

# Alerts & Publications

## Heightened Antitrust Risk in the EU: Restriction of Parallel Imports

January 1, 0001



Earlier today the European Commission's Consumer Affairs Commissioner Meglena Kuneva presented a new report on cross-border e-commerce in the EU. [1] While the report illustrated that online shopping within Europe is increasing, with the internet being the fastest growing retail channel in Europe, it also highlighted that cross-border e-commerce has been slow to develop in the EU. The Commission has announced that it will continue its investigation of how and where consumers are being prevented from shopping on-line across borders.

Given the particularly weak British Pound against the Euro in recent months, conditions are prime for the practice of parallel trading by retailers based in different Member States to take advantage of the exchange-rates. Similarly, European consumers based in continental Europe are able to make significant savings by purchasing exchange-rate dependant bargains from UK-based retailers of the same products available across the channel. This is especially so in respect of consumer electronic goods, a product sector which was highlighted in the Commissioner's speech today as being prone to 'artificial pricing' across Europe.

Consequently, it is more important than ever that upstream firms do not risk infringing European competition law by restricting trade across Member States. In comparison to the less problematic position regarding territorial restrictions in the US, the imposition of such limitations on the sale of goods or services within Europe is likely to constitute a serious infringement of Article 81.

The Commission has regarded territorial restrictions as amounting to very serious infringements in the past. For instance, Nintendo was fined 149 million Euro in 2002 as a result of an arrangement which prevented German consumers from accessing parallel imports of Nintendo products from lower-priced Member States, such as the UK. In addition, the Commission fined those of Nintendo's distributors who had participated in the arrangement a total of 18.8 million Euros.

With DG Consumer Affairs having now confirmed the commencement of an investigation regarding the "artificial pricing" of electronic goods across Europe over the course of 2009, the risk of related spill-over investigations under the competition rules by DG Competition is to be expected.

It would therefore be prudent for firms to verify their internal compliance with EU competition rules in relation to territorial restrictions. A crash-course in the main principles governing territorial restrictions under EU competition law would include the following:

- Restrictions regarding where or to whom a retailer may resell a product are generally regarded as hard-core restrictions and are not permitted under EU competition law. This includes direct or indirect restrictions on the territories in which, or customers to whom the buyer may resell.

- A number of permitted exceptions to the general prohibition do exist, such as the imposition of restrictions on "active" reselling into an exclusive territory (or exclusive customer group) reserved to the supplier or allocated by the supplier to another of its resellers, or where the restriction forms part of a selective distribution system. However, a legal review of the applicable arrangement is highly recommended.

Consequently, despite the various factors set out above (in addition to the crumbling world-wide economy) which create a real temptation for upstream companies to impose territorial restrictions and prevent bargain-hunters gaining from the current imbalance in exchange-rates across Europe, the risk of Article 81 enforcement relating to any (inadvertent or otherwise) territorial restriction needs to be taken very seriously.

[1] The Commission's report is available by clicking [here](#).