

# **BRUSSELS REGULATORY BRIEF: OCTOBER 2020**

## **EUROPEAN REGULATORY AND UK REGULATORY NEWSLETTER**

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### **ANTITRUST AND COMPETITION**

#### **The General Court of The EU Squashes the Commission's Inspection Decisions to Raid the French Mass Retail Sector**

The European Commission (Commission), if it has reason to suspect a company is engaged in activity that breaches competition law, will use a “dawn raid” to collect evidence to support its case. Dawn raids are unannounced on-site investigations by competition authorities seeking information on potentially anti-competitive behaviour and are used by authorities globally to uncover illegal collusion, including agreements between competitors on pricing or allocation of territories.

In February 2017, the Commission received information on suspected anti-competitive exchanges of information between certain French mass retailers and adopted decisions ordering dawn raids at the premises of these retailers. The Commission's decisions authorizing the dawn raids were based on two types of alleged anti-competitive behaviour. The first type concerned the exchanges on the discounts applied by suppliers of certain grocery products and exchanges on prices in the market of sale of services to manufacturers of branded grocery products. The second type concerned exchanges between two French mass retailers on their future strategies.

The Commission's decisions were appealed to the General Court of the EU (GCEU). The GCEU recalled that the threshold at which the Commission can consider it has enough evidence is below that required to show the existence of anti-competitive agreements after a formal probe. With respect to the targeted conducts, the GCEU found that, at the time of the inspection decisions, the Commission had sufficient evidence to suspect the first type of illegal exchanges but not the second, i.e., the exchanges of information concerning the future commercial strategies of the two French mass retailers. In fact, the only evidence obtained by the Commission on these exchanges was based on the organisation of a public conference by one of the companies (with more than 400 suppliers and journalists also present) and the attendance of a director of the other company. In addition, the content of the discussion at the conference was very general. According to the court, the sole presence of that director during the other company's public presentation was insufficient to deduce the existence of an anti-competitive agreement that would justify a dawn raid.

The judgment recalls the importance for companies to be prepared to handle a dawn raid but also to be alert for overreach by competition officials. Companies can legitimately object if the competition authorities attempt to obtain out-of-scope or privileged materials (i.e., documents covered by the attorney-client privilege). Accordingly,

it is critical for a company to be prepared to comply with a dawn raid—through the adoption of protocols—to protect both its short-term interest in expeditiously cooperating with a dawn raid and its long-term ability to protect its legal interests, including the possibility to challenge insufficiently supported inspection decisions.

## DIGITAL ECONOMY

### App Developers Coalition to Push For New Rights

A group of app developers, including Spotify and Epic Games (known for the game Fortnite), have launched a Coalition for App Fairness (the “Coalition”) to advocate against what they consider abusive conduct of some large app store providers.

The Coalition mainly focuses on three issues:

- App stores distribution fees, which are typically 30 percent of the sale's price;
- Alleged anti-competitive practices;
- Ranking and access.

The group has proposed a list of [10 App Store Principles](#), with the aim of having those introduced industry-wide. The list captures the group's objectives and includes: the ability to distribute apps outside of app stores; protection of developer's data; access to developer documentation; the right to communicate with users through apps for legitimate business purposes; no requirements to use the app store's payment systems; and no requirements to pay “unfair fees”.

App stores have proven to be successful platforms to search, discover, and download apps becoming one of the main sources of revenue for developers who have long complained about the terms and conditions that govern app stores. With this Coalition, they hope to push for regulatory and legislative changes in both the European Union and the United States.

This comes at a time of increasing scrutiny toward digital platforms by the Commission in an environment where constant changes are taking place at a regulatory level. The recent Platform-to-Business (P2B) Regulation already provides rules aimed at improving fairness and transparency for business users of digital platforms. With the 10 App Store Principles, the Coalition hopes to take the P2B rules one step further and see the introduction of conduct-restricting ex-ante rules for digital app intermediaries.

### Digital Services Act's Reports Approved by the European Parliament

At the beginning of October, three European Parliament's committees have formally adopted their reports on the upcoming Digital Services Act (DSA).

The Internal Market and Consumer Protection Committee ([report authored by MEP Alex Agius Saliba](#)) requests that the principle of “*what is illegal offline is also illegal online*,” as well as consumer protection and user safety, should become guiding principles of the DSA.

The Legal Affairs Committee ([report authored by MEP Tiemo Wölken](#)) calls for EU-wide standards on how hosting platforms should moderate content and for a clear distinction between illegal and harmful (e.g., fake news or disinformation) content.

Finally, the Committee on Civil Liberties, Justice, and Home Affairs ([report authored by MEP Kris Peeters](#)) recommends keeping the limited liability regime for platforms (e.g., platforms are not required to conduct a general monitoring of information that they transmit or store and they can, with certain exceptions, benefit from liability for the content they manage). However, the report also suggests that illegal content should not only be taken down but also followed up by law enforcement and the judiciary.

The three [reports were approved](#) by the European Parliament's plenary on 20 October. The reports will feed into the Commission's work on the DSA. The Commission's DSA proposal is currently expected in December 2020.

### The European Parliament Adopted Reports on Artificial Intelligence

On 1 October, the European Parliament's Legal Affairs Committee adopted [three reports on Artificial Intelligence](#) (AI), outlining how AI should be regulated in the areas of ethics, civil liability, and intellectual property.

The [report authored by MEP Ibán García Del Blanco](#) stresses the need for a new ethically-guided and socially responsible legal framework for the development, deployment, and use of AI. Future laws should be human-centric, human-made and designed to allow for human oversight.

MEP [Axel Voss' report](#) on civil liability regime for AI, calls for a strict liability system applicable only to high-risk AI-systems (normal-to-low risk AI appliances would be covered by the normal liability regime), with the aim to strike a balance between effectively protecting victims of harm or damage, and fostering the development of new AI technologies.

The third [report, by MEP Stéphane Séjourné](#) notes the need for the assessment of intellectual property rights in light of AI developments, specifically with regard to AI-assisted and AI-generated creations.

On 20 October, the European Parliament plenary [adopted the reports](#). They will inform the Commission's legislative work in this area. The Commission is expected to put forward a legislative proposal on this in early 2021.

## ECONOMIC AND FINANCIAL AFFAIRS

### European Commission's Action Plan to Revive the Capital Markets Union

The Commission takes the view that the Capital Markets Union (CMU) is one of the key policy instruments to ensure that European companies receive sufficient financing. In this context, on 24 September 2020, it launched its new CMU Action Plan setting out a list of 16 legislative and non-legislative actions, with three key objectives, namely: (i) the support of a green, digital, inclusive, and resilient economic recovery by making financing more accessible to European companies; (ii) making the European Union an even safer place for individuals to save and invest long-term; and (iii) integrating national capital markets into a genuine single market.

Some of the most relevant actions for the financial services industry are:

1. *The development of a European Single Access Point for company data.* Accessing public financial and sustainability-related information can be difficult for investors. An EU-wide digital access platform for companies' public financial and non-financial information is aimed at reducing information search costs for cross-border investors and will widen the investor base for companies.
2. *An EU-wide system for withholding tax relief at source.* The Commission recognizes that a significant burden in this area is caused by divergent and fraud-prone refund procedures for tax withheld in cases of

cross-border investment. While Member States laws in principle allow for a refund of the tax withheld to non-resident investors, those refund procedures tend to be extremely burdensome for both tax administrations and taxpayers, leading to late refunds.

3. *The provision of incentives for insurers to provide financing to EU capital markets.* Insurers are among the largest institutional investors in the EU. However, insurers' investment in businesses and projects seeking finance from capital markets is still limited. To this end, the ongoing review of Solvency II provides an opportunity to investigate which regulatory requirements are impeding better participation of insurers in capital markets, and how to bring SMEs and midcap businesses requiring investment and insurers closer together.

As for next steps, the Commission has set an ambitious timeframe envisaging to implement the majority of the actions in 2021 or 2022.

### European Commission Adopts its New Digital Finance Package

On 24 September 2020, the Commission announced its [Digital Finance Package](#), a set of measures to harness the potential of digital finance in terms of innovation and competition, while mitigating its risks. The Package consists of:

- A [Digital Finance Strategy](#) for the EU. The Strategy is a follow-up to the Commission's previous Fintech Action Plan and sets out four main priorities: (i) removing fragmentation in the Digital Single Market; (ii) adapting the EU regulatory framework to facilitate digital innovation; (iii) promoting data-driven innovation by establishing a common financial data space; and (iv) addressing the challenges and risks associated with the digital transformation.
- A proposal for a [Regulation](#) on markets in crypto-assets. It aims to create a harmonized EU framework for the issuance, application, and provision of services in crypto-assets. Issuers of crypto-assets, depending on their respective regulatory framework, will be permitted to offer those crypto-assets to the public or admit them to trading anywhere in the EU.
- A proposal for a [Regulation](#) on a pilot regime for market infrastructures based on distributed ledger technology (DLT). Its key objective is to enable market participants to operate a DLT market infrastructure (either a DLT multilateral trading facility or a DLT securities settlement system) by establishing clear and uniform operating requirements.
- A proposal for a [Regulation](#) on digital operational resilience for the financial sector. It provides that a broad scope of financial firms should adhere to strict standards to prevent and limit the impact of incidents and threats related to information communication technologies (ICT). Overall, it intends to: (i) streamline financial entities' conduct of ICT risk management; (ii) establish a thorough testing of ICT systems; and (iii) develop procedures to monitor and manage ICT third-party risk.
- A [Retail Payments Strategy](#) for the EU. The Strategy focuses, inter alia, on: (i) exploring the feasibility of developing a 'label', accompanied by a visible logo, for eligible pan-European payment solutions; (ii) ensuring consumer protection; (iii) supporting the issuance of a euro retail Central Bank Digital Currency; and (iv) launching a comprehensive review of the application and impact of PSD2 and a legislative proposal for a new 'Open Finance' framework.

- A proposal for a *Directive* amending several EU legal acts to complement EU legislative initiatives in relation to operational resilience and crypto-assets. It comprises amendments to: (i) CRDV requirements for contingency and business continuity plans; (ii) the MiFID definition of a financial instrument to provide that such instruments can be issued on a DLT; (iii) temporarily exempting DLT market infrastructures from MiFID II; and (iv) MiFID II so that it aligns with the digital operational resilience proposed Regulation concerning the continuity and regularity in the performance of investment services and activities, resilience and sufficient capacity of trading systems, effective business continuity arrangements, and risk management.

## **INSTITUTIONAL AFFAIRS**

### **The European Commission Launches Legal Action Against United Kingdom for Breaching the Withdrawal Agreement**

On 9 September 2020, the United Kingdom presented the Internal Market Bill designed, according to the UK government, to protect jobs and trade within the United Kingdom after the end of this year's Brexit transition period. One of the main objectives of the bill is to empower ministers to pass regulations, notably on trade and state aid, even if they are manifestly incompatible or inconsistent with the Withdrawal Agreement previously reached with the European Union under what is known as the Northern Ireland protocol. Both the European Union and the United Kingdom ratified the Withdrawal Agreement, which entered into force on 1 February 2020 and has legal effects under international law.

According to article 5 of the Agreement, the European Union and the United Kingdom shall act in good faith, shall take all appropriate measures to ensure fulfilment of the obligations arising from the Agreement, and shall refrain from any measures which could jeopardize the attainment of the objectives of this Agreement.

The Commission demanded that the United Kingdom drops the contentious clauses in the Internal Market Bill by the end of September, which the UK government failed to do. Therefore, on 1 October 2020, the Commission addressed to the United Kingdom a letter of formal notice for breaching its obligations under the Withdrawal Agreement.

In terms of next steps, the United Kingdom has until the end of October to submit its observations to the letter of formal notice. After examining these observations, or if no observations have been submitted, the Commission may, if appropriate, decide to issue a Reasoned Opinion, which is a formal request to comply with EU law.

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