



# Antitrust enforcers ramp up scrutiny of e-commerce at home and abroad

## Antitrust enforcers across the globe have infiltrated the e-commerce sector

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**A**ntitrust enforcers across the globe have infiltrated the e-commerce sector, and regulation in that sector is increasing rapidly both domestically and in Europe, as evidenced by recent developments. In-house counsel are advised to evaluate their lines of business and pricing models in e-commerce for potential vulnerabilities, and to incorporate some tips and hypotheticals on dealing with competitors in that sector in their antitrust compliance programs.

In April, the Antitrust Division of the U.S. Department of Justice (DOJ) announced its first ever criminal price-fixing prosecution in the e-commerce sector. In that case, *United States v. Topkins*, No. 15 Cr. 201 (N.D. Cal.), David Topkins, who worked for Art.com, an online seller of posters and framed art, pled guilty to a Sherman Act violation for his participation in a conspiracy to fix the prices of wall posters sold online through Amazon Marketplace. In announcing the prosecution, Assistant Attorney General Bill Baer stated that the Antitrust Division “will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms. American consumers have the right to a free and fair marketplace online, as well as in brick and mortar businesses.”

The criminal information charged Topkins and his co-conspirators with the price fixing of certain posters sold online

through Amazon Marketplace, a website that allows third parties to sell items to consumers. According to the plea agreement, Topkins participated in a conspiracy with other online sellers to fix the price of certain posters, and then agreed to adopt specific pricing algorithms that would implement the agreed-upon price changes. These posters were then sold at non-competitive prices in violation of Section 1 of the Sherman Act. The DOJ has agreed to recommend to the sentencing judge that Topkins receive a sentence of six to 12 months’ imprisonment and a criminal fine of \$20,000 in exchange for his cooperation with the ongoing investigation.

In the European Union (EU), the European Commission also opened an antitrust inquiry in April “to identify possible competition concerns affecting European e-commerce markets.” According to the Commission’s statement, the inquiry is especially directed at barriers erected by companies engaged in online shopping and trading, particularly those involved with electronics, clothing, shoes, and digital content. Such barriers “may include contractual restrictions in distribution agreements that prevent retailers from selling goods or services purchased online or cross-border to customers located in another EU country.” In a speech, Commissioner for Competition Margrethe Vestager gave the example of “geo-blocking,” which prevents users from accessing content based on their geographic location, as one such potential anticompetitive barrier. Vestager observed that she can watch her favorite

Danish television channels on her tablet device in Copenhagen but not in Brussels. The Commission will begin its inquiry by sending out requests for information — although the Commission’s statement notes that it can require compliance with such “requests” — and will issue a preliminary report on the status of its inquiry in 2016.

Although the DOJ criminal prosecution and the European Commission inquiry appear to be focused on different aspects of e-commerce, they both raise the prospect of antitrust scrutiny into accepted business practices that have not previously been understood categorically to be anticompetitive. For example, the international “geo-blocking” of television programs described by Commissioner Vestager could conceivably be the result of an anticompetitive trade barrier, but might instead constitute a legitimate attempt to comply with copyright law and the licensing restrictions placed on content by its creators. In anticipation of the European Commission’s apparently wide-ranging inquiry, counsel should prepare their clients, particularly those with a strong European online presence, for the possibility of regulatory scrutiny even over aspects of their business that they may regard as unrelated to competition.

As another example, pricing algorithms or dynamic pricing models, which can monitor the market for a product and automatically adjust its retail price accordingly, are ubiquitous in e-commerce. Such dynamic pricing has not been considered illegal in and of itself without evidence of an affirmative agreement to fix or stabilize

prices among competitors. Indeed, the *Topkins* case presented facts of anticompetitive conduct involving more than the mere use of an algorithm; Topkins pled to engaging in “pricing discussions with representatives of other poster-selling firms.” This type of active collusion constitutes a Sherman Act violation regardless of whether an algorithm is used as a means to affect the illegal price-fixing conspiracy.

It remains to be seen whether the focus by antitrust regulators and competition authorities on e-commerce reflects growing skepticism about the use of pricing algorithms in online pricing. This certainly seems possible, especially now that the Federal Trade Commission (FTC) has created a new Office of Technology Research and Investigation, which will

count “algorithmic transparency” among its areas of focus. This new office will be a part of the FTC’s Bureau of Consumer Protection, rather than the Bureau of Competition. Whatever the priorities of the antitrust authorities in the e-commerce sector may be, counsel should continue to advise their business folks with pricing authority about the “red flags” of collusion, and should closely monitor developments in the EU inquiry and investigations conducted by the DOJ and FTC in the e-commerce realm. Any conduct that can be perceived as depriving consumers of access to services like movie streaming, cloud computing, or online shopping may be subject to antitrust scrutiny under the new regime of global antitrust enforcement.

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