

## June 2019

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## The June issue of the Brussels Regulatory Brief includes the following topics:

- **Institutional developments**

The new European Parliament: more fragmentation, ad hoc coalitions, and greener policies? *On 23-26 May, EU citizens elected new Members of the European Parliament that will be in charge for the next five years. Increased fragmentation and the absence of the traditional majority will likely complicate political decision-making.*

- **Antitrust and Competition**

The European Commission fines five banks for taking part in two cartels in the Spot Foreign Exchange market. *The European Commission adopted two settlement decisions related to two cartels in the Spot Forex market involving exchanges of sensitive information between five major banks' traders.*

The European Commission fines the world's biggest beer brewer for restricting cross-border sales. *On 13 May 2019, the Commission issued a decision fining the world's biggest beer brewer 200 million euros for abusing its dominant position on the Belgian beer market.*

- **Telecommunications, media and technology**

New obligations for online platforms are on the horizon. *Two pieces of legislation setting out new obligations to ensure that online platforms deal fairly with consumers and other businesses are at the final stage of their legislative process.*

- **Trade**

International agreement reached to tighten rules on plastic waste exports. *In an effort to clamp down on plastic garbage exports, on the final day of a summit in Geneva on the Basel Convention, 186 countries plus the EU backed a Norwegian proposal suggesting that countries importing plastic waste have to give prior and informed consent before a shipment can take place.*

- **Economic and Financial Affairs**

EU financial supervisors advise the Commission on sustainability considerations in investment and insurance legislation. *On 3 May 2019, ESMA and EIOPA published a package of proposals introducing environmental, social and governance considerations in level 2 acts covering investment services and funds as well as (re-)insurance.*

## Institutional Developments

### The new European Parliament: more fragmentation, ad hoc coalitions, and greener policies?

The results of the May 2019 European Parliament (“EP”) elections resulted in a more complex European political landscape for the next five years. Increased fragmentation and the absence of the traditional center right (EPP) – center left (S&D) majority will likely complicate political decision-making.

The highest voter turnout in 20 years showed the EU citizens’ interest to tame the expected anti-EU protest wave, but also their willingness to be heard on issues such as climate change, immigration, and Brexit. While the feared radical anti-establishment revolution was warded off, strengthened populist forces can be expected to further complicate long-term integration ambitions.

Increasing its representation by almost forty seats, the new group Renew Europe (former centrist/liberal ALDE group) secured a key role for itself in forging future pro-European alliances in the EP. Despite the clear concentration in Germany and northern European member states, with almost 20 seats gained, the Greens also raised their stakes in the upcoming majority-making exercise. Previously considered as a marginal group, it now appears that Greens will be the ally that every large group needs, and their strong election result will translate into a push for increased environmental considerations across politics and policies. Their support will therefore come with a price tag. Concessions from the two main political families - European Socialists and Democrats (“S&D”) and the center right People’s party (“EPP”), both losing almost 40 seats, are certain.

Moreover, in the aftermath of Brexit, the number of Members of the EP (“MEPs”) will decrease from 751 to 705, with 27 of the 73 British seats being allocated to candidates from 14 Member States, who are currently on the waiting lists. Without considering the Euroskeptic Brexit Party, the groups affected the most by UK’s departure will be Renew Europe (losing 16 seats), Greens (11 seats) and S&D (10 seats).

The new EP composition also shifts the internal balance of power within political groups. The largest S&D delegation comes from the leftist Spanish socialist party, while the backbone of the last legislative term, the Italian center-left Democratic Party, has been considerably weakened. As a result, the S&D is likely to reshuffle its priorities further to the left and put climate change/sustainability, fair taxation and social policies at center stage. The strong Renew Europe representation is primarily driven by the alliance with French President Macron’s party. The French delegation includes many green-minded MEPs, which could give particular importance to environmental issues. Interestingly, the Green group also includes heterogeneous movements such as pro-independence regionalist parties from Spain and “pirate parties” calling for citizens’ digital rights.

The first task of the newly elected representatives will be to elect the new President of the European Commission. Under the informal [“Spitzenkandidat” process](#), firmly [supported](#) by a majority within the EP, the top EU role should be given to a candidate of the leading EU political party. However, with some critical voices like France’s President Macron, its nomination by the European Council might prove to be more complicated than five years ago. To be elected, the Commission President will need the backing of a majority of the Member States, as well as the absolute majority in the EP. Among the various options, a 433 seat-strong pro-EU coalition, comprising EPP, S&D and Renew Europe, would be sufficient to elect the new Commission President, but appears potentially shaky as regards alignment on programs and policies.

The President of the European Council, Donald Tusk, has already [signaled](#) that there will be no automaticity in the process of selecting the new Commission President. Political dynamics related to the Commission President also will be influenced by other high-level appointments, i.e. the European Council President, the High Representative for Foreign Affairs and Security Policy and the President of the European Central Bank. Party affiliations, but also geographical and gender balance will be decisive elements.

As regards policies, it is difficult to imagine that the new political cycle will produce leaps forward for integrationists, such as, for example, the deepening of the Economic and Monetary Union (“EMU”) and in particular risk mutualization, or the removal of the unanimity requirement in tax policy matters.

It appears that trade policy might prove to be one of the policy areas most affected by the election results. A more reluctant approach to trade liberalization can be expected along with deeper scrutiny of labor conditions, sustainability and climate change considerations in international agreements. Similarly, it is fair to expect that the EU agendas around climate strategy, circular economy, sustainable development, sustainable finance and other areas will enjoy stronger political support in the years to come. As regards tech policy, a large number of MEPs involved in the discussion of digital files have been re-elected to the EP. Over the next five years, they are likely to require the adoption of more stringent rules on electronic privacy and platforms’ liability towards consumers and SMEs, as well as on taxation of big tech firms and the intersection between digital and competition policy. ulting from the EU inter-institutional negotiations, is now subject to formal approval by the Parliament and Council.

## Antitrust and Competition

### European Commission fines five banks for taking part in two cartels in the Spot Foreign Exchange market

On 16 May 2019, the European Commission adopted two separate settlement decisions related to two cartels in the Spot Foreign Exchange (Forex) market for eleven currencies and involving five major banks. Spot Forex transactions refer to the trading of currencies done by major companies via traders on the same day at a prevailing exchange rate.

The Commission opened an investigation in September 2013 following an immunity application from one of the banks involved. The leniency procedure allows the first company that reveals the existence of a cartel to the Commission to avoid fines. The following companies that provide relevant information to the Commission may benefit from reductions of their fines. The percentage of reduction depends on the extent and relevance of the information provided and on the order in which applicants provide information.

Following its investigation, the Commission found that the banks' traders in charge of Forex spot trading participated in two cartels in the form of chatrooms. In these chatrooms, traders exchanged sensitive information relating to details on customers' orders (the name of the client, the amount to be exchanged and the currencies concerned), prices applicable to specific transactions, their open risk positions and other details of current or planned trading activities. Such information exchanges allowed the traders to coordinate certain trading practices, notably standing down, i.e. refraining from trading activity to avoid interfering with other participants' trading activities.

The aggregated amount of the fines imposed on the five banks is approximately EUR 1.07 billion. This also includes the Commission's reduction of 10% of the fines imposed on each bank involved in the settlement procedure. Such procedure allows participants to a cartel to acknowledge their participation and their liability in exchange of a 10% reduction of fines. This also allows the Commission to avoid long and complicated procedures.

The Commission indicated that, although it closed the procedure for these two cartels, it will continue pursuing other ongoing matters concerning conducts in the Forex spot trading market.

Although in 2018 the Commission adopted only four decisions, these two decisions show that the Commission will continue to prioritize cartel enforcement. The low number of decisions in 2018 is mostly due to the fact that cartel cases remain a long and complicated process. For instance, in the Forex investigation, the procedure lasted almost 6 years from the immunity application to the adoption of the final decisions. As EU Competition Commissioner Margrethe Vestager notably stated, "*these cartel decisions send a clear message that the Commission will not tolerate collusive behaviour in any sector of the financial markets*".

### European Commission fines the world's biggest beer brewer for restricting cross-border sales

On 13 May 2019, the European Commission issued a decision imposing on the world's largest beer brewer a fine in an amount of 200 million euros for abusing its dominant position in the Belgian beer market.

On 30 June 2016 the Commission opened an investigation into potentially anti-competitive practices led by Anheuser-Busch InBev ("Company") under EU Competition law for abuse of dominant position. From the investigation the Commission determined that the Company held a dominant position in the Belgian beer market based on indicators of constantly high market shares, ability to independently increase prices, the existence of significant barriers to entry, and limited countervailing buyer power of retailers.

In this case, the Commission found that the Company infringed Article 102 TFEU notably by preventing cross-border sales of beer within the EU and notably by hindering supermarkets and wholesalers to buy and to import beer in Belgium from the Netherlands at a lower price thereby placing them at a competitive disadvantage.

In its investigation, the Commission highlighted that the Company's strategy was achieved through a number of restrictive practices such as altering the beer packaging and removing mandatory information for consumers, restricting supplies of beer to the Netherlands so to limit imports to Belgium, limiting the sale of product to Belgian retailers subject to their agreement to limit imports from the Netherlands and making customer promotions in the Netherlands conditional upon not offering the same promotions to customers in Belgium.

Given the cooperation shown by the Company throughout the investigation, notably by acknowledging the facts and by agreeing to legally binding remedies to provide mandatory food information on the beer packaging both in French and Dutch, the Commission agreed to a 15% reduction of the fine. For these reasons, and taking into account the duration of the infringement, which lasted from 9 February 2009 to 31 October 2016, the Commission imposed a fine of €200 Million.

## Telecommunications, Media and Technology

### New obligations for online platforms are on the horizon

On 14 June 2019, the Council of the European Union formally adopted the [Regulation](#) on fairness and transparency for **business users** of online intermediation services. The Regulation sets out platform-to-business rules based on transparency and dispute resolution in order to ensure greater predictability and fairness for those businesses.

As of 2020, a large number of online platforms that allow EU businesses to sell goods or provide services to customers located in the EU will be subject to new requirements. The Regulation will apply to e-commerce marketplaces (including collaborative ones, in which business users are active), price comparison websites, social media, app stores and, to a limited extent, search engines. Pure business-to-business platforms, online payment services and online advertising tools are excluded from the scope of the new rules.

According to the European Commission, more than one million businesses, especially SMEs, already sell goods and services via online platforms.

Under the new rules, platforms will be required to ensure that their contractual terms and conditions are clear, easily available and that any changes to them are promptly notified. Moreover, platforms will be able to suspend or terminate their contractual relationship with business users only based on objective grounds and by providing a statement of reasons that led to these measures. Ranking has a huge impact on online sales. For this reason, the Regulation will require platforms to indicate in their terms and conditions the main parameters determining the position of goods and services. This is the only requirement applicable to search engines.

Similar transparency obligations concern the description of differentiated treatments given to goods and services offered by the platforms (or by business users they control) and access of business users to data generated by the provision of their services. Finally, platforms employing more than 50 persons will need to set up an internal system for handling complaints from business users.

As regards **business-to-consumers** relations, on 17 April 2019 the European Parliament confirmed the [political agreement](#) reached with the Council on the proposed Directive on better enforcement and modernization of EU consumer protection rules.

One of the main objectives of the Directive is to adapt the EU consumer protection framework to digital transformation. To this end, the Directive will oblige platforms such as online market places, search engines and comparison websites to make it clear when third parties pay to be placed in a list of search results ("paid inclusion") or for receiving higher ranking. Platforms will also be required to inform consumers whether they are concluding a contact with a professional seller or not and whether the transaction is protected by consumer legislation.

This is the first time that the EU establishes cross-sectorial rules applicable to online platforms. We are only at the beginning of this process, but it seems likely that the next targets of the Commission may be algorithms and the advertising ecosystem.

## Trade

### International agreement reached to tighten rules on plastic waste exports

In an effort to clamp down on plastic garbage exports, on 10 May 2019, the final day of a summit in Geneva on the Basel Convention, 186 countries (not including the United States) plus the EU backed a Norwegian proposal to submit most plastic waste exports to the [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes](#). From now on, only plastic waste which is clean, not mixed or contaminated and ready for recycling will be able to be shipped without prior and informed consent.

This new measure means that exporting countries would now need to reinforce their recycling businesses, a development that might result in new business opportunities for the global recycling industry of more than \$200 billion. On the other hand, the work of the private entities that until now received plastic scrap in developing countries with existing recycling infrastructure in place will depend on governmental approval.

Plastic waste is often dirty and poorly sorted, making it hard to recycle. Until May 10, there were no international restrictions on plastic waste shipments, which means the garbage flooded into poor countries that lack the capacity to manage it properly. The discussions about finding solutions on how to deal with excessive amounts of plastic garbage tuned to a heated debate after China's January 2018 ban on waste imports, followed by India's ban in March 2019. Because plastic waste flows quickly diverted to other countries in Southeast Asia, Malaysia, Vietnam and Thailand also began to restrict imports the past months. There was a growing push to act and eventually, at a U.N. Environment Assembly in March 2019, countries called for changing the rules on plastic waste shipments.

In the EU's position on the Norwegian proposal, the bloc clarified certain terms and asked for six more months — until July 2020 — to allow countries to properly implement it, but otherwise its position mirrors that of Norway. The EU is on board because it has been trying to increase recycling at home in an effort to reduce waste and its environmental impact, as well as cutting reliance on imports of fossil fuels. Because the EU Member States are represented by the international organization of the EU as party in the Basel Convention, the decision reached on 10 May is directly binding on EU countries, hence the EU institutions do not have to go through the procedure of adopting new legislation of the respective rules.

The U.S., the second largest waste exporter after the EU, is not party to the convention and opposed changing the rules, arguing it would undermine global recycling of plastic material without addressing the unsound disposal practices that cause marine plastic litter and microplastics. The U.S. could still strike bilateral or regional deals with importing countries that are parties to the Basel Convention, but these would still have to apply Basel environmental standards.

The new rules would apply from January 2021, according to the draft decision.

## Economic and Financial Affairs

### EU financial supervisors advise the Commission on sustainability considerations in investment and insurance legislation

On 3 May 2019, the European Securities and Markets Authority (“ESMA”) published a set of proposals introducing environmental, social and governance (“ESG”) considerations in delegated acts covering [investment services](#) (under MiFID II<sup>1</sup>) and [investments funds](#) (under AIFM and UCITS Directives<sup>2</sup>). On the same day, the European Insurance and Occupational Pensions Authority (“EIOPA”) issued similar [proposals](#) covering (re-)insurance (under Solvency II<sup>3</sup>) and insurance distribution (under IDD<sup>4</sup>). These proposals follow a request by the European Commission to explore possible avenues to incorporate ESG risks in the decisions taken and processes applied by financial market participants subject to the abovementioned legislation.

In its advice, ESMA referred to the industry feedback received in the preceding consultation. Among the key issues highlighted by stakeholders were the lack of common terminology and definitions as to what constitutes sustainability risks and factors, and the absence of a common taxonomy of sustainable business activities. The industry further demanded explicit references to materiality in the definitions used. Acknowledging the problem, ESMA invited the Commission to ensure consistency and apply definitions agreed under the adopted [Disclosures Regulation](#)<sup>5</sup>, which already includes references to materiality in the definition of sustainability risk.

With respect to funds' operating conditions, stakeholders sought clarity on whether the integration of ESG risks in investment processes concerns only the possible negative financial impact on portfolios or the actual impact of investee companies on the environment and society. According to ESMA, the most effective due diligence process includes both of these considerations. ESMA further underlined that the transition towards a more sustainable economy relies on stewardship, which is already enshrined under the Shareholders Rights Directive<sup>6</sup>. ESMA however clarified, that under the Disclosures Regulation, the considerations of the actual broader impact on due diligence will be mandatory only for some firms. ESMA acknowledged the industry recommendation to reflect the type of investment strategy (e.g. as index-based strategies) in the due diligence requirements. According to ESMA, such proportionality is already incorporated in the existing UCITS and AIFMD rules and therefore does not warrant specific clarification.

Similarly in the insurance sector, EIOPA encouraged the application of the stewardship approach by insurers and reinsurers and incorporated sustainability considerations in the prudent person principle<sup>7</sup>. EIOPA advised the Commission to require that insurance undertakings reflect the ESG preferences of policyholders and beneficiaries in their investment portfolio, where these preferences are relevant for the target market.

The European Commission will work with ESMA and EIOPA to translate their advice into delegated acts, which will consequently be subject to scrutiny by the European Parliament and the Council of the EU.

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<sup>1</sup> Markets in Financial Instruments Directive II (2014/65/EU)

<sup>2</sup> The Alternative Investment Fund Managers Directive (2011/61/EU) and the Undertakings in Collective Investment in Transferable Securities Directive (2009/65/EC)

<sup>3</sup> Directive on the taking-up and pursuit of the business of Insurance and Reinsurance (2009/138/EC)

<sup>4</sup> Insurance Distribution Directive (2016/97)

<sup>5</sup> Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks (2018/0179(COD))

<sup>6</sup> Directive on the encouragement of long-term shareholder engagement (2017/828)

<sup>7</sup> The prudent person principle stipulates that insurers may only invest in assets and instruments whose risks the undertaking concerned can properly identify, measure, monitor, manage, control and report and take into account in the assessment of its overall solvency needs.

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