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RECHTSANWÄLTE

# European Law - News

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**Content:** Competition law (Vertical Block Exemption Regulation for the motor vehicle sector, Revised Guidelines), banking law (common deposit guarantee, bank resolution), regulation of the markets for crypto assets, data protection law (dismissal of data protection officers), State aid law (combined heat and power).

## (1) Competition law – Vertical Block Exemption Regulation for the motor vehicle sector extended and revision of the Supplementary Guidelines

The European Commission has extended the Vertical Motor Vehicle Block Exemption Regulation (Regulation (EU) No. 461/2010) for five years until 31 May 2028 (Regulation (EU) 2023/822 of 17 April 2023). In addition, the Supplementary Guidelines were revised. This is intended to provide the motor vehicle industry with greater certainty as to how vertical agreements are to be legally assessed against the background of EU competition law.

Above all, the technical development with a stronger digitalisation of cars has brought with it that in future much more attention is to be paid to vehicle-generated data. Not only car manufacturers should be able to access such data, but also independent market participants such as independent repairers, spare parts manufacturers, automobile clubs, etc. for the delivery of services, for repairs, for maintenance or e.g. for the production of spare parts or tools. The access of independent market participants to technical information has therefore been expanded to access essential inputs, which above all also include vehicle-generated data.

When considering withholding on security grounds a particular item that is essential for repair and maintenance from other market participants, a proportionality test must first be carried out.

More detailed guidance on the European Commission's standard of review can now also be found in the revised Guidelines for agreements containing so-called hardcore restrictions as

serious restrictions of competition. The text of the revised Guidelines is primarily based on likelihood considerations.

## (2) Banking law: Reform of crisis mechanism in the banking sector and European deposit insurance framework

The European Commission is once again attempting to complete the Banking Union in the EU. To this end, it presented a package on 18 April 2023 to reform crisis management in the banking sector and deposit insurance framework. The European Bank Recovery and Resolution Directive (2014/59/EU), the European Single Resolution Mechanism Regulation (806/2014) and the European Deposit Guarantee Schemes Directive (2014/49/EU) are to be formally amended.

From the European Commission's point of view, medium-sized and smaller banks were resolved too rarely across Europe because it was resorted too often to mechanisms that were outside the harmonised resolution framework. This approach is to be changed in the future.

In Germany, savings banks and cooperative banks in particular are alarmed as to whether this will question the tried and tested three-pillar model and their own institutional protection schemes. In a questions and answers catalogue, the European Commission states:

"*The most sustainable way to reduce the risk of shortfalls in national deposit guarantee schemes remains the mutualisation of such schemes at a pan-European level as it would increase the resilience of funds against significant depletion events. The current rules provide for the possibility for national deposit guarantee schemes to voluntarily lend to each other, but in the absence of a political agreement to establish a European Deposit Insurance Scheme, today's reform cannot fully avoid the risk of shortfalls in national deposit guarantee schemes. According to the ECB, every Member State has at least one medium-sized or smaller bank for which a reimbursement of covered deposits would fully deplete the national deposit guarantee scheme. Therefore, pay-outs in case of liquidation presents the biggest danger of shortfalls for deposit guarantee schemes.“*

In a joint Declaration and Call for Action, institutional protection schemes of the banking industry from Austria, Germany, Italy, Poland and Spain immediately expressed their view and their postulations. For the further negotiations on the legislative package, they demand that the functionality of their systems be maintained even in the event of a reform of the crisis mechanism. In line with the subsidiarity principle, which is also expressly recognised and justiciable under EU law, they demand that the current prerogative of their institutional protection schemes mesures having priority over actions of a resolution authority ist maintained. In addition, when applying preventive measures, a distinction must be made between pure Deposit Guarantee Schemes and those Deposit Guarantee Schemes that are recognised as institutional protection

schemes under EU law. For the latter, the current provisions on the use of funds from the financing of deposit guarantee schemes should be maintained (Art. 11 of the Deposit Guarantee Schemes Directive).

In any case, according to the EU's plans, the coverage level of € 100,000 per person and institution for deposit protection should remain, and in exceptional cases, for example in the case of certain events such as inheritance, it should also extend beyond this. Public institutions such as schools and hospitals should also be able to benefit from depositor protection.

## (3) Crypto Assets: EU-wide regulation of the markets for crypto assets (Markets in Crypto Assets – MiCA)

On 20 April 2023, the European Parliament adopted a regulatory framework in the form of a European Regulation for crypto assets, including cryptocurrencies, in its first reading. The regulatory instrument is known as Markets in Crypto Assets = MiCA Regulation. If approved by the Council and promulgated in the Official Journal of the EU, it will realize the application of EU-wide rules for crypto assets that are not already covered by the existing rules in the financial services sector. According to the envisaged regulations, crypto securities transactions are to be regulated and greater transparency is to take effect. In particular, regulations on supervision, consumer protection and environmental protection are envisaged. The fight against crime and money laundering in particular are an essential goal of the planned regulations. In order to create an incentive to limit energy consumption in the creation and use of cryptocurrencies as much as possible, an obligation for important service providers to disclose their energy consumption is planned. Transactions by issuers and traders of cryptocurrencies will be monitored in accordance with the new regulations. Various service providers in the crypto sector will need a licence, but will then be able to operate across national borders throughout the EU. The intended Regulation can be expected to enter into force in June 2023.

## (4) Data protection law: European Court of Justice, judgment of 9 February 2023, C-453/21 (X-FAB Dresden GmbH & Co. KG ./. FC): Dismissal of data protection officers

In Germany a case before the European Court of Justice (ECJ) concerning the dismissal of data protection officers attracted a lot of attention. The background to the referral by the German Federal Labour Court was that, according to Article 38 (3) sentence 2 of the European General Data Protection Regulation (GDPR), a data protection officer "may not be dismissed or disadvantaged by the controller or processor for the performance of his duties". In national German law, Section 6 (4) sentence 1 of the Federal Data Protection Act (BDSG) refers in a more restrictive manner to the fact that the dismissal of the data protection officer is only permissible in

accordance with Section 626 of the German Civil Code (BGB), i.e. there would have to be an important reason in the sense of this stipulation, on which an immediate termination of an employment relationship can be based according to the BGB. This is the case if there are facts on the basis of which the dismissing party, taking into account all circumstances of the individual case and weighing the interests of both contracting parties, cannot reasonably be expected to continue the activity of the data protection officer(s) until the expiry of the notice period or until the agreed termination of the appointment relationship. The ECJ ruled in its judgment of 9 February 2023 that the European law standard of Art. 38 (3) sentence 2 GDPR does not preclude a stricter national standard, provided that the national standard does not impair the achievement of the objectives of the GDPR. This, in turn, must be ensured by a national court.

In addition, the ECJ commented on the understanding of Art. 38(6) GDPR. According to this, the data protection officer(s) may perform other tasks and duties. The controller or processor must ensure that such tasks and duties do not lead to a conflict of interest. According to the ECJ, a "conflict of interest" may exist if a data protection officer is entrusted with other tasks or duties which would lead him to determine the purposes and means of the processing of personal data at the controller or its processor. Again, this is to be examined in more detail by the courts of the Member States.

## (5) State aid law: Pending proceedings before the (European) General Court, Case T-409/21: Federal Republic of Germany ./. European Commission concerning cogeneration

By decision of 3 June 2021, the European Commission had approved various amendments to the Combined Heat and Power Act (KWKG) notified by Germany - possibly as a precautionary measure - (State aid SA.56826 (2020/N) - Germany - *Reform 2020 of the support scheme for combined heat and power* and State aid SA.53308 (2019/N) - *Germany - Amendment of the support scheme for existing CHP plants (§ 13 KWKG)*).

The Federal Republic of Germany then brought an action for annulment before the General Court of the EU against this decision insofar as „a) the support to the production of CHP electricity in new, modernised and retrofitted highly efficient CHP installations, (b) the support to energy-efficient district heating/cooling networks, (c) the support to heat/cooling storage facilities, (d) the support to the production of CHP electricity in existing highly efficient gas-fired CHP installations in the district heating sector, and (e) the reduced CHP surcharge for hydrogen producers are considered to be qualified as State aid under German Combined Heat and Power Law (Kraft-Wärme-Koppelungs-Gesetz, KWKG) 2020."

Oral proceedings in the case were held before the General Court on 4 May 2023. Germany is of the opinion that the Commission misinterpreted and misapplied Article 107(1) of the Treaty

on the Functioning of the EU. According to this provision, unless the European Treaties provide otherwise, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market insofar as it affects trade between Member States.

Specifically, contrary to the arguments put forward by the European Commisison, Germany considers that the fiscal nature of a surcharge of itself does not imply the funds raised having the characteristic of State resources.

In addition, neither the KWKG levy under the KWKG 2020 nor the surcharges paid to the plant operators by the network operators constitute a tax within the meaning of the ECJ case law.

Furthermore, Germany assumes that resources received by the transmission system operators are not under public control and are thus not at the disposal of the State.

The decision from Luxembourg is eagerly awaited, as the questions raised are of a more fundamental nature and, in view of the frequent amendments to the KWKG and other norms in energy law, can have a not inconsiderable impact on how far-reaching national scope is here for subsidy measures without running the risk of infringing European law.

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