
Newsletter, July/August 2012

EU Law News

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

EU files suit against Argentinian import restrictions with WTO

On 25 May 2012, the European Union filed a formal challenge with the World Trade Organisation (WTO) against Argentina's import restrictions. In the first step of the WTO's dispute settlement procedure, the EU is formally "requesting consultations" with Argentina to remove import measures that negatively affect international trade and investment. If no resolution is found in 60 days, the EU can ask the WTO to set up a panel of three arbitrators to judge the legality of Argentina's import measures.

The EU believes they contravene WTO rules for a transparent, free and fair trading system by subjecting the import of all goods to a pre-registration and pre-approval regime, demanding that selected goods also need an import license, and requiring importers to balance imports with exports or increase the local content of the products they manufacture in Argentina. The EU is not alone in objecting to such import measures, with less formal criticism also made by at least 14 of Argentina's trade partners at the 30 March meeting of the WTO's Goods Council, including the United States, Japan, South Korea and Australia.

In an official statement, EU Trade Commissioner Karel De Gucht elaborated that Argentinian import restrictions "are causing very real damage to EU companies", with their trade and investment climate actually worsening in 2012. These measures were already in place for certain goods in 2011 – affecting about €500m of EU exports – and have been extended to all products January this year. EU exports to Argentina amounted to €8.3bn in 2011.

MasterCard loses challenge to EU ban on cross-border fees

On 24 May 2012, the European Court of Justice (ECJ) rejected an action brought by MasterCard against the European Commission's

decision in 2007 to prohibit its cross-border inter-bank fees. The ECJ's ruling confirms that in card payment schemes, banks cannot restrict competition by agreeing on charges to the detriment of consumers.

In December 2007, the Commission had decided that MasterCard's collectively agreed multilateral interchange fees (MIFs) inflated the base on which acquiring banks charged prices to merchants, by indirectly setting a minimum price to be paid for accepting the organisation's payment cards. The Commission interpreted this restriction of price competition as an anticompetitive business practice, which breached Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) by harming both businesses and consumers.

In upholding the Commission's decision, the ECJ has paved the way for similar infringement claims to be brought against Visa Europe's equivalent MIFs. In reaction to the judgment, EU Competition Commissioner Joaquin Almunia invited both Visa and MasterCard to "consider carefully how to bring the multilateral interchange fees in the EU in line with competition", alluding to the formal charges his department has been publicly contemplating against Visa Europe since January. Both legal complaints are part of a wider EU strategy to break down barriers to e-commerce and cut costs for businesses, with cross-border credit and debit card fees currently accounting for 3 to 5% of the value of all card transactions in Western Europe.

Producers of water management products fined €13m in cartel settlement

The European Commission has fined two producers of water management products – used in heating, cooling and sanitation systems – for breaching EU antitrust rules outlawing cartels and restrictive business practices. Flamco and Reflex were

cumulatively fined €13,661,000 for coordinating prices through bilateral contacts, together with whistle-blower Pneumatex, on the German market from June 2006 until May 2008. Reflex and Pneumatex, in addition, expanded their anti-competitive behaviour to 13 other EU Member States for a limited period of three months.

In contrast to other antitrust cases, the alleged cartel existed for a relatively short period of time, and was ostensibly national rather than European, with its members operating together in the territory of only one Member State.

The case was resolved through a settlement procedure based on Antitrust Regulation 1/2003, which allows the Commission to apply a simplified procedure to suitable cases where the companies involved accept their culpability. The procedure reduces the length and cost of the investigation for the Commission, with companies benefitting from quicker decisions and a 10% reduction in fines.

Commission adopts rules on national support for industry electricity costs affected by ETS

The European Commission in May adopted a framework under which Member States will be permitted to compensate selected electro-intensive users – including producers of aluminium, copper, fertilisers, steel, paper, cotton, chemicals and some plastics - for up to 85% of the higher electricity costs expected to result from a change to the EU Emissions Trading Scheme (ETS) as from 2013.

The framework looks to avoid “carbon leakage”, whereby global greenhouse gas emissions increase as a consequence of European companies moving abroad, after being unable to impart ETS-induced cost increases onto their customers without losing market share to international competitors. As well as mitigating the impact of these indirect CO₂ costs, the rules aspire to preserve the price signals created by the ETS and to avoid competition distortions in the internal market.

Member States will be permitted to provide subsidies of up to 85% of the cost increases faced by the most efficient companies in each

sector between 2013 and 2015. The cap will gradually fall to 75% in 2019-20. National governments do, however, retain discretion over the level of compensation to apply to their industries, which could result in internal market distortions from differing regimes across the EU.

Priorities for the Cyprus Presidency of the Council of the European Union

The start of July saw Cyprus taking over the Presidency of the Council of the European Union, marking the first time since the onset of the financial crisis that a country receiving bail-out funds from the EU will take the helm.

It remains to be seen how this will affect Cyprus' tenure as Council President, with an early preference for a “more efficient European economy, based on growth” already conspicuously precluding the austerity measures imposed onto other struggling European economies. Other key legislative priorities for the Presidency include concluding the EU's Multiannual Financial Framework (2014-2020), creating a Common European Asylum System by the end of 2012, and improving the southern dimension of the European Neighbourhood Policy.

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.

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

Luther Rechtsanwaltsgesellschaft mbH employs around 320 lawyers and tax advisors and provides advice in all areas of business law. Our clients are mainly medium-sized and large companies as well as the public sector. Luther has offices in 11 German locations as well as 7 international locations and is a member of Taxand, a worldwide organisation of independent tax advisory firms.

Berlin, Cologne, Dresden, Dusseldorf, Essen, Frankfurt a. M., Hamburg, Hanover, Leipzig, Munich, Stuttgart | Brussels, Budapest, Istanbul, London, Luxembourg, Shanghai, Singapore