

# Client Alert

Business Litigation & Antitrust Practice Group

September 27, 2011

## EU Opens Antitrust Probe Into E-Payment Services

On September 26, 2011, the European Commission (Commission) announced that it has opened a competition law investigation into the standardisation process for payments over the internet (e-payments) undertaken by the European Payments Council (EPC). The Commission will examine the standardisation process to ensure that competition is not unduly restricted, for example, through the exclusion of new entrants and payment providers who are not controlled by a bank. The Commission has raised a concern that such restrictions may infringe the EU competition law prohibitions on restrictive agreements contained in Article 101 of the Treaty on the Functioning of the EU (TFEU).

The main concern of the investigation is that merchants and end-consumers may end up paying higher prices for e-payments if competitors to bank-controlled entities are excluded from the market.

### Status of Investigation So Far

The Commission is investigating whether a group of banks, reported to include Deutsche Bank, HSBC, Barclays and Spain's BBVA, is restricting or excluding new players from entering or expanding on the EU e-payments sector. The investigation has been prompted by a complainant.

EPC, the coordination and decision-making body of the European banking industry for payments, supports and promotes the creation of an integrated payments market through its self-regulatory project — the Single Euro Payments Area (SEPA). The Commission recognises the importance of standardisation, which results in greater efficiencies and better processes and services. Recently, for example, the Commission has issued EU guidelines on horizontal agreements,<sup>1</sup> which set out the kinds of agreements that do not raise competition concerns and the approach that the Commission will adopt when assessing standardisation agreements under EU competition law.

In principle, the Commission accepts that standards promote inter-operability and competition but emphasises the need to ensure that the standardisation process does not unduly restrict opportunities for non-participants. In this context Joaquín Almunia, Commission Vice President in charge of Competition Policy, has said:

*“Use of the internet is increasing rapidly making the need for secure and efficient online payment solutions in the whole Single Euro Payments Area all the more pressing. I therefore welcome the work of the European Payments Council to develop standards in this area. In principle, standards promote inter-operability and competition, but we need to ensure that the standardisation process does not unnecessarily restrict opportunities for non-participants.”*

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It may be no surprise that the financial services sector continues to be under the EU competition law spotlight. This is an area where competition law, consumer law and sector regulation tend to go hand in hand. The sector involves a multiplicity of players and end-consumer-facing businesses so there are potentially huge wins for the authorities from enforcement activity. Commissioner Almunia has repeatedly voiced concerns that distortions in competition may also pose systemic risk for the EU economies owing to the pivotal role of capital markets.

## Next Steps

There is no strict legal deadline for the Commission to complete its investigation. The duration, scope and outcome will depend on the arguments and evidence raised by the investigated and third parties. Procedural issues will come into play, including whether the investigated parties are able and willing to offer remedies or commitments to address any substantiated concerns. Such commitments could include participation in standards by entities that are not bank-controlled on Fair, Reasonable and Non-Discriminatory terms. However, the scope and application of such concept is fact-specific and there are limited EU precedents in this area, at least in the context of competition investigations.

Although the precise path of the investigation is unclear at this stage, all stakeholders will want to identify where their interests lie and how best to protect those interests. For banks and related entities, consideration will need to be given to defensive strategies through assembly of evidence and arguments. It should also be kept in mind that the investigation provides an opportunity to put forward arguments to educate the authorities about the economic drivers of the industry. Payment processors and merchants will want to consider how the ongoing probe affects their interests and how their participation in the Commission's market testing may facilitate business opportunities in the EU market. All players will need to stay abreast of developments on pending EU investigations into the financial services sector, in the context of ongoing policy initiatives. While regulators have urged banks to expedite standards to ease payments in euros, the recent competition probe makes clear that any potential spur to trade between the euro nations will need to be viewed against the EU rules on restrictive practices. The launch of the probe in no way indicates a final finding on infringement.

## How We Can Help

King & Spalding has wide experience in representing clients in competition proceedings before the European Commission and national competition authorities in the EU. We can assist clients in EU competition proceedings in the following areas:

- Development of regulatory strategy and management of the investigation process
- Evidence assembly and legal and economic analysis
- Case making and submissions to the regulators and other stakeholders
- Preparation for and support at meetings with regulators
- Remedies design

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*

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<sup>1</sup> Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 14 December 2010.