2011. Vossloh Laeis applied for leniency during said antitrust proceedings.

Later in 2016, Vossloh Laeis submitted an offer in a tender for the provision of railway material organized by the Munich utility company ("Stadtwerke München"). In the context of this tender Vossloh Laeis was asked by Stadtwerke München to disclose the Bundeskartellamt decision, pursuant to a German legislation according to which contracting authorities may ask economic operators to prove the re-establishment of their reliability if they have previously been found to have engaged in anticompetitive conduct. Vossloh Laeis refused to provide said decision and was therefore excluded from participating in the tender procedure, on the grounds that such refusal raised doubts on the company's trustworthiness following its participation in a cartel (from which Stadtwerke München presumably suffered harm, bringing also civil action for damages against Vossloh Laeis).

This decision was challenged by Vossloh Laeis before the Public Procurement Board for Southern Bavaria, which stayed the proceedings and referred the case to the Court, asking (i) whether a contracting authority can ask for a copy of the competition authority's decision; and (ii) from when the period of exclusion from public procurement should be calculated.

On 24 October 2018, the Court held that, as a general rule, a contracting authority is allowed to demand full cooperation from an economic operator, but that such cooperation must be limited to what is strictly necessary for the pursuit of its objective. In that context, contracting authorities should be able to assess the risks they could face by awarding contracts to doubtful economic operators. As a result, economic operators must cooperate in an effective manner. This includes providing the decisions of competition authorities. The contracting authority may also require an economic operator to prove the adoption of appropriate measures in order to demonstrate the re-establishment of its trustworthiness.

As regards the calculation of the exclusion period from public procurement, the Court held that the period of exclusion (for 3 or 5 years under German law) shall be calculated from the date of the competition authorities' decision.

ADVOCATE GENERAL WAHL ISSUES AN OPINION THAT THE PRINCIPLE OF "NE BIS IN IDEM" (DOUBLE JEOPARDY) IS NOT APPLICABLE IN A CASE WHERE A NATIONAL COMPETITION AUTHORITY HAS IMPOSED, IN A SINGLE DECISION, A FINE ON AN UNDERTAKING FOR ANTICOMPETITIVE CONDUCT ON THE BASIS OF A CONCURRENT APPLICATION OF NATIONAL AND EU COMPETITION RULES

According to Advocate General Nils Wahl's Opinion of 29 November 2018 in case **C-617/17**, the principle of *ne bis in idem* is not applicable in a case where a national competition authority has imposed, in a single decision, a fine on an undertaking for anticompetitive conduct on the basis of a concurrent application of national and EU competition rules.

In this case, the Polish Competition Authority found that a Polish insurance company had abused its dominant position between 2001 and 2007 by taking measures preventing competition on the Polish insurance market. Furthermore, such conduct could have had negative effects on foreign insurers' opportunities to access the Polish market. Considering that the insurance company's conduct had affected the national market and trade between EU Member States, it imposed a fine on the basis of both national and EU competition law.

The insurance company unsuccessfully contested the Polish Competition Authority's decision and brought an appeal before the Polish Supreme Court which, in turn, referred the case to the Court of Justice of the European Union. The referring court sought to establish whether, in light of the ne *bis in idem principle*, a national competition authority is prevented from imposing a fine on an undertaking for anticompetitive conduct, in one single decision, on the basis of national and EU competition law.

In his opinion, AG Wahl recalled that the *ne bis in idem* principle is a cornerstone in any legal system based on the rule of law. It indeed aims at ensuring that an offender cannot be sanctioned more than once for the same offense. As a result, this principle shall apply if there is a repetition of proceedings (i.e. the "*bis*" component) concerning the same anticompetitive conduct (i.e. the "*idem*" component).

AG Wahl reviewed whether there were two different proceedings and found that the "bis" component was missing. Indeed, the Polish Competition Authority took a single decision imposing a single fine composed of two parts on the basis of national and EU competition law. AG Wahl also reviewed whether the same offense was sanctioned twice and found that the "idem" component was missing. In competition law, the Court has consistently found that the ne bis in idem principle requires a three-fold criterion where the facts, the offender and the legal interest to be protected shall be the same. This is in contrast with the application of the principle in all other areas of EU law whereby only the facts and the offender must be the same. AG Wahl argued that the application of the principle should be uniform in all areas of EU law. Consequently, relying on a two-fold criterion involving the identity of facts and offender, without requiring the identity of legal interests to be protected, shall ensure effective protection of competition in the EU and additional legal certainty for undertakings.

INTERNAL MARKET

TRANSPORT

ON 20 DECEMBER 2017, THE CJEU RULED THAT UBER SHOULD BE CONSIDERED AS A TRANSPORT COMPANY

The CJEU affirmed that an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and a non-professional driver could be classified as an "information society service (…) normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."

However, the CJEU found that the service provided by Uber does not simply constitute an intermediation service. The CJEU highlighted that in situations where passengers are transported by non-professional drivers using their own vehicles, the provider of that intermediation service simultaneously offers urban transport services. The CJEU further took into account Uber's decisive influence over the conditions under which that service is provided by such drivers, such as the imposition of a maximum fare, as well as the company's control over drivers' conduct. On the basis of these elements, the CJEU concluded that the intermediation service in question forms an integral part of an overall service whose main component is a transport service.

As a result of the CJEU's ruling, Uber may be subject to stricter national regulation and licensing in the 28 EU Member States as a taxi operator. Furthermore, Uber's service must be excluded from the scope of the freedom to provide services in general as well as from the directive on services in the internal market and the directive on electronic commerce. Consequently, it is for the Member States to determine the conditions under which such services are to be provided in conformity with the Lisbon treaty.

Uber maintained that the CJEU's ruling has a limited impact on its activity as in the last years it has adapted its services, the cheapest one challenged in Barcelona is rarely in use any more (private drivers in their own cars without any license at all) and already operates under transport law of most Member States. However, CJEU's finding that Uber exercises "decisive influence" over the conditions under which drivers provide their services, may have an impact beyond the strict terms of the ruling itself: it may question Uber drivers' self-employment status, as such influence suggests that Uber drivers are in fact workers entitled to the national minimum wage or sick pay and that they may also be taxed on an employment basis. Consequently, Uber drivers' worker status may imply that fares will increase. It remains to be seen to what extent the CJEU's ruling may have impact on other digital platform providers and innovative business models challenging the status quo which may also be forced to be classified as traditional companies.

AIRLINE CONSOLIDATION IN EUROPE TO ATTRACT THE EUROPEAN COMMISSION'S SCRUTINY

On 21 December 2017, the European Commission announced it had conditionally authorized the acquisition by the largest German airline of a subsidiary of the second largest airline in Germany, after the latter filed for insolvency in August 2017.

The initial scope of the proposed transaction included the acquisition of a leisure air carrier, a regional air carrier and other aircraft, crew and slots. However, in order to secure the Commission's clearance, the airline had to submit two sets of commitments before the Commission was satisfied that they would comprehensively address the competition concerns raised by the transaction.

One of the key remedial solutions put forward by the airline was to substantially reduce the scope of the transaction as initially notified. In particular, the airline decided to abandon the acquisition of the leisure air carrier. This possibility was already contemplated in the sale and purchase agreement, pursuant to which the airline was enabled to modify the transaction perimeter. Concerning the transaction in its modified scope, the Commission still considered that it raised competition concerns at Düsseldorf airport because of the number of slots the airline would hold at this airport, post-transaction. It was, however, satisfied with the airline's commitments to reduce the number of the acquired slots.

An interesting element in this case was the fact that, before the proposed transaction was notified to the Commission, the airline sought the Commission's derogation from the suspension obligation, pursuant to which reportable transactions in the European Union cannot be closed or implemented before they have been notified and cleared by the Commission.

However, under the EU merger rules, the Commission may, on the basis of a reasoned request, grant a derogation from the suspension obligation. Typically, the Commission takes into account the effects of the suspension on one or more companies concerned by the transaction or on a third party and the threat to competition posed by the transaction.

The airline relied on this exception in order to be able to implement a number of measures (e.g. financially support the air carrier to prevent that its lessors could repossess its aircraft and sell them to third parties, securing the continuity of operations to avoid the grounding of the air carrier's aircraft) before notifying and obtaining the Commission's merger clearance. The Commission's derogation was granted on the basis of a number of strict conditions among which the obligation for the airline to notify the transaction to the Commission within a tight deadline.

TOURISM TASK FORCE - PUBLIC HEARING ON THE IMPACT OF BREXIT ON TOURISM

On 25 April 2018, the European Parliament's Committee for Transport and Tourism organized a meeting with several guest speakers, mainly from the UK, to discuss the current and possible future effect of Brexit on the European and British tourism industries.

A number of issues emerged to be key priorities for the participants:

- Additional administrative burdens at airports and border delays should be avoided to ensure the free flow of tourists between the UK and EU27 countries and not to be of detriment to destinations' desirability;
- Maintaining the Single European Sky initiative is vital, both for tourists and tourism workers, in order to avoid the decrease of flights and the incline of prices;
- Health insurance should be coordinated, in order to prevent health assistance from becoming more expensive and troublesome;
- Free mobile data roaming should be preserved;
- A beneficial arrangement on the delicate subject of EU workers in the UK and vice versa must be found;
- The UK must keep its participation in the European Aviation Safety Agency.

Malcom Roughead, CEO of Visit Scotland, seems to believe that Scotland will be able protect its strategic partnerships with European operators.

There is still no clear data as to whether Brexit has hurt UK and EU tourism but, since 2016, a worrying sign has emerged from the Spanish region of Valencia, hit by a 31% decrease in British demand for real estate.

For the future, Thomas Jenkins, CEO of the European Tourism Association, foresees the opening of EU branches by British operators, while Nigel Morgan, Professor in the School of Management at Swansea University, advised not to base strategic planning on the short term depreciation of the pound.

In conclusion, all speakers voiced the industry's concern to maintain the status quo as much and for as long as possible.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

PARLIAMENT AND COUNCIL ENDORSE THE PARTIAL ELIMINATION OF UNJUSTIFIED GEO-BLOCKING

The Plenary of the Parliament and the Council of the European Union ("Council") confirmed the provisional agreement reached on the Geo-blocking Regulation (formally "Regulation preventing geo-blocking and other forms of discrimination based on customer's nationality, place of residence or place of establishment within the EU market"). On 2 March 2018 the Regulation was published in the Official Journal of the EU and will apply from 3 December 2018.

The Regulation is part of the e-commerce package and addresses sales terms discrimination in the online access to goods, electronically supplied services and services provided in a specific physical location where it cannot be objectively justified (e.g. VAT obligations and legal requirements).

The final objective of the Regulation is to grant equal treatment to local customers and online buyers from another Member State. However, and contrary to what was proposed originally by the Commission, under the new rules, online traders are not obliged to deliver their products to the shoppers' country, nor to harmonize access conditions - including sale prices- across the EU. They are merely requested not to discriminate customers on the basis of their nationality, place of residence or place of temporary establishment in the EU when such customers have access to selling websites based in another Member State. Any access ban or any automatic redirection to another website without the consent of the consumer, or any discrimination on payment terms (regarding the use of credit cards from other EU countries, for example) will be prohibited.

In practical terms, this means that it will still be possible to have different websites (let's say website A and B) formatted and presented to the different audiences in EU country A and EU country B (in language, in tastes, in average sizes, in catalogue, etc. as well as in prices). But it will not be possible for the trader to prevent a customer from country A to access and purchase in the website B, and eventually to benefit from its better conditions or purchase something not available at home. At the same time, the trader is not forced to deliver a product purchased in the website A to country B: the trader may decide that it only delivers locally, in country A; or that free delivery does not apply if delivery must take place in country B.

After a very intensive debate, the Regulation will not apply to copyright protected content (e.g. download of music, e-books, online gaming and audio-visual content). However, a review clause requires the Commission to analyze the overall impact of the Regulation two years after its entry into force and assess the possible application of the rules to certain electronically supplied services which offer access to and use of copyrighted works.

Finally, agreements imposing passive sales restrictions which circumvent the requirements set forth above will be automatically void. This provision will only apply from 23 March 2020 to any such clauses concluded before 2 March 2018.

THE AUSTRIAN PRESIDENCY PROPOSES TO DISCARD THE DRAFT E-PRIVACY RULES ON SOFTWARE SETTINGS

In July 2018, the Austrian Presidency of the Council of the EU released its first compromise text on the prominent provisions of the **draft Regulation on Privacy and Electronic Communications**.

Tabled in January 2017, the proposal is intended to complement the EU data protection and telecoms frameworks, aligning the existing privacy legislation for electronic communications to the EU General Data Protection Regulation. Among the changes introduced with such reform, the proposed Regulation covers also telecommunication services provided by market-players via the Internet (the so-called OTTs) and include new rules on permitted processing of data, tracking technologies such as cookies and privacy settings for e-communication software placed on the market.

Although the Commission stressed to have the final text ready by 25 May 2018 - in line with the GDPR - the proposal is still stalling within the Council as a result of fierce lobbying in Brussels and at national level. Consequently, only a few days after the start of the **six-month presidency**, the Austrian experts immediately rolled up their sleeves with the aim to complete the file before the 2019 European elections.

The first Presidency's move in order to break the Council deadlock focuses on the general privacy settings set up in e-communication software. The Commission's original proposal would require software such as browsers or mobile apps to provide users with the possibility to easily decide whether to allow third parties' access and storing of information on their devices. Moreover, software providers would be demanded to inform users about the availability of such privacy settings upon the software installation.

In the compromise text circulated to the other Member States' teams, the Austrian Presidency proposes to deviate significantly from the approach taken by the Commission and has decided to delete in full the above-mentioned requirements. Such removal has been praised by a relevant number of Member States along with telecommunications operators and digital businesses organizations.

The final text on browser and software settings can have significant implications for the whole digital advertising sector, companies whose main source of income is advertising (e.g. electronic media) and, more broadly, the data-driven industry. In the next few months, we will see whether the Austrian Presidency's strategy leads to a solid Council position on the e-privacy proposal. Even in that case, nothing will be definitive: the European Parliament (which is ready to negotiate with the Council in order to reach a joint text on the proposal) recommends that software and browsers should have, by default, strong privacy settings to prevent third parties' tracking, storing and collection of information from the end-users' equipment.

TECH COMPANIES COULD FACE HARSH FINES UNLESS THEY QUICKLY REMOVE TERRORIST CONTENT

On 12 September 2018, during his last State of the Union speech, the President of the European Commission Jean-Claude Juncker announced a new **draft Regulation** aiming at preventing the dissemination of terrorist content online.

The proposal entails several new obligations for tech companies offering their services in the Union, who allow their customers to store content and make it available to third parties. The key provision of the text, the so-called one-hour rule, would request such companies to get terrorist content off their services within one hour following a removal order from national competent authorities or Union bodies. In case of "systematic failure" to comply, fines could go up to 4% of the liable company's global annual turnover.

Moreover, the proposal provides the first EU-wide legal definition of terrorist content as material: (a) inciting or advocating, including by glorifying, the commission of terrorist offences; (b) encouraging the contribution to terrorist offences; (c) promoting the activities of a terrorist group; (d) instructing on methods or techniques for the purpose of committing terrorist offences.

Besides the main obligation, service providers will also be required to inform the content provider about the removal, implement complaint mechanisms for removals and put in place measures to promptly assess the content referred by authorities. Service providers established outside the EU should also designate a legal or natural person as their representative in the Union for ensuring compliance with the rules. Finally, the Commission also introduces a "duty of vigilance" upon service providers to take proactive measures - such as the use of automated detection tools - to better protect their users from exposure to terrorist content.

The scope of the proposed rules could easily be extended to every company of whatever size that allows users to post content on its website (e.g. any company hosting a forum or a blog). For this reason, Internet service providers already took a vocal stance against the draft Regulation and declared that the proposal would hand over to internet intermediaries the responsibility of Member States to identify terrorist content while at the same time guaranteeing freedom of speech.

The Commission is giving greater prominence to counter-terrorism measures and formally called on the European Parliament and Council of the EU - as the EU co-legislators - to agree on their position in the coming months. It remains to be seen whether both institutions will now show strong political commitment to move forward on this issue in accordance with the Commission line.

GREEN LIGHT FOR THE FREE FLOW OF DATA AS THE 5TH EU FUNDAMENTAL FREEDOM

The European Union co-legislators, the European Parliament and Council of the EU, formally adopted the **Regulation** on *a framework for the free flow of non-personal data in the EU*.

The proposal was presented by the European Commission in September 2017 with the main objective of improving the mobility of non-personal data across borders in the EU, by preventing

Member States' data localization restrictions and making it easier for professionals to switch data service providers. Once in force, the recently adopted Regulation will stand alongside the GDPR as a pillar of the new 5th fundamental freedom, the free movement of data across the EU Single Market.

The final text of the Regulation is very similar to the Commission's original proposal. Member State's restrictions to the free flow of non-personal data within the EU may be justified only on grounds of public security. Moreover, Member States will have two years to repeal all existing localization requirements that are not in compliance with the Regulation and will have to notify to the Commission any new data localization measures they seek to introduce.

In the case of data sets composed of both personal and non-personal data, the Regulation will apply only to the non-personal data part of the set. When personal and non-personal data are "inextricably linked", the Regulation will apply without prejudice to the GDPR.

Finally, the Regulation does not include binding provisions on porting of data but instead it calls on cloud service providers to adopt codes of conduct covering, among others, best practices for facilitating the switching of providers and the porting of data. In this context, it is worth mentioning that cloud stakeholders started such self-regulatory work in April 2018.

The legislative procedure of the Regulation is now concluded. The new rules will apply from May 2019.

FOOD, DRUGS, MEDICAL DEVICES AND COSMETICS

EUROPEAN COMMISSION PUBLISHES DRAFT RULES ON COUNTRY OF ORIGIN/ PLACE OF PROVENANCE INDICATIONS FOR PRIMARY INGREDIENTS

The European Commission continues to develop the harmonised food labelling rules, which entered into force in 2014 (the "FIC"). On 4 January 2018, the European Commission published a Draft Implementing Regulation on the provision of voluntary indication of origin or place of provenance of foods (the "Draft Implementing Regulation"). The Draft Implementing Regulation is open for consultation until the 1 February 2018. If it is enacted in its current form, it will apply from 1 April 2019.

The FIC requires that when the place of origin or place of provenance of a whole product is provided on the product's label, and yet the origin or place of provenance of its primary ingredient is different, information must also be given about the origin or place of provenance of that primary ingredient. The Draft Implementing Regulation develops the application of this requirement.

The Draft Implementing Regulation seeks to ensure any information regarding the origin or place of provenance of the primary ingredient is not misleading to the consumer by (i) providing references to specific geographical areas ("EU", "non-EU" or "EU and non-EU"; Member States or third countries; or regions or any other geographical area within Member States/third countries, amongst other examples); or the option to inform consumers by using the following or similar statement: "(name of the primary ingredient) does not originate from (the country of origin or the place of provenance of the food)".

The Draft Implementing Regulation also lays down labelling presentation requirements for the country of origin or the place of provenance indications for primary ingredients, such as font size for any indications provided in words; and for any indications given in a non-scriptural form, a requirement that they shall appear in the same field of vision as the indication of the country of origin or the place of provenance of the food.

The Draft Implementing Regulation applies to all products for which an origin or place of provenance is provided, but which have a primary ingredient from a different origin or place of provenance. It does not apply to whole products that do not provide the information regarding origin or place of provenance, and in these cases it will not be necessary to provide the information regarding the origin or place of provenance of the primary ingredient.

CONSUMER PROTECTION

THE EUROPEAN COMMISSION LAUNCHES A REVISION OF CONSUMER PROTECTION RULES

On 11 April 2018, the European Commission released the so-called "New Deal for Consumers" initiative with the aim of further developing EU consumer protection rules, which are already ranked among the strictest in the world.

The "package" (as the name goes when several independent legal texts are intended to be negotiated together) includes two legislative proposals: a Directive on better enforcement and modernization of EU consumer protection rules as well as a Directive on representative actions for the protection of the collective interests of consumers.

In terms of modernizing consumer rights, the Commission seeks to improve transparency over the main parameters determining the ranking of the results of users' queries. Marketplaces, comparison tools, app stores or search engines will be requested to make it clear when third parties pay to be included in the list of search results ("paid inclusion") or for receiving higher ranking ("paid placements"). Moreover, the new rules introduce a most important change with long term consequences for companies in the digital environment. Up to now, the very definition of consumer was essentially linked to the existence of a money payment made in exchange of goods or services. These changes will extend the concept of consumer, and with that the scope of the existing consumer protection rules, to users who receive digital services (e.g. cloud storage, webmail and social media) in exchange of access to their personal data, even when there is no currency payment at all.

The proposed changes also intend to harmonize Member States' penalties for "widespread infringements", defined as those harming consumer's interests across various Member States. In those cases, the maximum fine would be at least 4% of the infringing trader's turnover in the Member States concerned.

As regards representative actions, the Commission seeks to introduce a EU-wide collective redress mechanism against illegal practices affecting a large number of consumers. Under the proposal, only nonprofit "qualified entities" designated by Member States will be authorized to bring actions before courts or administrative authorities.

Those entities will be enabled to apply for a provisional or definitive injunction order to stop or prohibit a harmful practice; and subsequently to seek a redress order which can obligate the trader to provide consumers with compensation, repair, replacement, price reduction, contract termination or reimbursement. To make a clear distinction with the U.S. system, redress cannot have punitive effect and will be limited to the actual loss or damage suffered by the consumers.

The proposals will be now discussed within the European Parliament and the Council of the EU. National provisions transposing the new rules will become applicable two years after the entry into force of the Directives.

SECURITY UNION

THE EUROPEAN COMMISSION INTRODUCES STRICTER RULES ON THE MARKETING AND USE OF EXPLOSIVE PRECURSORS

On 17 April 2018, the European Commission published a proposal for a Regulation (the "Proposal") on the marketing and use of explosive precursors. The Proposal has for objective to address the use of home-made explosives in terrorist attacks in Europe over the recent years.

The Commission proposed to add new chemicals, such as nitric acid, hydrogen peroxide, sodium chlorate, potassium chlorate, and perchlorate, to the list of banned substances which could be used for the manufacture of home-made explosives. The Proposal applies both to substances obtained in brick-and-mortar shops as well as from online retailers or via online market platforms. The new framework will bring to an end the registration systems introduced by some Member States which allow "members of the general public" to register purchases of some restricted substances upon presentation of an ID card and which are considered as insufficient from a security point of view.

Moreover, under the Proposal, Member States may adopt a mandatory licensing system for the purchase of a limited number of restricted substances which could have a legitimate use. Member States will verify the legitimacy of license requests and conduct a pre-authorization security screening, including a criminal record check of individuals. Businesses will be imposed the obligation to report any suspicious transaction within 24 hours. A transaction is to be considered "suspicious" when aiming at acquiring regulated explosives precursors in quantities, combinations or concentrations uncommon for "legitimate" use, and also when the substance or mixture could seem to be intended for the illicit manufacture of explosives. Member States will have to ensure that the competent national bodies and agencies are granted the necessary investigative powers.

The Proposal also maintains the existing provisions that national authorities may impose effective and dissuasive penalties as well as the so called "safeguard clause" under which Member States may introduce further restrictions by lowering the concentration limits defined in Annex I to the Regulation. The Commission may request the Member State(s) concerned to withdraw such restrictions, if it finds such measures not to be justified. The Commission will regularly update guidelines to assist the chemical supply chains and national authorities upon consultation with a specialized committee of experts.

Member States will also provide training for law enforcement, first responders and customs authorities to recognize regulated explosives precursors substances and mixtures and to react in a timely and appropriate manner. At least twice a year, Member States will have to organize awareness-raising actions, adapted to the specifics of sectors and businesses using regulated explosives precursors.

The Proposal also provides that the Commission must carry out an evaluation of the new Regulation and report on the main findings six years after the date of application of the new Regulation.


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FINANCIAL AFFAIRS

EUROPEAN COMMISSION PROPOSES NEW PRUDENTIAL REGIME FOR INVESTMENT FIRMS

On 20 December 2017, the European Commission proposed a review of the prudential rules for investment firms by amending the Regulation on capital requirements ("CRR") and the Directive on the prudential supervision of investment firms ("CRD"). Apart from CRD/ CRR, the review concerns also certain provisions of the Markets in Financial Instruments Directive and Regulation ("MiFID2/MiFIR").

The aim of the revision is to ensure a more proportionate application of prudential requirements for investment firms. It is considered that the existing prudential framework has not fully catered for the business models of investment firms, which do not engage in lending activities and are therefore less exposed to credit and liquidity risks. Under the Commission's proposals, the majority of EU investment firms, except for the largest, systemic ones, would no longer be subject to these rules.

Based on the recommendations of the European Banking Authority ("EBA"), the Commission proposes prudential requirements differentiated by three classes according to firms' size, nature and complexity. Only the largest firms, with assets over EUR 30 billion (Class 1) would remain under the prudential regime of the current CRR/ CRD and would be treated and supervised as significant credit institutions. This implies that their operations in Member States participating in the Banking Union would be directly supervised by the European Central Bank's Single Supervisory Mechanism ("SSM").

For larger firms (Class 2), further defined by specific thresholds, the rules introduce a new way of measuring their risks and provide for lighter governance and remuneration arrangements. The capital requirements for the least risky investment firms (Class 3) will be set in a simpler way, yet flexible enough to cater for various business models. These firms would not be subject to any additional requirements on corporate governance or remuneration. Any firm that is deemed to hold clients' funds however would not fall under this category.

The regulation entails transition provisions allowing firms to build up the new required amounts of initial capital in a period of 5 years. As regards non-EU firms, the proposal adjusts the equivalence test of the prudential treatment and supervisory convergence of the jurisdiction where they are established. These would be subject to a more detailed and granular assessment by the European Commission.

EUROPEAN PARLIAMENT SETS UP A NEW SPECIAL COMMITTEE TO LOOK INTO TAX EVASION PRACTICES

The Parliament intends to establish a new special Committee on financial crimes, tax evasion and tax avoidance. The Committee, also referred to as "TAXE 3", is expected to be formally endorsed by the Parliament's plenary on 1 March. Its draft **mandate** was already agreed by the Parliament's Conference of Presidents on 8 February and foresees a 12 months-long investigation into harmful tax practices within the EU as well as third countries, with a particular focus on the UK's Crown Dependencies and Overseas Territories.

45 Members of the Parliament ("MEPs") will be monitoring the implementation of the recommendations delivered by the former special and inquiry committees TAXE 1, TAXE 2, and PANA, set up in response to Luxemburg leaks and Panama papers scandals. The Paradise Papers were published shortly before the PANA Committee issued its final recommendations, which resulted in calls by some MEPs to continue their work and even to establish a permanent investigative committee.

TAXE 3 will be responsible for the assessment of the listing process and the impact of the EU's blacklist of non-cooperative jurisdictions in tax matters. The mandate grants the Committee the power to access relevant documents for its work and to hold hearings, while specifically referring to the Code of Conduct Group for business taxation, considered to be the most secretive Working Group of the Council. Furthermore, the Committee will conduct an analysis of VAT fraud and look into evasion practices in digital taxation. For the first time, the Parliament will also investigate national schemes providing tax privileges for new residents or foreign income. The assessment of the Commission's process of listing high-risk third countries in the area of money laundering and the evaluation of the consequences of bilateral tax treaties also figure among the Committee's competence.

EUROPEAN COMMISSION UNVEILED ITS ACTION PLAN ON FINTECH

On 8 March 2018, the European Commission released its **FinTech Action Plan** (the " FinTech Action Plan") addressing issues ranging from licensing, authorization and standardization in FinTech to potential regulatory approaches to cryptocurrencies, cloud services, blockchain technology and cybersecurity. The FinTech Action Plan is part of the Commission's efforts to build the Capital Markets Union and its agenda to create a Digital Single Market. The proposed initiatives can be categorized under three overarching **policy objectives** designed to grasp opportunities and limit risks associated with the new technologies.

First, the Commission seeks to create enabling conditions for the scaling up of innovative business models in the EU. Therefore, together with the FinTech Action Plan, the Commission put forward a proposal for a **Regulation** that will establish a European passporting regime for crowdfunding service providers. To foster competition and cross-border operations of FinTechs, the FinTech Action Plan also includes policy steps towards consistent licensing requirements and common standards. In terms of standardization, the FinTech Action Plan highlights in particular standardized application programming interfaces that would provide a basis for an open banking ecosystem in the EU. The Commission also intends to assess the suitability of existing regulation in light of emerging trends in the use of cryptocurrencies and Initial Coin Offerings.

Second, the Commission aims to boost the uptake of new technologies in the financial sector. The policy actions will target, *inter alia*, switching between cloud services providers as well as the development of standard contractual clauses for cloud outsourcing. With respect to distributed ledger technology ("DLT") and blockchain, the Commission plans to develop a comprehensive strategy addressing its applications in all sectors of the economy, as well as to foster the interoperability and standardization efforts. Furthermore, the Commission will also consider the use of DLT to collect and share information from public companies in the so-called European Financial Transparency Gateway. The Commission efforts will be supported by the already-established **EU Blockchain Observatory and Forum**.

Third, to enhance the security and resilience of the financial sector, the Commission will look into possible barriers hampering information sharing on cyber threats among financial market participants. The FinTech Action Plan also foresees a cost-benefit analysis of a potential EU cyber-resilience testing framework for the financial sector's largest players.

EUROPEAN COMMISSION'S STRATEGY ON GREEN FINANCE

On 8 March 2018, the Commission adopted an **Action Plan on Sustainable Finance** (the "Sustainable Finance Action Plan") setting out its strategy towards a financial system that supports the EU's climate and sustainable development agenda. The Sustainable Finance Action Plan includes 10 key initiatives broadly based on the **recommendations** of the Commission's

High-Level Expert Group on sustainable finance published in January 2018.

Among the legislative initiatives, the Sustainable Finance Action Plan foresees the establishment of a unified EU classification system for environmentally and socially sustainable activities. Embedded in the EU law, such common taxonomy would provide the basis for other non-legislative actions, such as sustainability standards, labels and benchmarks.

Furthermore, the Commission intends to adjust the fiduciary duty of asset managers and institutional investors in order to incorporate sustainability considerations in the investment process. Insurance distributors and investment firms are also going to be encouraged to acknowledge sustainability factors in their product selection processes and suitability assessments for their clients. Moreover, the Commission plans to explore the merits of including environmental, social and governance aspects in credit ratings and market research.

To incentivize financial institutions' participation in the fight against climate change, the Sustainable Finance Action Plan also proposes the recalibration of capital requirements for green investments. The so-called "green supporting factor" would enable financial institutions to hold less capital for sustainable financial products.

Various Sustainable Finance Action Plan initiatives focus on increased transparency in corporate reporting and sustainability disclosure. The Commission has already launched a "**fitness check**" of the existing legislation on public corporate reporting and aims to evaluate certain aspects of the International Accounting Standards Regulation as well as the standards' impact on sustainability. Inspired by the **recommendations** of the Financial Stability Board's Task Force on Climate-related Financial Disclosures, the Commission will also revise its guidelines on non-financial information.

EUROPEAN COMMISSION PROPOSES TO TAX DIGITAL GIANTS

On 21 March 2018, the Commission published two directives establishing new taxation rules for digital companies virtually active in the EU and large digital services providers relying on their users in value creation. The legislative package includes a **long-term, permanent solution** introducing the concept of "significant digital presence" and a **short-term quick fix** to deal with the issue pending agreement among EU Member States on the former. The Commission acknowledges that ideally the issue must be addressed at a global level. Due to the lack of progress in finding international consensus in the framework of the Organization for Economic Cooperation and Development, the Commission decided to move ahead and take the lead in this agenda.

Under the long-term proposal, businesses will be deemed to have a taxable digital presence if they fulfil at least one of the three criteria listed in the directive. A business will be liable to pay tax if it has, in the territory of an EU Member State, over 100 000 digital users; and/or generates annual revenues exceeding EUR 7 million; and/or closes more than 3,000 business contracts for digital services in one year. As such, the proposed Directive does not imply a new tax but rather re-allocates corporate taxation rights by marking a shift in the way profits are allocated to the Member States. It is suggested that the proposed principles are incorporated into the scope of the Common Consolidated Corporate Tax Base currently negotiated in the Council of the EU.

This long-term solution does not cover situations where businesses are tax residents of third countries, which have concluded double-taxation treaties with the EU Member State concerned. The Commission therefore also puts forward a **recommendation** on the adaptation of the Member States' double-taxation treaties with non-EU jurisdictions. To ensure consistent application at the international level, the Commission recommends that double-taxation treaties take into account the rules on profit attribution and digital presence introduced in the "long-term solution" directive.

The quick fix, designed to prevent a proliferation of unilateral measures at national level, introduces the so-called Digital Services Tax ("DST"). A 3% DST on gross revenues (rather than profits) will primarily affect businesses selling online advertising space, data generated by users or intermediating peer-to-peer sales. The Commission estimated that out of the 180 companies that would fall under the scope of the directive, half are based in the United States and a third in the EU. This is a result of the proposed annual global revenue threshold of EUR 750 million at the level of the multinational group, and a European threshold on revenues derived from digital services set at EUR 50 million.

EUROPEAN COMMISSION UNVEILED ITS LEGISLATIVE PACKAGE ON SUSTAINABLE FINANCE

On 24 May 2018, the European Commission presented a **package** of measures designed to engage capital markets in the implementation of the 2015 Paris climate accord. The legislative measures, previously announced in the Commission's **Action Plan on Financing Sustainable Growth** issued in March, include three regulations, as well as amendments to existing rules under the Markets in Financial Instruments Directive ("MiFID II") and the Insurance Distribution Directive ("IDD"). The key elements of the new rules encompass a framework to establish a harmonized classification system ("taxonomy"), new sustainability requirements for investors' fiduciary duty, disclosures and advice to clients, as well as a new category of a low carbon benchmark. The Commission welcomes feedback on the three regulations set out below until 20 July, 2018.

The Commission proposes to establish the **conditions and the general framework** to create a unified EU taxonomy identifying environmentally sustainable economic activities. To be deemed as environmentally sustainable, an activity would have to contribute to the six environmental objectives laid out in the proposal and comply with the technical screening criteria, which will be established by the Commission at a later stage on the basis of advice by a dedicated technical expert group. Notably, the process will be gradual, while the first set of criteria is envisaged to be adopted by 2019 year-end. The framework to be developed under the regulation could eventually serve as the basis for standards and labels for sustainable financial products.

Under the Commission's proposal for a regulation on **investors' disclosure**, fund firms will be required, among other things, to publish written policies on their websites on the integration of sustainability risks in investment decision-making processes. The extent of the expected impact of sustainability risks on the returns of a financial product, as well as sustainability considerations in the remuneration policies will also have to be disclosed. Through increased transparency, the proposal aims to tackle "greenwashing" practices, by which firms deceptively promote their products as environmentally friendly.

The Commission's amendments to **MiFID II** and **IDD** delegated rules would oblige investment firms and insurance distributors to actively question their customers about their sustainability requirements and preferences. Interested stakeholders can provide their comments on the proposed amendments until 21 June 2018.

Furthermore, the Commission is proposing to amend the **benchmarks regulation**, to create a new category of benchmarks comprising low-carbon and positive carbon impact benchmarks, which will provide investors with better information on the carbon footprint of their investments. The Commission leaves flexibility for benchmark providers, who will be free to provide a full spectrum of low-carbon benchmarks with a different degree of ambition with respect to meeting climate-related objectives.

As announced in the Action Plan on Financing Sustainable Growth, the Commission intends to roll out all the proposed actions by the second quarter of 2019.

IOSCO CONSULTATION ON GOOD PRACTICES TO ASSIST AUDIT COMMITTEES IN SUPPORTING AUDIT QUALITY

On 24 April, the Board of the International Organization of Securities Commissions (IOSCO) published a **consultation report** on good practices for audit committees in supporting audit quality. The overall objective of the report is to assist audit committees of listed securities in promoting and supporting audit quality. Interested parties are invited to submit their views on the proposed best practices by 24 July 2018.

The Audit Committee is a subcommittee of the board of directors of a listed entity that oversees matters relevant to the integrity of the issuer's financial reporting and supports the quality of audit. The IOSCO consultation report does not intend to establish the responsibilities of the entities' governance bodies, as these are regulated by the national laws of the jurisdictions. IOSCO however considers that effective audit committees can support audit quality in the interests of market confidence by ensuring the quality, accuracy, integrity, and comparability of issuers' disclosure.

IOSCO seeks stakeholders' feedback on the proposals for good practices for the audit committees in conducting various activities: (i) recommending the appointment of an auditor to shareholders; (ii) assessing potential and continuing auditors; (iii) setting audit fees; (iv) assessing auditor independence; (v) assessing audit quality.

Among other recommendations, IOSCO highlights that the quality of audit should be the main guiding principle in the appointment of an auditor rather than the fee reduction or opinion shopping. Furthermore, audit committees should consider the auditor's knowledge of the issuers business and industry as well as technical and specialist expertise. IOSCO encourages the committees to challenge the management's accounting treatments and estimates and where appropriate seek advice from third parties rather than from the auditor. Committees should also have policies in place establishing the evaluation process of the auditors' independence, including the auditor's team members.

Furthermore, in February 2018, IOSCO concluded a consultation on its proposal to reform the international audit standard-setting process aimed at enhancing its responsiveness to the public interest. The reform should also address concerns about the independence of the standard-setting process and the perceived strong influence of the audit profession. Following the scrutiny of stakeholders' comments, IOSCO intends to seek further feedback on its final proposals, transition plan and impact assessment of the suggested changes to the process.

EUROPEAN COMMISSION UPGRADES THE EU ANTI-MONEY LAUNDERING SUPERVISION

On 12 September 2018, the European Commission published a proposal aiming to address some of the shortcomings in the EU anti-money laundering ("AML") framework exposed by recent scandals involving European banks. The proposed changes are summarized in the Commission's **Communication**, accompanied by a legislative proposal aiming to expand the AML mandate of the European Banking Authority ("EBA"). The **proposal**, which targets specifically financial instutions, amends the 4th EU Anti-Money Laundering Directive, as well as sectoral legislation related to the European Supervisory Authorities and financial markets legislation.

The Communication on "Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions" outlines the existing deficiencies in the system and calls for quick, short-term legislative as well as non-legislatives remedies to restore the EU's reputation after the revelations and reduce financial stability risks.

The Commission proposes to entrust the EBA with EU-level supervisory powers and to enhance its supervisory toolbox through amendments to its founding Regulation. The EU-level AML supervision would thus no longer be shared among the three European Supervisory Authorities ("ESAs") through their Joint Committee, but would be centralized in the EBA and its own standing committee composed of the heads of the national AML authorities. The EBA would oversee the conduct of all the "obliged entities" defined by the fifth AMLD Directive ("AMLD5"), which also fall under the supervisory remit of the ESAs. Its new tools would include, among others, periodic reviews on AML issues, which should be reported to the European Parliament, the Council of the EU and the Commission, if serious breaches are identified. Besides becoming an AML data hub, the EBA would take a leading role in third-country coordination and would be able to directly address financial sector operators.

Furthermore, the Commission underlines the need to undertake changes in the banks' prudential framework, including confidentiality waivers to all authorities processing AML-related information as well as duty of cooperation between prudential and AML authorities. These changes were already suggested by the Parliament under the review of the Capital Requirements Directive ("CRD"), which is currently under negotiation. As regards non-legislative proposals, the Commission invites the EBA to adopt common guidance for prudential supervisors to take account of AML/CTF concerns in a consistent manner.

The Commission calls on the Parliament and the Council ("co-legislators") to adopt the proposal by early 2019 at the latest. The Commission does not rule out larger scale reforms, which will be reflected in its report on the implementation of the AMLD5. These could potentially include transforming the AMLD5 into a directly applicable regulation and establishing a new EU AML body.

IOSCO CONSULTS ON A NEW FRAMEWORK TO ASSESS LEVERAGE IN INVESTMENT FUNDS

On 14 November 2018, the Board of the International Organization of Securities Commissions ("IOSCO") launched a **consultation** on the proposed framework to measure leverage used by investment funds. Leverage is a financial technique used to increase fund's market exposure by using derivatives and/ or borrowed money. The IOSCO framework is a response, to a request by the Financial Stability Board ("FSB") made in the context of its **recommendations** to address financial stability risks stemming from vulnerabilities associated with asset management activities. The broader aim of the ongoing work is to ensure that the financial stability risks potentially arising from the growing asset management sector are properly understood and addressed, if necessary.

The existing regulatory and supervisory measures in most jurisdictions already set leverage limits or disclosure requirements on certain types of funds. These however do not always serve the purpose of risk mitigation from the financial stability perspective and do not always provide for regulatory intervention, when leverage builds up across the funds. Moreover, absence of consistent standards for measuring and analyzing leverage across funds and across jurisdictions results in a lack of comparable data. The ultimate goal of the IOSCO framework is therefore to enhance the authorities' understanding and monitoring of risks that leverage in funds may create. Identification of funds largely relying on the use of leverage would help to better target and prioritize regulatory resources.

IOSCO proposes a two-step assessment process. In the first step, using different exposure metrics, authorities would be able to exclude funds, which are not considered "risky" and filter out those that warrant further analysis. The subset of risky funds, would then in the second step, be subject to a risk-based analysis, e.g. focused on market or counterparty risks[1]. Acknowledging that no single measure is able to capture exposure by all types of funds, the IOSCO framework does not prescribe the metrics to be used by jurisdictions. Instead, IOSCO consults on three possible metrics and their combinations: (i) gross notional exposure of a fund without adjustment ("GNE"), (ii) adjusted GNE; and (iii) net notional exposure ("NNE"). It is also proposed to analyze these metrics by asset class, instead as a single figure of market exposure adding together exposures from all asset classes. Thereby, regulators would be able to identify funds with exposures to the assets with higher risk.

The second step would cater for the inherent limitations of the proposed metrics in the first step. For example, it would allow reflecting the counterparty risk-reducing margin or collateral posted by fund in derivatives transactions. In this step, authorities could decide to analyze funds' exposures to particular counterparties, issuers or market sectors experiencing market stress.

Interested stakeholders can submit their comments on the proposed framework until 1 February, 2019. Under the FSB recommendations, national regulators should collect the data, and take action where appropriate, on leverage and its use in funds, which are not subject to leverage limits or when the funds present financially stability concerns. IOSCO was requested to collect the aggregated data on leverage across the jurisdictions based on its framework by the end of 2019.

EUROPEAN COMMISSION SEEKS TO STRENGTHEN THE INTERNATIONAL ROLE OF THE EURO

On 5 December 2018, the European Commission published a **communication** "Towards a stronger international role of the euro" accompanied by a **recommendation** on the international role of the euro in the field of energy. The communication will be followed by a series of consultations, which will be evaluated in summer 2019 in view of identifying possible follow-up actions. The key aim of this Commission's effort is to "make the euro a source of economic protection and empowerment", and to ensure the euro constitutes a strong alternative to other currencies.
According to the Commission, the potential for the euro to reinforce its global position is currently supported by ongoing initiatives to complete the Economic and Monetary Union ("EMU"), including the Banking and Capital Markets Union projects ("BU" and "CMU"). The Commission highlights the present international window of opportunity to boost the use of the euro in the context of the emerging economic powers, technological innovation as well as the unilateral U.S. sanctions on Iran. Besides the promotion of the role of the euro in key strategic sectors, as included in the recommendation, the Commission underlines the importance of measures that will help strengthen

European financial markets, including an EU framework for a reliable interest rate benchmark, an integrated EU instant payments system as well as strengthened liquidity and resilience of European derivatives markets. None of these measures are entirely new, but progress on them can contribute to a stronger euro. As a concrete example, the Commission argues that this could be achieved by broadening the scope of derivative contracts covered by the clearing obligation and ensuring broad availability of euro-denominated derivate markets and European market infrastructures.

Furthermore, in January 2019, the Commission intends to launch a targeted consultation to gather insights on the potential obstacles and incentives with respect to euro liquidity in the foreign exchange markets. The specific focus will be on market marking by the euro area banks and the so called degree of triangulation, whereby one currency is converted to another indirectly by means of a third currency, usually the U.S. dollar. Regarding other sectors, the Commission intends to consult stakeholders on the market potential for a broader use of euro-denominated transactions in the areas of oil, refined products and gas. The raw material and food commodities sectors will also be looked at to identify ways of increasing trading in euro.

FRANCE AND GERMANY TO CHANGE THE SCOPE OF THE DIGITAL SERVICES TAX

The EU finance ministers gathered for the Ecofin Council meeting on 4 December to discuss, and originally also to find a compromise on, the European Commission proposal for a digital services tax ("DST"). The intention of the Austrian Presidency of the Council to reach a general approach on its **compromise text** failed to materialize due to continued opposition by a number of EU Member States, and ensuing Franco-German **joint declaration** suggesting to drastically amend the scope of the proposal.

France and Germany proposed to narrow down the tax base of the DST to cover online advertisement only, thereby leaving out the originally proposed data collection and intermediation platforms. Their declaration is based on the expectation that a global solution will be found at the OECD level by 2020, which would render specific EU rules unnecessary. France and Germany would like to see the EU DST enter into force as of January 2021 only in case the OECD fails to deliver. In such scenario, however, the declaration reads that the Member States can decide to broaden the scope of the tax at national level to cover other services.

The relevant Council expert group is now expected to redraft the text of the proposal in line with the Franco-German declaration, with the stated aim to adopt the Directive by March 2019. Despite the EU finance ministers' commitment to work constructively to achieve progress, it is unclear at this stage whether an agreement can be found by March 2019.


ASSEMBLEE NATIONALE

INTERNATIONAL TRADE

TRADE

SCREENING OF FOREIGN DIRECT INVESTMENTS IN THE EU

The European Parliament ("Parliament") recently intensified its activity on the Commission's proposal for a Regulation establishing a framework for screening of foreign direct investments ("FDI") into the EU (the "Proposal"). On 23 January 2018, the Parliament's Committee for International Trade held a hearing, including contributions from both stakeholders and experts on similar measures in other countries. Opening the hearing, EU Commissioner for Trade Cecilia Malmström stressed that the proposal aims at enhancing cooperation and coordination between Member States rather than harmonizing foreign investment screening.

At present, FDI screening is a decentralized process and is an exclusive responsibility of EU Member States. To date, no formal coordination among Member States and between the Commission and Member States has been introduced. According to a Commission's Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests", 12 Member States, including France and Germany, have adopted a legislative framework for FDI screening. EU Member States' screening mechanisms may significantly vary in their scopes of application. Furthermore, Member States have different concepts of "national security" and take diverging views whether economic security belongs to this concept. France has introduced review mechanisms for transactions made from EU-based investors in the field of defense and activities relating to dual-use goods and technologies. However, takeovers by investors from third countries are subject to review if the French target exercises activities related to the protection of public health and the integrity, security and continuity of operation of transport networks and services. The French legislation applies an extensive approach to the concept of "national security" and "public order" as it provides for screening mechanisms to activities beyond the defense and security sector. Similarly, under the Austrian Foreign Trade Act, energy supply, telecommunications and water supply belong to the field of public order and public safety. These approaches diverge from the practice of the Committee on Foreign Investment in the United States ("CFIUS") which does not apply a sectorial prohibition and assesses transactions on a case-by-case basis.

The Proposal establishes a coordination mechanism between Member States and the Commission rather than introducing a unified review process. It provides that Member States may "maintain, amend or adopt mechanisms to screen foreign direct investments on the grounds of security or public order". The Proposal grants the Commission the power to screen FDI that are "likely to affect projects or programs of Union interest on the grounds of security or public order" which involve a substantial amount or a significant share of funding by the European Union or which are subject to EU legislation on critical infrastructure, critical technologies or critical inputs. Under the Proposal, Member States authorities as well as the Commission will be empowered to consider the potential effects of investments by non-EU investors on critical infrastructure (including energy, transport, and communications); critical technologies (including artificial intelligence and cybersecurity) or access to sensitive information or the ability to control sensitive information. To be able to determine whether a FDI may affect a Member State's security or public order, the Commission and the other Member States should take into account relevant factors, including a transaction's effects on critical infrastructure and inputs which are essential for maintaining public order.

The Proposal further provides that Member States should set timeframes to adopt screening decisions. Member States will be requested to notify to the Commission their existing screening mechanisms 30 days after the entry into force of the proposed Regulation. After that, they should also notify any amendments to existing review mechanisms or any newly adopted mechanisms within 30 days. Member States who do not introduce screening mechanisms should provide the Commission with an annual report covering FDI on their territory.

Finally, the Proposal sets up a cooperation mechanism between Member States and the Commission. If a Member State considers that a FDI planned or completed in another Member State may affect its security or public order, it may provide comments to the Member State concerned and forward them to the Commission. Finally, Member States will have to appoint FDI screening contact points which will be in charge of all matters related to the implementation of the new framework.

The European Economic and Social Committee is expected to discuss an opinion on the matter: a public hearing took place at the end of February, and is followed by a vote on 18/19 April 2018. The vote at the Parliament's Committee for International Trade is scheduled for 17 May 2018.

AN ARBITRATION CLAUSE IN A BILATERAL INVESTMENT AGREEMENT BETWEEN THE NETHERLANDS AND SLOVAKIA IS NOT COMPATIBLE WITH EU LAW – CASE C-284/16, *SLOVAK REPUBLIC V ACHMEA BV*

On 6 March 2018, the Court of Justice of the European Union, the EU's highest court, ruled that a clause removing from the EU's judicial review investment disputes related to the application or interpretation of EU law is incompatible with EU law.

The CJEU's ruling referred to a bilateral investment treaty ("BIT") between the former Czechoslovakia and the Netherlands of 1991. Under the BIT, disputes between one contracting state and an investor from the other contracting party had to be settled amicably or before an arbitral tribunal. Challenging a measure of the Slovak government as an infringement against the BIT, Achmea brought arbitration proceedings against that state in 2008. In 2012, the arbitral tribunal, based in Frankfurt am Main (Germany), ruled that Slovakia's new legislation was contrary to the BIT and ordered the Slovak state to pay Achmea damages in amount of around EUR 22.1 million. Since Frankfurt am Main was chosen as the place of arbitration, German law applied to the arbitration proceedings.

Slovakia brought an action before the Higher Regional Court of Frankfurt am Main to request the annulment of the tribunal's award. Slovakia claimed that the arbitration clause in question was contrary to Article 18 TFEU (prohibition of any discrimination on grounds of nationality), Article 267 TFEU (exclusive competence of the CJEU to give preliminary rulings on the interpretation of the EU Treaties and acts of EU's institutions), and Article 344 TFEU (obligation of Member States to submit any dispute concerning the interpretation or application of the EU treaties to the CJEU). As the action was dismissed by the Higher Regional Court, the Slovak state brought an appeal before Germany's Federal Court of Justice which referred the matter to the CJEU. Germany's highest court focused on the application of Article 344 TFEU in this case and asked whether the EU treaties preclude an arbitration clause. It also asked the CJEU whether the provisions of the arbitration clause are contrary to the principle of non-discrimination on grounds of nationality.

In its ruling, the CJEU pointed first that the arbitral tribunal concerned was called on to rule on the basis of the law in force of the contracting state concerned by the dispute, as well as on other agreements between Slovakia and the Netherlands. The CJEU added that since EU law forms part of every Member State's legislation and derives from an international agreement between those states, the arbitral tribunal may be called on to interpret or apply EU law.

The CJEU further found that the arbitral tribunal is an exception to the jurisdiction system of both the Netherlands and Slovakia and that such arbitration tribunals cannot be considered as courts "of a Member State" within the meaning of EU law. Therefore, they have no power to refer a matter subject to their decision to the CJEU for a preliminary ruling.

The CJEU further noted that under the BIT, the arbitral tribunal's decision is final and that the arbitral tribunal may determine its own procedure as well as its seat and, consequently, the national law applicable to judicial review of the validity of the award it makes. However, according to the CJEU, judicial review may be exercised by national courts only to the extent allowed by national law. The CJEU stressed that this requirement was not fulfilled in this case. The CJEU accepts that in the context of commercial arbitration it is accepted that the review of arbitral awards by national courts may be limited in scope. But this cannot be applied in the case of investment arbitration. As the CJEU reasoning goes, while commercial arbitration is the result of the freely expressed will of the parties, investment arbitration is derived from a treaty by which two EU Member States agreed to remove from the jurisdiction of their own tribunals disputes related to the application or the interpretation of EU law. Consequently, Slovakia and the Netherlands established a mechanism of investment disputes settlement that failed to ensure the full effectiveness of EU law.

Furthermore, the CJEU emphasized that the BIT, which was concluded not by the EU but by two Member States, provides for the possibility of submitting investment-related disputes to a body which is not a part of the judicial system of the Member States and, thus, the EU. As a result, the provisions of the BIT questioned not only the principle of mutual trust between the Member States but also the preservation of the specific nature of EU law. The CJEU found that the arbitration clause in question was incompatible with the principle of sincere cooperation, providing that the EU and its Member States should "assist each other in carrying out tasks which flow from the Treaties" (Article 4(3) TEU).

The CJEU ruling has binding effect on all Member States. However, its impact is still not clear as the judgment refers only to investment arbitration, rather than to arbitration proceedings in general. The impact of this ruling on other pending proceedings is not clear. It is also unclear whether this ruling suggests that BIT between Member States must be renegotiated and arbitration clauses have to be deleted.

THE EU IMPROVES DEFINITION OF THE EUROPEAN COMMISSION'S ROLE IN FREE TRADE AGREEMENTS' NEGOTIATIONS

On 16 May 2017, the Court of Justice of the EU issued an Opinion on the division of competences between the Union and its Member States for the conclusion of the European Union and Singapore comprehensive Free Trade Agreement ("EUSFTA"). It was decided that the EU (represented by the European Commission) and the Member States have shared competence when negotiating Mixed Trade Agreements (see our previous **publication**). In practice, this means that certain aspects of any Mixed Trade Agreements would require an additional ratification by the Parliaments of all Member States, thereby adding a layer of complexity to the ratification process. This could also have an impact in the negotiation phase as well.

Since the CJEU's Opinion on the EUSFTA, the EU has undergone the process to implement these changes to clarify and define how the Commission and the EU Member States will share their authority in negotiating and approving Free Trade Agreements in the future. In a nutshell, trade negotiations will require two parallel processes: trade agreements, under the exclusive authority of the EU, and Member State Free Trade Agreements, limited to a closed and defined list of competences.

The Council of the EU at a meeting held on 22 May 2018 adopted an agreement on a proposal on the negotiation and conclusion of EU trade agreements . The Council addresses how to avoid the pitfalls of the division of competences between the EU and its Member States, and the need for doubling the negotiation and approval process at Member State level.

For instance, one of the most relevant areas excluded from EU-only trade agreements by the CJEU Opinion is non-direct foreign investment. A reduced negotiation scope could result in a loss of negotiation leverage for the EU and its Member States. In order to prevent this loss of leverage, the Council proposes that discussions regarding investment protection rules should take place at the earliest possible stage of the negotiations. EU-only investment agreements, where deemed necessary, should in principle be negotiated in parallel to non-direct foreign investment FTAs led by the Member States.

The Council has also highlighted that it will be crucial to involve and update the Parliaments of the Member States on the status of trade negotiations, to ensure these may progress smoothly and in parallel to EU-only investment agreements.

It remains to be seen whether the division of competences will indeed result in delays and loss of bargaining power for the EU and its Member States when negotiating future trade deals. Since the Council represents the heads of state of the Member States, it will play a crucial role in ensuring coordination and obtaining a consensus between the governments of the Member States during trade agreement negotiations. However, difficulties may nonetheless arise, given the EU has already witnessed how the influence of the Parliaments of Member States may negatively impact international trade deals.

Only time will say if these changes make it more difficult to negotiate trade agreements with the EU or if, on the contrary, this clarification of competences and better internal coordination among Trade Ministers helps the EU in ensuring effective trade negotiations and their faster ratification at national level.

THE EU OPPOSES USA'S SANCTIONS AGAINST IRAN

In May 2018, the United States withdrew from the Iran nuclear deal reached in 2015 between Iran, China, Russia, the United Kingdom, the US, France, Germany and the EU, so called "Joint Comprehensive Plan of Action" ("JCPOA"), and decided to re-adopt restrictive measures against Iran. Following unanimous approval by EU heads of State or government at the EU leaders' summit in Sofia, Bulgaria, the European Commission took formal steps to respond to USA's renewed sanctions against Iran.

On 6 June 2018, the Commission adopted amendments to Council Regulation (EC) No 2271/96 which provides for measures limiting the effects of the extra-territorial application of legislation adopted by a third country (so called "Blocking Regulation"), and to the Annex hereto. The Commission implemented these amendments through a non-legislative act. The European Parliament and the Council of the EU, EU's two co-legislators, will have to present eventual objections to the measures proposed by the Commission within a two-month period of notification by the Commission of the measures. Before the expiry of that period, the Parliament and the Council may inform the Commission that they will not object. That period may be extended by four months at the initiative of the Parliament or of the Council.

The Blocking Regulation prohibits EU companies to comply with the extraterritorial effects of US sanctions and allows businesses to recover damages arising from such sanctions from the person causing them. The Annex hereto sets out the measures the effects of which the Blocking Regulation aims to limit. Moreover, the Blocking Regulation restricts the effect in the EU of any rulings by foreign courts founded on USA's sanctions and provides that judgments issued by US courts applying US laws referred to in the amended Annex are not enforceable before Member States' courts or the EU courts. The Blocking Regulation includes a mechanism providing for the possibility for companies to request an exemption from the Commission if they can demonstrate that compliance with this act would "seriously damage their interests" or the interests of the EU.

In addition, the Blocking Regulation provides that EU citizens and residents as well as EU-based companies operating activities covered by the US sanctions are entitled to claim damages caused by the application of the sanctions. Recovery may be claimed from "the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary." In practical terms, any natural person or company experiencing damages as a result of the application of the sanctions by other economic operators may be entitled to launch proceedings in damages and interest and claim the recovery of various costs, including legal costs. The wording of this provision remains unclear as it may suggest that damages claims may be brought against the US Government which would probably challenge any proceedings on grounds of sovereign immunity. It is noteworthy that the Blocking Regulation does not provide for recovery from a company incorporated in the EU in accordance of the laws of one of the Member States if a US-based company of which an EU-based company is a subsidiary, has caused a damage. In such scenario, an EU-based subsidiary would be regarded as a separate legal person incorporated in the EU and legally distinguished from its parent company. Recovery can take the form of seizure and sale of any EU-located assets of the company or entity in question, including shares held in a legal person incorporated within the EU.

The provisions of the Blocking Regulation apply to EU nationals, EU residents legally established for at least six months within 12 months prior to the date of the application of the Blocking Regulations and to any company incorporated in one of the Member States. It also applies to any person "in the territorial waters or air space" of the EU and in any "aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity". The Blocking Regulation only applies with regards to such persons when they engage in international trade and/or movement of capital and related activities between the EU and third countries. Furthermore, persons whose economic and/or financial interests are directly or indirectly affected by the US sanctions against Iran are imposed the obligation to inform the Commission within 30 days of the date on which they became aware that they are affected.

In May 2018, the Commission also undertook to remove obstacles for the European Investment Bank ("EIB") to facilitate EU companies' investments in Iran. As a result, the EIB would be able to grant loans to companies, mainly to small and medium-sized enterprises. The Commission took into account the risk for businesses that such loans may not be covered by EU-based banks in attempt to comply with US sanctions and to avoid negative consequences for their operations in the

US. All relevant procedures will apply to individual financial operations.

The Commission further committed to pursue and strengthen EU's sectoral cooperation with Iran, including in the energy sector and with regard to small and medium-sized enterprises. Member States are encouraged to consider one-off bank transfers to Iran's Central Bank to facilitate the receipt by the Iran authorities of their oil-related revenues.

However, the Blocking Regulation does not remove all difficulties that may be faced by businesses. While the Blocking Regulation shields companies from fines imposed by the EU by compensating EU companies for any costs they have incurred as a result of US sanctions, it cannot protect companies against the effects of the sanctions, such as asset seizures or criminal charges in the US. EU companies would probably have to choose between being subject to fines in the United States for non-compliance with the sanctions against Iran or in the EU for compliance with the US sanctions.

EU - JAPAN ECONOMIC PARTNERSHIP AGREEMENT

On 6 July 2018, the Council of the European Union authorized the signature of the EU-Japan Economic Partnership Agreement, which was signed on the EU-Japan summit on 17 July 2018 in Tokyo by the European Commission President, Jean-Claude Juncker, and Donald Tusk, President of the European Council, and Japanese Prime Minister, Shinzo Abe.

This free trade agreement is the most important one negotiated by the EU, creating an open trade zone over 600 million people. Under the agreement, a vast majority of the EUR 1 billion of duties paid annually by EU businesses exporting to Japan is abolished. The agreement further leads to the removal of a number of long-standing regulatory barriers. It will also open up the Japanese market of 127 million consumers to key EU agricultural exports and will increase EU export opportunities in a range of other sectors.

The agreement opens access to services markets, including financial services, e-commerce, telecommunications and transport (often called a "Diary-for-Cars Agreement"). Moreover, EU businesses will have access to the procurement markets of 48 large Japanese cities and the economically important railway sector at national level. In addition, the agreement provides for the removal of customs duties on EU exports to Japan in the automotive sector. It further abolishes duties on many types of cheese such as Cheddar (currently at 29.8%) as well as on wine exports (an average of 15%). EU businesses will be able to increase beef exports to Japan substantially. Import duties on processed pork meat will be abolished and those on fresh meat imports will be significantly decreased.

The Japanese computer, electric and automobile industries are all expected to benefit from this free trade agreement. EU import tariffs on a number of Japanese products, such as cars, currently at 10 %, will gradually be abolished over eight years. Although cars and auto components account for about 20% of Japan's exports to Europe, Japanese carmakers' share of the European market is only about 10%. This share is considerably lower compared to market shares in the United States or Asia.

The EU and Japan further concluded talks on a reciprocal adequacy agreement on data protection which will complement the Economic Partnership Agreement, agreeing to mutually recognize each other's data protection systems as "equivalent".

The agreement will be ratified by the European Parliament and the Japanese Diet and it is expected to come into force in 2019.

CURRENT EU TRADE DEVELOPMENT TRENDS ON SINGAPORE, CHINA, VIETNAM AND MERCOSUR AGREEMENTS

Singapore

The EU-Singapore free trade agreement is one of EU's first 'new generation' bilateral agreements. On top of the classical removal of customs duties and non-tariff barriers for trade in goods and services, it contains important provisions on intellectual property protection, investment liberalisation, public procurement, competition and sustainable development. The agreement establishes the conditions for EU businesses to take full advantage of the opportunities created in Singapore as the business and transport hub of Southeast Asia. Once approved by the Council of the EU, the agreement will be sent to the European Parliament, aiming for the entry into force before the end of the current mandate of the European Commission in 2019.

China

EU-China trade and investment negotiations are also moving forward, even if slowly. In early July both sides exchanged their first market access offers for their bilateral investment agreement. The discussions covered essentially subjects such as expropriation, national treatment, fair and equitable treatment and sustainable development. As trade ties with the US deteriorate, Chinese premier Li Keqiang declared in July during a meeting in Sofia with leaders from 16 European countries that Beijing wants deeper cooperation with the EU and more foreign investment. Nonetheless, the EU continues to stand by the view that China remains a closed economy for EU investors, in a sense that the lack of level playing field between domestic companies and foreign investors lies on the strong role of state-owned enterprises in the Chinese economy. The problem lies on the two sides not speaking the same language when it comes to the "strong hand of the state", with China insisting that its state-owned companies do not benefit from subsidies, the EU says de facto preferential interest rates they obtain from state-owned banks is beneficial to them. Likewise, the EU hesitates to open up to a sector that does not enjoy reciprocity. The 19th round of negotiations is tentatively scheduled for 29-30 October in Beijing, but the exact agenda and timing are yet to be confirmed.

Concerning trade, Beijing continues to insist it wants a free trade agreement with the EU – a call the EU has been rejecting for years. Brussels leaders argue that China is not to be treated as a market economy. Digital is where divergence between the EU and China is most pronounced, as China already controls 40% of the world's e-commerce market, has already shut out Western payment services providers and has ambitions for its platforms to enter the European market.

The EU and China formed a working group on WTO reform following their summit in July, an expression of the cooperative approach; but to what extent can one expect Beijing to agree on new and revised WTO rules that would discipline a number of fundamental features in its economy, remains in Brussels a worrying dilemma.

Vietnam

Efforts are being made to approve the EU-Vietnam deal before the European elections next year, despite the very short timeframe left to do so. The pace during spring was apparently slow because of the 'legal scrubbing' process that precedes translation into more than 20 European languages of their long-sealed trade pact. These are two lengthy procedures that must be concluded before a deal can be put to approval to the Council and the Parliament. By the end of June nonetheless, the scrubbing marathon was finalized and endorsed.

Negotiations for an EU-Vietnam FTA were launched in June 2012 and concluded in 2015. Vietnam has experienced a radical economic and social transformation over the past two decades alongside integration into the global economy. As a rapidly developing and fast growing ASEAN economy, Vietnam holds substantial potential for EU businesses. Brussels insiders regard the Vietnam – EU FTA as ambitious and comprehensive that ensures a conclusive environment for trade and investment relations.

The ‘EU only’ part of the Vietnam deal could come into force immediately and permanently after being ratified by the Council and the Parliament but before the ‘investment agreement’ part of the accord is finalized, the Commission will send the ‘EU only’ part to Member States this autumn. The final deadline for ratification in Parliament is next April, and policy insiders in Brussels consider doubtful that the deal can be sealed in time. This is mainly because it is unclear if the numbers in the Parliament will add up - which basically depends on the signals on labor and human rights issues they get from Vietnam. In this respect, Brussels insiders believe the Commission was in fact afraid of tabling a deal for ratification to a Parliament that has been pushing Vietnam to come up with tangible guarantees that it would start the process of ratifying three International Labor Organisation conventions on freedom of association, the right to organize and collective bargaining, and the abolition of forced labor; MEPs also want Vietnam to improve its human rights record. The question remains whether it is likely that there would be enough time to ensure a proper parliamentary scrutiny before the final vote. The geopolitics issue is important in EU Vietnam relations, with increased uncertainty around global trade, the hesitation towards trade liberalization, globalization and the rules-based trade system.

Mercosur

On the other side, the negotiation horizon on the Mercosur agreement looks endless again. This summer, the Mercosur side made fresh concessions on auto tariffs and car parts. The Commission however made it abundantly clear that this is not enough to conclude a deal, especially in view of the pending work to be done and differences to bridge in several areas, notably on cars and car parts, geographical indications, maritime services and dairy. Commission stressed during summer that solutions to very important EU interests in these areas are still outstanding and will need to be addressed to allow a successful conclusion of the process. Mercosur may have tabled an updated offer in those outstanding areas but still the window of opportunity to conclude the agreement is apparently expected to close relatively soon, in view of the EU and Mercosur negotiating teams folding down a 36th round of talks held in Montevideo in early September: they concluded that for the time being a breakthrough is not managed. To some extent, this is due to EU’s not budging enough on expanding beef quotas. An additional factor lies apparently on the fact that Brazil’s elections early next month make it hard for the South Americans to conclude a deal that would require some tough concessions from them on imports of automobiles or dairy. In mid-October, Brazil will hold hotly contested general elections, after which talks would likely slow down; poll participants deem the possibility of a final conclusion on the Mercosur Trade discussions until the end of 2018 highly remote.

EU MOVES TO BOLSTER FREE MOVEMENT OF GOODS THROUGH EXTENDED MUTUAL RECOGNITION

On 22 November 2018, the Austrian presidency of the Council reached a political agreement with the European Parliament on measures which will facilitate the circulation of goods across the European Union. The new rules improve and expand the application of the mutual recognition principle, an essential component of the EU’s Single Market. This political agreement between the two co-legislators must now be formally adopted by the European Parliament and the Council. The new rules will be applied twelve months after the entry into force of the regulation.

The basic feature of the Single Market is that goods, people, services and capital circulate freely within EU borders. The goal of the Single Market is for a product manufactured or commercialised (e.g. legally imported) for the first time in the

EU through a Member State, to be able to be marketed, namely resold, in other EU Member States. In trading terms the EU becomes one territory without internal borders in a way that stimulates competition and trade, improves efficiency, raises quality, and helps cut prices.

This borderless trade space is grounded in two essential legal mechanisms: in some areas, through the harmonisation of the diverse Member States' regulations which could have an impact in the sale of goods across countries; that creates common EU legal requirements governing a specific area or sector (such as trade, transport, chemical components or medical devices), which are made mandatory in a set of EU legislative instruments (such as Directives and Regulations), establishing rules that will be applicable everywhere in the Union. Alternatively, when such harmonization is not possible or not convenient the mutual recognition principle applies: according to this principle, a Member State may not prohibit the entry and marketing on its territory of products which have previously lawfully entered or been marketed in another Member State, even where those products were manufactured in accordance with national regulations or standards different from those to which domestic products are subject. The only exceptions to this principle are restrictions justified on defined and narrowly interpreted grounds of a legitimate public interest, which must be proportionate to the pursued objectives.

However, this mutual recognition principle does not always work in practice as it should. And when there is no harmonization, some companies may be in fact compelled to apply different national rules, for the sake of efficiency and to save time and avoid paperwork and red tape. This new EU legislative steps taken last month by the European Council and the European Parliament seek to make sure that the existing legislative framework will be improved so as to allow businesses to rely sufficiently on the principle of mutual recognition when they enter new markets in other EU countries. The draft Regulation aspires to clarify the scope of mutual recognition in order to increase legal certainty for businesses and national authorities; introduces a mutual recognition declaration which demonstrates that the goods in question have already been lawfully marketed in an EU country; establishes a problem-solving mechanism that will provide practical solutions in case of disputes regarding the compatibility of an administrative decision denying or restricting market access; and finally, ameliorates administrative cooperation through Product Contact Points and reinforced recourse to IT technology that will enhance the exchange of information and trust among national authorities.

BREXIT

THE EUROPEAN COMMISSION PUSHES FORWARD URGENT LEGISLATION AHEAD OF BREXIT DEADLINE

As it is known, Brexit will take place on 29 March 2019, and may happen without any transition period extending the application of EU law until December 2020, if there is no deal on the Withdrawal Agreement. Such a "cliff-edge" scenario is becoming more plausible with each day, even though the European Commission believes that an agreement between the UK and the EU is still possible.

That is why the Commission has already published six of these "preparation-for-Brexit" legislative texts and has announced two others. This is consistent with the Commission's urgent calls for everybody to get ready for Brexit, last expressed in its Communication issued on 19 July 2018 regarding the preparation for the withdrawal of the United Kingdom from the European Union.

The texts ready for their discussion and approval by both co-legislators are:

- A **draft Regulation** on the apportionment of tariff rate quotas included in the World Trade Organization schedule of the EU following Brexit. The proposal would allow for the apportionment of tariff rate quotas between the EU27 and the UK in the absence of an agreement with WTO Members on this issue.
- A **draft Regulation** complementing EU type-approval legislation with regard to Brexit. The proposal would enable manufacturers of cars and other vehicles, as well as their technical parts currently holding type approvals issued by the UK type-approval authority, to apply for the same types with the EU27 correspondent authorities in time to prevent disruption in the manufacturing and distribution process.
- A **draft Regulation** regarding the relocation of the European Medicines Agency from London to Amsterdam.
- A **draft Regulation** about the move of the seat of the European Banking Authority from London to Paris.
- A **draft Regulation** amending the Regulation establishing the Connecting Europe Facility, a EU instrument that supports trans-European networks and infrastructures in the sectors of transport, telecommunications and energy. The proposal designs a new maritime route to connect Ireland with the continental part of the North Sea - Mediterranean corridor (specifically the Belgian ports of Zeebrugge and Antwerp and the Dutch port of Rotterdam), ensuring the connection between Ireland and the other Member States.
- A **draft Regulation** amending the Regulation on common rules and standards for ship inspection and survey organizations. The proposal addresses the transfer of sponsorship from the UK to a EU27 Member States in order to allow marine standards bodies that have been "sponsored" by the UK to continue to operate for EU-flagged ships after Brexit.

Moreover, the Commission plans to release two other legislative proposals soon:

- A Proposal amending the energy efficiency Directive and the Proposed Regulation on the Governance of the Energy Union: references to EU energy efficiency targets for 2030 would be adapted to the EU27.
- A Proposal for an amendment to the Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. The act would place the UK on either the "visa required" list of third countries or the "visa free" list.

While presenting this list as a proof of its own preparedness, the Commission urges all actors - primarily business operators and professionals - to also prepare for all potential outcomes of Brexit, with the help and guide of the already published technical "notices" on how to deal with Brexit consequences in different matters and sectors. In the Communication, the Commission underlines the strong impact for companies operating on transport, financial services, pharma and digital sectors, as well as all businesses trading goods between the EU and the UK.

BREXIT IMPACT ON AIR TRANSPORT

Deal Or No Deal? The State Of Play

The EU-UK Draft Withdrawal Agreement was agreed at negotiators level on 14 November 2018 and approved by the EU leaders on 25 November 2018. Ratification is awaited by the UK and EU Parliaments, with the former vote considered as the most risky one. If both Parliaments approve the Agreement, parties have until December 2020 to negotiate the future EU-UK relationship (with a possibility of a Joint Committee agreeing, before July 2020, an extension of said transition period only once and until July 2022 the latest) - during which period the legal position of the UK in the EU along with all rights and obligations deriving therefrom will remain the same. If however, UK Parliament's vote on the Agreement is negative, there will be no time to negotiate a revised version until March 2019. The air transport industry shall be therefore prepared for the implications of a no-deal case.

What Will Be The Ultimate Consequences Of A No-Deal Scenario For The Aviation Sector And Your Business?

The areas of aviation safety, aviation security and flights between the UK and the EU are regulated by precise legal provisions, on which the effects of a no deal scenario are difficult to predict. For EU to UK flights and vice versa, both the EU and UK registered airlines will need to obtain a licence from the UK Civil Aviation Authority and the European Safety Agency respectively. Regarding the allocation of slots at UK airports, the current rules would most likely remain unchanged in the event of no deal and there would likely be no disruption to the UK's provision of air navigation services as a result of leaving the EU without a deal. The UK government, however, has stated that it assumes a mutual interest in preserving the status quo based on a multilateral or bilateral level and has stressed that it would expect the recognition of equivalent safety standards to be on a reciprocal basis.

Are There Any Legal Instruments In Place For The Conclusion Of An EU-UK Agreement On Aviation Services?

Following the withdrawal, the UK will be treated as a third country by the EU. The **Political Declaration** on the outline of the future relationship, published on 22 November 2018, provides an overview on the legal framework that will cover market access, investment, safety and security in the aviation industry: the EU and the UK agreed on the future conclusion of a Comprehensive Air Transport Agreement that ensures open and fair competition in the air services sector.

Are Negotiations Underway For The Signing Of Bilateral Agreements?

In the case of ASAs (Air Services Agreements) with non-EU states, for airlines from one of the 111 countries with whom the UK has a bilateral ASA, including China, India and Brazil, there will be no substantial change. For airlines from one of the 17 non-EU countries where the EU has negotiated individual ASAs, negotiations are either still underway between the UK and those countries for replacement arrangements to be in place before the exit day, or already closed. This is the case for example of the new UK-Canada air services agreement which has reached an advanced stage; also of the UK-US open skies pact, the conclusion of which was realised on November 29, 2018. The new US aviation deal is one of nine new bilateral arrangements the UK has already achieved with countries around the world such as Albania, Georgia, Iceland, Israel, Kosovo, Montenegro, Morocco and Switzerland.

CONTRIBUTORS

Philip Torbøl
Partner, Brussels
philip.torbol@klgates.com
P +32.(0)2.336.1903

Mélanie Bruneau
Partner, Brussels
melanie.bruneau@klgates.com
P +32.(0)2.336.1940

Ignasi Guardans
Partner, Brussels
ignasi.guardans@klgates.com
P +32.(0)2.336.1949

Francesco Carloni
Partner, Brussels
francesco.carloni@klgates.com
P +32.(0)2.336.1908

Giovanni Campi
Financial Services
Policy Director, Brussels
giovanni.campi@klgates.com
P +32.(0)2.336.1910

Alessandro Di Mario
Associate, Brussels
alessandro.dimario@klgates.com
P +32.(0)2.336.1938

Antoine De Rohan Chabot
Associate, Brussels
antoine.derohanchabot@klgates.com
P +32.(0)2.336.1941

Katrin Hristova
Junior Attorney, Brussels
katrin.hristova@klgates.com
P +32.(0)2.336.1921

Francesca Lai
Junior Attorney, Brussels
fancesca.lai@klgates.com
P +32.(0)2.336.1924

Martina Topercerova
Policy and Regulatory
Specialist , Brussels
martina.topercerova@klgates.com
P +32.(0)2.336.1931

Cecilia Sbrolli
Legal Consultant , Brussels
cecilia.sbrolli@klgates.com
P +32.(0)2.336.1942

Alessio Ghiani
Legal Consultant , Brussels
alessio.ghiani@klgates.com
P +32.(0)2.336.1922

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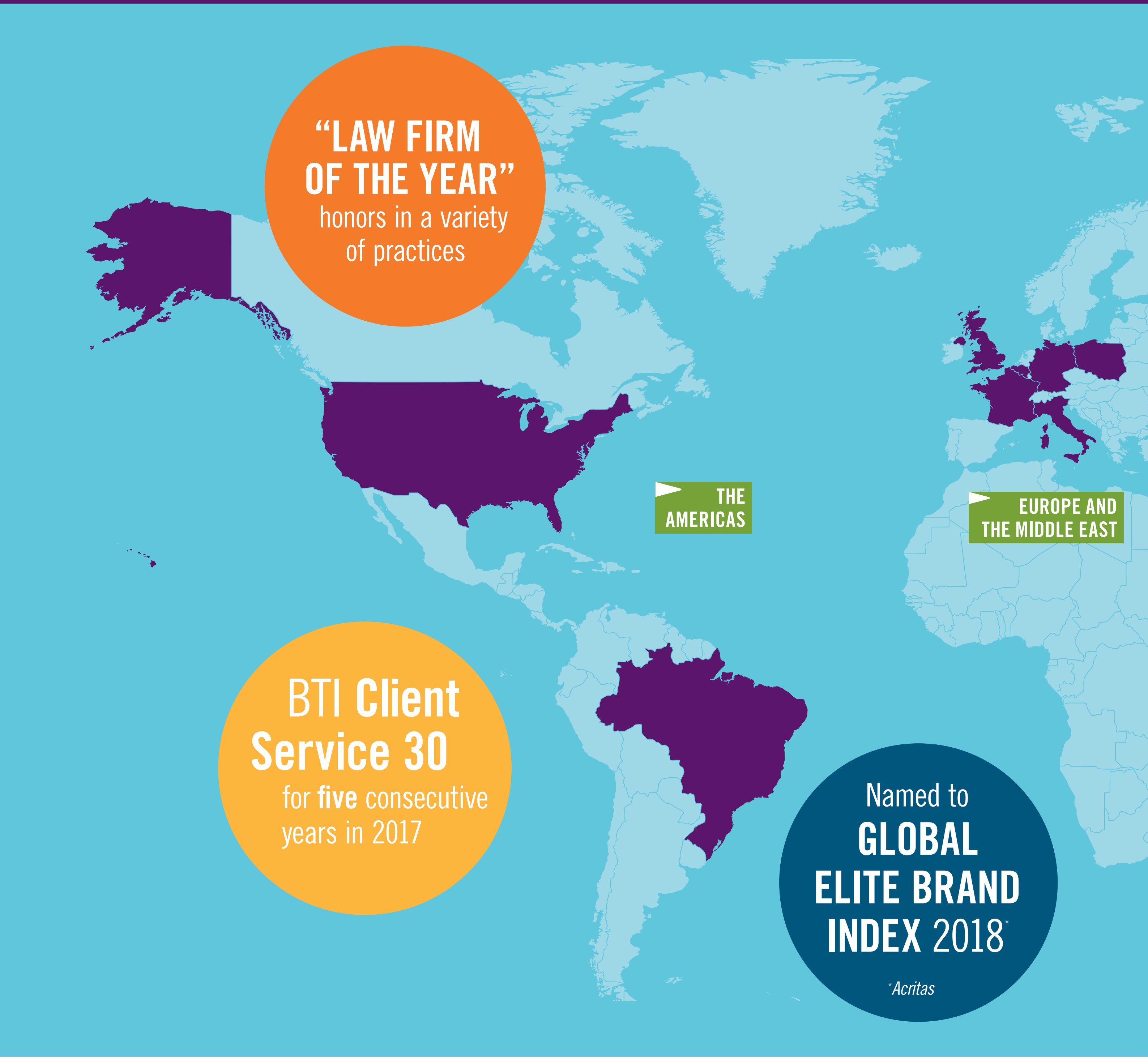

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