# BRUSSELS REGULATORY BRIEF: NOVEMBER 2023

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**EU Policy and Regulatory Newsletter**

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## ANTITRUST AND COMPETITION

### European Commission Approves Consolidation in the Ground Transportation Sector Subject to Remedies

The companies are two global suppliers of signalling systems for mainline and urban railway networks. The US$1.8 billion transaction was announced in August 2021 (Transaction). The Transaction was initially notified to the European Commission (Commission) on 4 October 2022. However, the parties decided to withdraw the filing on 2 November 2022 due to competition concerns raised by the Commission. The Transaction was then re-notified on 14 September 2023 and conditionally cleared by the Commission on 30 October 2023.

The Commission's investigation revealed that it would have reduced competition and led to higher prices and less innovation in the markets for rail mainline signalling projects in France and Germany. During the review of the Transaction, the parties submitted a number of economic evidence and bidding data analyses aimed at assessing the closeness of the competition between the merging parties. These analyses helped the Commission to narrow down its concerns in many markets due to the parties' limited direct competitive interactions or market shares.

In order to address the Commission's concerns in the markets for rail mainline signalling projects in France (including interlockings, overlay and re-signalling projects) and Germany (including overlay and re-signalling projects), the acquiring party offered to divest its mainline signalling platforms in France and Germany in order to remove the horizontal overlaps in these markets. On the basis of the positive feedback received from the market test, the Commission accepted these commitments. According to the Commission: “The divestiture of their activities in these countries will preserve competition and ensure that infrastructure managers, and ultimately customers, do not face increased prices, lower quality and less innovation.” The acquiring party now needs to find a suitable purchaser for the divested businesses that will have to be approved by the Commission.

The Transaction was also reviewed by a number of other jurisdictions globally, which approved it unconditionally except for the UK Competition and Markets Authority (CMA) which imposed remedies. Following an in-depth investigation (Phase II), on 17 November 2023 the CMA consulted on the proposed final commitments. These include the divestment of the acquiring party's mainline signalling business in France, Germany and the United Kingdom.

While the acquisition was reviewed and conditionally cleared by the CMA at the end of its Phase II investigation, the parties took a different approach in the European Union and decided to withdraw the notification in Phase I after the Commission raised competition concerns and then decided to re-file subsequently. This practice, known

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in the US HSR as “pull-and-refile,” allowed the parties of the Transaction to focus on the areas of concerns and effectively address these by securing a Phase I conditional clearance without entering into a Phase II investigation. The parties plan to finalize the Transaction during the first half of 2024.

## DIGITAL AFFAIRS

### The Court of Justice Ruled that a Member State May Not Subject a Communication Platform Provider Established in Another Member State to General and Abstract Obligations

On 9 November 2023, the Court of Justice of the European Union (Court of Justice) issued a judgment in the case C-376/22 following a request for a preliminary ruling by the Austrian Supreme Administrative Court. The request was raised in proceedings between big tech companies established in Ireland, which provided, inter alia, communication platform services in Austria, and the Austrian communications regulatory authority concerning its decisions of declaring that those companies fell under the scope of the Austrian federal law on measures for the protection of users of communications platforms. This Austrian law, introduced in 2021, requires domestic and foreign providers of communication platforms to set up mechanisms for reporting and verifying potentially illegal content, and provides for regular and transparent publication of reports of illegal content. The tech companies claimed that the law was contrary to EU law, and in particular to the Directive 2000/31/EC on information society services (Directive).

The Court of Justice affirmed that the purpose of the Directive is to establish a legal framework to ensure the free movement of information society services across member states, removing obstacles posed by the different national rules applicable to those services, thanks to the principle of control in the member state of origin.

The Court of Justice noted that, under strict conditions and in specific cases, member states other than the member state of origin of the service in question may take measures to guarantee public policy, the protection of public health, public security or of consumers. Such derogations must be notified to the Commission and the member state of origin. However, member states, apart from the member state of origin of the service in question, may not adopt general and abstract measures, which apply indiscriminately to any provider of a category of information society services established in that member state and in other member states.

The Court of Justice found that allowing those member states to adopt such general and abstract obligations would undermine the principle of control in the member state of origin of the service concerned, upon which the Directive is based. If the member state of destination–in this case, Austria–were authorised to adopt such measures, it would interfere on the regulatory powers of the home member state–in this case, Ireland. The Court of Justice found that this approach would also erode mutual trust between member states and contravene the principle of mutual recognition, and the platforms concerned would be subject to different laws, which would also infringe the freedom to provide services and therefore the proper functioning of the internal market.

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## FINANCIAL AFFAIRS

### Instant Payments: Council of the European Union and European Parliament Reach Provisional Agreement

On 7 November 2023, the European Parliament (Parliament) and the Council of the European Union (Council) reached a provisional agreement on the revision of the legislation for the Single Euro Payments Area, proposed by the Commission in October 2022. Payments service providers (PSPs) will be required to offer instant credit transfer services with no extra costs and under strict deadlines.

The revised text establishes that an instant credit transfer is supposed to be executed regardless of the day or hour and must be immediately processed within 10 seconds after the time of receipt of the payment order. Where a payment order is submitted for an account denominated in a foreign currency, PSPs will be required to convert immediately the amount in euro.

PSPs will be required to have robust and updated fraud detection and prevention measures, with the objective of blocking credit transfer sent to an unintended recipient as a result of fraud or error. Accordingly, PSPs will have to verify the identity of the payee that intends to send a credit transfer: where a discrepancy between the payer and the payee is identified, PSPs must compensate any financial damage incurred. PSPs will have to align instant credit transfers charges to those applicable to standard credit transfers. Additionally, the new rules allow payment and e-money institutions to have access to the European Central Bank's payments infrastructure.

The implementation of the new rules differs between Eurozone and non-Eurozone PSPs. Eurozone PSPs will have nine months after the entry into force of the regulation to set their instant payments systems, while they will have 18 months after the entry into force to allow clients to send money instantly. Non-Eurozone PSPs will have 33 months after the entry into force to get their systems ready and 50 months to offer instant payments.

## ENVIRONMENTAL AFFAIRS

### Sustainability Reporting: European Commission Postpones Second Batch of ESRS and Amends CSRD

On 17 October 2023, the Commission announced several initiatives with the objective of reducing reporting requirements for companies in scope of the Corporate Sustainability Reporting Directive (CSRD). The proposals are part of the Commission's “long-term competitiveness of the European Union” strategy, adopted on 16 March 2023 and aimed at rationalising reporting requirements.

Firstly, the Commission adopted a decision to postpone to 30 June 2026 the adoption of the European Sustainability Reporting Standards (ESRS) for small and medium-sized enterprises and for non-EU companies. The decision will modify CSRD provisions (art. 29b and 40b), which initially foresaw the adoption of the two sets of standards before 30 June 2024. The objective of the postponement is to allow companies to familiarise with the first batch of standards, applicable from 1 January 2024 for businesses already in scope of the Non-Financial

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Reporting Directive. On the same day, the Parliament rejected a motion calling on the Commission to adopt an amended delegated act for the first set of ESRS, reducing the complexity and the quantity of the standards.

Secondly, the Commission amended the monetary size criteria applicable to micro, small, medium and large companies (art. 3 of CSRD). The objective of the revision is to adjust the criteria to the inflation trend in the past two years and, therefore, reduce the number of companies in scope of the reporting requirements. The size criteria remained unchanged since the entry into force of the directive in 2023. However, the increase of the balance sheet and net turnover values of businesses will result in a reduction of the number of companies in scope.

The Parliament and the Council will both have two months to express any objections to the proposed amendments. Additionally, the Commission opened a public consultation on the postponement decision, closing on 19 December 2023.

## FOREIGN DIRECT INVESTMENT AND SANCTIONS

### Ireland's New FDI Regime and Related EU Developments

On 31 October 2023, Ireland's Screening of Third Country Transactions Act (Act) was signed into law, with the expectation that it will be implemented in the first half of 2024. The Act will align Ireland's national foreign investment screening strategy with that of other EU countries, as well as the EU's Foreign Direct Investment (FDI) Regulation.

#### *Key Features of the Irish FDI Regime*

The Act introduces the mandatory notification of certain transactions involving acquisitions by foreign companies that may affect the security or public order of Ireland. Transactions falling within scope must be notified to Ireland's Minister for Enterprise, Trade, and Employment (Minister). The foreign investment review has a suspensory effect on the implicated transaction. Transactions that meet the following criteria are required to be notified:

- A company from a country outside the European Economic Area or Switzerland, or a person connected with the company:
  - Acquires control of an asset or company in Ireland, or
  - Changes the percentage of shares or voting rights it holds in a company in Ireland from 25% or less to more than 25% or from 50% or less to more than 50%;
- In the twelve months prior to the transaction, the cumulative value of the transaction and all other transactions between the parties to the transaction (or connected persons) is at least €2 million;
- The transaction is not an internal re-organization whereby one company directly or indirectly controls all the parties to the transaction; and
- The transaction concerns one or more of the sensitive areas referred to in Article 4(1)(a)-(e) of the EU FDI Regulation, namely: critical infrastructure, critical technologies and dual-use items, the supply of critical inputs, access to sensitive information, and freedom and pluralism of the media.

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It is important to note that the obligation to notify rests on all parties to the relevant transaction unless they are not aware of the transaction.

Finally, the Minister has the authority to call-in, even retroactively, a transaction that does not meet the criteria for notification under the Act if there are reasonable grounds to suspect that the transaction would affect Ireland's security or public order.

### *Upcoming Developments in Other Member States and at the EU Level*

Several developments in other member states and at the EU level are also anticipated. The Swedish legislation on screening of foreign direct investments, which enters into force on 1 December 2023, will include a mandatory standstill notification obligation for a variety of sectors and activities. At the EU level, the Commission is expected to propose revisions to the existing EU FDI Regulation by the end of 2023, aiming to adapt to the changing geopolitical landscape and streamline approaches across EU member states. There will be an increased scrutiny on investments from entities linked to governments like Russia and Belarus, especially in critical EU assets. Additionally, the Commission plans to introduce a proposal covering outbound investment screening by the end of 2023 signalling a growing concern about the implications of such investments. As these developments unfold, businesses engaging in cross-border transactions will need to continue navigating an increasingly complex regulatory landscape across the European Union.

## The European Parliament Calls for Stricter Enforcement of EU Sanctions Against Russia

On 9 November 2023, the Parliament adopted a resolution calling for stricter enforcement of EU sanctions due to concerns about Russia's ability to circumvent international sanctions. While not legally binding, the Parliament's resolution makes a number of demands and highlights several topics expected to be addressed in the Commission's forthcoming 12th sanctions package, such as a ban on Russian diamonds and a lower price cap on Russian oil.

The resolution underscores the EU's objective to strategically weaken Russia's economic and industrial base. The resolution highlights the ways in which Russia manages to bypass sanctions, e.g. through increased imports of petroleum products made with Russian oil from countries like India. It also raises concerns about components produced in Europe reaching Russia via various countries and existing trade in sanctioned goods that are critical for warfare.

The resolution deplores that the European Union remains a significant client for Russian fossil fuels, due to exceptions to restrictions on the import of crude oil and oil products, as well as continuing imports of pipeline gas and liquefied natural gas.

Members of the Parliament put forth the following key actions to improve sanctions enforcement:

- Closing the EU market to Russian fossil fuels and a prohibition of Russian LNG and liquefied petroleum gas imports, as well as imports of products made with Russian oil;
- Imposing sanctions on major Russian oil companies;
- Using frozen Russian assets to support Ukraine's reconstruction efforts;

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- Strengthening EU-level oversight of sanctions implementation and developing a sanctions circumvention prevention and monitoring mechanism to increase coordination on the enforcement of sanctions on Russian oil exports specifically;
- Collaborating with the G7 to lower price caps on Russian oil and petroleum products;
- Prohibiting the shipment of Russian oil and LNG exports through EU territory and imposing price and volume caps on EU imports of Russian and Belarusian fertilisers; and
- Banning marketing and cutting diamonds of Russian origin or those re-exported by Russia to the European Union.

Finally, the resolution proposes a comprehensive review of the effectiveness of current Russia sanctions.

## OTHER EU NEWS

### European Union to Introduce Revised Framework on the Roll-Out of Intelligent Transport Systems

On 23 October 2023, the Council adopted a directive on the framework for the deployment of Intelligent Transport Systems (ITS) in the field of road transport and for interfaces with other modes of transport. It is intended to overhaul the legislative framework for accelerating and coordinating the deployment and use of ITS in light of the significant technological developments since the previous framework was adopted in 2010. This includes key developments in areas such as connected and automated mobility, on-demand mobility applications, and multimodal transport, and the need to accelerate the availability and enhance the interoperability of digital data.

ITS combine telecommunications and information technologies with transport engineering in order to plan, design, operate, maintain and manage transport systems. Similar to the existing regime, the new ITS directive sets out the general framework and will be supplemented by implementing and delegated acts containing more technical elements.

The new ITS directive extends the scope of the 2010 ITS directive to cover new services, such as multimodal information, booking and ticketing services (for example, apps to find and book journeys that combine public transport, shared car, or bike services), communication between vehicles and infrastructure and automated mobility.

The new ITS directive also defines targets for the digitisation of crucial information, including speed limits, roadworks and multimodal access nodes, as well as the delivery of essential services, such as information on road safety. This is expected to benefit transport users by promoting a broader coverage of real-time information and more accurate intelligent speed assistance systems.

Certain types of data listed in the new ITS directive's annexes will be required to be made available across the European Union. These include access conditions for tunnels and bridges, speed limits, traffic circulation plans, permanent access restrictions, road closures, roadworks and temporary traffic management measures. Critical services will also need to be made available throughout the European Union, including road safety-related traffic information services.

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The ITS directive was proposed by the Commission as part of a broader plan to overhaul the EU transport system with a view to achieving sustainable and smart mobility. Digitalisation is seen as an indispensable driver of this transformation, while simultaneously improving levels of safety, security, reliability and comfort.

The adoption by the Council was the final step in the legislative process. The ITS directive will be published in the Official Journal of the European Union in the coming weeks and enter into force on the 20th day after its publication. EU member states will then have two years to transpose the ITS directive and adopt binding rules for businesses at the national level, which is therefore expected by the end of 2025.

## New EU Rules Obliging Manufacturers to Make Repairs Easier and More Convenient Being Developed

On 25 October 2023, the Parliament's Committee on Internal Market and Consumer Protection (IMCO) adopted its position on the Commission proposal for a directive promoting the repair of goods.

According to this proposal, the directive will require sellers to provide free repair as a preferred option over other remedies (i.e. except when it is more expensive than replacement or when it is factually impossible or inconvenient for the consumer) within the two-year legal guarantee period. Manufacturers will also need to comply with reparability requirements outside the legal guarantee period in case of certain products, such as household washing machines, vacuum cleaners, smartphones and bicycles.

In order to stimulate a transparent and competitive repair market, independent repairers, refurbishers and end-users should be granted an access to all spare parts, information and tools at a reasonable cost throughout the lifespan of a product. Furthermore, consumers should be provided with the loaning of replacement devices during the repair period.

Finally, IMCO also introduced a one-year guarantee after repair to increase consumer trust in the repaired products and included demands for EU member states to promote repair through financial incentives like vouchers and national repair funds.

The Parliament approved its negotiating position on 21 November, with a very large majority of 590 votes in favour, 15 against, and 15 abstentions.

In terms of next steps, it is expected that EU member states (through the Council) will adopt their own negotiating position later in November 2023. Following that, talks between the Parliament and the Council on the final version of the text may begin, with a first meeting provisionally scheduled on 7 December 2023.

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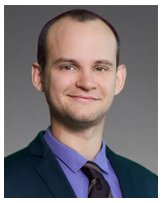
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