

EU & UK COMPETITION LAW

BULLETIN

1 July 2009

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Recent Developments in EU Export Controls

Export Controls regulate the export and intra-Community transfer of military and dual-use items. Dual-use items are civil goods that can also have military uses, for example, chemicals, batteries, night vision goggles and metal powder. There have recently been two significant developments in the area of EU Export Controls: (i) the recast of the dual-use Regulation; and (ii) the adoption of an EU Directive promising the facilitation of intra-Community transfer of certain military items.

Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

On 29 May 2009 the recast dual-use Regulation (Regulation 428/2009) was published in the EU Official Journal (EU OJ). Regulation 428/2009 will replace the currently applicable Regulation 1334/2000 from 27 August 2009.

As is currently the case, dual-use items listed in Annexes I and IV to Regulation 428/2009 will continue to require an authorisation for export and intra-Community transfer respectively. Dual-use items not listed in these Annexes will be subject to an export authorisation requirement, if the exporter knows or is informed by the authorities that they are subject to certain end-uses. Most importantly, an authorisation is required if (i) the dual-use items in question are intended for use in connection with weapons of mass destruction (WMD) or missiles capable of delivering such weapons; or (ii) the purchasing country or country of destination is subject to an arms embargo and the items in question are intended for a military end-use.

In addition to the current rules, Regulation 428/2009 introduces new controls on brokering activities and transit.

Brokering services comprise the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a non-EU Member State to any other non-EU Member State and the selling or buying of dual-use items that are located in non-EU Member States for their transfer to another non-EU Member State. Under the new Regulation 428/2009 brokering services will require a prior authorisation, if they concern items listed in Annex I and the broker knows or is informed by the authorities that these are subject to an end-use in relation to WMD or missiles capable of delivering such weapons.

Transit is the entering and passing through the EU customs territory of non-EU dual-use items with a destination outside the EU. Member States may prohibit the transit of non-Community dual-use items listed in Annex I of the Regulation 428/2009 if the items are or may be intended for use in relation to WMD or missiles capable of delivering such weapons.

Under Regulation 428/2009 Member States will also be required to place a stronger emphasis on a company's internal compliance with export control rules when reviewing an application for a global export authorisation. This could lead to a stronger focus on and controls of companies' compliance with export control laws.

Please click [here](#) to view the full version of a Hammonds LLP Review of the developments relating to the dual-use Regulation..

Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (Transfer Directive)

EU arms trade is currently subject to 27 national licensing regimes, which diverge widely. Member States have acknowledged that these disparities may impede the movement of defence-related products and distort competition within the internal market.

The Transfer Directive was published in the EU OJ on 10 June 2009 and encourages Member States to use a system of general and global, rather than individual, licences for certain types of intra-Community transfers of products listed in the EU Common Military List. General licences are established by national law or an administrative act, rather than in response to an application. Global licences authorise a supplier to transfer (categories of) defence-related products to certain (categories of) recipients during three years.

Use of such licenses can significantly facilitate and speed up a company's daily business administration, as not each single shipment would need prior approval from the authorities. The most attractive general licence is arguably for certified recipients. For suppliers to benefit from this general licence, a recipient must undergo a detailed certification process that probes its reliability and compliance with export controls.

In addition, Member States may also entirely exempt certain intra-Community transfers from the licence requirement.

Member States must implement the Transfer Directive into national law by June 2011.

Please click [here](#) to view the full version of a Hammonds LLP Review of the developments relating to the Transfer Directive.

MERGERS

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EU

Decisions

1 [Commission clears proposed takeover of SN Brussels Airlines by Lufthansa, subject to conditions](#)

The European Commission (the Commission) has approved under the EC Merger Regulation the proposed acquisition of SN Airholding, the holding company of the Belgian commercial airline SN Brussels Airlines, by Deutsche Lufthansa AG. The decision is conditional upon the implementation of a set of remedies, offered by Lufthansa to alleviate the Commission's competition concerns.

In January 2009, the Commission opened an in-depth inquiry to investigate further the potential impact of the proposed transaction on passenger transport on a number of routes between Belgium and Germany and Belgium and Switzerland (please click [here](#) for further details). The in-depth investigation confirmed that the transaction, as originally notified, would have raised competition concerns on the following routes: Brussels-Frankfurt, Brussels-Munich, Brussels-Hamburg and Brussels-Zürich. To address these concerns, Lufthansa submitted a set of remedies, offering an efficient and timely slot allocation mechanism that would allow new entrants to operate flights on each of the four routes where the Commission had concerns. In the light of the commitments, the Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

IP/09/974 – 22 June 2009

2 Commission approves proposed acquisition of Nuon Energy by Vattenfall, subject to conditions

The Commission has cleared under the EC Merger Regulation the proposed acquisition of N. V. Nuon Energy by Vattenfall AB. Both companies are active in the energy sector.

The Commission's decision is conditional upon the divestment of part of Nuon Energy's German retail operations. Vattenfall agreed to this divestment to remedy competition concerns the Commission had in relation to retail supplies of electricity to small commercial and domestic customers in Hamburg and Berlin. In view of the remedies proposed, the Commission concluded that the operation would not significantly impede effective competition in the EEA or any substantial part of it.

IP/09/978 – 22 June 2009

3 Commission approves proposed acquisition of Essent by RWE, subject to conditions

The Commission has cleared under the EC Merger Regulation the proposed acquisition of Essent by RWE. RWE is active on both electricity and natural gas markets in most Member States and in particular in Germany, the UK, the Czech Republic and Hungary. Essent is active in the electricity and natural gas markets, mainly in The Netherlands and to a lesser extent in Germany and Belgium. The activities of RWE and Essent overlap in both the electricity and gas markets in the Netherlands and Germany.

The Commission's decision is conditional upon RWE's commitment to divest Essent's controlling shareholding in Stadtwerke Bremen AG. RWE agreed to this divestment to remedy competition concerns the Commission had in relation to the German wholesale electricity and gas markets.

IP/09/987 – 23 June 2009

Invitations to Comment

4 GlaxoSmithKline/Stiefel Laboratories

Interested parties are invited to comment by 5 July 2009 on the proposed acquisition by GlaxoSmithKline plc of Stiefel Laboratories Inc. by way of a corporate merger of a subsidiary of GSK and Stiefel Laboratories.

5 Mitsubishi Corporation/Acciona Energia Internacional/Amper

Interested parties are invited to comment by 6 July 2009 on the proposed acquisition by Acciona Energia Internacional S.A.U. belonging to the Acciona Group and Mitsubishi Corporation of Amper Central Solar, S.A., a joint venture company, by way of purchase of shares.

UK

Decisions

6 Anticipated acquisition by Cranswick Country Foods plc of the pork processing business of Bowes of Norfolk

The Office of Fair Trading (the OFT) has not referred to the Competition Commission the anticipated acquisition by Cranswick Country Foods plc of the pork processing business of Bowes of Norfolk. Cranswick plc supplies a range of fresh pork, gourmet sausages, premium cooked meats, traditional dry cured bacon, charcuterie and sandwiches to its customers from a number of production facilities in the UK. Cranswick Country Foods plc is responsible for the fresh and processed pork operations of the Cranswick group. Bowes is a third generation family-owned business based in Watton, Norfolk.

On 3 April 2009, Cranswick plc, through Cranswick Country Foods plc, entered into sale and purchase agreements by which Cranswick plc agreed to purchase the whole of the issued share capital of Bowes. Cranswick plc will only be acquiring Bowes' pork processing division and, so, immediately prior to completion

of the acquisition the arable farming and pig rearing divisions will be sold off to companies owned by certain Bowes family members.

The parties overlap in the supply of live pigs for slaughter, the supply of fresh pork for consumption and the supply of pig meat for further processing. There had been some concerns in relation to the parties' ability and incentive to foreclose competitors in the downstream market. It was found by the OFT, however, that the parties' ability to foreclose in this market would be limited by their low upstream market power which would not enable them to partially or totally foreclose competitors. In addition, given that a significant proportion of Cranswick plc's sales are currently to its downstream competitors it was found by the OFT that it is not likely that it will have the incentive to foreclose a downstream competitor, especially given the difficulties in expanding its capacity.

ME/4079/09 – 23 June 2009

7 Competition Commission accept Project 'Kangaroo' remedies

The Competition Commission (CC) has accepted remedies submitted by television companies BBC, ITV and Channel 4 relating to their video on demand joint venture; Project 'Kangaroo'. The CC had previously concluded that the joint venture was likely to result in a substantial lessening of competition in the supply of UK TV video on demand content at the wholesale and retail levels and would have prohibited the deal without the agreed remedies. The remedies relate to limitations on the acquisition activity of the BBC, ITV and Channel 4 (in relation to each other); restrictions on the activities of the Directors of, and persons in managerial positions at, the BBC, ITV and Channel 4; and restrictions on the BBC, ITV and Channel 4 entering agreements in relation to these two points.

25 June 2009

Invitations to Comment

8 Tesco / Spar store in Wroughton

Anticipated acquisition by Tesco plc of a Spar grocery store in Wroughton from Capper & Co Limited - issued 18 June 2009.

9 Lactalis McLelland Limited / Lubborn Cheese Limited

Completed acquisition by Lactalis McLelland Limited of Lubborn Cheese Limited - issued 22 June 2009

10 Govia / South Central Passenger Rail Franchise

Acquisition by Govia Limited of the South Central Passenger Rail Franchise - issued 19 June 2009

ANTITRUST

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Other

11 Austrian Competition Authority takes action relating to petrol pricing and requests the assistance of the OFT

The Austrian Competition Authority, the Bundeswettbewerbsbehörde (BWB), has been conducting a domestic

probe into the pricing of petrol by Austrian traders since 2008. The BWB concluded, in an interim report in July 2008, that all petrol stations operating in Austria implemented their price increases at the same time, and decreased their prices within only a few days of each other. The investigated companies claimed that they merely adopt the daily prices published by Platts. Platts is a commodities listing service based in the UK and provides information (including price assessments) in relation to specialised areas such as oil, electricity, nuclear, coal, petrochemical and emissions markets.

The BWB sent a questionnaire to Platts in April 2009 to find out how Platts establish the prices for diesel and petrol in northwest Europe.

Not having received any response from Platts, the BWB announced on 26 June that it will ask the Office of Fair Trading for administrative assistance.

Furthermore, the BWB claims that since it started the public discussion earlier this year, prices at Austrian petrol stations have stopped following Platts' pricing. Oil companies and petrol stations have however continued to implement price increases and decreases simultaneously.

The BWB has therefore asked oil companies to commit themselves to submitting to a 'virtual data room' daily information on how they set end-prices. The submitted information will be analysed by a team of experts. (Oil companies will not have access to their competitors' information.) Whilst the BWB would prefer a voluntary commitment, it is, however, determined to take further legal steps should oil companies refuse to cooperate.

12 Austrian Competition Authority publishes Handbook on the implementation of the Leniency Programme

The Commission and 17 Member States have a "Leniency Programme" (i.e. a programme for cooperation in competition proceedings). Although these programmes differ substantially in detail between Member States, they all have the common concept that they either grant full immunity from fines or a significant reductions of fines which would otherwise have been imposed on a participant in a cartel in exchange for fully and voluntarily disclosing information on a cartel which meets specific criteria prior to or during the investigation of the case.

Austrian competition law contains a leniency programme, which has been effective since 1st January 2006. As part of this programme the BWB has recently published a handbook which describes the procedure for the implementation of the leniency programme.

The handbook contains, amongst other things, information relating to full immunity from fines (including qualifying criteria), information relating to reduction of fines and the procedure for seeking leniency (including the information that must be set out in the application).

STATE AID

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13 Commission approves Finnish export-credit insurance scheme

The Commission has authorised, under EC State aid rules, a measure adopted by Finland to limit the adverse impact of the current financial crisis on export firms. The Commission found the measure to be in line with its Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis. In particular, the measure requires market-oriented remuneration and tackles the problem of the current unavailability of short-term export credit insurance cover in the private market. The Commission authorised the measure until 31 December 2010.

IP/09/979 – 22 June 2009

14 Commission adopts guidance on in-depth assessment of regional aid to large investment

projects

The Commission has adopted a guidance paper setting out criteria for the in-depth assessment of regional aid to large investment projects. The guidance outlines the kind of information required by the Commission for its detailed compatibility assessment and the assessment methodology, which is based on the balancing of the positive and negative effects of the aid. The guidance is in line with the Commission's refined economic approach to analysing State aid, based on the principles set out in the State Aid Action Plan. The guidance forms part of the Commission's efforts to clarify and refine the State aid rules.

IP/09/993 – 24 June 2009

15 Commission requests Belgium and the UK to implement Transparency Directive

The Commission has addressed formal requests under the EC Treaty infringements procedure to Belgium and the United Kingdom requiring them to communicate the measures that are aimed at implementing the Commission Directive 2005/81/EC amending the Directive on the transparency of financial relations between Member States and public undertakings.

Member States were required to implement the Directive in national law by 19 December 2006. The requests take the form of "reasoned opinions", the second step in infringement procedures under Article 226 EC Treaty. Belgium and the UK now have two months to notify to the Commission the measures they have taken to implement the Directive. Failing this, the Commission may refer them to the European Court of Justice (ECJ).

IP/09/1027 – 25 June 2009

16 Commission refers Italy to Court for failure to respect Court ruling to recover illegal aid

The Commission has decided to refer Italy to the ECJ for failure to implement a 2004 ruling by the ECJ confirming a Commission decision of 1999 finding that Italy had granted illegal and incompatible aid and ordering its recovery.

The illegal aid in question took the form of exemptions from social security contributions in cases where companies could not prove that (a) new jobs had been created or (b) that the hired workers had special difficulties entering or re-entering the employment market. Although over five years have elapsed since this judgement, Italy has still only recovered a small part of the overall aid amount estimated at about €281 million. The Commission has, therefore, now requested the ECJ to impose fines on Italy under Article 228 EC Treaty.

Please click [here](#) to view a copy of the ECJ ruling in Case C-99/02.

IP/09/1028 – 25 June 2009

17 Commission approves recapitalisation of Anglo Irish Bank

The Commission has approved, under EC State aid rules, an emergency recapitalisation worth €4 billion that the Irish authorities intend to grant to Anglo Irish Bank. The Commission found that the notified measure constitutes an adequate means to remedy a serious disturbance in the Irish economy while avoiding undue distortions of competition. As such it is compatible with Article 87(3)(b) EC, as explained in the Commission's guidance on State aid to banks during the current financial crisis. In particular, the measure is limited in time and contains adequate safeguards to minimise distortions of competition. The aid is approved as a temporary rescue measure and Ireland has committed to submit a restructuring plan for the bank until the end of November 2009.

Please click [here](#) to view a copy of the Commission's guidance on State aid to banks during the current financial crisis.

IP/09/1045 – 26 June 2009

18 [The English High Court dismisses easyJet's judicial review action against the Civil Aviation Authority's Gatwick price control decision](#)

The High Court has dismissed easyJet's claim that the Civil Aviation Authority's (the CAA) decision of March 2008 on the price controls at Gatwick Airport was legally flawed. In March 2008 the CAA published a decision document on the price controls for Heathrow and Gatwick airports from 1 April 2008 to 31 March 2013. This had followed two and half years of consultation with the industry. One of the measures it introduced was an increase in the maximum amount airlines could charge passengers at Gatwick. This represented a 21% increase in real terms from the previous year's price cap. The CAA had claimed that the increase in airport charges was to pay for essential modernisation and improvements in services at Gatwick, including additional security costs at the airport.

easyJet brought an action (for judicial review) to challenge the CAA's decision in relation to CAA's price control at Gatwick. One of the main issues in dispute was the approach that the CAA had taken to the cost of security measures in calculating the price cap. Further, easyJet claimed that although there was consultation on the proposals, it had not been given a chance to comment on further information provided by Gatwick after the consultation period. easyJet claimed that the CAA had acted unfairly and unlawfully by taking account of this information. easyJet also claimed that the CAA had unlawfully failed to follow certain recommendations of the Competition Commission.

The High Court found that the CAA did not act unfairly by seeking further information from BAA after the consultation period had ended. The High Court concluded that the CAA needed the additional information to enable it to arrive at a decision, that the CAA gave consideration to all relevant material and that the CAA was entitled to conclude that it would not have been assisted by any additional consultation/representations from the airlines after the conclusion of the consultation period. The High Court also rejected claims that the CAA had acted unlawfully in not following certain recommendations of the Competition Commission in relation to aspects of the price control.

26 June 2009

If you require further information or advice on any of the items covered, then please contact either Diarmuid Ryan in London or Tom Pick in Brussels who are both partners in our EU Competition team.

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