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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL,
THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND
SOCIAL COMMITTEE**

"Enhancing Trust and Confidence in Business-to-Business Electronic Markets"

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1. INTRODUCTION

Business-to-Business electronic marketplaces ("B2B e-markets") are advanced forms of e-business, bringing together buyers and sellers to conduct commercial transactions by electronic means. Their different forms range from simple catalogue-based online buying and selling to sophisticated process integration solutions. In this way, e-markets contribute to improving efficiency and enhancing the productivity and competitiveness of European enterprises. However, despite the potential benefits, the participation of enterprises, notably of smaller and medium sized enterprises (SMEs), in B2B e-markets is still relatively low.

In November 2002, Directorate General Enterprise published a Commission Staff Working Document on "*B2B Internet trading platforms: Opportunities and barriers for SMEs - A first assessment*"¹, which identified a number of potential barriers hindering the participation of SMEs in electronic trading platforms, such as a lack of awareness, a lack of information and a lack of trust in relation to electronic transactions. Subsequently, an Expert Group, which included experts from industry and e-market operators, was established to further discuss these problems and to present recommendations to the Commission on how to facilitate the participation of SMEs in e-markets. The Commission welcomes the Report of the Expert Group² and supports the main recommendation to strengthen self-regulation in order to raise the level of trust and confidence in e-markets.

The relatively low use of B2B e-markets, in particular by SMEs, may be explained by the fact that buyers seem to benefit more from B2B e-markets than sellers. As a result, SMEs, which are often suppliers of large companies, are more reluctant to use B2B e-markets. In particular, concerns have been expressed by SMEs with respect to a specific form of e-market applications, namely online reverse auctions. Some of these concerns are related to the fact that online reverse auctions are mainly used as a tool to drive supplier prices down, thus apparently favouring buyers more than sellers. Such concerns may have a negative impact on the use of e-business in general and, as a result, on the productivity and competitiveness of European enterprises. However, the Commission's objective is not to promote specific trading forms but rather to remove existing or potential obstacles which may prevent enterprises from using e-markets in an efficient and mutually beneficial manner.

The objective of this Communication is to enhance trust and confidence in B2B e-markets by pre-empting existing concerns and facilitating the participation of enterprises in these new trading forms. Besides, the Communication aims to improve understanding of the applicable legal framework and to address potential barriers to the internal market which may arise from different national rules on unfair trade practices in B2B e-markets.

¹ SEC (2002) 1217, 11.11.2002.

² <http://europa.eu.int/comm/enterprise/ict/policy/b2b/wshop/fin-report.pdf>

Most importantly, the Communication aims to facilitate the further implementation of the recommendations of the Expert Group on the development of codes of conduct, in order to enhance trust and fairness and to facilitate broader participation of enterprises in B2B e-markets. Although this is predominantly the responsibility of the private sector, the Commission is willing to support consensus building in this area and to further promote self-regulation by appropriate means.

2. B2B E-MARKETS

B2B e-commerce, i.e. buying and selling online, has become an increasingly popular way of conducting transactions between companies. Many enterprises have meanwhile adopted ambitious strategies to increase the efficiency of internal business processes as well as to improve and streamline customer relationships. B2B e-markets are an advanced form of B2B e-commerce when compared to, for example, buying and selling via web sites. They can be defined as internet-based trading platforms where enterprises exchange goods and services.³

These new trading forms may not necessarily result in a balanced distribution of costs and benefits. This applies notably to online reverse auctions. Online auctions are formal price-finding procedures on an internet trading platform initiated by a seller with the aim of selling products or services at the highest possible price. Reverse auctions are initiated by the buyer with the aim of buying products and services for the lowest possible price. Some reverse auctions explicitly aim at short-term cost reductions instead of long-term business relations.

However, it has been argued that potential cost savings through reverse auctions, resulting from increased competitive pressure, may be more than outweighed by higher costs related to frequent changes of suppliers and therefore less integrated business chains. At present, the empirical and economic evidence available on the direct and indirect costs and benefits of different electronic trading forms, including reverse auctions, does not allow for definite conclusions on the effects on their participants. Therefore, the Commission will initiate an economic study in order to analyse the impact of B2B e-markets on competitiveness and productivity of the EU industry.

3. THE LEGAL FRAMEWORK FOR B2B E-MARKETS

B2B e-markets are subject to a number of legal rules, which cover different stages of their activities, ranging from their establishment to their operation and the conclusion of contracts by electronic means. These rules aim, in particular, at removing obstacles to the provision of information society services across the European Union and at ensuring fair and undistorted competition. Better awareness of the applicable law will certainly help to raise trust and confidence in the new forms of electronic trading. The Commission will therefore continue seeking support for the European e-Business Legal Portal, an online information service on the legal framework for e-business, notably for SMEs, provided by a European network of Euro Info Centres (ELEAS network).⁴

³ See Annex 1 for details.

⁴ <http://www.ebusinesslex.net>.

Raising awareness will strengthen B2B trade

Creating trust and confidence is increasingly an issue for electronic transactions between enterprises. This view is confirmed by the results of an open consultation of enterprises on legal barriers to e-business⁵, which was conducted by the Commission's services during the last quarter of 2003. A new concern relates to certain forms of online auctions due to their increasing use in B2B e-markets. Many enterprises are apparently unaware of the legal rules applicable to these auctions. They may thus perceive it as difficult to distinguish between a shift of market power that has to be accepted for economic reasons, and unfair practices which do not comply with legal provisions or codes of conduct. One reason for this is that, contrary to traditional auctions, electronic auctions are a relatively new phenomenon which has not yet had time to evolve and to develop trade practices which would address the potential conflicts inherent to auction tools in general.

The internal market rules apply to B2B e-markets...

The establishment of a B2B e-market is subject to the E-commerce Directive.⁶ B2B e-markets are considered as information society services, which can be freely established without prior authorisation. In addition, the internal market clause provides that each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. As a main rule, Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. However, the Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

With respect to the operation of a B2B e-market, the transparency rules of the Directive require information on the identity and the place of establishment of the service provider and that the transparency obligations for the electronic conclusion of contracts are respected. The Commission considers these legal provisions as important steps in the continuing creation of an internal market for B2B e-markets.

...but national legal differences still exist

Many concerns related to B2B e-markets, in particular to B2B electronic auctions, are attributed to a lack of transparency on the way the electronic transactions are conducted and to specific business practices which are perceived as unfair by enterprises. Examples of such postulated unfair practices refer to the lack of a clear reference to the participation terms and conditions, uncertainties regarding the exact moment a contract is concluded, the possibility to withdraw bids, the uncertainties as to the acceptance of the best bid in online auctions, and to practices which are considered as a distortion of the price setting mechanism in online auctions (e.g. the submission of bids by the initiator of an auction). Such practices are generally covered by national contract law and legislation against unfair competition, which apply to both offline and online auctions. However, these rules may differ from one country to

⁵ Commission Staff Working Document: Legal barriers in e-business "The results of an open consultation of enterprises", http://europa.eu.int/comm/enterprise/ict/policy/doc/legal_barriers_sec_2004_498.pdf.

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178 , 17/07/2000 p.1-16.

another, thus resulting in perceived uncertainties as to the applicable rules for cross-border electronic transactions.

In some cases, the existing national rules clearly state that specific practices constitute a breach of contract, e.g. the sale of defective goods, late or non-delivery of ordered products, late or non-payment of goods, wrong quantity or bad quality of delivered goods. In other cases, the legal situation is less clear, e.g. as regards the hidden setting of reserve prices in auctions, the right of the initiator of the auction to submit bids or the obligation of the initiator to accept the best bid. In particular, some national legal provisions may leave different options to the parties to agree on what extent such practices are allowed or not. It may also remain unclear how existing national rules for auctions apply to the online environment (e.g. definition of the exact moment a contract is concluded in an online auction).

Without further analysis it is difficult to assess to what extent the reported cases of unfair business practices in B2B e-markets are indeed covered by existing national legislation. In any case, differences exist between Member States on the way such practices are regulated, which may result in barriers when using e-markets for cross border electronic transactions. Therefore, the Commission intends to further assess to what extent existing national differences may constitute an obstacle to the internal market for B2B electronic transactions.

Better transparency on legal safeguards against unfair commercial practices is necessary

In order to increase the transparency of national rules applicable to unfair commercial practices, the Commission will launch a study which may contribute to a policy debate on the need for European harmonisation of the relevant legal provisions, as well as take into account the state of play on existing EU legislation⁷. In parallel, the Commission will encourage feedback from enterprises on concrete examples of unfair practices in B2B e-markets. Feedback will be collected through existing business networks, such as the European e-Business Legal Portal, the European B2B e-marketplaces portal⁸ and the national e-commerce contact points⁹. The results will be further analysed and published by the Commission's services.

⁷ E.g. the Directive on misleading and comparative advertising, Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250, 19.9.1984, p.17) and Directive 97/55/EC of the European Parliament and of the Council amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L 290, 23.10.1997, p.18).

⁸ <http://www.emarketservices.com>.

⁹ http://europa.eu.int/comm/internal_market/en/ecommerce/contactpoints_en.htm.

In addition, a Legal Expert Group on B2B e-markets will be established with representatives from Member States and relevant stakeholders, to further assess the legal situation and to analyse the specific complaints reported by enterprises. This group will be invited to prepare a report on the need for further European harmonisation in the field of contract law and for assessing the existing safeguards against unfair commercial practices in B2B e-markets, with a view to facilitating cross-border electronic transactions between enterprises. Follow-ups to this report will be carried out in line with the ongoing developments on European Contract Law¹⁰.

Competition rules for B2B e-markets are sufficient

Another major concern is that participants or owners of B2B e-markets may distort competition, e.g. through bundling purchasing or selling power or by sharing sensitive business information. The Commission is aware of such anti-competitive risks and therefore strictly applies EC Competition Law¹¹ in order to prevent concentration effects and to ensure that anti-competitive agreements or an abuse of a dominant position will not occur.¹²

In this respect, the prevention of abuse of market dominance is of particular importance, taking into account the user profiles of e-markets. A concern often expressed is that e-markets may create so-called network effects, as their value for individual users rises with the number of users, which may result in a dominant position of a network operator if the network effects are strong enough to induce all market participants to use the same network. In addition, risks of market dominance may arise from efforts to impose the exclusive use of a given e-market or to prevent access of all interested buyers and sellers to it. Of further relevance is the risk that e-market participants may effectively bundle purchasing or selling volumes, which may constitute a competition problem, if this affects their behaviour as buyers or sellers and their market shares are not insignificant. There is also the concern that electronic trading platforms may facilitate the exchange of market-sensitive business information on prices, quantities or other terms of the contract, thus leading to anti-competitive concerted practices or agreements between competitors. Whether the exchange of information constitutes a competition problem or not depends very much on the type of information and the intensity of the competition on the specific market. For example, the exchange of sensitive information on prices, participants, etc. in an oligopolistic market with only a few players is more likely to raise competition concerns than in an e-market with many buyers or sellers.

The Commission has gained practical experience in the assessment of B2B e-markets through a number of cases under Articles 81-82 of the EC Treaty and under the EC Merger Regulation. This experience has demonstrated that the existing competition rules sufficiently address the potential competition concerns raised by these new electronic trading forms and ensure that competition will not be distorted. In the cases dealt with so far, competition concerns have been cleared because the electronic market places involved provided for

¹⁰ Communication from the Commission to the Council and the European Parliament on European contract law (OJ C 255, 13.9.2001, p.1); Communication from the Commission to the European Parliament and the Council: A more coherent European contract law - an Action Plan (OJ C 63, 15.3.2003, p.1)

¹¹ Notably Arts. 81 and 82 of the EC Treaty, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22.

¹² This assessment will, however, have to be done on a case by case basis, so that the following passages cannot prejudice the application of EC competition rules to specific cases.

effective protection of sensitive business information or the limitation of joint buying. Under the new Regulation 1/2003¹³, which replaces Regulation 17/1962, an a-priori notification of agreements and clearance by the Commission is no longer foreseen. As a result, e-market operators will have to assess themselves, having recourse to Commission decisions and guidelines, such as the guidelines on horizontal cooperation agreements¹⁴, whether or not the agreements in question are compatible with Article 81 EC Treaty. The Commission, National Competition Authorities and Courts may, however, either on their own initiative or following a complaint, examine e-markets in view of possible infringements of EC competition rules.

...but transparency about the applicable competition rules can be further improved

Trust and confidence in B2B e-markets would certainly benefit from a more in-depth knowledge of the applicable competition rules. This would facilitate compliance with these rules by e-market operators as well as by the trading partners, and would have a disciplinary effect. The Commission therefore intends to provide stakeholders in B2B e-markets with an easy access to such coherent information. To this end, the e-marketplaces portal could comprise information on the Commission's competition law practice regarding the set up and operation of B2B e-marketplaces, mainly in the form of links to the relevant decisions and documents on the Commission's website. Information should also be provided on how to complain about anti-competitive behaviour in B2B e-markets.

4. THE ROLE OF SELF-REGULATION IN BUILDING TRUST IN B2B E-MARKETS

The legal provisions applicable to the establishment and operation of B2B e-markets leave, in some cases, scope for agreements between enterprises on the operational and contractual terms. In this context, self-regulation may play an important role in shaping business practices which are based on fair trade principles and the mutual benefits from trading online.

B2B e-markets are to be built on trust and confidence

The further development of B2B e-markets would certainly benefit if all participants felt reassured that transaction processes could be completed in a transparent, secure and fair way. In order to be more widely accepted, B2B e-markets should be built on trust and confidence. In this respect, the expectations of enterprises in relation to online trade are not fundamentally different from the expectations of consumers, although the enterprises are not subject to the same level of legal protection.

Self-regulation can play an important role in areas which are not covered by (mandatory) law. This makes it especially applicable to online auctions, since most national contract laws offer the parties the possibility to agree on the specific practices to be followed. In the relatively new area of online auctions, self-regulation may contribute to shaping fair business practices. Many potential conflicts resulting from perceived unfair practices could be avoided by ensuring better transparency on the applied rules, in particular if they are based on a broad consensus amongst the different partners.

¹³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 04.01.2003, p 1-25.

¹⁴ Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2-30.

The Commission supports the idea of self-regulation for B2B e-markets

The Commission is of the opinion that, in order for e-markets to be sustainable and efficient, they should be based on fair trade principles which allow enterprises to participate in them without taking undue risks. To be efficient, self-regulation must reflect a consensus between all relevant stakeholders. The Commission encourages the development of codes of conduct with the involvement of all relevant stakeholders, e.g. e-market operators, buyers and sellers, with a view to ensuring that the code of conduct reflects a balance of interest and results in increased commitment of the relevant stakeholders to fair practices. In order to facilitate this consensus building initiative and to evaluate its needs and possibilities, an open workshop on trust and confidence in B2B e-markets will be organised in the second half of 2004. It should be noted that the Commission is prepared to facilitate the process by bringing together the relevant stakeholders, however without being directly involved in the negotiations on the concrete terms of possible codes of conduct.

A reference model for codes of conduct in B2B e-markets

The needs and prospects for self-regulatory efforts may differ between sectors and trading forms. A particular need seems to exist for codes of conduct, which further specify transparency rules on the operation of B2B electronic reverse auctions. Following the recommendations of the Expert Group on B2B Internet trading platforms, such codes of conduct should, in particular, address the users' needs for information on the e-market in question (e.g. participants, transaction process models, price setting mechanisms, technical security, privacy and confidentiality, applicable law and dispute resolution schemes).¹⁵

First efforts to develop codes of conduct have been undertaken by European associations in various industrial sectors. However, a preliminary assessment demonstrates that they are often incomplete and do not sufficiently address all relevant issues.¹⁶ The Commission therefore invites the private sector to review existing codes of conduct, with a view to making them more inclusive and complete.

Codes of conduct for B2B e-markets are voluntary

By definition, codes of conduct are based on voluntary agreements and are not legally binding. The Commission is of the view that such voluntary commitments are best suited to create a climate of mutual trust and thus to strengthen e-business. It therefore considers that enterprises which subscribe to codes of conduct should effectively comply with them.

Greater transparency on agreed codes of conduct is needed to stimulate the further development of business practices. By adhering to a code of conduct, B2B e-market operators and enterprises may expect enhanced trust and confidence in their services, in particular if the code of conduct is supported by a third party certification scheme that verifies compliance with the agreed principles.

¹⁵ See Annex 2 and 3.

¹⁶ See Annex 2.

...but more transparency will help to promote fair trade principles

The Commission encourages B2B e-market operators to proactively enhance transparency of the terms of participation and to provide potential buyers and sellers with all relevant information in order to better assess the trustworthiness and security of the e-market. Based on such information, independent rating systems may be further developed, which will allow enterprises to make informed decisions about which B2B e-markets to use. In this respect, the European e-marketplaces portal will play an important role in better informing enterprises about those B2B e-markets which comply with the essential fair trade principles.

To further enhance the efficiency of self-regulation in this field, the Commission encourages business organisations and Chambers of Commerce to inform their members about the terms of existing codes of conduct and to provide guidance for an effective participation in B2B e-markets. All information and training efforts should remain strictly neutral and should not result in binding recommendations on the use of specific B2B e-markets.

5. CONCLUSIONS

This Communication addresses the need to enhance trust and confidence in B2B e-markets in order to reduce economic risks stemming from unfair or illegal business practices in such markets. B2B e-markets have the potential to enhance efficiency by reducing transaction costs and strengthening competition, but such efficiency gains largely depend on the willingness of enterprises to participate in them. To remove the potential barriers to the use of B2B e-markets resulting from a lack of trust and confidence, the Commission foresees taking the following steps:

- Analysis, in close co-operation with Member States, of existing national legislation which applies to unfair commercial practices in B2B e-markets, with a view to identifying possible gaps and/or needs for European harmonisation.
- Encouragement of the stakeholders to agree on or review codes of conduct, with a view to further promoting fair trade principles in B2B e-markets, as described in this Communication; the Commission is prepared to facilitate the process of consensus building between trading partners by bringing together all relevant stakeholders at sectoral level and further explaining the legal requirements to be met.
- Launch of a study on the economic impacts of B2B e-markets on competitiveness and productivity of EU enterprises, analysing in particular the direct and indirect costs and benefits incurred by the e-market participants. The results of this study will be further discussed with stakeholders, in order to optimise their business strategies in B2B e-markets.
- Provision of coherent information on the application of existing competition rules on B2B e-markets, in order to provide guidance for pro-competitive behaviour.

This Communication is expected to encourage a more intense dialogue between stakeholders involved in B2B e-markets with regard to respecting fair trade principles and security requirements. As a consequence, potential barriers to the participation in such electronic trading forms should be removed, giving a positive impact to the efficiency of business processes and the competitiveness of European enterprises. The Commission's services will regularly report on the progress made through the European e-marketplaces portal.