

EU Law News

A bi-monthly review of EU legal developments
affecting business in Europe

- Data protection reform agreed
- Court annuls fines in airline cargo case
- State aid for banks
- Proposals for digital contract rules and online sales
- Powers of national competition authorities

Data protection reform agreed

On 15 December 2015 Member States reached consensus with European Parliament representatives and the Commission on a final text of data protection reform consisting of two instruments.

The first instrument, the General Data Protection Regulation, will replace EU's 1995 Directive (95/46/EC). The newly proposed provisions are data portability, requirements on notification of data breaches and the introduction of a "one-stop-shop" whereby companies will only have to deal with one Data Protection Authority. Citizens will have to give explicit consent for their data to be used or repurposed. They can file complaints with their own national authority, which will cooperate with other concerned authorities to resolve the complaint. The "right to be forgotten" will allow citizens to request that their data be deleted, provided that there are no legitimate grounds for retaining it. The age at which parental consent is needed for the processing of children's data was contentious. It was agreed that Member States can separately define the age threshold within a range of 13 to 16 years.

Smaller companies are exempt from the obligation to appoint a data protection officer insofar as data processing is not their core business activity. Companies based outside the EU will have to apply the same rules when offering services in the EU. The maximum corporate fine for privacy violations is 4% of a company's global revenue.

The second instrument, the Data Protection Directive for the police and criminal justice sector will ensure that the data of victims, witnesses, and suspects of crimes, is duly protected in the context of a criminal investigation or a law enforcement action. The harmonised laws are aimed at facilitating cross-border cooperation of police or prosecutors to combat crime more effectively.

Following this political agreement reached, final texts will be adopted by the European Parliament and Council early 2016. The rules will become applicable two years thereafter. The Commission intends to work closely with member state data protection authorities to ensure a uniform application of the new rules, especially through the one-stop-shop mechanism.

Court annuls fines in airline cargo case

On 16 December 2015 the EU's General Court annulled the decision by which the Commission imposed fines amounting to approximately €790m on 11 airlines for their participation in a cartel on the airfreight market. According to the court, the grounds and the operative part of the Commission's decision are contradictory. The Commission had accused the carriers of running a single cartel but only provided price fixing evidence for smaller groups of companies on specific routes.

In early 2006 investigations were initiated by the European Commission into 20 airlines on the suspicion they were coordinating the pricing of fuel surcharges and security measures imposed after the terrorist attacks in the US in 2001. In November 2010 the Commission fined 11 airlines, including Japan Airlines, Cathay Pacific Airways, Cargolux Airlines International, Latam Airlines, Singapore Airlines, Deutsche Lufthansa, British Airways, SAS Cargo Group, Air France-KLM, and Martinair Holland. Lufthansa and its Swiss Airlines subsidiary had been supplying information and due to the Commission's leniency program have not been fined. The European Commission considers an appeal to the European Court of Justice.

State aid for banks

In December 2015 the European Commission published several cases regarding state aid to banks. Under EU law it is mandatory that schemes ensure that covered deposits are paid out when a bank is liquidated and exits the market. Such schemes generally do not constitute state aid. However, they may involve additional elements that fall foul of state aid law.

On 23 December 2015 the Commission concluded that the support granted by the Italian mandatory deposit guarantee scheme to Banca Tercas constituted incompatible state aid. In 2014, the Italian mandatory deposit guarantee scheme Fondo Interbancario di Tutela dei Depositi (FITD) paid Banca Tercas €300m in support through capital injections and guarantees in order to cover the losses of the bank and support its sale to Banca Popolare di Bari. The Commission decided that the FITD intervened beyond this pay-out function to depositors by granting support to a bank in difficulty and acted on behalf of the Italian state. Italy did not present a restructuring plan, subordinated creditors did not make any contribution to the cost of restructuring and no measures were implemented that would have sufficiently limited distortion of competition. The Commission did not find evidence of aid to the buyer, Banca Popolare di Bari. All depositors remained protected as part of the support measures.

On 21 December 2015 the Commission approved a prolongation of Portuguese state guarantees on bonds in the nominal amount of €3.5bn, issued by Portuguese bank Novo Banco. In 2014 the Commission had approved the resolution of Banco Espírito Santo and the immediate creation of Novo Banco as a bridge bank, which received a capitalisation of €4.9bn and is fully-owned by the Portuguese Resolution Fund. Portuguese authorities have now committed to additional restructuring measures to improve the bank's viability and efficiency, which would facilitate a sale in 2016.

On the same date the Commission approved Portuguese plans to provide €2.25bn of state aid to cover the funding gap in the

resolution of Banco Internacional do Funchal S.A. (Banif). An additional €422m covers the transfer of impaired assets to an asset management vehicle. A buffer in the form of a state guarantee to cater for potential recent changes of values in the part sold to Banco Santander Totta, brings the cost of the total measures up to €3bn. The package follows the Bank of Portugal's decision to put Banif into resolution on 19 December 2015. The aid would facilitate the sale of a large part of Banif's activities, including its deposits, to a strong purchaser. It would support the orderly wind-down of Banif's impaired assets. The exit of Banif from the market sufficiently addresses the distortions to competition arising from the significant amount of aid while all depositors continue to remain protected.

Between 4 and 18 December 2015 the Commission decided three more cases. It has approved additional state aid of €175m in favour of the Cooperative Central Bank Limited in Cyprus. It has also decided that resolution support by the Bank of Greece for Cooperative Bank of Peloponnese does not involve state aid and that Hungarian plans to grant state aid for the restructuring of Hungarian bank Magyar Kereskedelmi Bank Zrt are also in line with EU rules. Finally, the Commission has also opened an in-depth assessment concerning aid granted by Denmark to Vestjysk Bank.

Proposals for digital contract rules and online sales

On 9 December 2015 the European Commission published three proposals as part of its Digital Single Market Strategy to ensure better access for consumers and businesses to online goods and services across Europe. The first proposal is on the supply of digital content such as streaming of music while the second proposal is regarding the online sale of goods. The proposals aim to tackle obstacles to cross-border e-commerce such as legal fragmentation of consumer contract law and to increase consumer trust when buying online.

The digital contracts proposal would lift legal barriers by harmonising contractual rights throughout the EU. Businesses would be able to supply digital content or sell goods to consumers under the same set of key contract law rules. Regarding consumer rights in case of defective goods, Europe still works with 28 partly different sets of consumer contract laws, as there are only minimum EU requirements in place. Under the proposed rules for online purchases a consumer will be able to enjoy a two-year guarantee period. In the case of a defective product the burden of proof will be reversed and the consumer can ask for a remedy within that time period without having to prove the defect existed at the time of delivery.

The Commission presented a third proposal to allow Europeans to travel with their online content and an action plan to modernise EU copyright rules. Cross-border portability, a new

EU right for consumers, is expected by 2017, the same year as the end of roaming charges. As a Regulation, once adopted, it would be directly applicable in all 28 EU Member States.

Powers of national competition authorities

On 4 November 2015 the European Commission invited stakeholders to provide feedback on potential EU legislative actions to further strengthen the enforcement and sanctioning tools of national competition authorities in the context of EU anti-trust rules. The Commissioner in charge of competition policy, Margrethe Vestager, stated that national competition authorities have played a key role in enforcing EU antitrust rules alongside the Commission.

The entry into force of Regulation 1/2003 in 2004 transformed the European competition enforcement landscape by giving national competition authorities and national courts a key role in applying the EU rules on restrictive business practices and abuses of dominant market positions according to Articles 101 and 102 of the Treaty on the Functioning of the European Union. However, that regulation did not address the means and instruments by which national competition authorities can apply EU rules. For example, not all national competition authorities have effective leniency programmes that encourage companies to come forward, possibly in several jurisdictions, with evidence of illegal cartels. National competition authorities may also face difficulties relating to their powers of investigation as some national competition authorities cannot gather evidence stored on digital devices when inspecting the premises of a suspect, or lack the ability to impose effective fines for anticompetitive behavior.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

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