

EUROPEAN COMMISSION LAUNCHED E-COMMERCE SECTOR INQUIRY

Background

After the announcement of the European Commissioner for Competition, Margrethe Vestager, to initiate a sector inquiry for the e-commerce markets in March, the European Commission launched an antitrust competition inquiry into the e-commerce sector on May 6th. Competition sector inquiries are used by the European Commission ('EC') as a non-company investigative tool in areas where the EU single market integration is often faced with obstacles.

According to Commissioner Vestager, cross-border online sales within the EU are growing slowly despite the fact that more and more goods and services are traded online throughout Europe. Apart from the objective obstacles of preventing cross-border online sales such as language, consumer preferences and difference in legislations across the EU Member States, there are also technical and contractual barriers imposed by companies that restrict cross-border e-commerce.

The inquiry follows a number of open antitrust cases in the online sector. Subject to review by the EC are *contractual clauses* restricting the ability of subscribers to access satellite and online pay TV when they are outside the licensed territory; *online distribution* of electronic goods, relating to pricing and restrictions on cross-border supply; *geo-blocking* of certain online PC video games.

Scope of the Inquiry

The sector inquiry will *focus* on barriers to the cross-border sale of goods and digital content raised by private companies, especially in their distribution contracts and on industries in which e-commerce is used the most. The sector inquiry will focus particularly on potential barriers erected by companies to cross-border online trade in goods and services where e-commerce is most widespread such as electronics, clothing and shoes, as well as digital content.

Contractual arrangements between manufacturers/content owners and their distributors for preventing customers from accessing websites outside of their home country and use of geo-blocking software are practices that undermine cross-border trade. Under the EU Block Exemption Regulation, the so-called territorial restrictions are considered hard-core restrictions of competition sanctioned by the Commission with up to 10 % of a company's total turnover in the preceding business year.

The European Commission is looking for information about the anti-competitive practices used by manufacturers, merchants, content holders in their relations with distributors: whether distributors face restrictions to sell in territories outside the distribution area or whether different prices are set for different countries. For example, distribution agreements may provide for prohibition of passive online sale; penalties to distributors for selling out of a defined territory; provision of special incentives (bonuses) to distributors aimed at discouraging cross-border sales; use of geo-blocking tools for restriction of cross-border sales, etc.

The Commission and national competition authorities will uniform their actions in relation to restrictions on online sales in order to ensure better functioning of an EU single digital market.

Timeframe

The Commission expects to publish a preliminary report for consultation in mid-2016. The final report is expected in the first quarter of 2017.

The Commission may cooperate with the competition authorities of Member States for collection of information for local markets.

Impact of Sector Inquiry on Market Players

The Commission will collect information from a broad range of entities across the EU, for example, holders of content rights, broadcasters, manufacturers, merchants of goods sold online, and companies with online platforms (price-comparison and marketplace websites).

In its previous inquiries (for example, in investigations on energy, pharmaceuticals, financial services), the Commission sent out wide-ranging and very detailed information requests to a broad spectrum of industry players. Recipients were not obliged to respond to these informal requests, however, most of them still preferred to cooperate.

The Commission regularly sends *mandatory questionnaires* to certain market players which may incur significant financial penalties for non-compliance - 1 % of their total turnover in the preceding business year for supply of incorrect or misleading information, and/or periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year, per day, for delays in the provision of complete and correct information.

In the course of an inquiry, the EC may dawn raid market participants in order to obtain evidence relevant to the investigation.

Based on the results of the inquiry, the Commission could (as in previous analyses) open an investigation case against individual companies for infringements of competition law (abuse of dominant position or restrictive business practices). Therefore, in order to be

prepared for the Commission's requests the companies from the e-commerce sector should check whether their commercial relations (contracts, practices, communications) are compliant with EU competition requirements. It is recommendable for those companies to set up internal competition compliance programmes.

Bulgarian Market

There is a large number of online shops and internet platforms which operate on the Bulgarian market. Some of those (www.emag.bg) were recently imposed a fine for their anti-competitive practices by the Bulgarian antitrust authority in 2015 (1% of turnover, approx. BGN 138,000).

We expect the Commission to approach Bulgarian companies and ask them to provide information about their practices and relations with clients and suppliers.

Unannounced inspections (dawn raids) in the premises of the undertakings are also likely to take place. Inspections may be carried out by the European Commission or in cooperation with local investigators.

Therefore, companies from the sector should be aware of the competences of the EC and how to protect their rights. For instance, they may claim for protection of their business secrets provided to the Commission, as well as the correspondence with their external lawyers. However, communication and legal opinion of in-house legal counsels is not considered privileged legal information.

About Wolf Theiss

Wolf Theiss Sofia regularly provides advice to clients on competition law aspects of e-commerce and on-line selling in a range of sectors. We have extensive experience in setting programmes for competition compliance and in trainings of companies' staff on how to behave at times of dawn raids.

Wolf Theiss is one of the leading law firms in Central, Eastern and South-Eastern Europe. We have established our reputation of unsurpassed local knowledge and strong international capabilities. We opened the first Wolf Theiss office in Vienna over 50 years ago, and today our team is comprised of over 300 associates with different practice areas, working in offices spread in 13 countries in Central and Eastern Europe.

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