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Institutional developments

Malta takes over the EU Council Presidency

On 1 January 2017, the torch of the Presidency of the Council of the European Union ("**EU**") was passed from Slovakia to Malta. The Presidency rotates every six months between the EU Member States, but continuity is guaranteed through small groups of three countries with consecutive Presidencies, called 'trios'. Each trio sets long-term goals and prepares a common agenda with the topics and major issues for the Council to address over the next 18-month period. Each of the three Member States also prepares an individual, detailed 6-month programme. Malta, the last country in the Netherlands-Slovakia-Malta trio, will focus on migration, security, single market, social inclusion, neighbourhood policy and maritime affairs. It will of course also be faced with the UK formally triggering the exiting process from the EU, which is expected for March 2017.

While the Presidency of the Council of the EU does not have the political importance it used to, before the Lisbon Treaty (2009), it remains an important player in the Union's political reality, and has certainly an influence in the shaping of its political and legislative activity. It is the Presidency's responsibility to drive forward the Council's work on EU legislation, and to ensure orderly legislative processes and cooperation among Member States. The other main tasks of the Presidency are to represent the Council in relations with other EU institutions, and to plan and chair the meetings in the Council and its preparatory bodies.

Malta will host its first summit of EU Heads of Government on 3 February 2017.

Changes in the European Parliament

As explained in previous briefs, the European Parliament ("**EP**") divides in two terms the mandate of its President, as well as that of all its Committee's Chairs and Vice-Chairs. So, this January marked renovation time. On Tuesday, 17 January 2017, the EP held its presidential election to replace current EP President Martin Schulz. It took the maximum amount of ballots to elect his replacement, since none of the candidates won the required absolute majority of valid votes cast in the first three rounds of voting. But finally after the fourth round of voting, a winner could be determined: Antonio Tajani, a Member of the centre-right European People's Party ("**EPP**").

With Tajani's win, the EPP has now also conquered the third Presidency in an EU institution, along with Jean-Claude Juncker as President of the European Commission ("**Commission**") and Donald Tusk as President of the European Council. As such, the previously installed balance of top jobs within the EU institutions with a socialist as EP President, has now vanished in thin air.

In a statement released shortly before the final round of votes, Tajani committed himself to being a neutral President, who listens to all the Groups and does not predetermine the outcome of decisions. In other words, he will not (or so he says) advance a political agenda of his own, as his predecessor did more than once, but he pledges to be a representative of whatever the EP decides.

The EPP was able to secure the win by forming an *ad-hoc* alliance with the liberal Alliance of Liberals and Democrats for Europe ("**ALDE**") and the eurosceptic European Conservatives and Reformists Group ("**ECR**"), and as such marking the end of a longstanding 'grand coalition' with the Socialists & Democrats ("**S&D**"). Whether this new political agreement will or will not have an impact beyond this election and the internal life of the EP, remains to be seen.

The new situation may come as a serious change to the previous alliance between President Schulz and President Juncker: their very close personal relation reinforced the narrow collaboration between the EP and the Commission, and has been the key to moving policy initiatives forward for the last years. Indeed, such a "great coalition" between representatives of the two main European parties created an unspoken obligation for the S&D to support Juncker's position also in challenging situations (even if it did not impose a constant agreement between the EPP and the S&D in every legislative file). Now, breakdown of this unwritten but effective coalition could have a severe impact on Juncker: Socialists and Democrats have been freed, and can be much more critical also in institutional matters. This may be crucial at a time when Juncker keeps attempting to run a more political and top-down Commission. Indeed, there is not always peace among political comrades: it also remains to be seen how this shift within the EP will affect its internal political landscape.

Will the British MEPs keep their positions?

The elections for EP Committee Chairs and Vice-Chairs elections followed on the third week of January. After the Referendum on the EU membership of the United Kingdom ("**UK**"), and now that the UK has one foot out the door, several voices had called on the British MEPs to vacate any influential positions they held (at the moment, there are three Committee Chairs who are British). However, it appears the British MEPs are staying put for now: only five parliamentary committees will have a new chair, none of which are replacing a British chair. The Political Groups behind each one of those British MEPs have decided to support them and propose them again as candidates, in important Committees such as the Internal Market and Consumer Protection Committee, or the Civil Liberties Committee.

So, it can be now confirmed that Brexit will be Brexit, but it has not happened yet: British MEPs will stay in their current positions with all their prerogatives until the UK leaves the EU.

Antitrust and competition

Recent statistics on the total level of fines confirm that the fight against cartels remains a top enforcement priority of the Commission

The Commission has historically been particularly harsh when imposing fines on cartelists. This is due to the fact that – contrary to other jurisdictions (such as the U.S. and certain EU Member States) – EU antitrust law does not provide for criminal prosecution in case of cartel violations. As a result, the Commission has increasingly focused on the level of fines to ensure an adequate level of deterrence. This trend appears to be confirmed by the recent statistics published by the Commission on its enforcement activities in relation to cartels. In particular, these statistics reveal that, since Margrethe Vestager has become the EU Competition Commissioner ("**Competition Commissioner**") in 2014, the total level of fines imposed has not departed significantly from the previous levels reported during the terms of her predecessors, namely Neelie Kroes and Joaquín Almunia.

Year	Fines imposed (not adjusted for Court judgments)*	Number of companies targeted by a cartel decision*	Cartel cases decided by the Commission*
2005-2009	9 414 012 500	205	33
2010-2014	8 712 512 674	192	30
2015-2016	4 091 507 000	37	11

* Until 12 December 2016.

In the period 2005-2009 the total fines imposed in cartel cases were approximately EUR 9.4 billion, followed closely by approximately EUR 8.7 billion between 2010 and 2014. This compares with a figure of approximately

EUR 4 billion for the past two years. A similar trend can be observed with regard to the average number of cartel cases decided per year.

The situation is different, if we look at the number of companies targeted by a cartel decision. The statistics show that, on average, previous cartel decisions have targeted 6.3 companies per cartel investigation. By contrast, if we look at the latest figures, under the current Competition Commissioner cartel decisions have targeted on average 3.4 companies. However, during the past two years, the Commission has imposed the highest cartel fine per cartel case so far– approximately EUR 2.93 billion – and per company – approximately EUR 1 billion. These fines concerned the truck producers cartel which lasted 14 years and covered the entire European Economic Area (for further information on this case, please see here our publication of October 2016).

Accordingly, whilst it remains to be seen whether at the end of the Competition Commissioner's term the number of cartel decisions may depart from the previous periods, the harsh level of fines imposed on the cartelists so far indicate that the cartel fines are likely to remain particularly high, consistent with the Commission's approach when fighting cartels.

Merging companies – be aware of the risk of providing misleading information to the Commission during its merger review

On 20 December 2016, the Commission announced it had sent a statement of objections to a U.S. company offering a social networking platform (the "**Acquiring Company**"), alleging it had intentionally or negligently provided incorrect or misleading information when the Commission was reviewing its acquisition of a consumer communications services provider back in 2014. Under EU competition law, through the statement of objections the Commission informs in writing companies of any competition concerns. Now the Acquiring Company can respond to the Commission's charge sheet until 31 January 2017.

The merger under review was already cleared by the Commission in October 2014. At the time, the Commission's investigation of the effects of the transaction had targeted three areas – consumer communications services, social networking services and online advertising services. It found that the transaction did not raise competition concerns and therefore it authorized it unconditionally.

The recent review was prompted by an announcement in August 2016 that it was possible to link the phone numbers of the consumer communications services provider's users with identities of users of the Acquiring Company. The Commission's preliminary view is that the technical possibility to match automatically both companies' users already existed in 2014, contrary to what was stated during the initial merger review process. What is interesting here is that, during the initial investigation, the Commission had concluded that the transaction would not raise competition concerns irrespective of whether the acquirer started collecting data of the target company's users.

While the Commission's decision to authorize the transaction unconditionally will still remain in effect, the Acquiring Company faces the possibility of having to pay a significant fine. Under the EU rules applicable to the review of proposed mergers ("**EU Merger Regulation**"), companies need to comply with certain procedural obligations during the investigation into the transaction. One of these obligations is that they should not, intentionally or negligently, provide incorrect or misleading information. If they do, the EU Merger Regulation provides that the Commission may impose a fine not exceeding 1% of the company's aggregate turnover.

This case serves as a useful reminder to companies that they should be particularly careful when submitting information to the Commission. They should ensure, in particular, that no misleading or incorrect information is provided during the merger review as, even two years after their transaction is cleared, the Commission will not hesitate to open an investigation which could potentially result in the imposition of significant fines.

Telecommunications, media and technology

The last Digital Single Market Strategy proposal: ePrivacy Directive

On 10 January the Commission finally presented new rules on privacy in electronic communications, the last legislative proposal under the Digital Single Market Strategy ("**DSM Strategy**"). The DSM Strategy included the objective to increase trust in and the security of digital services. In that context, the Commission proposed a reform of the data protection framework across the EU, which materialized in the adoption of the General Data Protection Regulation ("**GDPR**").

Such an overhaul of the European data privacy rules created the urgent need to review the Directive 2002/58/EC ("**ePrivacy Directive**"), which addressed the matters of privacy protection specifically for users of electronic

communications services. This has resulted in the decision of transforming the essence of the ePrivacy Directive into a new Regulation (here), "concerning the respect for private life and the protection of personal data in electronic communications", and modernizing its previous content, while ensuring its consistency with the GDPR.

This new Regulation creates a regulatory level playing field between 'traditional' telecommunication services and new players such as platforms, location services and message service providers, extending the obligations of the former to the latter. These relate to several privacy-related issues, such as the notice and consent by end users, publicly available directories, unsolicited communications, confidentiality of communications, processing of electronic communications data and the time limits for their erasure.

The draft Regulation applies to the processing of electronic communications data carried out in connection with the provision and the use of electronic communications services and to the protection of information related to the terminal equipment of end-users located in the EU. It is irrelevant if a payment of the end-user is required or not.

Where the provider of an electronic communications service is not established in the EU it will be mandatory for it to designate a representative in the EU, established in one of the Member States where the end users of such electronic communications services are located.

Any natural or legal person adversely affected by infringements of the Regulation and having a legitimate interest, including a provider of electronic communications services, shall have a right to bring legal proceedings in respect of such infringements.

In terms of penalties, the consequences for non-compliance may be heavy with fines of up to EUR 20 million or 4% of the total worldwide annual turnover.

The proposed Regulation starts now its full legislative procedure. Although most electronic communication providers and new market players where vocal against it, there is general political consensus both in the Council and in the EP about the need for this specific law. The Regulation may take at least a full year before it is approved by EP. But in any case, its entry into force has ben set to be coordinated with that of the GDPR in 2018.

A European services e-card

With the purpose of releasing the full potential of the Single Market and make of it the base for European companies to flourish, the Commission proposed a package of measures to simplify bureaucracy for services providers and to support Member States in the identification of excessively onerous or obsolete requirements on self-employed people or companies operating nationally or across borders.

The Package includes four initiatives: a new European services e-card, a proportionality assessment of national rules on professional services, guidance for national reforms in regulation of professions and an improved system of notification of draft national laws on services.

The draft Regulation 2016/0403 (COD) introducing a European Services e-card and related administrative facilities (here) proposes a simplified electronic procedure addressed to providers of business services and construction services to help them to comply with all legal and administrative obligations required to provide services domestically and in the "host country".

The new system will allow service providers to follow familiar procedures, liaising with their own administration and language, while the home country interlocutor will be in charge of verifying the documents submitted online and of transmitting them to the host Member State.

This preserves the power to apply domestic legal requirements and to decide on the applicant's request to provide services on its territory. Finally, the host Member State can cancel, repeal or suspend the e-card at any moment.

Economic and financial affairs

The EU and the United States ("U.S.") reach an agreement on insurance and reinsurance

On 13 January 2017, the EU and the U.S. reached a bilateral agreement on prudential measures regarding insurance and reinsurance (the "**Agreement**"). The text is now to be formally adopted by the U.S. Congress as well as by the EU co-legislators (Council of the EU and the EP) before it enters into force. The Agreement successfully concludes a negotiation process conducted jointly by the Commission and the U.S. Department of Treasury since

February 2016[1]. It aims at reducing legal and prudential barriers to transatlantic provision of insurance or reinsurance services.

On reinsurance, the Agreement states that neither the U.S. nor the EU supervisor can impose local presence requirements or collateral requirements.

The Agreement provides for a simplified oversight regime for EU and U.S. insurance groups, which will be subject to prudential oversight by their own supervisor. The limitations set by the Agreement to worldwide oversight by relevant supervisors cover in particular solvency and capital matters, as well as reporting and governance. Importantly, the Agreement foresees that supervisors retain their ability to request and obtain information about global activities which could impact financial stability in their territory.

Finally, the Agreement also encourages insurance supervisory authorities in the U.S. and the EU to continue exchanging supervisory information on insurers and reinsurers that operate in their markets. To support such information exchange, the Agreement includes model memorandum of understanding provisions.

European legislators agreed on simplified prospectus rules

The reform of the prospectus regime, one of the first legislative initiatives launched by the Commission as part of the Capital Markets Union (CMU), is close to be finalized. On 20 December 2016[2], the Permanent Representatives Committee approved, on behalf of the Council of the EU, the agreement reached with the EP on 7 December 2016. The text will now be formally adopted by the EU co-legislators before it can be published in the Official Journal and enter into force. The agreement has already been adopted by the ECON Committee of the European Parliament on 25 January 2017.

Replacing the existing Prospectus Directive, the new regulation aims at facilitating access to financial markets for companies, with a particular focus on small and medium-sized enterprises. In revising the EU framework for prospectuses, the Commission simplified the rules and streamlined administrative procedures. The overall objective is to encourage companies to turn to capital markets by making prospectus requirements cheaper and easier.

The new prospectus framework requires the issuance of a prospectus for securities with a value above EUR 1 milion, whereas the current legislation establishes the threshold at EUR 100,000. Member States will also be able to set further exemptions for small issuers on domestic markets by defining a higher threshold up to EUR 8 million. SMEs, small mid-caps companies with up to 499 employees and unlisted companies launching small issuances will be eligible for a simplified prospectus regime called “EU Growth Prospectus”. Frequent issuers will also benefit from a simplified regime, through the Universal Registration Document (URD).

Greater emphasis on sustainable finance

Recent initiatives reflect the growing attention given by regulators and the industry to the social and environment impact of the financial services sector.

On 14 December 2016, the Financial Stability Board (FSB) Task Force on Climate-related Financial Disclosures (TFCFD) published its final report providing recommendations to increase transparency on climate-related risks. The TFCFD considers that climate-related shocks could have severe financial consequences and trigger sudden losses in asset values. The report highlights the need for the financial sector to better take into account the potential risks associated with climate change and the transition to a low carbon economy. In parallel, the TFCFD underlines that such changes also bring significant opportunities for organizations focused on climate change mitigation and adaptation solutions.

In the framework of CMU, the Commission recently set up a High-Level Expert Group on sustainable finance[3]. Composed of various stakeholders, this group is due to deliver recommendations on how to integrate sustainability considerations into the European financial framework by the end of 2017. Referring to the Paris Agreement[4] and to the 2030 Agenda for sustainable development[5], the Commission emphasizes the need to include the financial sector in a broader strategy towards sustainable growth. The initiative also aims at exploring and anticipating climate-related risks in order to enhance financial stability.

[1] All joint statements issued during the negotiations are available online.
[2] Council of the EU, Press Release, 20 December 2016.
[3] European Commission, 22 December 2016, Press release detailing the composition of the High-level expert group.
[4] Paris Agreement, signed on 22 April 2016 within the United Nations Framework Convention on Climate Change.
[5] 2030 Agenda for sustainable development, adopted on 25 September 205 by the General Assembly of the United Nations.

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