

KIRKLAND ALERT

February 2016

Antitrust Update: EU Antitrust v. U.S. Companies

From time to time the European Commission (EC) is accused of unfairly targeting U.S. companies in its antitrust scrutiny. Competition Commissioner Margrethe Vestager was quick to reject this suggestion last year and already in 2016 has been in front of U.S. media to reiterate that this is not the case. Our quick look at cases involving U.S. companies reveals a nuanced picture. Sectors currently of interest to the EC are populated by U.S. companies, bringing them into the EC's spotlight. However, although some face serious antitrust risks, others are benefiting from positive support or even escaping adverse findings.

TECHNOLOGY – DOMINANCE

Google. The long-running Google saga continues. Under the previous Competition Commissioner, the EC market-tested several iterations of commitments offered by Google, to no avail. It has now turned up the heat on Google by issuing a “Statement of Objections” (SO) which sets out adverse findings on a preliminary basis. The EC alleges that Google favors its own comparison shopping product in its general search results pages. In a newer case, “Android,” the EC is investigating whether practices relating to the use of Google applications on the Android smartphone operating system have hindered competition from rival operating systems and apps.

Qualcomm. In December the EC stepped up its investigation of Qualcomm with an SO. The Commission alleges that Qualcomm unlawfully paid rebates and other incentives in return for exclusivity or near-exclusivity with customers and engaged in predatory pricing — thereby allegedly excluding other 3G and 4G chipset manufacturers from the market.

***INSIGHT** – The EC continues to be vigilant against practices by incumbent technology companies that may limit competition; and the EC continues to be more interventionist than its U.S. counterparts. Google and Qualcomm follow a line of U.S. tech companies whose practices have been alleged to violate (at significant cost to them) the EU prohibition on “abuse of dominance.”*

E-COMMERCE – ONLINE DISTRIBUTION

E-Commerce Sector Inquiry. In May 2015, the EC opened its e-commerce “sector inquiry.” The key objective is to root out agreements and practices that hinder online sales between Member States (so-called “geo-blocking”), in order to encourage the digital economy in the EU. The EC plans to publish an issues paper on geo-blocking in Spring 2016 as its investigation continues. There are also a number of e-commerce investigations ongoing, as detailed below, and past experience shows that more can be expected in the wake of the sector inquiry.

From time to time the EC is accused of targeting U.S. companies specifically in antitrust. This looks set to remain an issue in 2016, although our quick look at the cases reveals a nuanced picture.

The EC continues to be vigilant regarding practices by incumbent technology companies that may limit competition; and to be more interventionist than its U.S. counterparts.

Sky/Hollywood Studios. The EC has alleged that licensing deals between Sky TV in the UK and six major Hollywood movie studios are anti-competitive because they prevent consumers from accessing content outside the UK. The EC's case is that such geo-blocking practices prevent EU cross-border competition between pay-TV services. The case highlights a clash between EU competition policy and EU copyright laws, which are not currently conducive to EU-wide licensing.

Online Travel Agents. Over the last two years, many European Member States have investigated the use of “most favored nation” (MFN) clauses in distribution agreements between hotels and online travel agents (OTAs). The investigations have focused on “narrow” and “broad” MFNs. Narrow MFNs require hotels not to offer lower prices on the hotel's own website than its prices offered via the OTA. Broad MFNs also prevent the hotel from agreeing lower prices with other OTAs. France, Italy and Sweden (amongst others) have accepted commitments from OTAs only to use narrow MFNs. However, in a move highlighting that enforcement is not consistent across the EU, the German authority (Bundeskartellamt) has rejected similar commitments from Booking.com (which is part of the Priceline Group) holding that its narrow MFNs are also anticompetitive. Booking.com is appealing the decision.

Amazon. In June 2015, the EC opened an investigation into MFNs in Amazon's contracts with e-book publishers. The current focus is on e-books in English and German, which are the largest language markets. The EC's hypothesis is that if publishers are obliged to report and offer to Amazon any better deals that the publishers agree with Amazon's competitors, this unfairly impedes competition, enabling Amazon to protect its alleged dominant position.

***INSIGHT** – MFNs and territorial restrictions are vertical restraints which typically are justified as necessary to enable the substantial investment in brands and technology required to enter and compete. However, in the e-commerce context, the EC sees them as potentially problematic where they benefit a major platform, or where they are standard across the industry, as in the case of the Hollywood studios. Once again, we see here a more interventionist approach by the EC than by its U.S. counterparts.*

THE SHARING ECONOMY

In contrast to the cases against U.S. companies, market disruptors such as Uber and Airbnb are benefiting from support from some competition agencies in the EU.

Uber. As Uber comes under close scrutiny following widespread protests, the UK Competition and Markets Authority (CMA) defended the innovative taxi service, criticising London's transport authority (TfL) over proposals aimed at curtailing the rise of Uber and other taxi app groups. TfL had proposed a number of tougher rules for private-hire vehicles, including forcing drivers to wait five minutes before picking up a customer, not allowing apps to show vehicles available for hire on a map and giving fixed fares at the start of a journey. The CMA intervened, arguing that the rules would artificially restrict competition and harm consumers. The Span-

MFNs and territorial restrictions are restraints which typically are justified as necessary to enable the substantial investment in brands and technology required to enter and compete. In the e-commerce context, the EC views them as potentially problematic where they benefit major platforms or are standard across an industry.

ish competition authority is also due to publish a report calling for an end to the restrictions imposed on the operations of Uber and Airbnb in Spain (where Uber has been banned and Airbnb's operations severely restricted). The report is set to be the first comprehensive report on the sharing economy by a European regulator.

***INSIGHT** – Competition law and policy will play an important role in the development of the sharing economy in Europe. Whereas certain political actors may have protectionist instincts, it is notable that competition authorities are coming out against those views, to support the new entry.*

FINANCIAL TRADING

In the wake of its LIBOR/EURIBOR investigations, the EC continues to investigate rate setting and other conduct in trading markets.

Forex. The EC is undertaking its own investigation of forex market manipulation. Six banks have already been heavily fined by U.S. and UK authorities and a decision by the EC is expected. Experts expect private lawsuits to follow as a result of the decision.

Credit Default Swaps. Unusually, the EC closed antitrust proceedings against the 13 investment banks involved in its investigation into the credit default swaps market. The EC had alleged that banks collectively blocked exchanges to protect their revenues from OTC trading of credit derivatives but, in a reprieve for the banks, it has abandoned these claims. Proceedings continue against Markit and the International Swaps and Derivatives Association.

Precious Metals Trading. The EC is investigating anti-competitive behavior in precious metals spot trading. It is not alone: the UK, Swiss and U.S. authorities are also conducting investigations.

***INSIGHT** – The investment banks have suffered at the hands of regulators around the world in the wake of the financial crisis and the various trading practices uncovered in recent years. The EC has largely been in step with the United States in its interventions, although the credit default swaps case was a notable exception (after the Department of Justice's own credit default swaps case went cold). With that off the table, in this sector at least, EC and U.S. cases are generally aligned.*

TAX TREATMENT AS UNLAWFUL STATE AID

The “Luxembourg Leaks” in 2014, disclosing confidential information about hundreds of tax rulings by Luxembourg, triggered a series of investigations to establish whether the tax regimes in certain EU countries (in particular Luxembourg, Ireland, Belgium and the Netherlands) were unfairly favoring specific companies.

Starbucks and Fiat. Transfer pricing arrangements, accepted by some Member States when calculating tax for multinational companies, are being deemed to be

Competition law and policy will play an important role in the development of the sharing economy in Europe, supporting market disruptors such as Uber and Airbnb.

unlawful state aid. In the case of Starbucks and Fiat (part of Fiat Chrysler), the EC has found that prices for goods and services sold intra-group were set at levels that did not correspond to market conditions, enabling profits to be shifted and escape taxation. Starbucks and Fiat are early examples — cases are ongoing against a number of companies. Where there is a ruling of unlawful state aid, the beneficiary of the aid is required to repay it, with interest.

***FINAL COMMENT** – Leaving aside the impact on U.S. companies who operate in the sectors of interest to the Competition Commissioner, the EC's most politically controversial move on the antitrust stage this year has been against Russia. In April it issued an SO against Gazprom. Beyond the lawyers and economists who usually attend the oral hearing, Alexander Medvedev himself attended Gazprom's hearing, underlining the political sensitivity around the case.*

Thus, in her first full year as Competition Commissioner, Margrethe Vestager has shown herself to be unafraid of big companies, big decisions and controversy. Equally, however, the EC cannot proceed oblivious to the response from outside Europe, and we anticipate that the Commissioner will continue to look to find resolutions where feasible, so that not every case ends up with major penalties and appeals to the European court. In particular, all eyes will be on Google and whether a resolution to that case is achievable. More generally, we expect e-commerce and tech to continue as the major focus this year, closely reflecting the digital agenda of the European Commission.

In her first full year as Competition Commissioner, Margrethe Vestager has shown herself to be unafraid of big companies, big decisions and controversy.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Paula Riedel
Kirkland & Ellis International LLP
30 St Mary Axe
London EC3A 8AF
United Kingdom
www.kirkland.com/priedel
+44 20 7469 2470

Sarah Jordan
Kirkland & Ellis International LLP
30 St Mary Axe
London EC3A 8AF
United Kingdom
www.kirkland.com/sjordan
+44 20 7469 2260

James H. Mutchnik, P.C.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/jmutchnik
+1 312 862 2350

This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.

© 2016 Kirkland & Ellis International LLP. All rights reserved.

www.kirkland.com