



# Renewed focus on cross-border trade

THE EUROPEAN COMMISSION VOICES NEW CONCERNS ABOUT BARRIERS TO CROSS-BORDER ONLINE SALES

The European Commission has recently published a number of statements highlighting concerns about barriers to e-commerce. Its desire to protect consumers in the economic downturn is refocusing its attention on practices that prevent cross-border trade, particularly via the internet. It has already notified its intention to investigate further 'the arbitrary segmentation of the internal market by traders for the sole purpose of price discrimination of EU consumers' and to take a tough stance on such practices. Businesses should ensure that their policies and practices on cross-border trade comply with EC competition law principles.

The overriding goal of the European Community has always been to achieve a single or common market for Europe. This imperative has strongly influenced the development of EU competition law, with the European Commission taking a keen interest in practices that hinder trade between member states. Now, changed market conditions and exchange rate movements have renewed emphasis on these issues, particularly in relation to obstacles to internet trading.

In early enforcement of EU competition law, the Commission maintained a strict policy against any measure agreed between a producer and a distributor that, directly or indirectly, divided the EU market by geography. The Commission has in the past taken action against measures such as export bans, circulars discouraging export, supplying insufficient quantities of goods to restrict exports and charging discriminatory prices to prevent export. Its desire to protect customers in the economic downturn and the growing frustration of online customers unable to obtain supplies cross-border have brought renewed focus by the Commission on practices that inhibit cross-border trade.

Consumer expectations and economic pressure on distributors are increasingly coming into conflict. The growth in online retailing increases consumer awareness of offers by distributors worldwide. The economic downturn and the falling value of many non-euro-zone currencies against the euro are likely to result in more pressure than ever from consumers across Europe, looking for a good deal, wanting to access

those offers cross-border. At the same time distributors, under margin pressure due to the downturn, are increasingly likely to call on producers to provide some sort of territorial protection against competition from distributors outside their territory.

The Commission has taken note. In September, Neelie Kroes, the Competition Commissioner, hosted a round table to discuss opportunities and barriers to online retailing. It was attended by senior consumer and industry representatives, including the chief executive officers of Alcatel-Lucent, LVMH, eBay, EMI, Apple, SACEM, Which? and Sir Mick Jagger. The Commissioner noted in her closing remarks, 'Consumers see the internet, and the borders that exist online, and feel that they are not getting a fair deal.' She warned that 'if this is because competition rules are not being respected, consumers and companies should know that I will enforce them'.

It is a concern that is shared by many in the European Commission. The Internal Market Commissioner, Charlie McCreevy, who also attended the round table, stated, 'It is high time that we tackle unnecessary barriers to improve the regulatory environment to make the internal market on the internet a reality.' More recently, the Consumer Affairs Commissioner, Meglena Kuneva, reminded businesses that the single market imperative is still very much a key concern for the European Commission. In launching a report on cross-border e-commerce in the EU she mentioned that she is concerned about 'the arbitrary segmentation of the

internal market by traders for the sole purpose of price discrimination of EU consumers. This kind of artificial segmentation based on national borders has no place in Europe's single market.'

Anecdotal evidence collated by MLex, a competition policy intelligence company, 'suggests moves to stem supplies to retailers selling out of the UK may already be happening'. The company undertook a survey of six online camera retailers. Three offered EU delivery but said they were experiencing delays or problems securing supply. The three that offered only UK delivery had stock.

Following on from the report Commissioner Kuneva has launched a 'mystery shopping' exercise to see when, why and how consumers are being prevented from shopping across the EU. The results will be published in September alongside a wider report on the functioning of the retail sector.

## **The Commission report on cross-border e-commerce in the EU**

Commissioner Kuneva believes that 'internet retailing holds the promise of making the retail internal market a reality for consumers hitherto confined within national borders'.

The Commission reports that in 2006 the e-commerce market was estimated to be worth €106bn. Although there are significant variations between member states, the Commission reports that between 2006 and 2008 the proportion of all EU consumers that have bought at least one item over the internet increased from 27 to 33 per cent.

This is in marked contrast to the report's finding that e-commerce on a cross-border basis has remained stable at 6 to 7 per cent. The Commission finds this concerning, given the potential for cross-border trade that can be demonstrated by the one-third of EU citizens who indicated to the Commission that they would consider buying a product or service from another member state via the internet because it is cheaper or better. One-third of EU consumers say they are willing to purchase goods and services in another language and 59 per cent of retailers are prepared to carry out transactions in more than one language.

The Commission concludes that business potential for cross-border online trade is failing to materialise. It finds that the reason for this failure stems from concerns that make consumers reluctant to purchase online from retailers in other member states as well as practical and economic obstacles, some of which have regulatory underpinnings, that make retailers reluctant to sell online across borders.

In the 'mystery shopping' exercise, experts will pose as consumers and will attempt thousands of cross-border transactions in online commerce to see when, why and how consumers are being prevented from shopping across the EU.

## **What power does the Commission have?**

Commissioner Kuneva has no power to penalise or impose orders on businesses. However, if she uncovers evidence of potential anti-competitive practices that stifle cross-border trade she is likely to call for tougher regulation of such behaviour and Commissioner Kroes may investigate for breach of the EC Treaty.

Commissioner Kroes has already voiced an intention to take a tough stance on any practices that impede online sales across borders. In her closing remarks at the round table on online commerce she stated that the competition rules governing distribution agreements 'already have provisions for internet sales and if I hear that these rules are not being respected, then I will look into these allegations immediately. And if I find any company to have breached the rules, I will ask the Commission to act and punish the companies concerned.'

Investigations for breach of the EC Treaty prohibition on anti-competitive agreements can result in substantial fines and the Commission is particularly severe on practices that offend against the objective of achieving a single market. In 2003 it imposed a fine of €149m on Nintendo for engaging in practices designed to prevent exports from low-priced to high-priced countries.

Competition authorities in most member states also have jurisdiction to conduct similar investigations at a national level and impose fines.

## What is prohibited?

The Commission has found a number of restrictions in vertical relationships (ie at different levels of the supply chain) to breach the prohibition against anti-competitive agreements contained in article 81 of the EC Treaty. These include: sending circulars to distributors discouraging exports; permitting export only if consent is first obtained; printing 'export prohibited' on invoices; supplying an insufficient quantity of goods to satisfy additional export demand with the object of restricting exports; limiting guarantees to the member state in which the product was purchased; charging discriminatory prices to discourage export; terminating agreements with distributors that export; and requiring cross-border purchasers to pay a deposit not payable by local purchasers.

That is not to say that all restrictions in vertical relationships breach the prohibition. The Commission has acknowledged that some restrictions in vertical relationships are beneficial for competition. It has published criteria that, if satisfied, automatically exempt vertical agreements from the prohibition contained within article 81 of the EC Treaty. Among other things, agreements between parties that do not exceed certain market share thresholds and do not contain certain hard-core restrictions will benefit from automatic exemption. Only certain territorial restrictions are permissible. Absolute territorial protection is considered a hard-core restriction.

More specifically, the Commission's guidelines on vertical restraints state that 'every distributor must be free to use the internet to advertise or sell products'. It then provides guidance on which types of vertical restraints on selling goods cross-border would fall within the automatic exemption, distinguishing between passive and active sales. Commissioner Kroes has invited views on the criteria and guidelines for internet sales.

## What does all of this mean for businesses?

In light of the European Commission's statements that it will be investigating practices by traders that may arbitrarily segment the internal market and intends to take strict enforcement action against such practices, businesses may wish to consider a review of their current approach to cross-border sales.

Businesses should, in particular, consider:

- re-appraising their European pricing policies;
- refreshing their competition law compliance programmes; and
- reviewing their commercial arrangements with distributors and internet sales policies.

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