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Antitrust Alert

European Antitrust Watchdog Prepares E-Commerce Sector Inquiry

On March 26, 2015, European Competition Commissioner Margrethe Vestager proposed launching a formal sector inquiry into the European e-commerce industry, with a special focus on cross-border e-commerce activities. According to the Commissioner, there are a number of indications that competition may not be working well in the European e-commerce sector, including the fact that nearly half of all EU consumers used the Internet for purchasing products or services in 2014, but only 15 percent of them have bought from a seller based in another EU member state.

Competition sector inquiries are investigations that the European Commission (EC) carries out when it has indications that a sector is not working as well as it should. After collecting the data and evidence, the EC uses the information obtained in the inquiry to better understand the market from the perspective of competition policy and to identify issues that could restrict competition.

Just one day before Commissioner Vestager's March 26 comments, the EC confirmed that it raided several companies involved in online sales of consumer electronics over alleged anti-competitive agreements. The competition watchdog said it carried out the unannounced inspections on March 10, 2015 "in several member states at the premises of a number of companies active in the online sale of consumer electronics and consumer electrical products." The Commission has not disclosed the names of any companies raided nor how many companies were involved. These raids are related to earlier dawn raids the Commission carried out in December 2013 at companies in the consumer electronics industry. At the time, Royal

Philips and Samsung confirmed they were inspected by commission officials, while several other companies were rumored to have been visited as well.

One of the EU's main objectives is to guarantee an internal market, also known as the single market, for its "four freedoms"—the free movement of goods, capital, services and people—within the EU's 28 member states. The internal market can be in great danger if companies implement techniques such as "geo-blocking" to harm competition. Geo-blocking is usually used to identify e-commerce customers by their origin, often by analyzing their credit card data or residence or IP-address. By using geo-information, companies are able to redirect business requests to defined business channels, which can mean that certain business channels are not made known or available to the customer. A typical example of geo-blocking would be redirecting the request from a German resident for a certain product or service to a defined business channel that serves only German customers, whereas customers from other EU member states are redirected to different business channels related to their specific locations. In practice, this can help the concerned company to maintain defined price levels in different EU member states.

Art. 17 of Regulation 1/2003 gives the EC power to conduct sector inquiries. In the course of such an inquiry, the EC can use all its powers of investigation, including using dawn raids. A sector inquiry can only lead to a report, not remedies. The information gained through the sector inquiry, however, may lead to the subsequent opening of proceedings concerning individual infringements of Articles 101 and 102 TFEU.

The EC has conducted prominent competition inquiries in many sectors already, including financial services, pharmaceuticals and energy, among others. Following these sector inquiries, the EC often adopted a substantial number of individual decisions finding infringements of Articles 101 or 102 TFEU and imposed huge fines.

Preliminary results from the sector inquiry are probably not due before mid-2016, while the timing of such inquiries and results corresponds with the scope of such investigation. It is expected that the Commission intends to send out questionnaires to a number of companies concerned as well as to EU member states. Commissioner Vestager also confirmed that the inquiry would not be targeted solely on US companies, which are the major players in e-commerce also in Europe.

Companies using e-commerce must be aware of the imminent activities of the European antitrust watchdog. Typically sector inquiries are launched with a number of unannounced on-site inspections at companies to collect internal data. Companies are therefore well advised to

check their online activities to detect (potential) infringements of anticompetitive agreements or behavior, including an abuse of dominance. Moreover companies should reconsider their guidelines for unannounced visits by an authority. To the extent that an inquiry confirms the existence of anticompetitive behavior, agreements or abuses of dominant position by individual companies, the EC or the national competition authorities can use the collected information in order to take the appropriate measures to restore competition in the relevant markets including imposing substantial fines.

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