BRUSSELS REGULATORY BRIEF: FEBRUARY 2024

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EU Policy and Regulatory Newsletter

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ANTITRUST AND COMPETITION

The European Commission Carried Out Unannounced Inspections in the Tires Sector

On 30 January 2024, the Commission conducted dawn raids at the premises of several companies active in the tires sector, such as tire manufacturers, in a number of Member States, including Belgium, Finland, and Germany. The Commission officials were accompanied by their counterparts from the relevant national competition authorities where the inspections were carried out.

The Commission has concerns that the inspected companies may have breached EU antitrust rules that prohibit cartels and restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union (TFEU)). In particular, it is concerned that the companies may have engaged in price coordination via public communications concerning new replacement tires for passenger cars, vans, trucks, and buses sold in the European Economic Area.

In its “Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements” of July 2023, the Commission clarified that public disclosure of commercially sensitive information may, in some cases, form part of a communication channel between competitors to signal future intentions to behave on the market in a specific way or provide a focal point for coordination between competitors. Such public communication may constitute an infringement of Article 101(1) TFEU.

The Commission is empowered to conduct unannounced inspections at the premises (whether business or private residence) of companies suspected of breaching EU competition rules. Such so-called dawn raids are typically the first step in an antitrust investigation. During the dawn raids, the Commission may examine and copy any books or records related to the business, whether in paper or electronic form. Failure to comply and cooperate with the Commission may lead to the imposition of fines of up to 1% of the company total turnover in the last financial year. The obstruction of the inspection can also be used as an aggravating circumstance when determining the level of the fine for antitrust infringement. The duration of the Commission's investigation depends on a number of factors, including the complexity of each case, the extent to which the companies concerned cooperate with the Commission, and the exercise of the rights of defense.

In 2021, Executive Vice-President of the Commission Margrethe Vestager gave the speech “A New Era of Cartel Enforcement,” where she stated that “we're developing new ways to spot cartels, and … we take an interest in new types of cartel, as well as more familiar ones.”

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The Commission carried out 64 and 62 dawn raids in 2022 and 2023, respectively. The inspections cover a wide range of sectors from fashion, digital, pharma, food, automotive, etc. Companies should be mindful of the potential risks and have inspection protocols in place to effectively manage and mitigate the impact of antitrust dawn raids.

DIGITAL AFFAIRS

EU Artificial Intelligence Act: February 2024 Marks Landmark Votes

On 13 February 2024, Parliament committees responsible for the AI Act (the Committee on Internal Market and Consumer Protection and Committee on Civil Liberties, Justice and Home Affairs) approved the provisional political agreement on the AI Act, reached on 9 December 2023 (see our previous coverage here). The Parliament's joint committee vote follows the text's unanimous approval by the Committee of the Permanent Representatives of the Member States to the European Union (COREPER) on 2 February 2024. The Parliament is expected to vote on the AI Act's adoption during its plenary session provisionally scheduled for 10-11 April 2024. Once formally adopted by the Parliament, the text will then be sent to the Council of the EU for final adoption. The AI Act will enter into force 20 days after its publication in the Official Journal of the EU. Once entered into force, it will become progressively enforceable over a 36-month period.

The AI Act applies whenever AI Systems are employed, or where their output is intended to be used, in the European Union, regardless of where the AI system or its operator is based. Private and public operators that do not comply with the AI Act will face penalties and administrative fines up to 35 million euros or 7% of their global turnover, whichever is higher.

The overall text contains 89 recitals and 85 articles spanning well over 200 pages. Among the key points agreed during the recent votes are:

Definition of AI

An “AI System” is “a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.” The text clarifies that the definition is not intended to cover simpler traditional software systems or programming approaches, which are based on rules defined solely by natural persons to automatically execute operations.

Risk-based Approach

In light of the potential risks associated with the use of a specific AI System in terms of infringement of fundamental rights and user's safety, the AI Act follows a risk-based approach, whereby legal intervention is adapted to the level of risk classified using the following categories, including: (i) prohibited artificial intelligence practices presenting an unacceptable risk; (ii) high-risk systems; (iii) limited-risk systems; and (iv) low- or minimal-risk systems.

General-Purpose AI Models

A General-Purpose AI Model (GPAI Models) is an AI System that is able to perform generally applicable functions such as image/speech recognition, audio/video generation, pattern detection, question answering, translation, and

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is able to have multiple intended and unintended purposes. The text introduces horizontal obligations for all AI Models of this category. They include the requirement to maintain updated technical documentation and the obligation to make such documentation available to the AI Office and national competent authorities upon request.

AI Office and AI Board

An AI Office will be created within the Commission. The Commission will entrust the AI Office to oversee GPAI models, provide input on standards and testing practices (notably by drawing up codes of practice), and ensure enforcement in the Member States. An AI Board will be established and composed of Member States' representatives. As an advisory body to the Commission, the AI Board will function as a platform through which Member States can coordinate on the AI Act's implementation.

FINANCIAL AFFAIRS

EU Legislators Agreed to Revise the Clearing Rules Under EMIR, Introducing Additional Requirements for Financial Firms Subject to Clearing Obligations

On 7 February 2024, the Council and Parliament (co-legislators) reached a provisional agreement on the revision of EMIR. The Commission proposed to review the regulatory framework in December 2022, with the objective of making the EU clearing landscape more attractive after Brexit. On 14 February 2024, the Permanent Representatives Committee (COREPER) of the Council approved the provisional agreement. The European Parliament's Committee on Economic and Monetary Affairs (ECON) will then formalize the agreement, followed by a vote in Plenary scheduled for 22 April 2024.

A key aspect involves the introduction of an active account requirement at EU central counterparties (CCPs). Financial and nonfinancial counterparties will be required to open an active account at an EU CCP to clear trades in specific, systemically important derivative categories. This new requirement will be applicable six months after the entry into force of EMIR and a Joint Monitoring Mechanism will oversee compliance. The thresholds under articles 4a and 10 specifying which financial and nonfinancial counterparties are subject to the clearing obligation will be calculated, including only those derivatives that are not cleared at an EU CCP or at a recognized third-country CCP. The revised article 4a also expands the scope of the clearing obligation, requiring additional market participants of substantial systemic importance to clear their transactions.

Additionally, the agreement replaces article 13 equivalence decisions with a list of third countries for which an exemption of intragroup transactions from clearing should not be granted. The revised rules introduce additional transparency obligations on CCPs to enhance visibility and predictability of margin calls. Co-legislators also approved amendments to the reporting regime under article 9, requiring counterparties to update their reporting formats, expand reporting fields, and use a Unique Product Identifier Code and a Unique Trade Identifier in their reports.

From a supervisory perspective, the provisional agreement intends to strengthen cooperation, coordination, and information sharing among national supervisors and the European Securities and Markets Authority (ESMA). The ESMA will have specific supervisory powers on CCPs, enabling it to issue a reasoned opinion on an annual review and evaluation of CCPs, co-chair CCP colleges, and have a coordinating role in emergency situations.

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ESMA will be empowered to participate in on-site inspections at CCPs' premises launched by National Competent Authorities.

COREPER approved the provisional agreement on 14 February 2024. The Parliament's Committee on Economic and Monetary Affairs (ECON) will then formalize the agreement, followed by a vote in plenary scheduled for 22 April.

ESG AFFAIRS

EU Legislators Agree on Regulatory Framework for ESG Rating Providers

On 5 February 2024, the Parliament and the Council have provisionally agreed on a legislation aimed at ensuring transparency and integrity of ESG rating providers. The Commission proposed the regulation in June 2023 following a request by ESMA to be conferred with direct supervisory responsibilities over ESG rating agencies. On 14 February 2024, Member States formally approved the provisional agreement. ECON will approve it on 22 February 2024, followed by a vote in Plenary scheduled for 22 April 2024. The Regulation will start to apply 18 months after its entry into force.

Under the new rules, EU-based ESG rating providers will need to obtain authorization from ESMA, while non-EU ESG rating agencies will be required to obtain endorsement by an EU-authorized rating provider or recognition or inclusion in the registry of ESG rating providers via an equivalence decision for their country of origin. Small companies and groups providing ESG ratings will be exempted from registration during a period of three years.

Notably, the new rules mandate ESG rating providers to disaggregate environmental, social, and governance criteria when issuing a single rating, specifying the weight assigned to each criterion. Compliance also extends to organizational and governance principles, ensuring the separation of activities to prevent conflicts of interest. ESMA is empowered to request information, conduct investigations, and perform on-site inspections at ESG rating providers' premises.

Additionally, financial firms using in-house green ratings for marketing purposes will need to disclose information on the methodologies used to produce them. This new requirement stems from an amendment to the Sustainable Finance Disclosure Regulation and would thus complement other disclosure obligations within this framework (financial firms are already required to provide information on the use of ESG ratings in pre-contractual and periodic disclosures).

Provisional Agreement Reached on a Proposal for a Directive on EU Consumers' Rights for Attractive and Accessible Repairs

On 1 February 2024, the Parliament and the Council reached a provisional agreement on a proposal for a directive providing common rules to facilitate and enhance the repair of goods for consumers. The next step is the formal adoption of the provisional agreement by the Parliament and the Council.

This provisional agreement will offer consumers a new right to repair within and beyond the scope currently legally guaranteed in order to encourage consumers to reduce waste, opt for more sustainable consumption and support a circular economy. To this end, new rules are proposed under the agreement. It complements other EU

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initiatives such as the proposals on Ecodesign for Sustainable Products Regulation and the Empowering Consumers for the Green Transition Directive to increase social and environmental sustainability within the European Union and globally.

In particular, manufacturers will be required to repair common household products (e.g., vacuum cleaners, washing machines, smartphones). As such, the legal guarantee period may be extended by one year if a defect is detected during the legal guarantee period and if consumers choose to repair their goods. In addition, in the event the legal guarantee has expired, consumers can still benefit from an easier and cheaper way of repairing defects in these products if they are repairable.

Consumers shall be informed of the manufacturer's obligation to repair and information on repair services will need to be provided by the repairer, including the indicative prices, the method of calculating the price or the maximum price, the time needed to repair, and the identity of the repairer. There is also a possibility for consumers to borrow a device during the reparation of their own.

In addition, Members States will be requested to establish a European repair platform, which should also be accessible for persons with disabilities, to make it easier for consumers to find a competent repairer and to adopt at least one measure promoting repair such as repair funds, repair vouchers, or support for local repair projects.

Council Adopts General Approach on Proposed Ban of Products Made with Forced Labor

On 26 January 2024, the Council adopted its position on the proposed regulation prohibiting products made with forced labor, as defined by the International Labour Organization (ILO).

The proposal, which was published in September 2022, is intended to complement other EU initiatives imposing due diligence and reporting obligations on companies active on the EU market with a view to increasing social and environmental sustainability within the European Union and globally.

The ILO's definition of forced labor is broad and includes all work or service that is exacted from any person under the threat of any penalty and for which the said person has not offered himself voluntarily, excluding certain activities such as, for example, compulsory military service and minor communal services.

The ban on products made with forced labor, as proposed by the Commission, will apply to goods made in the European Union for domestic consumption or export, as well as goods imported into the European Union. It will apply to both large companies and small and medium-sized enterprises and cover all industries. Member State authorities will assess the forced-labor risk based on a range of information. Where the relevant authority has reasonable indications that a product has been made with forced labor, it should start an investigation. It may request information from companies or carry out checks and inspections, even in third countries. Where it is found that forced labor was used, the Commission will order the withdrawal of the product and companies will need to dispose of the goods.

The Council's general approach clarifies that the proposed regulation covers also products offered for distance sales (e.g., online). It also calls for the creation of a forced labor single portal with easily accessible and relevant information and tools and reinforces the role of the Commission in investigating forced labor.

Where the Commission identifies a “Union interest” (such as where the risks of suspected forced labor are located outside the territory of the European Union or the products concerned are present in at least three Member

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States), the Commission should automatically take over the pre-investigation phase. For cross-border investigations, the Council calls for one lead competent authority that should be designated to ensure an efficient and coherent approach within the European Union.

Having adopted its general approach, the Council is now ready to enter into negotiations with the Parliament, which adopted its negotiating position on 8 November 2023. Once a final text is agreed and formally adopted, the regulation will be published and enter into force with direct effect in the Member States.

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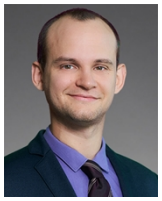

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