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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 2014

Interest derivatives cartel fined €1.71bn

On 4 December 2013, the European Commission fined eight international financial institutions a total of €1.71bn for their participation in illegal cartels in markets for financial derivatives covering the European Economic Area (EEA). Four of those institutions were participating in a cartel relating to interest rate derivatives denominated in the euro currency (Barclays, Deutsche Bank, RBS and Société Générale), and six were participating in one or more bilateral cartels relating to derivatives denominated in Japanese Yen (Deutsche Bank, RBS, UBS, Citigroup, JP Morgan and RP Martin).

Interest rate derivatives are financial products used by banks or companies for managing the risk of interest rate fluctuations. They are traded worldwide, and derive their value from the level of a benchmark interest rate, for example LIBOR or EURIBOR. These benchmarks reflect an average of the quotes submitted daily by a number of banks who are members of a panel, and are intended to reflect the cost of interbank lending in a given currency.

Operating between 2005 and 2010, both identified cartels aimed at distorting the normal course of pricing components, with traders of different banks discussing their submissions for the calculation of the EURIBOR and Japanese Yen LIBOR as well as their trading and pricing strategies. Barclays and UBS received full immunity from fines under the Commission's 2006 Leniency Notice for revealing the existence of the cartels to the Commission, with Citigroup also benefitting from full immunity. Some of the same financial institutions have already been fined by financial regulatory agencies for their individual manipulation of benchmarks, with these fines being made in addition specifically for cartel behaviour.

The Commission is also investigating manipulations of other benchmarks, including an enquiry into Shell, BP, the price-reporting agency Platts and others for tampering with the benchmarking of oil products. Other European agencies are separately looking into a possible manipulation of the benchmark of gold, and Competition Commissioner Joaquín Almunia announced at the World Economic Forum in Davos on 24 January 2014 that his staff were additionally investigating "benchmarks for raw material prices".

Auditing regulation finalized by EU Member States

An EU package to reform the auditing sector was adopted by Member States on 17 December 2013, paving the way for its adoption later in 2014. The agreed proposals will force companies to change accountants every ten years, in reaction to the criticism brought against this sector for giving banks a clean bill of health before the onset of the financial crisis.

As part of the package, auditors will be strictly prohibited from providing additional non-audit services to their audit clients. Included in this are limitations on tax advice and advice on the financial and investment strategy of their clients. Clauses which stipulate that their accounts must be audited by one of the so-called "Big Four" firms (Deloitte, EY, KPMG and PwC) will also be banned in bank loan agreements with companies, and auditors will have to give an overall assurance over the accuracy of company accounts.

The Commission's proposal had originally called for a switch of auditors every six years, but this was extended to 25 years through the opinion of the European Parliament's legal affairs committee, after being criticised for unfairly imposing costs on companies during the re-tendering process. The ten year compromise finally agreed upon through trilateral negotiations has been commended by Internal Markets Commissioner Michel Barnier for having "a major impact in reducing excessive familiarity between the auditors and their clients and in enhancing professional skepticism".

Commission proposes common approach to violations of EU Customs Law

On 13 December 2013, the Commission announced a framework for harmonizing customs infringements across all 28 EU Member States. Although EU customs legislation has been fully harmonized in a single legal act since the beginning of the Internal Market, the consequences of violating these common rules have so far varied across Member States.

To remedy this, the proposed Directive sets down a common list of acts that constitute a breach of EU customs rules. These are differentiated by severity, and some are categorized as to whether there was intent or negligence. The proposal then sets out a scale of appropriate sanctions to be applied, depending on the nature of the infringement. These range from a fine of 1% of the value of goods for inadvertent or administrative errors, up to a fine of 30% of the value of the goods for the most serious breaches.

Member States are also instructed to consider the nature and circumstances of the infringement when applying sanctions, including the frequency and duration, whether a "trusted trader" is involved and the amount of evaded duties. The Commission intends that its proposal will overcome vulnerabilities in cross-border revenue collection and weaknesses in enforcing policies such as consumer protection and agriculture in relation to import and export of goods.

Commission introduces merger simplification package

One 5 December 2013, the European Commission adopted a package that widens the scope of its simplified review procedure under the EU Merger Regulation. Under this package, more mergers than before that are in general unlikely to raise competition problems will be examined under a simplified procedure. Companies may use a shorter notification form and need to provide much less detailed information.

These rules are applicable in three situations, which the Commission estimates will cover 60 to 70% of merger cases:

- Mergers in markets where the merging companies compete and where they have a market share of less than 20%;
- Mergers where one of the companies sells to a market in which the other company is active as long as the market share is less than 30%;
- Mergers where the companies‘ combined market shares are between 20% and 50%, but the increase in market share due to the merger is small.

The Commission expects that this simplification will lead to a reduction of transaction costs for companies. Changes will be made to the Merger Implementing Regulation, in order to reduce the information requested from companies when notifying a merger. This is intended to reduce the time spent on exchanges between companies and the Commission before a notification.

European Commission announces 2030 climate and energy goals

On 22 January 2014, the Commission announced its 2030 framework for climate and energy. Building on from its binding 2020 targets for Member States to achieve a 20% reduction in greenhouse gas emissions, a 20% increase in renewable energy and energy savings of 20%, the new framework proposes:

- A binding target for Member States to reduce greenhouse gas emissions by 40% (below the 1990 level).
- An EU-wide binding target for renewable energy to represent at least 27% of energy consumption (above 1990 levels).
- Renewed ambitions for energy efficiency policies

Compared with previous frameworks, the proposal is marked by a lack of a binding energy efficiency target and a “business-as-usual” renewable energy target that will not need to be translated into national plans by Member States.

The Commission also presented a legislative proposal to create a market stability reserve for the EU’s Emissions Trading System (ETS) in 2021, in order to address the surplus of allowances and increase the ETS’s robustness as a tool to decarbonise the EU economy.

EU requests WTO consultations over Brazil’s discriminatory taxes

On 19 December 2013, the EU requested consultations under the dispute settlement provisions of the World Trade Organisation (WTO), in order to address several distortive tax policies introduced by the Brazilian government. Especially for the automotive sector, these are seen to discriminate against imported goods and to provide prohibitive support to Brazilian exporters through selective exemptions and reductions from taxes on domestic goods.

In September 2011, the Brazilian Government had imposed a significant tax increase on motor vehicles (an additional 30% on their value), coupled with an exemption for domestically produced cars and trucks. This has since been updated with an equivalently structured tax regime, Inovar-Auto, set to last until 2017. The EU has also objected to selective tax benefits for other domestically produced goods, ranging from computers and smartphones to semiconductors, which allegedly have an equally negative impact on EU exporters.

According to the European Commission, these issues have been raised without progress in bilateral talks with Brazil and in WTO bodies. The consultation process is the next step in formalising the issue, with the EU and Brazil now having 60 days to resolve their dispute through negotiations. If no satisfactory solution is reached, the EU can request that the WTO sets up a panel of trade experts to rule on the compatibility of Brazil’s measures with WTO rules.

Luther, EU Law Center
Avenue Louise 326, 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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