

## EU Law News

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

### European Commission pushes reciprocity in third-party public procurement markets

In late March, the European Commission unveiled a proposal that would allow it to exclude foreign bidders from EU public procurement contracts if European firms continue to struggle to win public tenders abroad. When there is 'persistent difficulty' with a non-EU country in terms of the openness of its public procurement markets, the Commission could investigate and negotiate whether to impose an EU-wide market specific restriction.

The proposal comes as a reaction to disproportionate practice from major economic rivals, whose public procurement legislation is seen to favour domestic firms. Recent complaints centre on 'Buy American' US Policies – for example the 2011 Jobs Bill and the 2009 American Recovery and Reinvestment Act – and China's refusal to sign the WTO's Government Procurement Agreement (GPA). Commission figures show that the EU makes €352bn worth of public procurement contracts open to foreign bidders, while US and Japanese markets offer only €178bn and €27bn respectively.

The proposal also suggests that for contracts over the value of €5m, national authorities will be able to request that the Commission investigates individual foreign bidders and approves their exclusion from national auctions. EU Trade Commissioner Karl de Gucht stated that both measures would 'increase the leverage of the European Union in international negotiations and with our partners to open up their procurement markets for European companies'.

### European Commission launches modernisation effort for state aid controls

The European Commission has this month adopted a communication on State Aid Modernisation, which sets the objectives of a reform package to be implemented by the end of 2013. This package has three main objectives:

- To support sustainable growth and to discourage public spending that does not bring real added-value and distorts competition.
- To focus more on cases with the biggest impact on the single market.
- To streamline procedures so that decisions are delivered within business relevant timelines.

In this vein, subsidies can be directed towards flagship initiatives of the Europe 2020 strategy for smart, sustainable and inclusive growth in a pro-competitive way, while the Commission will direct stronger scrutiny to what it perceives as large and distortive levels of aid.

With 1.6 trillion euros siphoned from member state governments to struggling banks between October 2008 and 2011, and the Commission also approving €11.7bn for crisis hit companies, national state aid is seen by the commission as an important buffer against the effects of the economic crisis. EU Competition Commissioner Joaquin Almunia hopes the reform will increase its effectiveness by 'helping public authorities make more efficient use of scarce public resources'. In the future, European state aid regulation should work more effectively to both promote and enforce; 'helping to achieve the EU's growth objectives while limiting competition distortions'.

### Long road ahead for the Anti-counterfeiting Trade Agreement

On 4 April, the European Commission agreed on the legal submission to be presented to the European Court of Justice regarding the controversial Anti-counterfeiting Trade Agreement (ACTA) on whether its content is 'compatible with the European treaties, in particular the Charter of Fundamental Rights of the European Union'. This wide scope allows the judges in the ECJ

to examine specific fundamental rights – for example freedom of expression, information or data protection, and the right to property – that the agreement might infringe.

Alongside its legal vetting in the court, ACTA has received growing criticism from several groups in the European Parliament. In April, MEPs in the Alliance of Liberal Democrats (ALDE) group joined Socialist & Democrats (S&D) and Green MEPs in formal opposition to the document, considerably raising the likelihood that Parliament will reject the treaty.

However, given that the court's opinion on ACTA could take up to two years, the intense public and lobbying pressure surrounding the agreement still has time to influence in either direction.

#### **EU and US agree to recognise each other's "safe traders"**

On 4 May, the EU and USA formally agreed to recognise each other's official safe traders, with certified companies able to benefit from faster controls and reduced administration for customs clearance. Their mutual recognition agreement will also improve security on imports and exports, with both sets of customs authorities better able to focus their attention onto real risk areas.

There are currently around five thousand companies approved as Authorised Economic Operators (AEOs) in the EU, and over ten thousand certified members of the US Customs-Trade Partnership against terrorism (C-TPAT); all of whom will be covered by the decision, which will be implemented from July 2012. Their improved access will further streamline the flow of goods between the two strategic trade partners, whose imports and exports value reached almost €500bn in 2011.

Mutual recognition is an important component of the EU's external trade policy, with Switzerland, Norway and Japan already recognising the AEO certification, and a similar agreement also being explored with China.

#### **Commission fines window mounting cartel**

Nine European producers of mountings for windows have cumulatively been fined €85,876,000 for agreeing on annual common price increases in breach of Article 101 of the Treaty on the Functioning of the European Union, which prohibits cartels and restrictive business practices. Exceptionally, the individual fines were not equal to 10% of each company's annual turnover; even though such a high penalty would have been justified under the EU's 2006 Guidelines on the method of setting fines. However, for the first time, the Commission exercised its discretion and reduced the fines to take into account the mono-product nature of the companies and their differences in participation in the infringement.

The collusion – between Roto, Gretsch-Unitas, Siegenia, Winkhaus, Hautau, Fuhr, Strenger of Germany, Maco of Austria and AGB of Italy – lasted from November 1999 to July 2007, with the group agreeing on price increases in informal gatherings alongside their annual trade association meetings in Germany. The European Commission granted Roto full immunity for being the first to provide information about the cartel, while the fines for Gretsch Unitas and Maco were reduced by 45% and 25% due to their co-operation.

Window mountings are mechanical metal parts necessary to open and close windows and window-doors, and are an important component of all of those sold in Europe. With the companies involved having high combined shares in the €1bn market, the cartel had a direct impact on consumers in the European Economic Area (EEA).

*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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