SEPTEMBER 2020

Welcome to the inaugural issue of the EU Regulatory & Antitrust Monitoring on Sustainability newsletter. The September issue features six key takeaways from the past month to which companies and investors operating in the EU should pay attention. Further details on these topics are included below.

6 KEY TAKEAWAYS

1

EU Commission adopts new initiatives to review the renewable energy and energy efficiency Directives

European Commission | 3 August 2020

On 3 August 2020, the European Commission published a combined Roadmap and Inception Impact Assessment on the review of the Directive 2012/27/EU on energy efficiency and on the revision of Directive 2018/2001/EU on the promotion of the use of renewable energy that comes from non-fossil sources, namely wind, solar and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas and biogas. Both the review and revision are open for feedback until 21 September 2020. See more.

2

Financial regulation – EU Commission to consider sustainable corporate governance legislation

European Commission | 1 August 2020

The European Commission’s Inception Impact Assessment for sustainable corporate governance aims to improve the framework to incentivise corporate boards to integrate stakeholder interests, sustainability risks, dependencies, opportunities, and adverse impacts into strategies, decisions, and oversight. See more.

3

Financial regulation – ESG disclosures in financial benchmarks now finalised

European Commission | 9 August 2020

The EU Commission has published the final Delegated Regulations under the Low Carbon Benchmarks Regulation, setting out sustainability criteria in order for a benchmark to qualify as an EU Climate Transition Benchmark (CTB) or EU Paris-aligned Benchmark (PAB) and setting out the environmental, social, and governance (ESG) disclosure requirements for benchmarks provided in accordance with the European Benchmarks Regulation (BMR). See more.

4

The Dutch ACM draft guidelines on sustainability agreements

ACM | 9 July 2020

The Dutch Authority for Consumers and Markets (ACM) clarifies that agreements to introduce certain environmental and climate-conscious standards, certifications, and labels, as well as certain sustainability agreements do not restrict competition and are, therefore, permitted. See more.

5

EU Commission launches public consultation on sustainable aviation fuels

European Commission | 5 August 2020

On 5 August, the Commission launched a public consultation on policy options to reduce greenhouse gas emissions in the aviation sector as part of the ReFuelEU Aviation legislative initiative. See more.

6

EIB provides The Mobility House with €15 million for smart charging technology

European Investment Bank | 18 August 2020

European Investment Bank (EIB) and the European Commission under the ‘InnovFin Energy Demonstration Projects’ support innovative energy system transformation projects up to €75 million. See more.

LEGAL & INDUSTRY UPDATES

1. EU Commission adopts new initiatives to review the renewable energy and energy efficiency Directives

European Commission | 3 August 2020 | source

Both legislative initiatives aim to review the current legislation on the promotion of the use of renewable energy and on energy efficiency, as part of the *European Green Deal,* which aims to reduce greenhouse gas emissions and to enshrine the 2050 climate-neutrality objective into EU law.

Regarding the Renewable Energy Directive, the European Commission intends to assess whether the EU renewable energy target of at least 32% Renewable Energy Sources consumption by 2030 should be raised and also review the Directive in light of the Climate Target Plan for 2030 and other initiatives including the Biodiversity Strategy, the Energy System Integration Strategy, and the Hydrogen Strategy.

The Energy Efficiency Directive aims to assess the effectiveness of the current legal framework since its entry into force in 2012, except for those elements already evaluated in the context of the Clean Energy for All Europeans Package adopted in 2018. For both Directives, the European Commission is expected to adopt a legislative initiative by the first two quarters of 2021.

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2. Financial regulation – EU Commission to consider legislation for sustainable corporate governance

European Commission | 1 August 2020 **|** source

The European Commission's initiative would help company directors establish longer time horizons in corporate decision-making and withstand short-term pressures, strengthen the resilience and long-term performance of companies through sustainable business models, and create legal certainty and a level playing field for companies.

Although the revised Non-Financial Reporting Directive should clarify the requirement to report on due diligence processes, such a requirement would still not be underpinned by a corporate obligation to carry out due diligence, including mitigation of adverse impacts.

The EU-level legislation could include a combination of the following corporate and directors' duties with a view to requiring certain limited liability companies to "do no harm" and to empowering corporate directors to integrate wider interests into decisions (building on existing corporate governance mechanisms):

i. Companies to take measures to address their adverse sustainability impacts;
ii. Company directors to take into account all stakeholders' interests that are relevant for the long-term sustainability of the firm or belong to those affected by it (employees, environment, other stakeholders affected by the business, etc.), as part of their duty of care to promote the interests of the company and pursue its objectives;
iii. An appropriate facilitating, enforcement, and implementation mechanisms accompanying these duties, including possible remediation where necessary;
iv. Other possible corporate governance arrangements, such as directors' remuneration, etc.

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3. Financial regulation – ESG disclosures in financial benchmarks now finalised

European Commission | 9 August 2020 | source

The sustainability criteria for a benchmark to qualify as an EU Climate Transition Benchmark (CTB) or EU Paris-aligned Benchmark (PAB), as well as the ESG disclosure requirements for benchmarks to be provided in accordance with the European Benchmarks Regulation (BMR), have now been established.

In particular, all financial benchmarks approved for use in the EU will need to disclose whether they track ESG criteria or not. Those benchmarks wishing to be labelled as ESG, CTB, or PAB will need to comply with detailed disclosure standards in relation to the 'E', 'S', and 'G' criteria, which are tailored to the nature of the constituent input data the index is seeking to track. Benchmark administrators that do not produce ESG benchmarks are required to disclose that fact. Significant benchmark administrators must include ESG benchmarks within their portfolio of indices.

Benchmark administrators in the scope of the rules have been required to make a more simplistic form of ESG disclosures since 30 April 2020. The in-force date of the detail under the Delegated Regulations is not confirmed. However, it is anticipated to apply by November 2020.

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4. The Dutch ACM draft guidelines on sustainability agreements

ACM | 9 July 2020 | source

According to the ACM's new draft guidelines, sustainability agreements that restrict competition will be permitted if certain conditions are fulfilled. The main condition is that the benefits of the collaboration must outweigh the disadvantages. In particular, sustainability agreements will not be anticompetitive if they "*do not or not appreciably affect competition on the basis of key competition parameters*", including for example price, quality, diversity, service, and the distribution method.

Indeed, the ACM identifies certain categories of sustainability agreements that are permitted, such as the agreements that incentivize undertakings "*to make a positive contribution to a sustainability objective without being binding on the individual undertakings*", as well as the initiatives on joint standards and certification labels about the use of raw materials, production methods, and other environmental and climate-conscious practices.

According to the draft guidelines, other permitted initiatives include agreements that create new products and markets, and those that need a joint initiative to acquire sufficient production resources, including know-how, or for achieving sufficient scale. The trade-off is that the benefits for society must be equal to or greater than the disadvantages for users. Consequently, the ACM will not impose sanctions on joint agreements when businesses have followed the Guidelines in good faith, also when "*ultimately [they] do not meet all the conditions*".

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5. EU Commission launches public consultation on sustainable aviation fuels

European Commission | 5 August 2020 | source

The Commission is currently assessing different policy options to boost the development and uptake of sustainable aviation fuels in the EU as part of the ReFuelEU Aviation legislative initiative. According to the EU Commissioner for Transport, Adina Vălean, the aviation sector has been hit heavily by the coronavirus pandemic and the objective of the ReFuelEU Aviation initiative is to use the recovery as an opportunity for aviation to become greener.

The objective of the launched public consultation is to collect stakeholder views on draft policy measures and policy options of the ReFuelEU initiative. The Commission primarily seeks views from public authorities at the EU, national, and regional levels, European and international organisations dealing with aviation and transport fuel issues, actors in the jet fuel production industry, actors in the air transport industry, and the general public. The consultation will be open until 28 October 2020.

The ReFuelEU Aviation initiative was announced as part of the European Green Deal in December 2019 and will be included in the Sustainable and Smart Mobility Strategy, which is scheduled for release in 2020 and will supersede the 2011 Transport White Paper.

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6. EIB finances The Mobility House with €15 million for smart charging technology

European Investment Bank | 18 August 2020 | source

The EIB provides The Mobility House, a technology company and solution provider of charging services, with €15 million to boost intelligent integration of electric vehicles into the power grid. In particular, the goal of The Mobility House is to integrate vehicle batteries into the power grid using intelligent charging and energy solutions. The funding will support activities in Germany, France, the Netherlands and other countries in Europe, in order to promote the use of renewables by allowing electric vehicles to be employed for energy storage in the power grid and therefore reduce costs of electric mobility.

The loan is also supported by the European Commission under the 'InnovFin Energy Demonstration Projects' facility, which is funded under the EU's current research and innovation programme Horizon 2020. Within this context, the InnovFin Energy Demonstration Projects ensure loans, loan guarantees, or equity-type financing to innovative energy system transformation projects up to €75 million.

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