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EU Law News

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

EU issues second WTO challenge against China's export restrictions on raw materials

Buoyed by the World Trade Organisation's ruling against Chinese export restrictions on raw materials earlier in the year, the EU this month launched a second legal challenge against the restrictions placed on seventeen different rare earth exports. Rare earths are a key component in a number of high-tech consumer products produced in Europe including hybrid cars, wind-power turbines and flat-screen televisions. Together with Japan and the US, the EU argues that because of China's 95% share of global rare earth metal production, such limitations artificially push up international prices. They also unfairly advantage Chinese industry and encourage foreign firms to establish themselves in China where the penalties of export quotas and duties can be avoided.

The WTO has already adjudged equivalent restrictions to be distortive, rejecting China's plea for an exemption on environmental grounds this January. According to EU Trade Commissioner Karel De Gucht, the EU's follow-up action was instigated because 'China has made no attempt to remove other export restrictions' in the period following this first ruling. The international community is closely monitoring developments, with thirteen countries gaining observer status for the first case.

Europe's aviation companies complain about carbon tax

Seven of Europe's largest aviation companies — Airbus, British Airways, Virgin Atlantic, Lufthansa, Air France, Air Berlin and Iberia — have written to the EU's political leaders warning of the implications of bringing global airlines into the emissions trading scheme (ETS). Under the proposed scheme, airlines would receive tradable allowances covering a certain level of CO₂ emissions from their annual flights. At the end of each year, operators would have to surrender allowances equal to their actual emissions over the period.

China, Russia and the United States are amongst those countries that have registered complaints about the EU's plans to introduce the ETS, with each considering measures to exclude their own fleets from participation. Europe's aviation companies have confirmed that they 'fully expect the lists of suspensions, cancellations and punitive actions to grow as other important markets continue to oppose the ETS'; with a looming trade war over the ETS something Europe 'can ill-afford in the current economic climate'. Worryingly for them, China has already suspended a €9.2 billion order for Airbus planes, threatening 1,000 jobs at Airbus and a further 1,000 in related businesses.

ECJ rules that social networks cannot stop its users from downloading songs illegally

In February, the European Court of Justice (ECJ) ruled that online social networks could not be forced to block users from downloading songs illegally, as to do so would heighten costs and infringe on privacy. The case in question — *Sabam vs. Netlog (C-360/10)* — was referred to the ECJ for a preliminary ruling in 2009, after music royalty collecting society SABAM asked a Belgian court to force online social network Netlog to stop its users illegally downloading songs covered in their portfolio. Under the 2001 EU copyright directive, copyright holders can obtain injunctions against intermediaries whose services are used by third parties to infringe copyright.

The ECJ ruled, however, that SABAM's restrictions would be a 'serious infringement of Netlog's freedom to conduct its business'; requiring the company to 'install a complicated, permanent system at its own expense'. The court also suggested that forcing companies to install a filter to identify, analyse and process users' personal information might infringe their privacy and could unintentionally result in the blocking of lawful content. Such a requirement, the court ruled, would not respect the requirement

that a fair balance be struck between the right to intellectual property on the one hand and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

EC opens in-depth state aid investigation into air transport sector in Germany and Austria

On February 22nd, the European Commission opened in-depth state aid investigations into Germany and Austria's air transport sectors. It will look specifically at whether financial arrangements between public authorities and the airports of Saarbrücken, Zweibrücken, Lübeck-Blankensee (Germany) and Klagenfurt (Austria) — as well as rebates and marketing agreements concluded between these airports and some of the airlines using them — are in line with EU state aid rules. The airports each have set lower charges for certain budget airlines including Ryanair, Lufthansa's Germanwings and Air Berlin.

This is the fifth EU investigation into airports suspected of receiving unfair public support, with other inquiries underway in France, Sweden, Ireland, Hungary and Romania. Such public authority investments would be in line with EU state aid rules only if they were made on terms that a private player operating under market conditions would accept. In the aviation sector specifically, infrastructure investment subsidies could in principle be compatible if they were necessary, proportionate, pursued an objective of general interest, ensured non-discriminatory access for all users and did not unduly affect trade in the internal market.

Microsoft attacks Motorola's distortive patent pricing

Less than two weeks after the European Commission approved Google's \$12.5 billion acquisition of Motorola Mobility, Microsoft Corp. have registered a complaint with EU antitrust authorities accusing the partnership of charging too much for use of their fair-use patents.

Writing on his blog, Microsoft's Deputy General Counsel David Heiner asserted that in doing so 'Motorola is attempting to block

sales of Windows PCs, our Xbox game consoles, and other products' by forcing companies to pay disproportionate royalties for the use of fifty Motorola patents applying to a video technology standard. Whereas Microsoft must pay an extra \$22.50 on any \$1,000 laptop to use Motorola's patents, the 2,300 other patents that it must satisfy cumulatively cost only two cents. Google spokesman Al Verney dismissed their complaint as 'consistent with the way that [Microsoft] use the regulatory process to attack competitors'. Google had pledged to guarantee access to standard essential patents to competitors under fair terms as part of its acquisition of Motorola.

This action is the latest in a series of legal skirmishes between the two technology giants, with Microsoft also amongst the complainants in the EU's investigation of Google for potential abuses of a dominant position in online search and advertising. The EU is also currently investigating whether Samsung Electronics Co Ltd has infringed EU antitrust rules in its patent disputes with Apple; with the interlocking technologies of modern electronic devices fast becoming a key battleground in European competition law.

This publication has been carefully prepared but is intended for general guidance only. On any specific matter, reference should be made to the appropriate adviser.

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