BRUSSELS REGULATORY BRIEF: WINTER 2023-2024

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EU Policy and Regulatory Newsletter

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ANTITRUST AND COMPETITION

The European Court of Justice Held Rules Set by Sports Governing Bodies Must Comply With EU Competition Law

On 21 December 2023, the European Court of Justice (ECJ) held in a preliminary ruling that the statutes adopted by FIFA and the Union of European Football Associations (UEFA) (Statutes) are contrary to EU competition law.

In 2021, a group of 12 European football clubs announced their intention to set up a new football league – the European Super League (ESL). FIFA and UEFA objected to this initiative and threatened to impose sanctions on the clubs and players, including disqualification from participating in any tournament. The Statutes provide that third-party competitions such as international leagues and matches require prior approval by the two associations. Therefore, the 12 European football clubs brought an action against UEFA and FIFA before the Commercial Court in Madrid on the allegation that the Statutes infringe EU competition law rules, namely Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements between undertakings, and Article 102 TFEU, which prohibits the abuse of a dominant position. The Commercial Court decided to stay the proceedings and asked the ECJ for a preliminary ruling.

The ECJ found that the two associations hold a dominant position according to Article 102 TFEU as they have the only relevant control powers to authorise the setting up and organisation of competing football competitions. Moreover, as these powers were discretionary in nature and did not include any objective and proportionate framework for access to third-party competition, the ECJ held that they could be characterised as an abuse under Article 102 TFEU. Similarly, the ECJ ruled that the pre-authorisation regime of the Statutes could be characterised as a "by object" infringement under Article 101(1) TFEU meaning that by their very nature they are anticompetitive. UEFA and FIFA can still bring forward arguments to objectively justify their Statutes under Article 102 or 101(3) TFEU before the Spanish Commercial Court.

While the ECJ found that the Statutes of the two major football associations are incompatible with EU competition law, the judgment does not, in and of itself, imply that the planned setup of a new international football league must necessarily be approved. In addition, the ECJ left the door open to some of the arguments concerning the relevance of the solidarity mechanism stemming from the UEFA's and FIFA's redistribution of media rights, which could possibly provide justification of the Statutes in the proceedings before the Spanish Commercial Court. As such, the full ramifications of the ECJ ruling remains to be seen.

SANCTIONS

Council of the European Union and European Parliament Agree on Proposal to Criminalise Violation of Sanctions

On 12 December 2023, the European Parliament (Parliament) and the Council of the European Union (Council) reached a provisional political agreement on a new EU directive requiring EU Member States to criminalise the violation of EU sanctions.

Currently, EU sanctions legislation only provides that EU Member States must adopt effective, proportionate and dissuasive penalties. The new directive will introduce a uniform baseline for penalties across the European Union with a view to filling current legal gaps and amplifying the penalties' deterrent effect.

EU Member States will be required to define certain actions as criminal offences, including:

- Trading sanctioned goods and running transactions with states or entities that are subject to EU restrictive measures;
- Providing financial services or performing financial activities that are prohibited or restricted;
- Covering up the ownership of funds or economic resources by a person, entity or body that is sanctioned by the European Union; and
- Inciting, aiding, and abetting the above actions.

Both individuals and businesses can be liable. For individuals, the directive will require EU Member States to impose maximum penalties ranging, depending on the offence, from at least one year of imprisonment to at least five years of imprisonment.

Businesses will be liable if the offence was committed to the business' benefit and by a person in a leading position, such as persons empowered to represent the business, take decisions on its behalf or with the authority to exercise control within the business. Penalties will include disqualification of business activities and the withdrawal of permits and authorisations to pursue their economic activities.

The directive will enter into force once the Parliament and the Council formally adopt the text and the directive is published in the Official Journal of the European Union.

DIGITAL AFFAIRS

European Commission Designates Second Set of Very Large Online Platforms Under the Digital Services Act

On 20 December 2023, the European Commission (Commission) confirmed the designation of a second set of three additional very large online platforms (VLOPs) under the Digital Services Act (DSA). This designation followed an investigation upon which the Commission determined that the VLOPs fulfil the criteria of having an average of 45 million monthly users in the European Union.

This second set of VLOP designations under the DSA follows and complements the first set of designations on 25 April 2023, pursuant to which the Commission designated 19 VLOPs and search engines.

Under the DSA, all online platforms and search engines, except small and microenterprises, must adhere to the DSA requirements by 17 February 2024. Key obligations include:

- Implementing user-friendly tools for reporting illegal content;
- Prioritizing reports from recognized "trusted flaggers;"
- Explaining reasons to users for content restrictions or removals;
- Offering an internal complaint system for content moderation appeals;
- Promptly alerting law enforcement of potential criminal activities, including threats to life or safety, and child sexual abuse;
- Revising systems for enhanced privacy, security and minor protection;
- Avoiding deceptive or manipulative interface designs;
- Clearly identifying advertisements;
- Eliminating targeted ads based on sensitive data profiling or directed at minors;
- Maintaining clear, fair terms and conditions and applying them diligently; and
- Publishing annual reports on content moderation.

In addition, the designated VLOPs must implement additional measures addressing systemic risks and user protection, particularly for minors, within four months from their designation. These include:

- Rigorous content moderation, including analyzing and publicly reporting on systemic risks and implementing measures to mitigate illegal or rights-threatening content;
- Enhancing internal processes and resources for identifying systemic risks;
- Designing services and interfaces with a focus on child welfare, including age verification tools; and
- Publishing detailed risk assessments about the impact on minors' mental and physical health.

The Commission, in collaboration with the Digital Services Coordinators from the platforms' Member States of establishment, will oversee the compliance of the newly designated VLOPs with DSA obligations.

FINANCIAL AFFAIRS

Member States and European Parliament Reach Provisional Agreement on New Rules for the Insurance Sector

On 14 December, Parliament and the Council reached a provisional agreement on the amended Solvency II Directive and the Insurance Recovery and Resolution Directive (IRRD). The amended Solvency II and IRRD

Directives were originally proposed by the Commission in September 2021, with the aim to make the insurance sector more resilient and future-proof.

The provisional agreement on Solvency II provides incentives to insurers to invest in long-term capital for projects that contribute to the realisation of the European Green Deal. The revised directive will introduce a new macroprudential framework in the resilience regime applicable to insurers, while more simplified and proportionate rules will reduce the administrative burdens upon small and noncomplex insurance companies. The European Insurance and Occupational Pensions Authority (EIOPA) will be mandated to elaborate further technical standards and will collaborate with the Commission in the adoption of future delegated acts.

The revised rules on IRRD set out a new harmonised regime for resolving insurers. National authorities will have preventive powers to intervene at an early stage and Member States will be mandated to set up national insurance resolution authorities. The requirement for insurance and reinsurance companies to draw and submit pre-emptive recovery plans to national supervisors will only apply to entities representing at least 60% of the respective market. Small and noncomplex companies will be exempted from pre-emptive recovery planning requirements. Within the resolution procedure mechanism, national authorities will also be provided with additional resolution tools (write-down and conversion, solvent run-offs and transfer tools).

The texts of the provisional agreements will now need to be formally adopted by both the Parliament and the Council. Once formally adopted, the amended directives will enter into force 20 days after publication in the Official Journal of the EU. The agreement reached on Solvency II relates to the Solvency II Directive and does not relate to the Solvency II Delegated Regulation, another important component of the solvency framework which will also undergo a review process at a later stage.

ENVIRONMENTAL AFFAIRS

Corporate Sustainability Due Diligence: European Parliament and Council Reach Provisional Agreement

On 14 December, Parliament and the Council reached a provisional agreement on the Corporate Sustainability Due Diligence Directive (CS3D).

For EU companies, CS3D will apply to entities with more than 500 employees and a net turnover of more than €150 million (group 1) and to companies with more than 250 employees and a net turnover of €40 million, of which €20 million was generated in high-risk sectors (e.g., manufacture of textiles, agriculture, manufacture of food, extraction of minerals - group 2). For non-EU companies, due diligence requirements will apply within three years from the entering into force of CS3D (around 2028) only to those entities generating more than €150 million in the European Union. There are no employee criteria for nonEU companies. Importantly, the Commission is required to publish a list of third country companies in scope.

For the companies falling in scope, the CS3D obligations require companies to carry out meaningful engagement (through dialogue and consultations) with affected stakeholders. Member States will be mandated to create practical portals providing information on content and criteria, information and Commission guidance on related due diligence matters. Financial services will be excluded, at least initially, from the CS3D scope, with limited obligations for financial institutions covering their duty to identify upstream risks and drawing up transition plans in accordance with Article 15 of CS3D. A review clause will allow EU legislators to revise the relevant provisions and on the basis of an impact assessment, to include financial services at a later stage.

The regime establishing a directors' duty of care, initially included in the Commission's proposal, has been deleted from the provisionally agreed text, while the civil liability framework has been reinforced by introducing stronger provisions on access to justice for the persons affected by the negative impact of a company's activities. Parliament and the Council also agreed on minimum penalties, with pecuniary sanctions of at least 5% of a sanctioned company's worldwide net turnover.

Technical work on the future provisions by the co-legislators concluded on 23 January 2024. The text will now need to be formally approved by both Parliament and the Council and will enter into force after 20 days of its publication in the Official Journal of the EU. However, it remains uncertain whether the file will conclude the legislative procedure under its current form, as the German's support of the Directive is compromised by business organisations and political parties in the coalition government. Should the text be approved, Member States will have two years to transpose it into national law. The related obligations are expected to start applying from 2027.

Provisional Agreement Reached on the European Union's Power Market Reform

On 14 December 2023, Parliament and the Council reached a provisional agreement on reforming the design of the EU electricity market, with the objective to help the European Union develop an energy system based on renewable energies, reduce energy bills, better protect consumers against price rises and provide them with the means to benefit from the transition. This provisional agreement is in line with the European Green Deal and the REPowerEU plan, which aim to ensure a sustainable and independent energy supply, and make European industry cleaner and more competitive by providing better access to affordable renewable and nonfossil energy.

This provisional agreement consists in the amendment of several pieces of EU legislation concerning the EU electricity market, including the Electricity Regulation, the Electricity Directive, and the Regulation on Wholesale Energy Market Integrity and Transparency. The objective of the revision is to achieve greater price stability for consumers and suppliers through the wider use of long-term contracts for clean electricity production and the introduction of more flexible nonfossil fuel solutions into the system, such as demand response and storage.

Under the revised legislation: (i) consumers will enjoy a wider choice of contracts and clearer information before being bound by a contract, (ii) suppliers will be required to manage their price risks at least up to the volume of fixed contracts, and (iii) Member States will have to set up suppliers of last resort so that no consumer is deprived of electricity. In addition, vulnerable consumers and the energy poor will be protected from cuts, and Member States will be able to extend regulated retail prices to households and small and medium-sized enterprises in the event of a crisis. Finally, consumers, businesses and public authorities will be encouraged to invest in wind or solar farms and to sell surplus solar electricity produced on their roof to their neighbours, not just to their supplier.

National regulators, who will have greater powers to monitor the integrity and transparency of the energy market under the coordination of the Agency for the Cooperation of Energy Regulators, will ensure the competitiveness of markets and the transparent setting of prices.

In addition, the adoption of the reform will facilitate the deployment of more stable long-term contracts, such as power purchase agreements (PPAs), through which companies will be able to establish their own direct energy supplies and can thus benefit from more stable prices for renewable and low-carbon energy production. This is designed to enhance the competitiveness of European industry by limiting its exposure to volatile fossil fuel prices. Member States will also need to ensure that market-based guarantees are available for PPAs.

The next step will be the formal adoption of the provisional agreement by Parliament and the Council.

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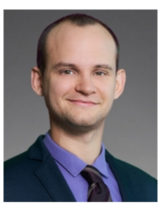

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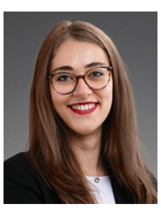

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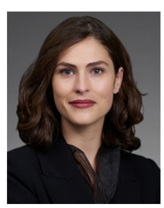

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