

EU Commission probes financial services sector for possible anti-competitive conduct

The European Commission (“Commission”) recently announced that it would launch a sector-specific inquiry into the state of competition in the EU’s financial services sector. The inquiry will focus on the areas of retail banking and business insurance in particular.

Sector inquiries are often used by the Commission to acquire information and knowledge on certain product or service markets. For the Commission, sector-specific investigations are an effective means of determining the level of competition in the markets under investigation. Subsequently, the results of such inquiries are thoroughly analysed by the Commission, to form a basis for potential action against EU antitrust violations that may come to the Commission’s attention. The Commission will particularly assess whether there are any anti-competitive agreements or practices in the industry, or whether one or more players may be abusing a dominant position within the EU or a substantial part thereof. If the Commission finds that there are indeed violations of EU antitrust law, it may impose harsh sanctions in the form of fines that can go as high up as 10 percent of the infringing companies’ annual turnover in the last financial year.

The legal basis for the Commission’s power to carry out sector-specific inquiries can be found in Regulation 1/2003, which stipulates that the Commission may undertake sector inquiries when the trend of trade, price developments or other circumstances suggest that competition in a given sector might be distorted. Within the framework of an inquiry, the Commission is entitled to send letters to companies requesting information, request information from the national competition authorities of the Member States and even organise surprise inspections carried out in the premises of the banks (so-called “dawn raids”) to collect evidence of an infringement.

The Commission has a history of tackling illegal restrictions of competition in the financial services sector. In 2001, the Commission

decided to slap five German banks with a fine of approx.  100m for price fixing (i.e. for agreeing to charge a minimum fee of three percent when exchanging euro-zone currencies), which is considered illegal per se. The allegedly anti-competitive behavior of the German banks in question took place before the introduction of the euro in 1999, and was discovered by the Commission through a series of surprise inspections. The Commission’s decision in the German banks-case was soon followed by a decision to fine eight Austrian banks for a total of approximately  124m, as a result of an alleged price cartel that covered the whole of Austria. The conduct of the banks was considered particularly serious by the Commission, considering they had fixed the prices of a wide variety of financial products and services vis- -vis consumers, such as loans and savings, money transfers and export financing.

Only last year the Commission initiated an antitrust investigation against Visa’s business practices in the EU. The Commission’s investigation related to Visa’s membership rule, according to which Visa did not accept membership applications from competing credit card service providers. Morgan Stanley had wanted to offer card services to shops and merchants in the EU but was denied membership of Visa because it owned its own credit card (the Discover card) at that time. Although the case is still pending, the Commission has aired that Visa’s exclusion may have seriously hampered competition in the merchant acquiring market, which deals with transactions between merchants and card companies. This was, however, not the first time that the Commission targeted Visa. In 2002, the Commission exempted Visa’s multilateral interchange fees (MIF) for cross-border Visa card payments from the application of EU antitrust rules following an in-depth investigation. The Commission’s exemption came after various discussion with Visa that resulted in, among other things, the latter committing to

reduce the level of its MIF.

In the past the Commission has also exempted various agreements between banks in Belgium and the Netherlands designed to promote standardization from prosecution under EU antitrust rules. These agreements affected rates between banks only, as well as fixed maximum commissions that were not passed on to the customers. The Commission concluded that such agreements did not significantly distort competition within the EU, and that as a result consumer interests were not in peril.

Together with the inquiry into the financial services sector the Commission has also announced that it will conduct ex officio investigations into the European gas and electricity sector in the coming months.

The launch of a sector-specific inquiry by the Commission does not necessarily presuppose that all players in that sector are involved in anti-competitive behavior. However, the fact that the Commission has decided to focus its investigatory efforts on very specific industries indicates that, at least in the Commission’s view, some companies may not be competing on a level playing field within those industries. Financial services providers whose activities include retail banking and business insurance should be aware of the upcoming inquiry and take the necessary steps in order to prepare for possible scrutiny by the Commission. These steps may include verifying whether their internal antitrust compliance procedures are effective and whether a preparatory antitrust audit would be opportune. Also, all relevant staff should be properly informed about the do’s and don’ts in the event of a dawn raid by the Commission, especially since recent EU legislation has boosted the Commission’s investigation powers. ■

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