

Brussels Brief

A weekly overview of the regulatory, legal and political developments of the institutions and the issues facing the European Union



17 February 2006

Key Developments

Competition: Global Investigations into Suspected Air Cargo Cartel

Yannis Virvilis

This week the European Commission conducted “dawn raids” of several large airline operators for alleged price fixing in the cargo market. It is believed that these “dawn raids” fall within a global investigation into this market by European and US regulators. The companies under investigation include large groups operating worldwide such as AirFrance-KLM, American Airlines, British Airways, Cathay Pacific, Lufthansa, SAS and United Airlines. The investigations by the competition authorities involve allegations of anti-competitive agreements regarding certain surcharges that the airlines imposed, such as fuel surcharges or surcharges for additional security measures or war-risk insurance premiums. In Europe, companies found to be guilty of participating in a cartel are potentially liable to fines of up to 10 per cent of their annual turnover.

Competition: Commission Closes Probe into CD-Recordable Patent Licensing Scheme

Alana Tervo

A complaint by an association of European manufacturers of CD-Recordable discs has led to the abandonment of a Philips-administered patent pool in Europe. The individual licensors participating in the pool (Philips, Sony and Taiyo Yuden) now must grant licences to use each of their own CD-R patents on an individual basis. The complaint has also led to changes in Philips’ own CD-R disc licensing programme in Europe. These include: (i) a four-month retrospective royalty reduction from 4.5 US cents to 2.5 US cents per disc; (ii) the publishing of independent reports on Philips’ website regarding Philips’ patents essential to produce CD-R discs; (iii) an obligation on Philips to address technical problems associated with the management of the CD-R standard; and (iv) updating the CD-R standard to clarify that discs using high speed recording technologies other than Philips’ qualify as CD-R discs. The European Commission closed the case after these changes to the programmes led to the withdrawal of the original complaint.

Internal Market: Report on Public Response to Investment Fund Green Paper

Philip Bentley QC

The European Commission has published an analysis of over 120 responses from the European fund industry and other stakeholders to its July 2005 Green Paper on the enhancement of the EU framework for investment funds. This analysis will feed into the Commission’s White Paper on investment funds, scheduled for publication in August 2006. There is strong support for (i) improvement of the implementation of the Undertakings for the Collective Investment of Transferable Securities (UCITS) III Directive (ii) further work on the Simplified Prospectus to make it more investor-friendly, and (iii) expanding the range of single market freedoms available to fund managers, provided this does not prejudice investor protection.

Trade: WTO Appellate Body Condemns US FSC Export Subsidies

Michal Cieplinski

The World Trade Organisation (WTO) Appellate Body has again condemned US federal tax subsidies in the Foreign Sales Corporation (FSC) dispute. In 2000 a WTO Panel ruled in favour of the EU, concluding that the tax subsidies under the Foreign Sales Corporation legislation violated WTO rules. Subsequent WTO Compliance Panels found that through its “transitional” measures, the American Job Creation Act allowed US companies to continue to benefit from the export subsidies for many years. The current WTO Appellate Body decision obliges the US to bring its legislation into line with its WTO obligations within 60 days or face the possibility of EU retaliatory measures.

Mergers: Commission Clears Joint Acquisition of Erdemir by Arcelor and OYAK

Andrea Hamilton

The European Commission has cleared the joint acquisition of Erdemir, Turkey’s largest steel producer, by Arcelor SA of Luxembourg and OYAK, the Turkish armed forces’ pensions fund. Arcelor is a major European steel producer that is primarily active in four market sectors: flat carbon steel, long carbon steel, stainless steel, and steel related services. The

Commission found that Arcelor's and Erdemir's activities overlap primarily in the markets for specific types of carbon steel flat products, but that Erdemir's exports of such products to European Economic Area (EEA) countries are negligible. As a result, the Commission concluded that Arcelor will realise only a slight market share increase, while competitors, including ThyssenKrupp and Corus, remain active in these markets. ThyssenKrupp has repeatedly denied reports that it intends to acquire Corus. Meanwhile, Mittal Steel recently made a hostile bid to acquire Arcelor.

State Aid: Commission Clears Public Purchase of Austrian SME Bonds

Philip Torbøl

The European Commission has decided to allow Austria Wirtschaftsservice GmbH (AW) to participate in a portfolio of bonds issued by small and medium enterprises. AW is a public body that administers the award of grants to Austrian companies and its participation will amount to ten per cent of the total EUR 300 million bond portfolio. Because AW's participation would be made on market conditions that would have been acceptable to a private investor, the Commission found that it did not constitute State aid within the meaning of the EC Treaty.

Product Liability: "Producer" Can Include Distribution Subsidiary

Hannah Wilson

Following a reference from the High Court of England and Wales, the European Court of Justice (ECJ) in Case C-127/04 has ruled that a product is put into circulation when it is removed from the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public for use or consumption. The reference was made in the course of litigation in which the claimant had mistakenly issued proceedings against one company believing it to be the manufacturer. It later transpired that the company was only a subsidiary of the manufacturer. New proceedings were issued against the parent company, who responded by declaring that they were issued too late and were statute-barred. The issue was therefore whether the subsidiary was the producer. The ECJ did not answer this question but said that it was for the national courts to decide by application of the principle set out above.

Public Procurement: Exclusion of Tenderer for Failure to Pay Social Security/Taxes

Elena Kostadinova

The undertakings La Cascina, Zilch and G.f.M tendered to the Italian Ministry of Defence for the award of a contract to supply catering services. The contracting authority excluded them from the procedure because they were not in compliance

with regard to their social security and tax situation. These undertakings sought annulment of this decision. They claimed that Italian law and practice allowed them to regularise their situation at a later date and they had done so. A question of interpretation of Council Directive 92/50/EEC on public service contracts was referred to the European Court of Justice (ECJ). The ECJ observed that the Directive did not prevent Member States from imposing less onerous obligations, and therefore they can choose to allow a tenderer to regularise his tax/ social security situation at a later date, provided he does so within a period prescribed by law. Such deadline must in any event be before the award of the contract.

Justice and Home Affairs: Modified Proposal on Cross-Border Disputes

Iveta Mikelsona

The European Commission has modified a proposed Regulation on the law applicable to non-contractual obligations ("Rome II"). The proposed Regulation will harmonise Member States' rules on conflict of laws in this area. The original proposal was made in 2003 and modified by the Commission after a first reading by the European Parliament. The modified proposal incorporates amendments suggested by the European Parliament, including a provision that would uphold certain choice of law agreements made between businesses. Rome II will complement Rome I, the proposed Regulation on the choice of law applicable to contractual obligations, and complete the harmonisation of the rules of conflict of laws relating to liability in contractual and non-contractual matters.

Next Week's Events

Monday 20 February – Friday 24 February 2006

COUNCIL MEETINGS

- Agriculture and Fisheries Council (20 February 2006)
- Justice and Home Affairs Council (21 February 2006)
- Education, Youth and Culture Council (23 February 2006)

COURT OF JUSTICE

Judgments

Community own resources

- C-201/04 Molenbergnatie

Customs union

- C-546/03 Spain

- C-492/04 Dolland and Aitchison

Freedom of establishment

- C-152/03 Ritter-Coulais

- C-253/03 CLT-UFA

Freedom of movement for persons

- C-286/03 Hosse
- C-232/03 Finland
- C-471/04 Keller Holding

Free movement of capital

- C-513/03 van Hilten-van der Heijden

Free movement of goods

- C-441/04 A-Punkt Schmuckhandel

Law governing the institutions

- C-122/04 Commission v Parliament and Council

Social Policy

- C-46/04 Ireland

State aid

- C-346/03, C-529/03 Atzeni and Others

Taxation

- C-255/02 Halifax and Others
- C-419/02 BUPA Hospitals and Goldsbrough Developments
- C-223/03 University of Huddersfield Higher Education Corporation

Opinions

Agriculture

- C-353/04 Nowaco Germany

Approximation of laws

- C-380/03 Germany

Competition

- C-96/04P British Airways

Freedom of establishment

- C-374/04 ACT Group Litigation

Freedom to provide services

- C-168/04 Austria

Law governing the institutions

- C-432/04 Cresson

COURT OF FIRST INSTANCE

Judgments

Competition

- T-282/02 Cementbouw Handel & Industrie

Intellectual Property

- T-214/04 Royal County of Berkshire Polo Club

- T-74/04 Nestlé

- T-194/03 Il Ponte Finanziaria

State aid

- T-34/02 Le Levant 001
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