



**FAIB**

be international... in Belgium



# Year in Review & Bird & Bird

19 December 2019



What were the legal developments relevant for the non-profit sector in 2019?

2019

[YEAR IN REVIEW]

# AGENDA

- **Employment**
- **Advocacy/Public Affairs**
- **Corporate**
- **Tax**
- **Competition**
- **IP**



**Employment**



# TOPIC

Unacceptable behaviour in the workplace: Don't let #MeToo become #YouToo



Cecilia Lahaye, Counsel  
International HR Services

- 1 What is unacceptable behaviour?
- 2 How can you prevent unacceptable behaviour and protect employees?
- 3 What are the procedures?
- 4 What protection is guaranteed to Employees?
- 5 Takeaways



# What is unacceptable behaviour?

## *Forms*

### Sexual harassment

Unwanted, sexual, dignity,  
environment

### Bullying or harassment

Series of  
behaviours

### Violence

Psychological or  
physical attack

# Consent

*Simple as a cup of tea*

CONSENT

IT'S SIMPLE AS TEA



# Consent

*In practice*

Are you absolutely sure you'd like a cup of tea?

Absolutely – bring it on! I want your tea and I want it now!

# Consent

*In practice*

Wasn't that the best cup of tea?

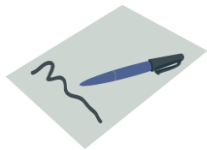
Where'd you get that idea?

I know a good cup of tea when I have one, but this...  
**Worst tea ever!**

And what's more: ***I never wanted it.***

# Solutions

## Love contract?



*We have entered into a personal relationship outside of work that is **completely voluntary and consensual**. We have received copies of the company policies relating to sexual harassment and workplace conduct and **agree to follow these rules**, including refraining from any displays of affection at work or work-related events. We also agree that there has not been, nor will there be, **any claim of sexual harassment** for any event relating to our working together prior to signing this document. We understand that we will not seek or accept a position within the organization where one of us reports to the other and that we will remove ourselves from any work-related decisions that may arise involving the other. We also understand that **either of us can end the relationship** without fear of work-related retaliation and agree to conduct our business at work according to these guidelines. We will **notify the company** when our personal relationship ends. Additionally, we understand that any violation of company policies or this agreement will be grounds for disciplinary action, **up to and including termination of employment**. We understand that any disputes arising from the relationship as it pertains to work issues, including agreeing to this document, will be resolved through mediation, and that we have the right to consult an attorney before signing this document. With our signatures below, we understand and agree to abide by company policies and will conduct our consensual personal relationship outside of the work environment. We attest that up to the time of signing this document no prior behaviour in the relationship has violated company policy.*

*Signed and dated*

# Solutions

*Forbidding love?*

**But what about your  
fundamental right to a  
private life (art. 8  
European Convention on  
Human Rights)?**



- 1 What is unacceptable behaviour?
- 2 How can you prevent unacceptable behaviour and protect employees?
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# How can you prevent unacceptable behaviour and protect employees?

## Prevalence

**8.3%** of employees were confronted with sexual harassment

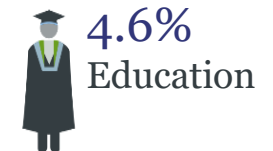
**3** most prevalent forms:

- "ogling" - **6.8%**
- "sexual approaches via body language, in speech, e-mail" - **3.2%**
- "unwelcome physical contact or touching" - **2.1%**

**Who's** affected?

- More women (**6.8%**) than men (**6.1%**)
- slightly younger (**<45 y - 9.5%**) than older (**>45 y - 6.9%**)

Prevalence per business sector



\*Source: [Survey conducted by IDEWE](#) (ESPPW) in 2018

# How can you prevent unacceptable behaviour and protect employees?

Sexual harassment  
means  
**psychosocial  
risk**

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Employer has duty to  
provide a **safe work  
environment**

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# How can you prevent unacceptable behaviour and protect employees?

## *Specific obligations*

<p>1</p> <p>Internal procedures</p>	<p>i.e.: work rules. Who to contact? What to do?</p>	<p>2</p> <p>Prevention advisor psychosocial risk (PAPR)</p>	<ul style="list-style-type: none"><li>• &lt; 50 employees: External Service for Prevention and Protection at work (ESPPW)</li><li>• &gt; 50 employees: ESPPW or Internal Service</li></ul>
<p>3</p> <p>Confidential counsellor (CC)</p>	<p>Employee – first "Go-To" Person/Mediator</p>	<p>4</p> <p>Prevention policy</p>	<ul style="list-style-type: none"><li>• General risk analysis and prevention measures</li><li>• Specific risk analysis – upon request</li></ul>



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# What are the procedures?

## *Internal procedure*

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### Informal intervention:

- ✓ Employee ⇒ PAPR/CC: dialogue - reconciliation – intervention

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### Formal intervention:

- ✓ Employee ⇒ PAPR: mandatory information (facts, date, place, accused, ...) - PAPR accepts or refuses to proceed with formal intervention
- ✓ If accepted - employer must take appropriate collective or individual measures - must be logged.

# What are the procedures?

## *External procedure*

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1 Social Inspection services

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2 Police/judicial authorities

- Perpetrator: imprisonment for 6 months to 3 years or fines of €4,800 to 48,000 or both
- Employer: criminal fine of €800 to 8,000 or administrative fines of €400 to 4,000

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3 Bring civil claim before Labour Court against perpetrator or his employer

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4 File summary proceedings and obtain Court injunction

# What are the procedures?

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## Who?

Victim +  
representative  
trade  
unions /  
Institute for  
equal rights  
men / women

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## Damages:

Lump sum of 3 months  
capped (2019:  
€3,694.18/month) or actual  
damages – 3 months could  
become 6 if:

- linked to discrimination  
or
- perpetrator is employer  
or
- seriousness of offenses.

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## Liable?

= perpetrator – employer  
liable under art. 1384, § 3  
Civil Code - recourse  
against perpetrator if  
(i) on purpose or  
(ii) inexcusable fault.

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# What protection is guaranteed to Employees?

## *Protecting against dismissal*

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### Notion

*Dismissal or any act of retaliation or retribution*

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### Who?

- Employee or witness who filed request for formal intervention via the **internal procedure**
- Employee who filed complaint with **Social Inspection Services**, under specific conditions

# What protection is guaranteed to Employees?

## *Protecting against dismissal*

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### For how long?

- 12 months as of filing of request for intervention
- 12 months as of filing of witness statement
- 3 months after judgment in case filed by employee becomes final

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### Options?

- If dismissed: employee can ask to be *reinstated*
- If reinstatement is refused (and employer unable to prove dismissal unrelated to complaint): 6 months' additional wages or actual damages (if proven).

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# Takeaways

*Not to be taken lightly*

1. Make sure **Work Rules** are up to date
2. Choose **confidential counsellor** with care
3. Provide **training**
4. Draft **action plans** to ensure respectful work environment
5. Take complaints seriously and follow **proceedings**



Prevention is always  
better than the cure!



#TeamJunckerEU

Europese  
Commissie

Commission  
européenne

European  
Commission



*Getting your  
EU voice heard*

# Advocacy/Public Affairs

TOPIC

# Navigating the new European landscape

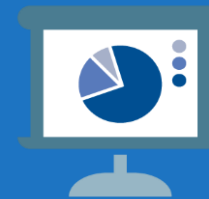
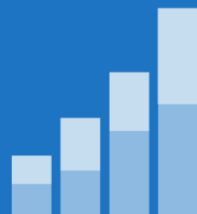
Francine Cunningham, Senior Public Affairs Manager LLM



# 1. European Parliament

*Ninth term: 2019 - 2024*

Slide 28

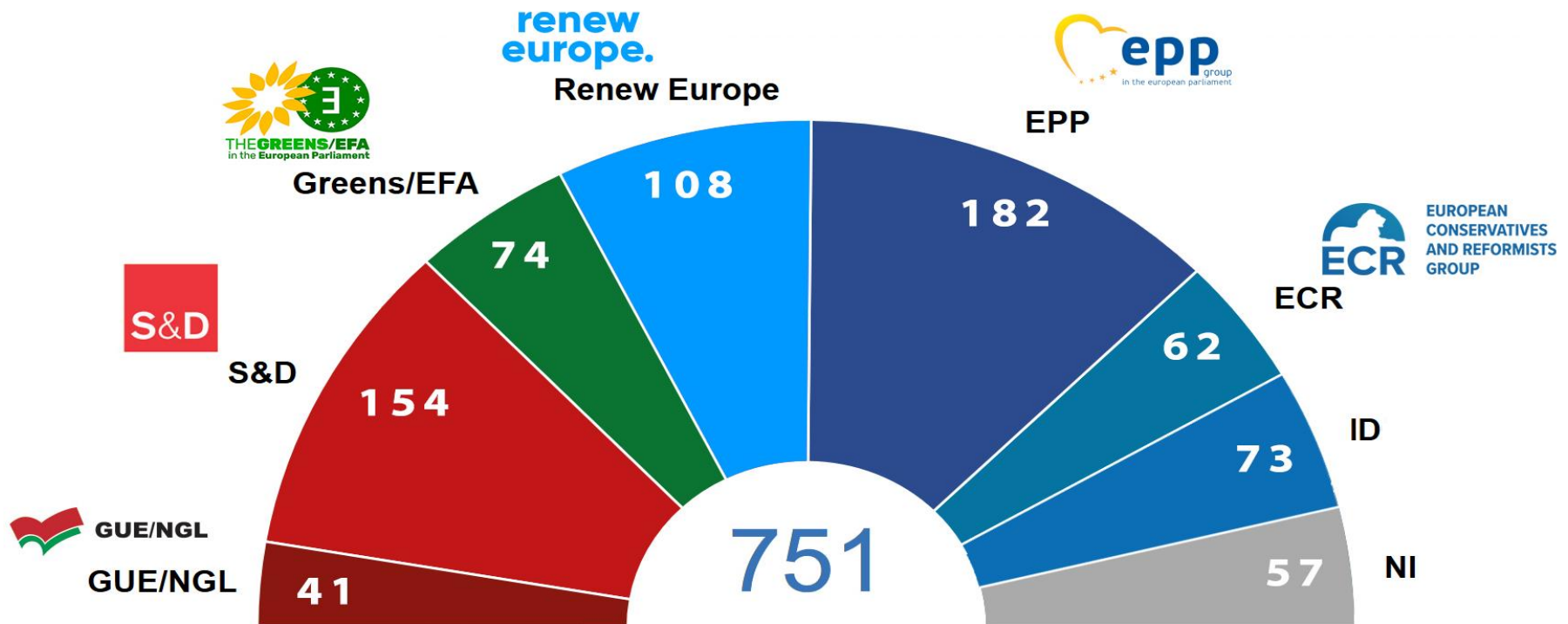


# Seat distribution - July 2019



*New MEPs amount to 61 per cent*

- **7 political groups** and 1 group of **non-attached MEPs**
- Currently **748 MEPs** represented (plus three Catalan seats under dispute)

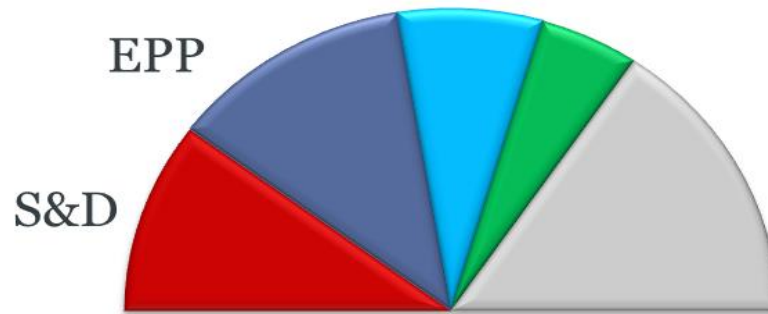


Source: <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190612STO54311/parliament-starts-new-term-with-seven-political-groups>

Slide 29

# End of the duopoly

*EPP and S&D lost their majority*



518/751 seats

- For a **majority 376 seats** are needed – EPP + S&D = 336 seats
- At least **three political groups** required i.e. EPP + S&D + RE = 444/751 seats;  
or EPP + S&D + Greens = 410/751 seats
- For a **stable majority** a coalition of **four political groups** is needed = 518 seats

# Brexit impact on seat distribution

*EPP and Identity & Democracy set to benefit*



- Parliament size reduces from 751 to **705 MEPs**
- **46 seats** kept for future enlargements
- **27 seats redistributed** among 14 under-represented EU countries
- Greens to be pushed to fourth largest party

Member State	Current seats	Allocated seats
Spain	54	+5
France	74	+5
Italy	73	+3
Netherland	26	+3
Ireland	13	+2
PL, RO, SE, AT, DK, FI, SK, HR, EE	Various	+1

## 2. New European Commission *Mandate 2019 to 2024*





# Big picture: emerging themes



- **'Geopolitical Commission'** – assertive in defending the bloc's interests
- **Technological sovereignty** – ensure independence from foreign players and solutions for Europe's industry and critical infrastructure
- **Setting global standards** in digital market - high level of consumer protection, data protection, privacy, security and transparency
- **No silos** – alignment of digital policy and competition
- **Ethics and fairness** – not just letter but spirit of the law
- **One in, one out principle** – no layer cake of regulation

# Commission leadership

*Ursula von der Leyen (Germany, EPP)*



## **First female Commission President,**

- Former Defence Minister (Germany)

## **Three Executive Vice-Presidents:**

### **Margrethe Vestager (Denmark)**

- Executive Vice-President – Europe fit for the Digital Age

### **Frans Timmermans (The Netherlands)**

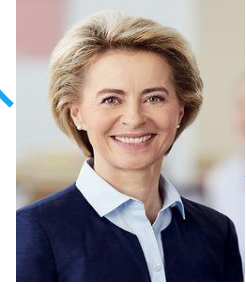
- Executive Vice-President – European Green Deal

### **Valdis Dombrovskis (Latvia)**

- Executive Vice-President – An Economy that Works for People

# Ursula Von der Leyen (Germany, EPP)

*Commission President*



## **First female Commission President**

- Former German Defence Minister
- **383 votes in favour**, 327 against, 22 abstentions
- Commission delayed until 1 December after 3 candidates rejected (FR, HU, RO)

## **What to watch**

- Emphasises a 'values-based' approach to policy-making
- Promised to give more weight to 'parliamentary democracy'

*"We want multilateralism, we want fair trade, we defend the rules-based order because we know it is better for all of us. We have to do it the European way."*

# Margrethe Vestager (DK, Renew Europe)

*Executive Vice-President for a 'Europe fit for the digital age' & Competition Commissioner*



Outgoing Competition Commissioner in the Juncker Commission (2014-2019)

## **Mission**

- To co-lead work on a new long-term strategy for **Europe's industrial future**
- To coordinate work on **new Digital Services Act, Digital Taxation** and **AI**
- To **strengthen competition enforcement** and **review EU competition rules**

## **What to watch**

- 'Super Commissioner' and bane of Silicon Valley companies
- How to combine role as digital policy maker and competition law enforcer?

*"On the question of breaking up companies, well this is a tool that we have available: it can be done. The thing is, I have an obligation to use the least-intrusive tool in order to restore fair competition..."*

# Frans Timmermans (The Netherlands, S&D)

*Executive Vice President European Green Deal*



- Most senior S&D politician in Commission
- Former Commission First VP in Charge of Better Regulation, Rule of Law
- **Mission**
- Prepare law to achieve 'climate neutrality' by 2050
- Lead 'climate diplomacy' at global level
- Secure substantial emissions cuts by 2030 (from -40% to -55%)
- **What to watch**
- He lacks economic tools - will Central & Eastern Europe accept steep cuts?
- Pressure for EU curbs on lobbying by oil and gas industry similar to tobacco industry

*"I believe European manufacturing has understood this [green] transition is inevitable to safeguard jobs in the future."*

# Valdis Dombrovskis (Latvia, EPP)



*Executive Vice-President for an Economy that works for people*

Outgoing Commission Vice-President for the euro and Social Dialogue, Financial Services & Markets (2014-2019)

## **Mission**

- To put forward a **FinTech Strategy** to support digital technologies in EU financial system
- To ensure a common approach with Member States on **cryptocurrencies**
- Put forward plan to fight **money laundering & financing of terrorist activities**
- To speed up the work towards a **Capital Markets Union**

## **What to watch**

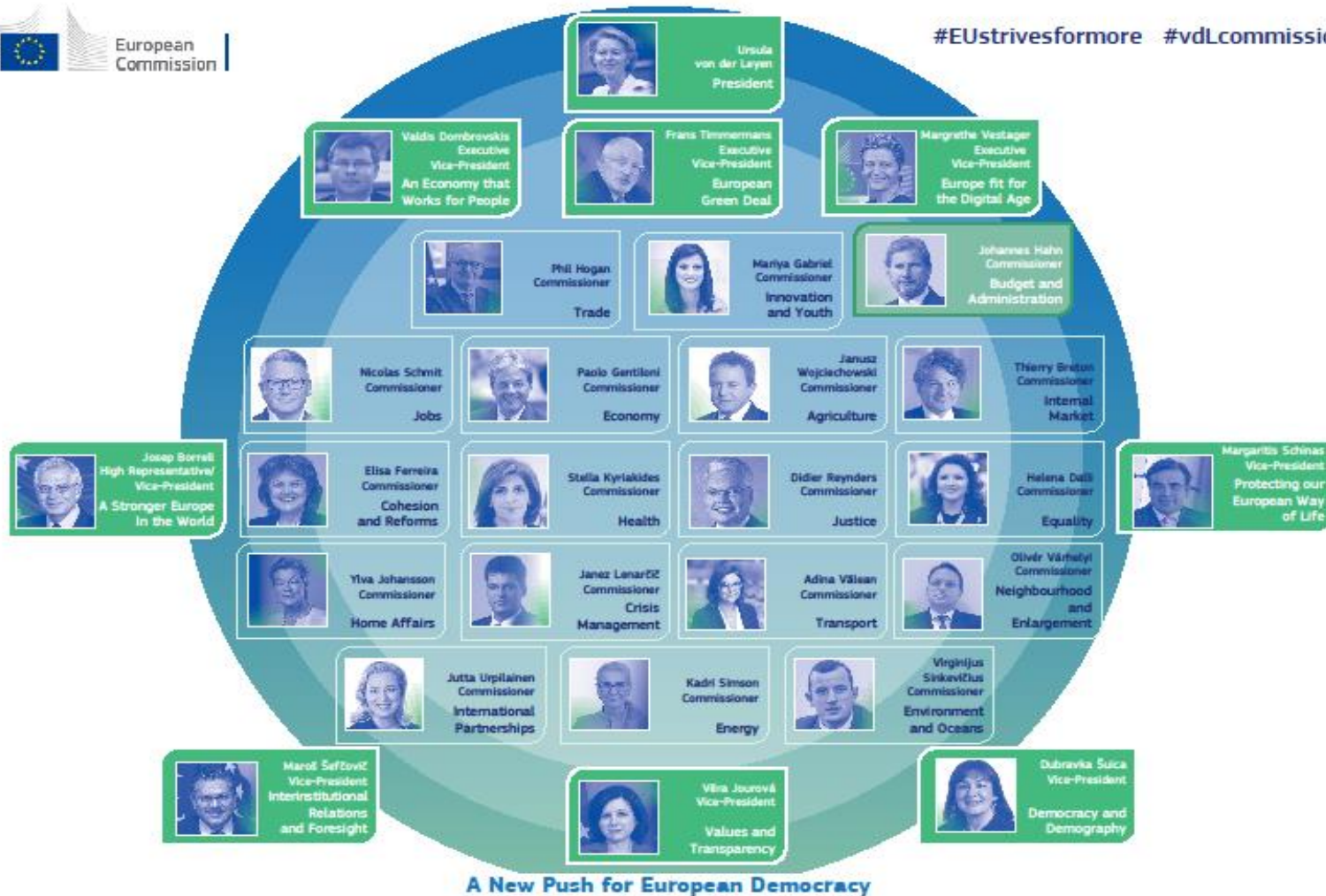
- Ambitions for Europe to be a global standard setter in area of tech and finance
- Plans a new Fintech unit in DG FISMA

*“We’ll need to regulate Libra to supervise it on EU level both from the point of financial stability and the protection of investors.”*

# New College of Commissioners



#EUstrivesformore #vdLcommission



# Thierry Breton (French, Renew Europe)

*Internal Market Commissioner*



- Former Atos CEO (2008-2019) former CEO of France Télécom (2002-2005)
- Former French Minister of Economy, Finance and Industry (2005-2007)

## **Mission**

- To enhance Europe's **technological sovereignty**
- To lead a coordinated European approach on **Artificial Intelligence**
- To develop the new **Digital Services Act**
- To establish **a level playing field** throughout the Internal Market
- To contribute to a long-term **industrial strategy**
- To promote a coherent **audio-visual policy**

## **What to watch**

- Focus on data as way to unlock value in digital market, reluctant around AI
- How will his work be coordinated with Vestager?

*"I won't be the voice of regulation on AI. I will be the Commissioner of data."*



# Phil Hogan (Ireland, EPP)

## *Trade Commissioner*



- Outgoing Agriculture Commissioner (2014-2019)

### **Mission**

- To protect Europe from **unfair trade practices**
- To implement the new system for screening **Foreign Direct Investment**
- To address the distortive effects of foreign subsidies in the internal market.”
- To act as EU lead regarding reform of the **World Trade Organisation**

### **What to watch**

- He talks of "critical moment for multilateralism"
- Can be expected to take a more assertive approach with U.S. and China

*“Europe has to stand up for itself.”*

*"The rules book need to be updated to address issues such as the rampant use of subsidies by China and others, and forced technology transfer."*

# Mariya Gabriel (Bulgaria, EPP)

*Commissioner for  
Innovation, Research,  
Culture & Youth*



Former Commissioner for Digital Economy & Society

## **Mission**

- To promote **creative industries**
- To promote **sport** as a **tool for inclusion and wellbeing**
- To ensure sufficient investment flows to **disruptive research and breakthrough innovations**

## **What to watch**

- In charge of Horizon Europe €120bn fund

*"I support increasing the budget for Horizon Europe. It's not an item of spending but investment."*

# Didier Reynders (Belgium, Renew Europe)

*Commissioner  
for Justice*



Former Belgian Deputy Prime Minister & Minister for Foreign Affairs

## **Mission**

- To lead the work on **consumer protection**, for cross-border and online transactions
- To ensure enforcement of **GDPR** and promote as a global model

## **What to watch**

- Will push Council on collective redress, allowing groups of consumers to sue companies

*"We need to ask more and more information on the algorithms"*

# Bird & Bird's practice group

## *Regulatory & Public Affairs*



Monitoring Services  
(following regulatory  
developments and tracking  
specific issues)



Setting up EU outreach  
programmes for clients to  
meet decision makers



Explaining EU legislative  
processes and timelines



Strategic advice on  
regulatory developments  
and compliance



Drafting EU consultation  
responses



Messaging and drafting  
talking points



Assistance for trade  
association management



Organising and  
representing stakeholder  
groups with common  
interests



Cross jurisdictional or  
multijurisdictional  
mapping and analyses of  
national positions



Organising opinion-forming  
events in  
Brussels/Strasbourg



Briefing clients prior to  
meetings/ hearings with  
EU Institutions



# Contacts for the Regulatory & Public Affairs team

[Francine.Cunningham@twobirds.com](mailto:Francine.Cunningham@twobirds.com)

[Marianne.Minnecre@twobirds.com](mailto:Marianne.Minnecre@twobirds.com)

[Feyo.Sickinghe@twobirds.com](mailto:Feyo.Sickinghe@twobirds.com)

[Pauline.VanSande@twobirds.com](mailto:Pauline.VanSande@twobirds.com)

[Chiara.Horgan@twobirds.com](mailto:Chiara.Horgan@twobirds.com)

# Corporate Law



# TOPICS

1. Companies Code Reform – Impact (I)NPAs
2. New insolvency regime for NPA's
3. UBO Register

# Companies Code Reform – Impact (I)NPAs

## General overview

- ❖ New Code of Companies and Associations (**CCA**)
- ❖ Adopted on 23 March 2019
- ❖ Integration of Act of 27 June 1921 concerning NPAs, INPAs and Foundations
- ❖ For new associations: entry into force on 1 May 2019
- ❖ For existing associations
  - ❖ optional opt-in until 31 December 2019
  - ❖ mandatory provisions as from 1 January 2020
  - ❖ obligation to align AoA by 31 December 2024



# Companies Code Reform – Impact (I)NPAs

## New definition

*"An association is established by an agreement between two or more persons, called members. It pursues a disinterested purpose in the context of one or more specific activities which it has as a subject. It may not, directly or indirectly, grant or confer any benefit to the founders, members, directors or any other person, except for the disinterested purpose specified in the articles of association. Any operation contrary to this prohibition is null and void."*

## INPA

- ❖ recognized by Royal Decree
- ❖ purpose with international dimension



# Companies Code Reform – Impact (I)NPAs

## New definition

- ❖ *"Disinterested purpose"*
  - ❖ Minister of Justice: "generous nature"
  
- ❖ *"One or more specific activities which it has as a subject"*
  - ❖ No restrictions with respect to the activities anymore
  
- ❖ *"No (in)direct benefit"*
  - ❖ Transaction which reduces the assets or increases the liabilities of the (I)NPA; and
  - ❖ for which the (I)NPA receives:
    - ❖ no consideration; or
    - ❖ a consideration that is "manifestly too low"

# Companies Code Reform – Impact (I)NPAs

## Directors' liability (mandatory)

- ❖ Liability towards the (I)NPA
  - ❖ Individual liability for any misconduct committed in the performance of their duties
  - ❖ Joint and several liability for breaches of the BCCA or the articles of association
  
- ❖ Liability towards third parties
  - ❖ Joint and several liability for breaches of the BCCA or the articles of association
  
- ❖ Liability towards the tax and social security authorities
  - ❖ (Several) liability for unpaid VAT
  - ❖ (Several) liability for unpaid payroll tax
  - ❖ (Several) liability for unpaid social security contributions
  
- ❖ Liability following the bankruptcy of the (I)NPA (not applicable if it was a small (I)NPA)
  - ❖ (Several) liability for serious misconduct that contributed to the bankruptcy of the (I)NPA
  - ❖ (Several) liability for "wrongful trading" (i.e. continuing to manage an irretrievably lost (I)NPA)

# Companies Code Reform – Impact (I)NPAs

## Directors' liability

- ❖ Financial limitations:
  - ❖ EUR 125,000 to EUR 12,000,000 according to size criteria
- ❖ Financial limitations not applicable in case of:
  - ❖ Minor violations with a repetitive character
  - ❖ Gross negligence
  - ❖ Fraud/intention to create damage
  - ❖ Specific tax and other liabilities
  - ❖ Criminal liability
- ❖ Term of limitation: 5 years
- ❖ Prohibition of contractual or statutory limitations of liability that go beyond the provisions of the New Code of Companies and Associations
- ❖ Prohibition of exemption and guarantee clauses granted by the NPA to its directors

# Companies Code Reform – Impact (I)NPAs

## Conflicts of interests (mandatory for NPAs/recommended for INPAs)

- ❖ When a director would derive a direct or indirect patrimonial benefit from a decision or transaction, against the interests of the NPA
- ❖ Prior information of the other board members, to be reflected in the minutes
- ❖ Prohibition to participate to the discussion and abstention to vote
- ❖ If a majority of the directors are conflicted: referral to the general assembly
- ❖ Exception for "*recurring transactions which are at arm's length market conditions*"
- ❖ The CCA does **not** provide a mandatory conflicts of interests procedure for INPAs, leaving room for either taking over the above or including tailor-made provisions in the articles of associations

# Companies Code Reform – Impact on AoA

## Our articles of association: tips and tricks

- ❖ In principle, there are only minor and formal amendments needed
  - Mention the region in which the registered office is located (if applicable)
  - Denomination of the general management body (*organe général de direction/algemeen leidinggevend orgaan*) → general assembly of members (*assemblée générale des membres/algemene vergadering van leden*)
- ❖ Proposal to align articles of associations with mandatory provisions (e.g. conflicts of interest procedure) in order to avoid legal uncertainty
- ❖ Proposal to do so at the next annual general assembly meeting
- ❖ Opportunity to make any other amendments to the articles

# New insolvency regime for NPA's

## ❖ Liquidation

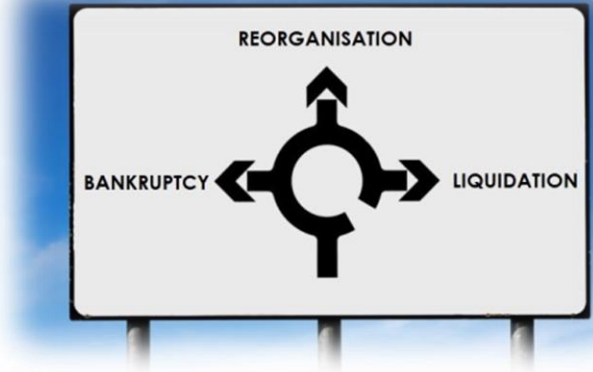
- ❖ Detailed provisions - comparable to liquidation of companies
  - Voluntary winding up (reporting requirements)
  - Automatic winding up (expiry of term or resolution clause)
  - Judicial winding up (requested by member, third party or public prosecutor - for cause)
- ❖ Liquidation: possible court intervention

## ❖ Bankruptcy

- ❖ Mandatory when ceasing payments and creditors' trust is lost
  - Deadline of one month !
- ❖ Impact on directors' liability (joint/several liability !)

## ❖ Judicial reorganisation

- ❖ The Belgian Chapter 11 (now also for NPA's)
- ❖ Opportunities
  - Possible to (partially) write off debts in reorganisation plan approved by creditors and court



# UBO Register



- ❖ Obligation to communicate information regarding ultimate beneficial owners ("UBO")
- ❖ Deadline ~~30 November 2018~~ ~~30 September 2019~~ **31 December 2019** (forbearance)
- ❖ Beneficial owners of an NPA: directors, daily managers, founders, persons in whose main interest the association was formed or any other person exercising control of the association by other means
- ❖ Continuous obligation:
  - Yearly confirmation (after receipt of auto-reminder) !
  - Registration of changes within one month !
- ❖ Failure by NPAs and their directors to comply is punishable by criminal and/or administrative fines

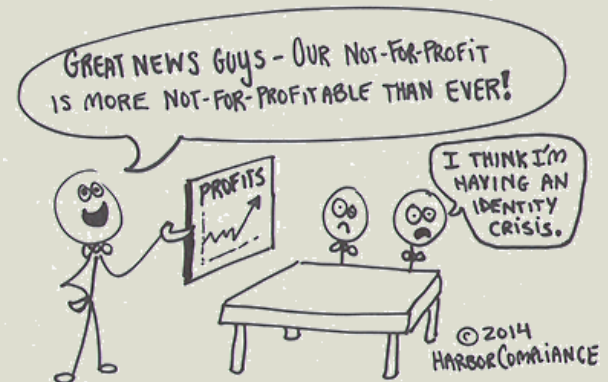


TAX



# TOPICS

1. Tax impact of the Belgian Code of Companies and Associations
2. Case law
  - NPAs' tax regime - LET vs CIT
  - Directors' liability for tax debt
  - International conferences
3. Recognition as a professional association
4. Tax inspectors' access to the UBO register
5. Miscellaneous



# 1. Tax impact of the Belgian Code of Companies and Associations

# Tax impact of the BCCA

## *Before the reform*

*Commercial operations as a NPA's main activity in order to pursue a profit motive*

## *Reform of the BCCA*

*Distinction with companies no longer based on profit:*

- "Profit" → "disinterested result"*
- No more activity limitation*
- Result may only be used for disinterested purpose*

*Impact on tax regime*

*No impact on applicable tax regime (LET vs CIT)  
→ question of fact*

## 2. Case law

# i. NPAs' tax regime - LET vs CIT

Brussels Court of Appeal, dd. 18.12.18



- NPAs in principle subject to LET **BUT** constitution as a NPA does not mean that CIT will not be applicable
- **"Carrying on an enterprise" & "performing activities of a lucrative nature"**
- **CIT indicators**

Mons Court of Appeal, dd. 08.05.19



- **BTA argued:**  
*"NPAs subject to CIT if they carry out usual and regular transactions of a commercial nature as they are of a profitable nature"*
- **Kind reminder of the Mons Court of Appeal:**  
*"Operational activities are not of a profitable nature if they only involve accessory commercial activities"*

## ii. Directors' liability for tax debt



### Gent Court of Appeal, dd. 08.01.19

- Belgian State successfully **sued "Directors"** of 2 NPAs for damages on the grounds that they were liable for the **negligence** of these NPAs in paying their VAT debt
- Delegation of responsibility was no excuse  
→ compliance with VAT obligations  
=  
part of the NPA's day-to-day management tasks
- **Mitigating factor:**
  - circumstances beyond a Director's control preventing him from ensuring compliance ✓
  - insurmountable financial problems and were therefore unable to meet their VAT obligations ✗

## iii. International conferences

**ECJ, dd. 13.03.2019**

- **Conference fee** in B2B situation: VAT rules depend on qualification of **"event"** (service is located in country of conference) or **"activity"** (service is located in country of participant)
- **Belgian guidelines:** more than 1 day = "activity"
- **ECJ:** "event" is short term (to be considered in its context) but not just one-day

(see also: FAIB News 2019, n° 117)



### 3. Recognition as a professional association



# Recognition as a professional association



- **Official recognition as a "professional association"** or as a "federation of professional associations" now possible
- Application to be filed with the 'General Directorate of SME Policy' of the FPS Economy
- **Conditions** to be met, a.o. that the NPA
  - Was formed exclusively for studying, protecting and developing the professional interests of its members
  - Does not practise any profession or craft itself
- **Facilitates** application of the income tax exemption

## 4. Tax inspectors' access to the UBO register

# Tax inspectors' access to the UBO register

Royal Decree **regulating access of tax inspectors** to UBO register

**Tackle fraud** & ensure **correct tax collection**

**Application request for access**

- Upon approval, designated **"access managers"** may grant **direct access to the tax inspectors**

**Access to the UBO register**

- Only available to **"advisors"** or **officials with a higher title**
- Under the **responsibility of the FPS Finance**
- Only via the **electronic transmission channel of the access platform**



## 6. Miscellaneous

# Miscellaneous

- **Scope of the UBO register** for (I)NPAs
  - Categories of final beneficiaries = **cumulative**
- **Accountancy**
  - Balance sheet and P&L structure slightly adjusted following BCCA
  - Draft CNC/CBN opinion on "**size**" **criteria** for NPAs (impact on the form of annual accounts)
  - Simplification, clarification & harmonisation of (I)NPA accounting rules
  - New rules & accounting structure applicable to the annual accounts relating to the FYs with a closing date as from 01.01.20
- Brussels: **substantial reduction of inheritance tax on legacies** (12,5% → 7%) made to NPAs if they are recognised institutions eligible for tax-deductible donations
- **Tax-deductible donations** may to eligible institutions now be made **online**



# Competition Law

# TOPICS

## **Recent developments in EU Competition law enforcement:**

1. Competition law fines
2. Recent cases involving associations
3. ECN + Directive
4. Legislative initiatives
5. Focus on digital and technology sectors
6. Merger control
7. Dramatis personae

# Competition law fines

## *Highest individual cartel fines*

Fine	Undertaking	Cartel	Year
EUR 1,009m	Daimler	Trucks	2016
EUR 881m	Scania	Trucks	2017
EUR 753m	DAF	Trucks	2016

## *Fines in relation to abuse of dominance*

Total fine	Undertaking	Product	Year
EUR 4.3b	Google	Mobile operating systems	2018
EUR 997m	Qualcomm	Microchips	2018

## *EU fines imposed on intermediaries*

Total fine	Undertaking	Product	Year
EUR 14.9m	ICAP	Yen Interest Rate Derivatives	2015
EUR 348,000	AC-Treuhand	Heat stabilisers	2009



# Recent cases involving associations

- **May 2019:** The European Commission opens investigation against **Insurance Ireland** to assess its data pooling system
  - Insurance Ireland is an association bringing together several member companies active in the insurance sector. It administers and makes available to its member companies a database insurance claims to which all members contribute
  - Investigation into the participation conditions and access restrictions
- **October 2019:** The Belgian Competition Authority fined the **National Order of Pharmacists** for provisions in its deontological code restricting online advertising
  - Total fine: **EUR 225 000**
- **May 2019:** The Belgian Competition Authority fined the **National Order of Pharmacists** for excluding the Medi-Market Group from the market
  - Total fine: **EUR 1 million**

# ECN+ Directive

## Importance

- For each EU antitrust decision, 9 national decisions

## Objectives

- Ensure NCAs' independence and resources
- Removing enforcement obstacles
- Enabling mutual assistance
- **Increase deterrence**

## Transposition into national law

- Transposition period of minimum 2 years

## Prediction

- Higher fines – worldwide turnover
  - June 2019, Belgium: IV.84 CEL – 10% cap calculation on worldwide instead of national turnover

# Legislative initiatives



- Review Vertical BER + GL
- Review Horizontal BER
  - R&D BER
  - Specialisation BER
  - Horizontal cooperation GL
- Evaluation of the Motor Vehicle BER
- Regulation 330/2010 – distribution of cars
- Regulation 461/2010 – repair & maintenance and distribution of spare parts (until 30 May 2021)

# Focus on digital and technology sectors



- Amazon Marketplace
- Apple – Spotify
- Broadcom - interim measures
- Network sharing Czech Republic
- Geo-blocking
  - Videogames
  - Guess
- Qualcomm cases

# Merger control

- Siemens / Alstom
  - August 2019, Chinese train maker CRRC acquiring German Vossloh Locomotives
- Killer acquisitions
  - Is turnover the right threshold?
- Data
  - Google / Fitbit
  - Microsoft / LinkedIn



# Dramatis personae

- Commission Vice-President Vestager
  - Reappointed for Competition
  - "Europe fit for a digital age"
  
- Director General Olivier Guersent
  - "Happy to be back home"





IP

1. Implementation of the Trade Secrets Directive
2. New Copyright Directive
3. Social Media influencers





# Implementation of the Trade Secrets Directive



# Trade Secrets

- Information which meets all of the following requirements:
  - a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
  - b) it has commercial value because it is secret;
  - c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
- Scope of protection
- Restrictive case law
- Confidentiality in court proceedings



# Copyright Directive in the Digital Single Market



# Text and data mining exception

## Issue

- Harnessing of large amounts of information available in digital form and the extraction of its value
- In the context of Artificial Intelligence
- Copyright protected content



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## 2 new mandatory exceptions

### 1. Scientific purpose

- Research organisations and cultural heritage institutions
- No prior authorisation
- No compensation
- Lawful access to the data



### 2. Non-purpose specific

- Commercial entities & individuals
- Opt-out mechanism
- No prior authorisation
- No compensation
- Lawful access to the data

# Social media influencers



# Influencer Marketing

- EU Advertising Standards Alliance: Best Practice Recommendation (Dec 2018)
- Definition of a commercial content:
  - In exchange for compensation
  - Under the editorial control of the brand owner
- Rule: easily recognizable as commercial communication
- Belgium: JEP



Sportsman receives free samples of a new sugar-free drink to taste it. The brand's message is: "Hello, here's our new product to taste. Enjoy it". The athlete tests the product, takes a picture and publishes it on his page Facebook with a positive comment.

→ NON COMMERCIAL

A vlogger receives clothing to perform a review. The agreement between the brand and the vlogger is that the explanations that have been given about the product must be included in the review. For the rest, the vlogger is free to post other additional comments if he wishes.

→ COMMERCIAL COMMUNICATION  
→ Mandatory mention

**TAX**

**Kevin Paramore**

Tel : +32 (0)2 282 60 39

[kevin.paramore@twobirds.com](mailto:kevin.paramore@twobirds.com)

**CORPORATE**

**Paul Hermant**

Tel : +32 (0)2 282 60 35

[paul.hermant@twobirds.com](mailto:paul.hermant@twobirds.com)

**EMPLOYMENT**

**Cecilia Lahaye**

Tel : +32 (0)2 282 60 84

[cecilia.lahaye@twobirds.com](mailto:cecilia.lahaye@twobirds.com)

**CORPORATE**

**Cedric Berckmans**

Tel : +32 (0)2 282 60 37

[cedric.berckmans@twobirds.com](mailto:cedric.berckmans@twobirds.com)

**COMPETITION**

**José Rivas**

Tel : +32 (0)2 282 60 93

[jose.rivas@twobirds.com](mailto:jose.rivas@twobirds.com)

**& Bird & Bird**

**PUBLIC AFFAIRS**

**Francine Cunningham**

Tel : +32 (0)2 282 60 56

[francine.cunningham@twobirds.com](mailto:francine.cunningham@twobirds.com)

**IP**

**Auriane Schockaert**

Tel : +32 (0)2 282 60 36

[auriane.schockaert@twobirds.com](mailto:auriane.schockaert@twobirds.com)