

EU Law News

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

- Romanian power company fined for abuse of a dominant position
- Commission proposes stronger cooperation with non-EU countries to combat VAT fraud
- Producers of foam for mattresses, sofas and car seats fined €114m in cartel settlement
- European Court of Justice permits blocking of copyright-infringing websites
- Visa agrees to cap transaction fees
- Agreement for EU Emissions Trading Scheme to exempt non-EU airlines

Romanian power company fined for abuse of a dominant position

On 5 March 2014, the European Commission imposed a fine of just over €1m on S.C. OPCOM S.A. for abusing its dominant position in the Romanian market for facilitating electricity spot trading. Between 2008 and 2013, OPCOM required members of the spot electricity markets to have a Romanian VAT registration, deliberately excluding those traders that were already registered for VAT in other EU Member States. This meant that EU traders could only enter the Romanian wholesale electricity market by formally establishing themselves in Romania, resulting in additional costs and organisational disadvantages, and breaching the principles of the EU single market.

OPCOM operates the only power exchange in Romania, which acts as the organised market for trading electricity. Spot trading refers to trading electricity in the short term (i.e. within the same day or for the next day). According to the Commission, national power exchanges have an important role in providing public price information, and in achieving transparent and reliable electricity prices onto the wholesale and retail markets. The number of traders affected by OPCOM's action was judged to be significant, with over 50% of spot trading participants in other Member States identifiable as EU traders without a local VAT registration.

OPCOM's parent company, Transelectrica, was also held liable for the infringement. Transelectrica is the operation arm of the Romanian electricity transmission system.

Commission proposes stronger cooperation with non-EU countries to combat VAT fraud

On 6 February 2014, the Commission announced its intentions to commence negotiations with Russia and Norway on administrative cooperation agreements related to VAT. The broad goal of these agreements would be to establish a framework of mutual assistance in combatting cross-border VAT fraud, and in enabling each country to recover the VAT that is due to them. Negotiations will focus on improving information exchange in the most sensitive sectors - online services, downloads and e-commerce - after a recent estimation from the Commission that total evaded tax revenue within the EU amounted to €193bn annually.

In order to sign accords that will allow tax administrations to cooperate, the Commission requires a mandate from the Council of the EU to start negotiations with third countries. This process could be time-consuming, with certain countries thought to be reluctant to share their tax data with third coun-

tries. In addition, the Greek presidency of the EU has not yet put the issue on the Council's agenda.

The co-operation agreements would be based on the Regulation on administrative co-operation in the field of VAT, which currently sets the framework for intra-EU collaboration in this area. Member States already co-operate against VAT fraud by allowing access to each other's databases, and by exchanging information (either automatically or on request) on taxpayers' activities. The Commission is so far targeting neighbouring countries, its main commercial partners and countries considered to be leaders in the field of electronically supplied services. As well as Norway and Russia, exploratory talks have been initiated with Canada, Turkey and China.

Producers of foam for mattresses, sofas and car seats fined €114m in cartel settlement

On 29 January 2014, the European Commission imposed fines totaling €114m on the four major producers of flexible polyurethane foam – Vita, Carpenter, Recticel and Eurofoam – due to their coordination of the sales prices of various foam types from October 2005 until July 2010, in 10 EU Member States. Flexible polyurethane foam is mainly used in household furniture such as mattresses and sofas, with applications in the automotive sector also accounting for about a quarter of the total market.

The four companies aimed to avoid aggressive price competition and pass on raw material price increases of bulk chemicals to customers. To achieve this goal, multiple price co-ordination meetings were organised at all levels of European management, including numerous telephone and other bilateral contacts. Vita benefited from immunity after revealing the existence of the cartel to the Commission, while Eurofoam, Recticel and Greiner received fine reductions for their co-operation in the investigation. After all companies agreed to settle the case with the Commission their fines were further reduced by 10%.

European Court of Justice permits blocking of copyright-infringing websites

On 27 March 2014, the European Court of Justice (ECJ) upheld the ruling that "an internet service provider may be ordered to block its customers' access to a copyright-infringing website", in response to a case brought to their attention by the Austrian Supreme Court. Constantin Film Verleih and Wega Filmproduktionsgesellschaft, two companies holding rights to their films, became aware that certain films could be viewed or downloaded from the website "kino.to" without their consent.

The Austrian courts had accordingly prohibited Austrian internet service provider (ISP) UPC Telekabel Wien from providing its customers with access to that site.

After being asked to confirm the ruling by the Austrian courts, the ECJ upheld the original decision. They noted that “an ISP which allows its customers to access protected subject-matter, made available on the internet by a third party, is an intermediary whose services are used to infringe a copyright”. Therefore, as ISPs have a role in the copyright infringements, they can be requested to prevent illegal activities by blocking access to specific websites.

The ruling sets a precedent by further defining the role of access providers in dealing with online piracy. Past decisions had opposed a policing role for internet access providers, who should not be permitted to filter online content to prevent breaches of copyright. Under this new ruling, and different from filtering activities, ISPs will only be permitted to impose such controls when requested to do so by copyright holders damaged by the violations. National authorities will still have to respect the right of service providers to conduct their business and the right of users to access information.

Visa agrees to cap transaction fees

As an update to a previous edition of EU Law News, the European Commission has now rendered legally binding the commitments offered by Visa Europe to significantly reduce its multilateral interchange fees (MIFs) for credit card payments to a level of 0.3% of the value of the transaction (a reduction of 40-60%), and to reform its rules in order to facilitate cross-border competition. This marks the end of one in a series of long-running antitrust investigations into card payment companies for their imposition of MIFs onto merchants and then indirectly onto consumers.

Preliminary deal for EU Emissions Trading Scheme to exempt non-EU airlines

On 4 March 2014, Members of the European Parliament and Member State negotiators reached a deal to change the rules of the European Union's Emission Trading Scheme (ETS) to exempt all emissions from any flight entering or leaving EU airspace. This further dilutes the EU's original intentions by effectively exempting all foreign flights from complying with the ETS, with European airlines operating within EU airspace still having to comply.

The ETS had originally been intended to cover all emissions from flights landing or taking off from an EU airport. However, in 2012,

the EU had given a temporary exemption on flights leaving or entering EU airspace after third countries had strongly objected to their inclusion within the scheme. The exemption had been made in order to give the International Civil Aviation Organisation (ICAO) sufficient time to agree a global mechanism to control aviation emission so that all countries would be covered.

As reported in a previous edition of EU Law News, the ICAO had agreed in October 2013 that it would deliver a global market based mechanism to curb airline emissions by 2016 to enable implementation in 2020. As a stopgap, until this plan is implemented, the Commission had proposed to amend their ETS legislation to charge aircraft only for emissions taking place in EU airspace. However, third countries had since maintained their position that the EU should go further in exempting all emissions from flights entering or leaving the EU, with intense pressure being imposed on national governments leading up to the current deal.

As the latest development, the European Parliament voted on 3 April 2014 to back the deal, approving the proposed compromise by 458 votes to 120 with 24 abstentions. This full vote reversed the position taken to reject the deal by the Parliament's Committee on Environment, Public Health and Food Policy on 19 March.

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

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