

EU Law News

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

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Google's alleged market dominance

On 20 April 2016 the European Commission informed Alphabet of its preliminary view that Google has abused its dominant position by imposing restrictions on Android device manufacturers and mobile network operators. The Commission's statement of objections comes on top of the separate and ongoing case that Google would be abusing its dominance of online search to promote its own shopping services unfairly.

Globally more than 80% of smartphones use Android's open-source system. Google is also dominant in the markets for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system. The Commission's concerns focus on three aspects.

- Google's licensing terms oblige manufacturers, for example, who wish to pre-install Google's app store for Android and Play Store on their devices to also pre-install Google Search. In addition Google demands that those manufacturers set Google Search as the default search provider on those devices. The Commission seeks to ensure that manufacturers are free to choose which apps they pre-install on their devices.
- Google would also prevent competition through modified versions of Android, called "Android forks". The Commission has found evidence that Google's conduct prevented manufacturers from selling smart mobile devices based on a competing Android fork which had the potential of becoming a credible alternative to the Google Android operating system.
- Google has granted significant financial incentives to some of the largest smartphone and tablet manufacturers as well as mobile network operators. The Commission takes issue with the conditions associated with Google's incentives, in particular that the financial incentive is not paid if any search provider other than Google Search is pre-installed on smart mobile devices.

European Court annuls Commission decisions relating to cement manufacturers

On 10 March 2016 the European Court of Justice (ECJ) annulled a decision of the Commission requesting information on the ground that the decision did not sufficiently explain why the request was necessary. In 2008 and 2009 the Commission carried out inspections at the premises of several cement companies and initiated a procedure for alleged infringements. Those infringements included restrictions on trade flows in the European Economic Area, market-sharing, price coordination and related anti-competitive practices in the cement and related pro-

duct markets. In 2011 the Commission asked the companies to answer a questionnaire concerning suspected infringements.

Several companies brought actions for annulment before the General Court. They criticised the Commission for not having adequately explained the alleged infringements and for the disproportionate volume of the information requested and the burdensome format of the required response. On 14 March 2014 the General Court confirmed the lawfulness of the requests for information sent by the Commission.

However, upon appeal by the companies the ECJ found that the questions sent by the Commission to the companies were extremely numerous and covered very different types of information. The Commission's decisions do not disclose unequivocally the grounds for suspicion of infringement and why the requested information is necessary for the investigation. An excessively succinct, vague and generic statement of reasons may not justify requests for information which, as in the present cases, occurred several months after the opening of the investigation and more than two years after the first inspections. The ECJ noted that the decisions were adopted at a time when the Commission already had information that would have allowed it to present more precisely the suspicion of infringement weighing on the companies involved. Consequently, it concluded that the statement of reasons for the Commission decisions did not meet the requisite legal standard and set aside the judgments of the General Court as well as the Commission decisions.

Geo-blocking widely found across the EU

On 18 March 2016 the publication of the Commission's e-commerce sector inquiry showed that geo-blocking is widespread in the EU. Geo-blocking prevents consumers from purchasing consumer goods and accessing digital content online in the European Union because of the shopper's location or country of residence. This is partly due to unilateral decisions by companies not to sell abroad but also contractual barriers set up by companies preventing consumers from shopping online across EU borders.

The inquiry included more than 1400 retailers and digital content providers from all 28 EU Member States. 38% of the responding retailers selling consumer goods and 68% of digital content providers replied that they geo-block consumers located in other EU Member States. The publication of the inquiry on geo-blocking does not prejudge any anticompetitive concerns or the opening of any antitrust cases. The findings will feed the Commission's ongoing analysis in the sector inquiry to identify possible competition problems and also complement actions launched within the framework of the Commission's Digital Single Market Strategy in order to address barriers that hinder cross-border e-commerce.

Insurance block exemption regulation

On 17 March 2016 the European Commission published a report on the functioning of the Insurance Block Exemption Regulation (IBER). The IBER came into force in 2010 and will expire on 31 March 2017. Its purpose is to exempt certain types of co-operation in the insurance sector from EU antitrust rules. The review of the Regulation started with a public consultation, followed by questionnaires sent to customers, intermediaries, federations, brokers and other stakeholders.

The IBER provides exemptions for agreements between insurers. With regard to joint compilations, tables and studies, the functioning of the insurance industry no longer appears to require an exceptional instrument like the IBER because the Commission's guidelines on horizontal cooperation, adopted in 2010, offer guidance on how to assess the admissibility of this type of co-operation.

Co-(re)insurance pools are set up by several insurers to cover certain risks such as large scale environmental risks. Only a limited number of companies benefit from the exemption. The review also showed that insurers share risks in various forms and that there is an important and growing market trend away from institutionalised pools as identified in IBER towards alternative and more flexible ways of co-(re)insuring risks.

At this stage, the Commission's preliminary view is that it is no longer necessary to maintain sector-specific block exemptions. The Commission will organise a meeting with all stakeholders to provide an opportunity to discuss the report's findings. It has also commissioned two studies on issues that stakeholders have raised; firstly, regarding asset switching between different insurance products of relevance for pools and, secondly, different forms of co-(re)insurance available on the market and their impact on competition.

State Aid for renewable energy in Italy

On 29 April 2016 the Commission concluded that an Italian scheme aimed at supporting electricity generation from renewable energy sources is in line with EU State Aid rules. It assessed the scheme under its 2014 Guidelines on State Aid for Environmental Protection and Energy. The scheme will support Italy in reaching its EU renewable energy targets by helping to deploy around 1,300 megawatts of additional renewable generation capacity. Under these rules Member States can grant State Aid for renewable energy, subject to certain conditions. Europe should meet its ambitious energy and climate targets at the least possible cost for taxpayers and without undue distortions of competition in the Single Market.

The scheme will last until the end of 2016. All renewable energy technologies can benefit from the scheme, except solar power

which is deemed already competitive on the Italian market without the need for direct support for the electricity produced. The type of support renewable energy projects can receive under the scheme depends on their size: large projects with more than 5 MW of installed power will compete in tenders specific for each technology; medium size projects with installed power between 0.5 MW and 5 MW enter a list specific for each technology, and will be prioritised subject to set criteria in order to receive support; projects smaller than 0.5 MW will have direct access to aid upon request.

The Commission found that the scheme, in promoting the integration of renewable energy producers into the market, is in line with the guidelines. Only small installations can benefit from feed-in tariffs, whilst larger installations will receive support through a premium, i.e. a top-up on the market price, which exposes these renewable energy sources to market signals. The scheme will also support the refurbishing of existing generators of any size, for example to increase their efficiency or extend their operational lifetime. The Commission concluded that the scheme will increase the proportion of electricity generated from renewable sources and reduce pollution, in line with EU Energy Union goals, without unduly distorting competition.

Investigation into suspected paper industry cartel

On 15 March 2016 Commission officials carried out unannounced inspections at the premises of several companies active in the sector of kraft paper and industrial paper sacks. The inspections took place in several Member States. The Commission officials were accompanied by their counterparts from the relevant national competition authorities.

The Commission is concerned that the companies in the sector may have carried out anti-competitive practices such as price fixing and customer allocation. The inspections are a preliminary step in investigations into suspected cartels and do not mean that the companies are guilty of anti-competitive behaviour. There is no legal deadline to complete the cartel inquiries as each case depends on a number of factors, including the complexity of each case, and the extent to which the companies concerned co-operate.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

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