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EU Law News

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

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Newsletter May/June 2014

EU and Russia begin disputes at WTO level

On 8 April 2014, the EU launched a dispute in the World Trade Organisation (WTO) against the Russian ban on imports of pigs, fresh pork and certain pig products from the EU. Three weeks later, Russia also began a WTO dispute on EU energy rules that challenge Gazprom's business model.

Russia had closed its market for EU pork imports at the end of January 2014, citing four isolated cases of African swine fever (ASF) detected in wild boar at the Lithuanian and Polish border with Belarus. Their action cuts off almost 25% of all EU exports to Russia, with the total value of EU pork exports in 2013 reaching €1.4bn. EU Trade Commissioner Karel De Gucht condemned the ban as "clearly disproportionate and going against WTO rules".

On the other issue, Russia is disputing the legality of the EU's 2009 third energy package, objecting specifically to its requirement on granting access to natural gas and electricity networks, which forces Russian firms, such as Gazprom, to sell stakes and cede market share. The EU's legislation is a specific obstacle to Russia's planned South Stream pipeline, which would bypass Ukraine. Russian representatives insist the EU measures are inconsistent with WTO agreements on services, as well as on subsidies and being countervailing measures.

In both cases the EU and Russia now have 60 days to find a satisfactory solution before the WTO can be requested to set up a panel to rule on the legality of the measures in question.

Commission releases state aid rules for energy and the environment

On 9 April 2014, the European Commission adopted new rules on public support for projects in the field of environmental protection and clean energy, with plans to phase out renewable energy subsidies across the EU. The Commission's guidelines are intended to support Member States in reaching their 2020 targets, and to this end promote a gradual move to market-based support for renewable energy.

Over the last five years renewable energy sources have been heavily supported with fixed tariffs. Although this was successful in encouraging the growth of renewables in the European energy mix, such fixed support also sheltered the industry from price signals, and has led to market distortions. The Commission's revised state aid rules therefore look to eliminate the situation whereby renewables installations have generated electricity irrespective of the actual demand, and have outcompeted other electrical generation which has to rely solely on the market price to operate effectively.

To achieve this, feed-in tariffs will be replaced by feed-in premiums that expose renewables to market signals, while energy infrastructure and cross-border schemes will also to some extent be protected, and 68 energy intensive sectors will be singled out for subsidies. Such measures have generally been received favourably by European industry, although objections have been raised from other quarters regarding the exemptions granted to energy-intensive industries, such as the chemical, metal, paper and ceramic sectors, from paying full market premium support to renewable power generators.

From 1 July 2014, he Commission will assess new and pending state aid measures according to the criteria set out in these guidelines, and Member States have one year from their publication in the EU Official Journal to bring existing aid schemes in line with their provisions.

China and EU negotiators finalise mutual recognition agreement

On 16 May 2014, EU and Chinese negotiators signed a mutual recognition agreement to recognise each other's certified safe traders, thereby allowing these companies to benefit from faster controls and reduced administration for customs clearance. By mutually recognising trusted traders, both Chinese and EU customs should be able to focus their resources on real risk areas, thereby improving supply chain security.

The EU is the first trading partner to enter into such an agreement with China, having already signed similar deals with the US and Japan. China remains the EU's biggest source of imports, with daily trade amounting to well over €1bn. In 2013, EU exports to China increased by 2.9% to €148.1bn, while the EU imported €279bn worth of goods in 2013.

The mutual recognition agreement looks to optimise customs procedures for both sides, and utilizes the EU Authorised Economic Operator (AEO) status, which was launched in 2008. Companies certified under this initiative have proven themselves to be safe, reliable and compliant with security procedures, and so have fewer inspections on goods and speedier customs procedures and formalities. There are currently around 15,000 companies approved as AEOs in the EU, each of which is now accepted in China through this mutual recognition agreement.

ECJ rules that Data Retention Directive is no longer valid

The European Court of Justice (ECJ) has ruled that the EU Directive imposing data retention obligations on electronic communications services, such as telecoms operators or Internet

service providers, is no longer valid. The ECJ was responding to a request from the Irish High Court and Austrian Constitutional Court to examine the validity of the Directive. The ECJ concluded that the directive "entails a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary".

The data retention directive had been conceived in the period following the 9/11 terrorist attacks in the United States, with subsequent attacks in Madrid and London shifting public opinion in favour of higher security, despite any potential implications for privacy. Since November 2006, the Directive has obliged telecom and internet service providers to retain traffic, location data and other information for a period between six months and two years. The identity of interlocutors is retained, although service subscribers' names and the content of the communications are not recorded.

In the ECJ's opinion, although this data is not directly considerable as personal, "taken as a whole, [it] may provide very precise information on the private lives of the persons whose data are retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements [and] activities carried out, social relationships and the social environments frequented". The Court's declaration of invalidity will take effect from the date on which the Directive entered into force. This has possible negative consequences for the work of European security agencies, which rely extensively on data collected and stored by electronic communications providers.

Producers of high voltage cables fined €302m for cartel behaviour

The European Commission has ruled that eleven producers of underground and submarine high voltage power cables were engaging in cartel behaviour for almost ten years, and has imposed fines totaling €301,639,000. From 1999 onwards, these companies shared markets and allocated customers between themselves on a global scale. This included an allocation of important high voltage power cable projects in the European Economic Area (EEA), including large infrastructure and renewable energy projects such as offshore wind farms.

Submarine and underground high voltage cables are typically used to connect generation capacity to the electricity grid, or to interconnect power grids in different countries. Six European, three Japanese and two Korean producers were involved in the cartel, with ABB receiving full immunity from fines after being the first to reveal their collusion to the Commission. All eleven producers entered into mutual agreements, according to which the European and Asian producers would keep out of each other's home territories.

The cartel participants also allocated projects between themselves according to the geographic region or customer. Whenever the Japanese and Korean companies received requests from European customers, they would notify their European counterparts and decline to bid. The cartelists also agreed on prices levels to be applied, in order to guarantee that the designated supplier would bid the lowest price. Regular meetings were held in European and South-East Asian hotels, with further contact maintained through e-mails, faxes and telephone calls.

Antitrust action against Motorola and Samsung over Apple injunctions

Updating on a previous article, the European Commission has ruled that Motorola Mobility's seeking and enforcement of an injunction against Apple before a German court on the basis of a smartphone standard essential patent (SEP) constitutes an abuse of a dominant position under EU antitrust rules.

SEPs are required to ensure that industry standard technology can be developed. As a result, standards bodies generally require their members to commit to license SEPs on fair, reasonable and non-discriminatory (or "FRAND") terms. The Commission found that it was abusive for Motorola to seek and enforce an injunction in Germany on the basis of a SEP, which it had committed to licence on FRAND terms and for which Apple had agreed to take a licence. Motorola's insistence that Apple give up its right to challenge their validity or infringement of Motorola SEPs was also judged anti-competitive.

This ruling confirms that it is anti-competitive to use SEP injunctions if a holder had committed to licence the SEP on FRAND terms, and the licensee is willing to take a licence on such terms. This will be used in forthcoming disputes, for example between Huawei and ZTE at the Regional Court of Dusseldorf.

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