

EU Policy Update for February 2016

Article By:

Sebastian F.A. Vos

Atli Stannard

Jean De Ruyt

Karel Kovanda

Dutch Presidency and Brexit

In January, the Netherlands took over the Presidency of the Council of the European Union from Luxembourg. In line with the political intentions of the Juncker Commission to be ‘big on the big issues but small on the small issues’, the **Netherlands promises to focus on the essentials during its Presidency**. In particular, the Dutch Presidency would like to focus on migration and international security. Another priority is to strengthen the free movement of services and the free movement of workers, where the Presidency would like to strengthen the protection of workers posted abroad.

Additionally, on February 2, the President of the European Council, Donald Tusk, presented his proposals for a ‘**new settlement of the United Kingdom within the European Union**’. If accepted, they would allow David Cameron to campaign in the ‘Brexit’ referendum on the continuing membership of the UK in the bloc. The Heads of State and Government will discuss and adopt the text in a meeting on February 18. For Covington’s analysis of the proposals presented and the referendum, please see [here](#).

Digital Single Market Policy

The formal adoption of the **EU Network and Information Security (NIS) Directive is a step closer following a vote on January 14** by the European Parliament’s internal market and consumer protection (IMCO) committee. The committee confirmed that the minimum harmonisation requirements under the Directive do not apply to digital service providers. This means that Member States will not be able to impose any further security or notification requirements on digital service providers beyond those contained in the Directive, when transposing it into national law. The NIS Directive will now be put forward for a plenary vote in the European Parliament. Once it is published in the Official Journal of the European Union and enters into force later this year, Member States will have 21 months to transpose it into national law. Member States will then have a further 6 months to apply criteria laid down in the Directive to identify specific operators of essential services covered by

national rules. These processes are likely to be complicated, and companies that may fall within scope should participate in consultations and monitor developments across the EU over the coming months.

On January 19, the European Parliament adopted a **resolution on the Digital Single Market Strategy** of the European Commission. The parliamentarians called for ambitious and targeted actions to complete Europe's digital single market. Among other things, the MEPs support the end of geo-blocking practices across Europe, the setting of a single set of contract rules and consumer rights for online sales and for digital content, and the modernization of the copyright framework. The full text of the resolution is available [here](#).

On February 2, the European Commission and U.S. Government reached a **political agreement on the new framework for transatlantic data flows**. The new framework – the EU-U.S. Privacy Shield – succeeds the EU-U.S. Safe Harbor framework. (For more on the Court of Justice of the European Union decision in the *Schrems* case declaring the Safe Harbor invalid, see [here](#).) The EU's College of Commissioners has also mandated Vice-President Ansip, in charge of the Digital Single Market, and Commissioner Jourová, Commissioner for Justice, Consumers and Gender Equality, to prepare the necessary steps to put in place the new arrangement. For Covington's full analysis of the announcement of the EU-U.S. Privacy Shield, please see [here](#).

Energy and Environment Policy

The European Commission published a **proposal to update the approval requirements and market surveillance of new passenger cars** and their respective systems and components. The Commission's proposal aims at strengthening the credibility and enforcement of the applicable safety and environmental requirements for cars, following the controversy regarding Volkswagen last year.

In a significant departure from past EU legislation, the proposal would empower the Commission to impose administrative fines on economic operators who are found not to have complied with the approval requirements, of up to €30,000 per non-compliant vehicle.

The Commission's proposal focuses on three elements. First, the European Commission proposes to reinforce the credibility of the type-approval assessment of new vehicles by ensuring that the technical services testing the new vehicles are fully independent from car manufacturers. For this purpose, the proposal would enhance the financial independence of such technical services and require Member States to create a national fee structure to cover the costs of type-approval testing and market surveillance activities for vehicles. Moreover, in order to prevent the use of 'defeat devices', as in the Volkswagen controversy, the proposal would grant approval authorities and technical services access to the software and algorithms of the vehicles tested.

Second, the proposal includes measures to strengthen the market surveillance of vehicles after they are type-approved and in circulation. Member State authorities and the Commission would be able to conduct tests and inspections on cars available on the market and would be empowered to adopt restrictive measures in case of non-compliance of vehicles. Among other proposed measures, the Commission would establish and chair a forum to coordinate the network of national authorities responsible for type-approval and market surveillance. Member States would also be able to inspect and take measures against vehicles type-approved in a different EU Member State.

Third, the Commission proposes measures to ensure that non-compliant manufacturers are penalized in case of non-compliance. Member States would be required to adopt penalties for non-

compliant economic operators, including car manufacturers, importers and distributors, as well as technical services. This may be complemented by administrative fines, imposed by the Commission, of up to €30,000 per non-compliant vehicle, as referred to above.

Finally, the European Commission hopes to ensure a more uniform application of the legislation in the EU by proposing a Regulation as opposed to the current Framework Directive 2007/46/EC. If adopted, the Regulation would be directly applicable in national law with no requirement of transposition.

The Commission proposal is available [here](#); it has been sent to the Council and European Parliament for consideration.

The European Commission is expected to propose a revision of the Fertilizers [Regulation \(EC\) 2003/2003](#) in March 2016. This revision comes in parallel to the Circular Economy Package announced in December 2015, which aims to create a single market for the reuse of materials and resources.

Under the current EU Regulation 2003/2003, manufacturers and importers of fertilizers may choose to comply with the laws of the Member States where they market their products, or to get their products approved and CE-labeled under the Regulation. However, Regulation 2003/2003 only regulates a limited number of categories of fertilizer products.

According to Commission officials, the proposal aims to create a level playing field between existing, mostly inorganic categories of fertilizers, and innovative fertilizers, which often contain nutrients or organic matter recovered and recycled from biowaste or other secondary raw materials. Therefore, the proposal will make the approval process more flexible for new categories of CE-labeled fertilizers.

The draft legislative text is structured in four parts: (i) a list of materials that could be used for the production of CE-marketed fertilizing products under the conditions included in the annexes of the proposal; (ii) a list of product function categories for fertilizers, rules for blends of different product categories, and respective safety and quality requirements for each category included in the annexes; (iii) an annex with the labelling requirements by product function; and (iv) a section with the different conformity assessment procedures. Fertilizers that follow the harmonized EN standards will be presumed to conform with the requirements of the regulation.

Moreover, the proposal would continue to allow Member States to regulate national fertilizing products. Products that are not in compliance with the EU Fertilizers Regulation and do not carry the CE label would be able to be marketed in a particular Member State if they comply with its national legislation.

Importantly, the revised Fertilizers Regulation is also likely to include an EU-wide limit on the presence of cadmium in fertilizers. In November 2015, the Scientific Committee on Health and Environmental Risks published an opinion concluding that new scientific information available justifies an update of the 2002 opinion on Member State Assessments of Risk to health and the Environment from Cadmium – see [here](#).

The draft proposal is currently in inter-service consultation among the different Directorates General of the European Commission. Fertilizer manufacturers wishing to voice their opinion regarding the future Regulation on fertilizers should reach out now to the different services of the Commission.

Internal Market and Financial Services Policies

On January 15, the European Commission launched a **public consultation on non-binding guidance for reporting non-financial information** by certain large companies, following Article 2 of Directive 2014/95/EU – see [here](#). Directive 2014/95/EU aims at improving the transparency of certain large companies related to Environmental matters, social and employee matters, human rights, and anticorruption and bribery matters. The feedback gathered during the consultation will be used to prepare the guidelines and facilitate the disclosure of non-financial information by undertakings. The public consultation will run until April 15, 2016.

On January 28, the European Commission presented its so-called **Anti-tax Avoidance Package** – see [here](#). The initiative includes: (i) a new communication on tax avoidance in the EU; (ii) a proposal for an Anti-Tax Avoidance Directive; (iii) a proposal for a Directive implementing the G20/OECD Country by Country Reporting (CbC Reporting); (iv) a Recommendation to the Member States on Tax Treaties, and (v) a Communication on an External Strategy regarding tax avoidance.

The Anti-Tax Avoidance Directive includes six measures, which aim at limiting the abuse of six well-established practices used to avoid taxes in various jurisdictions in Europe. These include the mismatch in legal characterisation of financial instruments or legal entities between Member States, excessive inter-group interest charges, and a general anti-abuse rule against arrangements the essential purpose of which is to obtain a tax advantage.

The legislative proposal on CbC Reporting aims to strengthen the existing mandatory and automatic exchange of information between the Member States in the field of taxation. The proposal also requires the parent entity of a multinational group to report to the competent authorities the aggregated information on the revenue, profit (or loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash equivalents, in respect of each jurisdiction in which the group operates.

Finally, because tax avoidance has a strong global dimension, the EU will also cooperate better with third countries on tax issues. The Commission therefore proposes to adopt a common EU system to screen, list and put pressure on third countries that refuse to adopt policies to limit tax avoidance. In addition, before the end of 2016, the Commission and Member States will consider whether to put in place sanctions to incentivize third countries to improve their tax systems.

Life Sciences and Healthcare Policies

At the beginning of February 2016, the Dutch presidency **will resume trilogues** on the legislative proposals regarding the **medical devices Regulation (“MD proposal”)** and the ***in vitro* diagnostic medical devices Regulation (“IVD proposal”)**. The European Commission presented this pair of proposals in September 2012, and recently called upon the Council of Ministers and the European Parliament to reach an agreement in the first half of 2016. The Dutch delegation therefore intends to ramp up the number of trilogues between the institutions to five political meetings and 10 to 15 technical meetings during its presidency. Nonetheless, important differences remain between the negotiators on the reprocessing of single use devices, liability insurance for manufactures, and the classification of devices in the framework of the IVD proposal. It is understood that the Dutch presidency hopes to achieve an agreement by the Employment, Social Policy, Health and Consumer Affairs Council of June 17, 2016.

Trade Policy and Sanctions

On January 1, the **Deep and Comprehensive Free Trade Area** (“DCFTA”) between the EU and Ukraine **became operational**. According to the Commission, the implementation of the DCFTA will improve the Gross Domestic Product of Ukraine by *circa* 6% and increase economic welfare for Ukrainians by 12% over the medium term.

On January 13, the European Commission held an initial orientation debate on **Market Economy Status for China in anti-dumping proceedings**. Under the current WTO rules, the EU can calculate potential anti-dumping duties on the basis of data from another market economy country rather than the domestic prices used in China, because there is a presumption that market economy conditions do not prevail in China. However, this provision, included under Article 15(a)(ii) of China’s Protocol of Accession to the WTO, will expire on December 12, 2016. The Commission is therefore considering its options for changing the methods used to calculate dumping margins in respect of China. It is important for the Commission to start the process on time, because any change in the anti-dumping rules are likely to require legislation to be adopted by the Council and the European Parliament. Given the delicate nature of such negotiations, the process is expected to take a year.

January 16, 2016, saw the Implementation Day of the [Joint Comprehensive Plan of Action](#) (“JCPOA”) – the historic deal reached among China, France, Germany, Russia, the UK, the U.S., the EU and Iran to ensure the exclusively peaceful nature of Iran’s nuclear program. As part of that agreement, **the Council of the EU lifted all nuclear-related economic and financial EU sanctions on Iran**. It did so by bringing into force the [EU legislative package](#) adopted on October 18, 2015, following the verification by the International Atomic Energy Agency (“IAEA”) that Iran had complied with the requirements laid down in the JCPOA. As of January 16, many sectors and activities have been reactivated, including, among others: financial, banking and insurance measures; oil, gas and petrochemical; shipping and transport; gold and other metals; software; and the un-freezing of the assets of certain persons and entities. Note that **proliferation-related sanctions, including arms and missile technology sanctions, will remain in place until 2023** (subject to various conditions). For the Council press release, see [here](#). For more details, see the Council Information Note [here](#). For Covington’s full analysis of the implementation of the JCPOA, see [here](#).

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