BRUSSELS REGULATORY BRIEF: APRIL

Date: April 2016

European Regulatory / UK Regulatory Newsletter

By: Francesco Carloni, Giovanni Campi

ANTITRUST AND COMPETITION

A welcome limitation on the investigatory powers of the Commission when requesting information from companies

On 10 March 2016, the Court of Justice of the European Union ("CJEU") set aside an information request decision of the European Commission ("Commission") to several cement producers in a cartel investigation. The CJEU found the request for information to be excessively brief, vague and generic, especially considering the considerable number of questions and the very different types of information requested.

Information request decisions shall require only information which may assist the Commission in investigating its suspicions of infringement. The CJEU clarified the legal standard for the Commission's information request decisions to be legal. In particular, they must describe the legal basis for the request, state the purpose and reasons justifying the request with sufficient precision, specify the information which the request is intended to reveal, and fix a time-limit within which the information is to be provided.

The CJEU found that the Commission did not meet the above requirements given that, inter alia, the Commission's information request decision was sent when it already had sufficient information about the case (gathered through dawn raids and previous requests for information). As a result, the CJEU annulled the Commission's request.

The ruling provides welcome clarity on the limits of the Commission's investigative powers in antitrust cases. In particular, it clarifies that the Commission must provide clear and concrete reasons where it requests information, and that it is not allowed to go on 'fishing expeditions' beyond the specific scope of suspected infringements or with vague purpose. The requirement to state "the purpose of the request" will prevent the Commission from relying on requests for information to get disproportionate – and often irrelevant – amounts of information and ensure the respect of the rights of defense of companies targeted by the information request decisions.

As a consequence of the application of the legal standard described above, companies may benefit from clearer, more specific and justified information requests from the Commission. This could in turn potentially reduce their burden in terms of both time and resources when responding to such requests.

The Court of Justice of the EU reaffirms that EU and Member States leniency programs are independent

The CJEU recently ruled that EU and Member State leniency programs function independently. In other words,

©2005-2026 K&L Gates LLP. All Rights Reserved.

companies which obtain leniency or immunity in an EU cartel investigation are not entitled to leniency/immunity in related national investigations.

The judgment (dated 20 January 2016) originated from a request for a preliminary ruling by Italy's Council of State. It reaffirmed the freedom of national competition authorities to adopt leniency programs and that each of those programs shall be regarded as autonomous both from other Member State's programs and the EU leniency program.

The CJEU's ruling further strengthens the need for companies to be extremely careful when preparing and submitting leniency applications to the Commission and national competition authorities. In particular, they must ensure that they file leniency applications in all potentially relevant jurisdictions, that these applications are consistent as regards the scope of conduct covered, and that they provide sufficient information to the national competition authorities. If they do so, they are covered should the Commission limit its investigation to only certain aspects of a cartel, leaving the national competition authorities free to pursue other aspects of the cartel at the national level.

The Commission is expected to take into account the CJEU's findings when publishing its reports on its recently closed public consultation aimed at strengthening the national competition authorities' enforcement powers. This may also fall within legislative proposal reforms at the EU level.

INTELLECTUAL PROPERTY

Commission takes action to allow better access to online digital goods and services

On 29 February 2016, EU ministers meeting in the framework of the 'Competitiveness Council' were briefed by the Commission on its proposal for a regulation on cross-border portability of online content services in the internal market unveiled on 9 December 2015.

This proposal is among the first legislative initiatives put forward by the Commission to deliver on its objective of creating a real Digital Single Market (DSM) within the EU.

It intends to ensure that every consumer has full access to whatever online content he/she is entitled to in his/her country of residence, whenever he/she is temporally in another EU country. This is imposed as an obligation to any service provider providing an "online content service" (including other content such as sports or news). As this "access from abroad" will clash with territorial obligations assumed by the service provider, the Regulation imposes the legal fiction according to which "access to and use of this service shall be deemed to occur solely in the Member State of residence". In other words, more or less like diplomats in some civil law issues, a traveller, an exchange student or a temporary worker abroad will be considered as not having left the country of residence for the purpose of access to that country's online content. Any contractual provision banning this will be considered void and not enforceable.

Member States' civil servants met within the Council of the EU ("Council")'s Working Party on Intellectual Property for the third time on 21 March 2016 to examine the first compromise proposal presented by the Dutch Presidency of the Council for discussion. The discussions on technical level are likely to speed up in the coming weeks/months as the Dutch Presidency aims to reach a General Approach at the joint Telecom/Competitiveness Council to take place on 26 and 27 May 2016.

©2005-2026 K&L Gates LLP. All Rights Reserved.

On the European Parliament's side, Marco Zullo (EFFD, IT) was appointed rapporteur on this text on 2 February 2016 after the proposal was referred to the Internal Market and Consumer Protection (IMCO) Committee on 21 January 2016.

PRIVACY, DATA PROTECTION AND INFORMATION MANAGEMENT

Commission and United States agree on a new arrangement for transatlantic commercial data flows: the EU-U.S. Privacy Shield

On 2 February 2016, the Commission announced (here) it had reached a political agreement with the U.S. government on a new framework for transatlantic data flows named EU-U.S. Privacy Shield. This new commercial data sharing pact is intended to replace the old 2000 EU-U.S. Safe Harbour framework knocked down by the CJEU on 6 October 2015 in the Schrems case, and aims at rebuilding trust in transatlantic data flows through stronger safeguards.

On 29 February 2016, the Commission released the legal texts putting the EU-U.S. Privacy Shield in place which include a Commission's draft adequacy decision (here), the EU-U.S. Privacy Shield framework principles (here) issued by the U.S. Department of Commerce as well as U.S. government's written commitments on the enforcement on the agreement. Additionally, the Commission published a Communication (here) taking stock of the actions taken to rebuild trust in transatlantic data exchanges since Snowden's revelations in 2013 on U.S. mass-surveillance practices.

This new arrangement contains several new elements compared to the annulled EU-U.S. Safe Harbour framework: (i) creation of an independent Ombudsperson within the U.S. State Department in charge of treating complaints relating to access of U.S. intelligence agencies to personal data, (ii) enhanced EU citizens' rights with several redress mechanisms and (iii) an annual joint review mechanism aimed at monitoring the proper functioning of the new framework.

Article 31 Committee bringing together expert representatives of each Member States administration met on 7 April to start reviewing the details of the Privacy Shield agreement. The Article 29 Working Party gathering EU data protection authorities ("DPAs") met on 13 April and issued a non-biding opinion on the Privacy Shield. Although not legally binding, this opinion carries some political weight since DPAs will be tasked with investigating complaints and can potentially bring data transfers to the U.S. to a halt. The opinion of the Article 29 Working Party consists in a request of further elucidations on three key points. First, the EU DPAs demand assurance against bulk collection of data by the US intelligence agencies; second, they demand a clarification concerning the powers and the independence of the Ombudsman and, finally, the regulators ask a revision of the agreement in two years to ensure it complies with the General Data Protection Regulation that will be implemented in that period.

The Article 31 Committee will adopt a binding opinion on 19 May, under the comitology "examination procedure", by qualified majority voting before the College of Commissioners can formally adopt an adequacy decision determining that the U.S. legal order ensures a level of protection of personal data equivalent to EU standards. The Commission is expected to have the Privacy Shield into force by June 2016.

ENERGY AND RENEWABLES

©2005-2026 K&L Gates LLP. All Rights Reserved.

The Commission adopts the Sustainable Energy Security package

On 16 February 2016, the Commission issued a Sustainable Energy Security package ("**SESP**") to address possible natural gas supply disruptions across the EU.

The program promotes moderation of energy demand, improvement of cooperation among EU Member States, diversification of energy sources, as well as infrastructure development and wider involvement in the liquefied natural gas ("**LNG**") market.

The SESP consists of policy and regulatory measures of different nature to be ratified and implemented by different authorities, at both European and national level. It embraces four key areas:

- *Security of gas supply regulation*: proposed by the Commission, it foresees a set of measures to defend the security of gas supply and proposes a shift from a national to a regional level when planning security of supply measures;
- *Decision on intergovernmental agreements*: a set of rules proposed by the Commission introduces an obligation of *ex-ante* compatibility control, forcing Member States to warn the Commission of the intergovernmental agreements they intend to conclude with non-EU countries;
- *LNG and gas storage strategy*: a Communication from the Commission aiming to expand the access of all Member States to LNG, to build the infrastructure necessary to complete the internal energy market and to determine the projects essential to put an end to the dependency of some Member States on a single natural gas provider;
- *Heating and cooling strategy*: a Communication from the Commission that focus on easing decarbonisation in buildings and industry.

Increased LNG imports can diversify EU's gas supply portfolio, with important consequences in terms of increased independence of Eastern and Southern European countries from a single-source, reinforced European negotiating power with Gazprom and, finally, a better security of supply.

To this end, Member States must develop their infrastructure to fully participate in the natural gas market across Europe. The package acknowledges the necessity of additional pipelines and their connection to face the diverse gas storage capacity among MS.

The SESP will encourage wider access to the LNG global market, increasing competition for European gas customers, thus decreasing gas prices for consumers.

However, several challenges persist. First, the further expansion of European natural gas market, which has been a vague goal for years, and also infrastructure development, which will require considerable capital investment. Second, participation in the global natural gas market leads to competition for gas supplies with traditional LNG purchasers and with emerging consumers, as well as to an increased reactivity to global economic and non-economic factors that can alter consumer prices.

TRANSPORT

EU Passenger Name Record (EU PNR) data

©2005-2026 K&L Gates LLP. All Rights Reserved.

In 2011, the Commission put forward a proposal for a Directive on the use of Passenger Name Record (PNR) data. PNR data is information provided by passengers and collected by air carriers during reservation and check-in procedures, such as contact details, travel dates and travel itinerary, ticket information, baggage information and payment information, which, according to the directive proposal, would be used for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

In April 2013, the proposal was rejected by the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee due to concerns over interference with fundamental rights of privacy and data protection. Indeed, while it is common for law enforcement to request transfer of personal data for a specific person, suspected of a particular crime, the PNR scheme allows proactive systematic checks on large sets of data regarding all passengers, thus affecting millions of non-suspect people. Many stakeholders questioned the necessity and proportionality of this intrusive measure and rather saw it as another step on the road to a surveillance society.

However, following the Paris attacks of January 2015 and in view of the fight against terrorism and the phenomenon of foreign fighters, the PNR proposal once again came under the spotlight. Hence, the European Parliament committed to finalising the EU PNR directive by the end of 2015.

Under the directive, air carriers must provide member states' authorities with the PNR data for extra-EU flights (i.e. flights entering or departing from the EU). It will also offer member states the possibility to collect PNR data concerning intra-EU flights. The member states are required to set up a Passenger Information Unit, which will receive the PNR data from the air carriers.

The PNR data is to be retained for a period of five years: the data will be "unmasked" (i.e. will include personal identifying information) for the first six months; for the remaining four and a half years, the data will have to be "masked out" or depersonalised, and will only be fully accessible under very strict and limited conditions.

The Paris attacks of November 2015 and the recent Brussels attacks of March 2016 moved the directive adoption process again in a higher gear. On 4 December 2015, the Council approved the compromise text agreed with the European Parliament. On 10 December 2015, it was endorsed by the LIBE Committee. The draft directive has since been adopted by Parliament as a whole on 14 April 2016, and will then have to be formally approved by the Council. Transposition of the EU PNR directive into national laws will be required within two years after its entry into force.

ECONOMIC AND FINANCIAL AFFAIRS

Finalisation of transatlantic negotiations on central counterparties

Concluding a long process, the Commission and the United States Commodity Futures Trading Commission ("**CFTC**") agreed on a common approach to regulate transatlantic central counterparties ("**CCPs**"). The objective of this common approach is to simplify the regulatory requirements for EU and US CCPs wishing to provide their services across the Atlantic and to ensure that CCPs on both sides of the Atlantic operate to the same high standards and at a comparable level of cost to their participants.

©2005-2026 K&L Gates LLP. All Rights Reserved.

The political agreement was followed by the adoption by the Commission of an equivalence decision which formally recognises that the US regulatory framework for CCPs provides equivalent safeguards and guarantees as the EU framework. In practical terms, this implies that CCPs recognised by the CTFC will be granted the qualifying CCP status by the European Markets and Securities Authority ('ESMA'). This status enables them to provide clearing services under the same regulatory requirements as EU CCPs.

Similarly, the CTFC adopted a substituted compliance framework for dually-registered CCPs based in the EU. It formally recognised the EU regulatory framework for CCPs to be comparable to the US one.

Progress in the adoption of the anti-tax avoidance package

As a follow up to the Organisation for Economic Cooperation and Development ("**OECD**") Base Erosion and Profit Shifting ("**BEPS**") initiative endorsed by the G20 in November 2015, the Commission presented on 28 January 2016 an Anti-Tax Avoidance Package. The package contains two legislative proposals for which the legislative process is currently ongoing. The first is a proposal for an Anti-Tax Avoidance Directive ("**ATAD**") which would provide legally-binding anti-abuse measures. The second is a proposal to revise the Administrative Cooperation Directive ("**DAC4**") to introduce further transparency provisions and particularly the automatic and mandatory exchange of country-by-country reporting ("**CbCR**") information between national tax administrations.

Meeting on 8 March, the ECOFIN Council reached a political agreement on DAC4. Work on ATAD is still ongoing but both the Commission and the Presidency aim to swiftly adopt the text. The European Parliament, via a draft report prepared by Hugues Bayet (S&D, BE), proposed a series of amendments, including giving the Commission more visibility on information exchanged by national authorities.

The ECOFIN Council also adopted conclusions on the reform of the Code of Conduct Group on business taxation to enhance its governance and transparent functioning.

In addition to the Anti-Tax Avoidance package, the Commission published on 12 April 2016 a proposal to increase public tax transparency. In the context of the Panama Papers, the Commission proposes to make country-by-country reports public, thus going further than the OECD recommendations. Under the proposed rules, country-by-country reports for EU Member States and tax havens will need to be published on the websites of companies operating in the EU.

MiFID II/MiFIR developments

The Commission put forward legislative proposals to postpone by one year the MiFID II/MiFIR application date to 3 January 2018.

During the legislative process related to the MiFID II/MiFIR postponement, the European Parliament is seeking to modify some elements of the legislation. The reports on MiFID II and MiFIR prepared by Markus Ferber (EPP, DE) introduces amendments to clarify the exemption for trading on own account. Other amendments are proposed to on the regime of package transactions in order to better take into account their specificities. The ECON Committee of the European Parliament adopted the two reports on 7 April 2016.

©2005-2026 K&L Gates LLP. All Rights Reserved.

At the same time, ESMA and the Commission have been exchanging letters on specific MiFID II/MiFIR regulatory technical standards (RTS), on ancillary activity exemptions, position limits to commodity derivatives and non-equity transparency requirements. The Commission requested ESMA to rework the relevant draft RTS.

In the meanwhile, on the 7th April, the Commission started publishing delegated acts for MiFID II (Delegated Directive on safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits).

KEY CONTACTS



FRANCESCO CARLONI
OFFICE MANAGING PARTNER, BRUSSELS

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



GIOVANNI CAMPI
SENIOR POLICY DIRECTOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.