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EU Law News

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

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Newsletter January/February 2016

Leniency Programmes Coexist Autonomously

On 20 January 2016 the European Court of Justice (ECJ) held that, in the field of competition law, the leniency programmes of the EU and of the Member States coexist autonomously (Case C-428/14). According to the ECJ those programmes reflect the system of parallel competences of the Commission and of the national competition authorities. The competition rules in the Member States are based on a cooperation mechanism between these competition authorities, the 'European Competition Network' (ECN). In 2006 the ECN adopted a Model Leniency Programme. In 2007, the Italian Authority responsible for competition compliance (AGCM) adopted a similar model providing for a 'summary' leniency application encouraging participants in cartels to report them and granting immunity from fines to the first to submit evidence.

In 2007 and 2008 DHL, Agility and Schenker submitted separate applications for leniency to the Commission and to the AGCM. In 2011 the AGCM found that several companies, including DHL, Schenker and Agility, had participated in a cartel in the international road freight forwarding sector. The AGCM said Schenker was the first company to have applied for immunity from fines in Italy in December 2007. Accordingly, under the national leniency programme, no fine was imposed on Schenker. DHL and Agility, however, were ordered to pay fines.

DHL subsequently argued before Italian courts for annulment of the AGCM's decision. According to DHL, AGCM should have taken into account the leniency application submitted to the Commission in June 2007, prior to the application made by Schenker to the AGCM.

The ECJ held that the Model Leniency Programme is not binding on national competition authorities, irrespective of the judicial or administrative nature of those authorities. There is also no legal link between the applications in respect of the same cartel, and EU law does not preclude a national leniency system which allows the acceptance of a summary application. National law must allow the possibility for a company which was not the first to submit an application for immunity to the Commission to submit a summary application for (full) immunity to the national competition authorities. As a consequence, companies contemplating to blow the whistle on a cross-border cartel must consider to submit leniency applications with the European Commission and one or more national competition authorities in the EU in parallel.

EU-US Data Privacy Shield

On 29 February 2016 the new arrangements and the draft "adequacy decision" were announced by the Commission that would place stronger obligations on US companies to protect Europeans' personal data and ensure stronger monitoring and enforcement by US agencies. On 2 February 2016 the EU and US had reached agreement to replace the Safe Harbour framework which was outlawed by the ECJ in October 2015.

The pact would require further monitoring and enforcement by the US Department of Commerce and Federal Trade Commission (FTC) which will also increase their cooperation with European Data Protection Authorities. The US stated that transfers will be subject to clear conditions, limitations and oversight, preventing generalised access to data. The newly created Ombudsperson mechanism will handle and solve complaints or enquiries raised by EU citizens in this context. Effective protection of EU citizens' rights means that several redress possibilities will exist. Complaints have to be resolved by companies within 45 days. A free of charge Alternative Dispute Resolution solution will be available. EU citizens can also turn to their national Data Protection Authorities.

Effective protection of EU citizens' rights will be reinforced with several redress possibilities and complaints have to be resolved by companies within 45 days. A free of charge Alternative Dispute Resolution solution will be available. EU citizens can also go to their national Data Protection Authorities, who will work with the U.S. Department of Commerce and Federal Trade Commission to ensure that unresolved complaints by EU citizens are investigated and resolved. The EU and US will review their new pact regularly and the European Commission will hold an annual summit with interested non-governmental organisations and stakeholders to discuss broader developments on privacy matters.

The pact still requires approval. Representatives of the Member States and the EU Data Protection Authorities (Article 29 Working Party) will give their opinion. US authorities will put in place the new framework, monitoring and the Ombudsperson mechanism. The Commission will shortly propose the signature of the Umbrella Agreement which should be adopted by the European Council of Ministers after obtaining the consent of the European Parliament.

Anti-dumping Duty Developments

On 4 February 2016 the ECJ held that the regulation by the Commission of 2006 imposing an anti-dumping duty on imports into the EU of certain leather footwear originating in China and Vietnam is partially invalid (Cases C-659/13 and C-34/14). China and Vietnam are non-market economy countries which are members of the World Trade Organisation. The ECJ pointed out that the Commission may decide to limit the investigation to a reasonable number of parties by using statistically valid samples of exporting producers. The ECJ found that the Council and the Commission did not make the right judgment upon claims for market economy treatment submitted by the Chinese

and Vietnamese exporting producers which were not sampled. The institutions must in this case calculate an individual anti-dumping duty for exporting producers who demonstrate on the basis of properly substantiated claims that they meet the criteria justifying individual treatment.

On 12 February 2016 the Commission launched new anti-dumping investigations into several steel products. It opened new anti-dumping investigations to determine whether imports of three steel products have been dumped on the EU market. If this is found to be the case, the Commission will take measures to protect the European industry from damaging effects of unfair trade. All three steel products subject to these investigations – seamless pipes, heavy plates and hot-rolled flat steel – originate in China. In addition the Commission decided to impose provisional anti-dumping duties on cold-rolled flat steel from China and Russia. This follows other provisional anti-dumping measures adopted recently, on so called “high fatigue performance rebars” from China, imposed on 29 January 2016. The EU now has 37 trade defence measures in place on imports of steel products, while nine investigations are still ongoing.

Enquiry into Container Shipping

On 16 February 2016 the European Commission invited comments from interested parties on commitments offered by fifteen container liner shipping companies to address concerns relating to concerted practices. Container liner shipping is the transport of containers by ship at a fixed time schedule on a specific route between ranges of ports and accounts for the vast majority of non-bulk freight carried by sea.

The Commission has concerns that the companies’ practice of publishing their future price increase intentions may harm competition and customers. The price announcements, known as General Rate Increases or GRI announcements indicate the amount of the increase in US-Dollars per transported container unit, the affected trade route and their intended implementation date. During the announcement period some or all of the other carriers announce similar intended rate increases. The announcements may therefore not provide full information on new prices to customers but merely allow carriers to explore each other’s pricing intentions and coordinate their behaviour.

In order to address these concerns the carriers offered commitments for a period of three years. For example, the carriers will include at least the five main elements of the total price (base rate, bunker charges, security charges, terminal handling charges and peak season charges). They will be binding on the carriers as maximum prices, thereby allowing for offer prices below these ceilings. The price announcements will not be made more than 31 days before their entry into force.

Commission Approves Acquisitions

On 8 January 2016 the Commission approved the acquisition of TNT Express by FedEx Corporation. FedEx and TNT are two out of four ‘integrators’ currently offering a broad portfolio of reliable services in the small package delivery sector in Europe. The other integrators are Europe-based DHL, owned by Deutsche Post, and US-based UPS. The Commission was concerned about insufficient competition in certain markets of the European Economic Area (EEA) as well as when packages are delivered to a destination outside the EEA. Following an in-depth investigation the Commission concluded that the proposed concentration would not significantly impede effective competition in the EEA or any substantial part of it.

On 15 January 2016 the Commission approved the acquisition of beverage can manufacturer Rexam by rival Ball, subject to the divestment of 12 plants. Rexam and Ball are the top two manufacturers in the EEA and also the two market leaders worldwide. The proposed takeover, in the absence of remedies, would have eliminated an important competitor and reduced the choice of suitable suppliers in already concentrated markets. Can-Pack and Crown, the only remaining main players in Europe, would not have posed a sufficient competitive challenge. The Commission’s decision is conditional upon full implementation of the commitment for divestments.

On 16 February 2016 the Commission approved the acquisition of Procter & Gamble's beauty products businesses by Coty. Both are manufacturers of consumer products such as fragrances, colour cosmetics and skin & body care. The Commission investigated whether the acquisition would reduce competition and lead to higher prices in Europe, in particular for fragrances and cosmetics. The Commission concluded that strong independent players would remain active in all the concerned markets.

Luther, EU Law Center
Avenue Louise 326, 1050 Brussels, Belgium
Phone +32 2 6277 760, Fax +32 2 6277 761
helmut.janssen@luther-lawfirm.com
gabrielle.williamson@luther-lawfirm.com

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