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# EU Law News

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

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## **Commission opens formal antitrust proceedings to investigate sales of e-books**

The European Commission has announced that it has opened formal proceedings into whether a group of international publishers, possibly with the help of Apple, have engaged in anti-competitive practices affecting the sale of e-books in the European Economic Area in breach of EU antitrust rules. The European Commission have said that they will look into whether the group of publishers and Apple have engaged in illegal practices or agreements that would have the effect of restricting competition, as well as examining the character and terms of their agency agreements. In particular the Commission will be examining whether these agreements had the effect of breaching EU antitrust rules that prohibit cartels and restrictive business practices.

The opening of investigations follows unannounced investigations by the Commission on the premises of several companies active in the e-book publishing sector in a number of Member States. The Commission investigation has been taking place in parallel with another investigation into the same matter by the UK Office of Fair Trading as to whether arrangements for the sale of e-books may breach competition rules. The UK OFT has since closed its investigation on grounds of administrative priority.

## **ECJ Advocate General delivers opinion that functionalities of computer programs are not covered by European copyright**

In his opinion on the case *SAS Institute Inc. v World Programming Ltd (C-406/10)*, Advocate General Bot has taken the view that the copyright protection of a computer program does not extend to its functionalities. A computer program's functionalities were described as those services that users expect from the computer program. The case was brought by SAS Institute Inc. who claimed that World Programming Ltd created a program, WPS, which

emulated much of the functionality of an SAS Institute program. The aim of WPS was to ensure that customers' application programs ran the same way on WPS as on SAS components as well as being able to understand and interpret the data format of the SAS program to ensure interoperability between the two programs. There was no suggestion that World Programming Ltd had access to or had copied the underlying source (programming) code of the SAS components.

Advocate General Bot explained his view saying that although Directive 91/250/EEC protects the literal elements of a program, namely the source code, object code and other elements expressing the creativity of its author, this protection does not extend to functionalities of the program as they are similar to ideas so far as they are dictated by a "specific and limited purpose". Such a protection would make it possible to monopolise ideas "to the detriment of technological progress and industrial development." Advocate General Bot further noted that the programming language, the language in which a code is written, likewise cannot be copyrighted as the programming language is a means which "permits expression, not the expression itself."

An Advocate General's Opinion is a legal solution to cases and is not binding on the Court of Justice.

## **ECJ rules taxes designed to help offshore companies avoid tax constitute state aid**

The European Court of Justice has recently ruled that a tax system designed in such a way that enables offshore companies to avoid taxation constitutes a state aid scheme that is incompatible with the common market. The case, *Commission and Spain v Government of Gibraltar and United Kingdom (C-106/09 and C-107/09)* concerns a reform of the corporate tax system in Gibraltar which replaced the former corporate tax with three taxes

applicable to all Gibraltar companies: a company registration fee, a payroll tax and a business property occupation tax (BPOT).

In 2004 the Commission decided the reform of the system constituted a state aid scheme that was incompatible with the internal market as aspects of the tax reform were materially selective because, inter alia, the payroll tax and BPOT favour companies operating offshore as these companies have no real physical presence in Gibraltar and would therefore incur no corporation tax. In addition the Commission held that the scheme was regionally selective as it imposed upon companies in Gibraltar a lower rate of tax than those in the United Kingdom.

At first the General Court annulled the Commission decision. However on appeal the Court of Justice held that the General Court erred in law in finding that the proposed tax reform does not confer selective advantages on offshore companies. The Court of Justice found that the combination of the payroll tax and BPOT excludes from the outset any taxation of offshore companies since they have no employees and also do not occupy a business property in Gibraltar. This Court therefore upheld the decision of the European Commission.

#### Priorities of Danish EU Presidency

The start of the New Year saw Denmark take over from Poland the helm of the Council of the European Union which is the body representing Member States' governments. Although the role of the Presidency has been diminished in recent years following the introduction of the Lisbon Treaty, the Presidency nevertheless gives Denmark some control over agenda setting for the six month period during which it will chair meetings of ministers representing Member States. Denmark has set as priorities for the next six months:

- implementing stronger financial regulation and progress on discussions on the EU multi-annual budget;
- moving forward with the twelve key initiatives of the single market with special emphasis on directives on public procurement, the

standardisation package, revision of the accounting standards, the venture capital proposal, the common European Patent system and better enforcement of the posting of workers directive;

- promoting the integration of environmental protection in other policy areas including the common agricultural policy, the cohesion policy, transportation and the single market;
- continuing efforts to finalise the Common European Asylum System (CEAS) before the end of 2012 and seeking to finalise negotiations on the European Investigation Order.

#### Greek farmers must return €425m in subsidies

Greek government subsidies amounting to €425m which are incompatible with EU law must be returned, a European Commission spokesperson has said. The subsidies were granted after Greek farmers blocked highways at the beginning of 2009 which resulted in the shutting of border crossings with Bulgaria and cutting off road access to Athens and other cities. The blockages were mounted in demand of tax rebates and subsidies to help cope with the global economic downturn. The then Agriculture Minister had claimed that the subsidies were made in conformity with EU rules. A spokesperson for the European Commission said that the manner in which the subsidies will be reclaimed is a matter for the Greek government. The details of when the subsidies must be repaid will depend on a decision yet to be published in the European Union's Official Journal.

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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