

## EU Law News

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

- TV and Computer Monitor Tubes Cartel dealt record €1.47bn fine by Commission
- Commission accepts legally binding commitments from Apple and four international publishers for sale of e-books
- Commission rules Italian State aid to ground handling operator SEA Handling to be unlawful
- EU challenges Argentinian import restrictions through WTO
- Commission sends Statement of Objections to Samsung over misuse of mobile-essential patents
- New EU legislation adopted on bilateral investment treaties (BITs)

## TV and Computer Monitor Tubes Cartel dealt record €1.47bn fine by Commission

On 5 December 2012, the European Commission fined seven international groups of companies a record total of €1,470,515,000 for participating in two distinct cartels in the production and sale of cathode ray tubes (CRT). The cartels operated worldwide, with one concerning colour picture tubes used for televisions and the other concerning colour display tubes used in computer monitors. Chungwha, LG Electronics, Philips and Samsung SDI participated in both cartels, while Panasonic, Toshiba, MTPD and Technicolor participated only in the cartel for television tubes.

A CRT is an evacuated glass envelope containing an electron gun and a fluorescent screen. Although they have been gradually replaced by alternative technologies such as LCD and plasma displays in modern television and computer screens, CRTs used to account for 50 to 70% of the screen price. According to the Commission, the cartelists carried out a full range of anti-competitive practices between 1996 and 2006 in order to resist the decline of the CRT market; including price fixing, market sharing, customer allocation, capacity and output coordination and exchanges of commercially sensitive information.

Operations were planned at top-level meetings of the two cartels, while the practical preparation and implementation was coordinated through lower-level meetings on a quarterly, monthly or weekly basis. After reviewing demand, production, sales and capacity in the main sales areas – including Europe – participants discussed pricing for individual customers, thus directly impacting on customers in the European Economic Area.

## Commission accepts legally binding commitments from Apple and four international publishers for sale of e-books

The European Commission has accepted commitments offered by Apple and four international publishers (Simon & Schuster, Harper Collins, Hachette and Holtzbrinck) to address concerns that they had contrived to limit price competition for e-books in breach of EU antitrust rules.

In January 2010, Apple and the four publishers had switched from a wholesale model of e-book selling to agency contracts, which mandated publishers to set retail prices for e-books according to fixed pricing rules. The contracts included a “Most-Favoured Nation” (MFN) clause, whereby in the event of another retailer offering a lower retail price for a particular e-book, each publisher would have to adjust the retail price of that e-book in Apple’s iBookstore to match accordingly.

This provision would have resulted in lower revenues for the four publishers if other retailers using wholesale models – including Amazon - had continued to offer e-books at low pricing levels, thereby incentivising them to favour equivalent agency contracts across all retailers. The Commission’s preliminary investigation indicated that Amazon and other retailers had subsequently been forced to switch to the agency model.

The commitments made by Apple and the four publishers pledge to the termination of agency agreements, and a five year ban on retail price MFN clauses in each of their contracts. In addition, there will be a two-year cooling off period during which the four publishers will not restrict the ability of e-book retailers to set retail prices for e-books or offer discounts and promotions. The Commission accepted these terms without further action.

## Commission rules Italian State aid to ground handling operator SEA Handling to be unlawful

On 19 December 2012, the European Commission concluded that approximately €360m of State aid granted between 2002 and 2010 by SEA - the state-owned operator of the Milan Malpensa and Milan Linate Airports - to its subsidiary SEA Handling was incompatible with EU State aid rules, and so must be recovered.

The Commission’s in-depth investigation concluded that the capital injections carried out by SEA gave SEA Handling an undue economic advantage not shared by its competitors. Given its consistently difficult financial situation, the Commission concluded that SEA would not have been able to secure such levels of financing from the market.

The Commission also ruled that SEA’s capital injections were incompatible with the 2004 EU Rescue and Restructuring Guidelines (2004/C 244/02), which provide conditions for companies in financial difficulties lawfully to receive State aid. SEA Handling’s business plan failed to demonstrate how the company could become viable and operate without continued state support, and did not contain evidence that SEA Handling itself would be contributing to the cost of restructuring. It also did not provide any compensatory measures to minimise the competition distortions brought about by the state support received.

## EU challenges Argentinian import restrictions through WTO

Together with Mexico, Japan and the United States, the EU has requested that the World Trade Organisation (WTO) establishes a dispute settlement panel in an effort to overcome

long-running Argentinian import restrictions. Their complaint raises concerns over Argentina's non-automatic import licences, which require importers of over 600 tariff lines to apply for non-automatic approval for an import licence as a prior condition for importation for goods. The complainants have argued that, contrary to WTO rules, these licences are issued in a "discretionary way with burdensome procedures, long delays of up to six months and under unacceptable and non-transparent conditions".

Since February 2012, Argentina has also introduced a new pre-approval requirement covering all imports, which allegedly create long delays and result in significant costs for many companies. The EU and other complaining parties argue that by blocking imports and discouraging trade and investment, both measures are incompatible with the WTO's prohibition of quantitative restrictions, as well as with the rules of its *Agreement on Import Licensing Procedures*.

The European Commission estimates that, in 2011, Argentina's non-automatic import licence affected EU exports worth €500m, not including trade flows that have been blocked by the restrictions. The introduction of the pre-approval requirement in 2012 has further raised the value of potentially affected trade to €8.3bn, the total value of all EU exports to Argentina in 2011.

## Commission sends Statement of Objections to Samsung over misuse of mobile-essential patents

On 21 December 2012, the European Commission sent a Statement of Objections questioning whether Samsung's seeking of national injunctions against Apple on the basis of its mobile phone standard essential patents (SEPs) amounts to an abuse of a dominant position, as is prohibited under Article 102 of the Treaty on the Functioning of the European Union.

Standardisation bodies typically require members to commit to license patents that they have declared essential for a standard under Fair, Reasonable and Non-Discriminatory (FRAND) terms. This commitment is designed to ensure effective access to a standard for all market players, since access to SEPs are a precondition for any company to sell interoperable products in the market.

In 2011, Samsung sought injunctions in various EU Member States against Apple based on claimed infringements of certain of its 3G UMTS SEPs, despite having committed to license them on a FRAND basis. The Commission's preliminary view is that, because Apple had proven willing to negotiate a FRAND licence for the SEPs, Samsung's recourse to injunctions risks excluding products from the market without justification, and may distort licensing negotiations unduly in its favour.

Samsung withdrew its injunction requests in Europe shortly before the Commission sent its Statement of Objections.

## New EU legislation adopted on bilateral investment treaties (BITs)

On 12 December 2012, the European Parliament and Council adopted a new Regulation on establishing transitional arrangements for bilateral investment agreements between Member States and third countries. With foreign direct investment becoming an exclusive EU competence under the Lisbon Treaty in December 2009, this was a necessary step to clarify the status of the 1,200 BITs that had been concluded by Member States prior to the Treaty's entry into force.

According to the European Commission, the Regulation will provide legal certainty for EU and international investors benefiting from investment protection through such prior BITs between EU Member States and third countries. Such BITs may be maintained in force until they are replaced by an EU investment agreement.

The Regulation also establishes a mechanism for empowering EU Member States – under certain conditions – to negotiate BITs with countries not immediately scheduled for EU-wide investment negotiations. This will expand the scope of investment protection currently available to investors.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

Luther, EU Law Center  
Avenue Louise 240, B-1050 Brussels  
Phone +32 2 6277 760, Fax +32 2 6277 761  
helmut.janssen@luther-lawfirm.com  
gabrielle.williamson@luther-lawfirm.com

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**Auf den Punkt. Luther.**

