

BRUSSELS REGULATORY BRIEF: MARCH 2022

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European Regulatory and UK Regulatory Newsletter

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ANTITRUST AND COMPETITION

The European Commission Opens Investigation into an Allegedly Anticompetitive Agreement Between Two Global Tech Companies Active in Online Display Advertising Services

On 11 March 2022, the European Commission (Commission) opened an investigation into alleged anticompetitive practices by two global tech companies active in the provision of online display advertising services.

One of the investigated companies provides advertising technology services that intermediate between advertisers and publishers by real-time auctioning of online display advertising space on websites or mobile apps, including through its bidding program (Program). The other company provides online display advertising services and participates—through its own service (Audience Network)—in auctions for third-party publishers' advertising space using the investigated company's and rivals' advertising technology services (together, "Parties").

The investigation seeks to assess whether an agreement between the Parties dated September 2018 (Agreement) complies with EU competition rules. Under the Agreement, the Audience Network could participate in the Program in order to have the opportunity to win online display advertising spaces. According to the Commission, publishers rely on online display advertising to fund online content for consumers. The Commission contends that the Agreement may result in a scheme that could exclude providers offering similar technology services to compete with the Program, thereby negatively affecting publishers and consumers.

The Commission intends to carry out its investigation of the Agreement not only under the provision prohibiting anticompetitive agreements between competitors (i.e., Article 101 of the Treaty on the Functioning of the European Union (TFEU)) but also on the basis of potential abuse of a dominant position, which is prohibited by Article 102 of the TFEU.

Should the Commission establish an infringement of Article 101 of the TFEU, both Parties could be fined up to 10% of their overall annual turnover generated in the last financial year before the adoption of the decision. In the event of a breach of Article 102 of the TFEU, the dominant company could be fined up to 10% of its total turnover in the last financial year.

The Agreement is also subject to a parallel investigation opened on 11 March 2022 by the UK Competition and Market Authority (CMA). This investigation seeks to ascertain whether the Parties may have compromised the uptake of header bidding services and abused a dominant position in the market for online display advertising. As is customary in the case of parallel investigations, the Commission is in contact with the CMA and they will closely

cooperate on this investigation. The Agreement also provoked a formal complaint in the United States, filed before a federal court in December 2020 by a group of U.S. state attorneys general, led by the attorney general of Texas.

DIGITAL AFFAIRS

European Parliament's Special Committee Proposes EU Road Map on Artificial Intelligence

European Parliament's Special Committee on Artificial Intelligence in a Digital Age (AIDA) was established on 18 June 2020 with the goal to analyze the future impact of artificial intelligence (AI) on the EU economy, to investigate the challenge of deploying AI, and to analyze the approach of third countries towards AI. To achieve its objectives, AIDA organized hearings and workshops with stakeholders, including experts, policymakers, and the business community.

On 22 March 2022, AIDA concluded its inquiries and adopted its final recommendations, defining common EU AI objectives in the medium and long term, as well as the major steps needed to reach them. The report notes that while the European Union needs to act as a global standard-setter in AI, there is currently a risk that standards will be developed in other regions in the future, often by nondemocratic actors. This could, in turn, pave the way for mass surveillance and a threat to fundamental rights, such as the rights to privacy and data protection.

AIDA also identified policy options that could unlock the European Union's AI potential in health, the environment, and climate change—to better address pandemics and enhance quality of life through personalized medicine. The report stressed a need for accompanying investments in infrastructure, education, and training in order to increase capital and labor productivity, innovation, sustainable growth, and job creation. At the same time, the report warns that the level of regulatory intervention should be proportionate to the type of risk associated with using an AI system in a particular way.

The report was adopted by AIDA members with 25 votes in favor, two votes against, with six abstentions. It will be put to a vote by the European Parliament's plenary session in May 2022.

The Commission Wants Big Tech to Pay the European Union for Digital Services Act Supervision

On 15 March 2022, during a meeting to discuss the final wording of the Digital Services Act (DSA), the European Commission's legislative proposal to modernize the e-Commerce Directive, Executive Vice-President Margrethe Vestager proposed that very large online platforms, such as Google, Amazon, and Facebook, should be charged a supervisory fee to cover the cost of monitoring them.

A similar mechanism is in place with the European Central Bank, which charges a supervisory fee to all supervised banks, but the European Parliament already rejected a DSA supervisory fee in January, after the Greens/European Free Alliance political group proposed the measure in December 2021.

These added responsibilities to be borne by the Commission as supervisor of large platforms will mean additional burdens on financial and human resources.

While details of the proposal and the exact amount of the supervisory fee were not made public, Vestager is understood to have told the officials present in the meeting that there is a need for “sustainable financing” for the added supervisory role, and the EU will study how large platforms could pay for it.

ENVIRONMENTAL AFFAIRS

REPowerEU: Joint European Action for More Affordable, Secure, and Sustainable Energy

REPowerEU outlines a series of measures to respond to rising energy prices in the European Union and to replenish gas stocks for next winter by diversifying gas supplies via higher liquefied natural gas (LNG) and pipeline imports from non-Russian suppliers, as well as larger volumes of biomethane and renewable hydrogen production and import. The plan also aims to reduce faster the use of fossil fuels in homes, buildings, industries, and power systems by boosting energy efficiency, increasing renewables and electrification, and addressing infrastructure bottlenecks.

The “Energy Prices Toolbox” presented by the Commission in October 2021 has helped member states to mitigate the impact of high-energy prices on vulnerable consumers and remains an important framework for national measures. REPowerEU aims to provide member states with additional guidance, including the possibility to regulate prices in exceptional circumstances, and sets out how member states can redistribute revenue from high-energy sector profits and emissions trading to consumers.

The Commission intends to present by April 2022 a legislative proposal requiring underground gas storage across the European Union to be filled up to at least 90% of its capacity by 1 October each year, which will entail the monitoring and enforcement of filling levels. It will also assess options to optimize the electricity market design, taking into account the final report of the EU Agency for the Cooperation of Energy Regulators (ACER) and other contributions on benefits and drawbacks of alternative pricing mechanisms to keep electricity affordable, without disrupting supply and further investment in the green transition.

ECONOMIC AND FINANCIAL AFFAIRS

ESMA Presents Proposals to Enhance the Resilience of EU MMFs

On 16 February, the European Securities and Markets Authority (ESMA) issued its [Final Report](#) presenting its opinion on the Commission's forthcoming review of [Regulation \(EU\) 2017/1131](#) (known as the Money Market Funds (MMF) Regulation), which is to be launched in 2022. ESMA proposes a number of key reforms to enhance the resilience of EU MMFs, in particular with regard to threshold effects for constant net asset value (CNAV) MMFs and liquidity-related issues.

Specifically, ESMA addresses threshold effects for CNAV MMFs by proposing to remove the possibility to use amortized costs for low volatility net asset value (LVNAV) MMFs and to decouple regulatory thresholds from suspensions, gates, and redemption fees for LVNAV/CNAV MMFs. In terms of liquidity-related issues, the proposed reforms focus on: (i) ensuring the mandatory availability of at least one liquidity management tool for all MMFs; (ii) amending the daily liquidity assets ratios/weekly liquidity assets ratios of variable net asset value and

LVNAV MMFs, and the pool of eligible assets that may be used to satisfy the liquidity ratios; and (iii) the inclusion/reinforcement of the possibility to temporarily use liquidity buffers in times of stress.

Furthermore, ESMA puts forward complementary actions that would better prepare MMFs for crisis, including measures to enhance the MMF reporting requirements and the MMF stress-testing framework, to clarify the requirements on external support, and to specify the rules on the rating of MMFs.

PUBLIC PROCUREMENT

Long-Awaited Agreement Reached on the International Procurement Instrument.

On 14 March, the Commission, the European Parliament, and the Council of the European Union reached a political agreement on the International Procurement Instrument (IPI). This has been a long-awaited decision, as the Commission first proposed the IPI in 2012 and amended it in 2016. The Council of the European Union adopted its position on the proposal in June 2021, and the European Parliament did the same in December 2021.

Contrary to many economies who have limited will to liberalize market access and therefore apply restrictive practices which end up discriminating EU businesses, the European Union's public procurement market is one of the largest and more accessible worldwide. In this sense, the aim of the IPI is to give the European Union an advantage in negotiating the reciprocal opening of public procurement markets in non-EU countries. Thus, the IPI allows the European Union to initiate investigations in cases of alleged restrictions for EU companies in non-EU procurement markets or engage in consultations with the country concerned on the opening of its procurement market. All in all, this regulation enables the European Union to restrict access to the EU procurement market for foreign companies in case they originate in a country that applies restrictions to EU companies.

The main sensitive topic during the political negotiations was the scope of exemptions from the legislation and who would have the power to exempt.

In this sense, the European Parliament supported a broad exemption for all developing countries falling under the European Union's General Scheme of Preferences. However, the Council of the European Union did not agree, as this would weaken the instrument. Finally, the IPI will only exempt the least developed countries with a possibility of broadening the scope in case the legislation is revised in the future.

Moreover, the Council of the European Union was demanding for member states to be able to ignore a Commission decision in case the latter would lead to a disproportionate price increase. However, the European Parliament thought that this demand would provide a loophole in the legislation. Finally, the Council of the European Union's demand was abandoned.

On 16 March, technical negotiators greenlighted the text. The European Parliament and the Council of the European Union will now formally adopt the amended regulation with a view to its entry into force as soon as possible.

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