

Client Alert

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European Commission Takes on E-Commerce Sector

By Thomas McQuail and Suzanne Jude

On May 6, 2015, the European Commission launched a competition inquiry into the e-commerce sector.¹ This inquiry is one of 16 initiatives that the Commission announced for the creation of a Digital Single Market for Europe. As the Internet is largely dominated by non-EU companies, we expect the inquiry to mainly focus on U.S. companies, which could lead to further friction between the U.S. and the EU.

WHY HAS THE COMMISSION LAUNCHED A SECTOR INQUIRY?

The Commission believes that companies have created artificial barriers to trade that impede the development of a vibrant e-commerce industry in Europe. As a result, customers in certain EU Member States often pay more than customers in neighboring EU countries for identical products. The Commission believes that online shopping should enable customers to benefit from lower prices offered across Europe. However, in practice, this has not happened yet. The vast majority of online transactions in the EU are still made within one and the same EU Member State, and customers are reluctant to shop online across country borders.

The competition rules have long been used to break down artificial barriers to trade. Over the years, the Commission has investigated and fined many companies for impeding parallel trade, including in the electronics, pharmaceutical, and automobile sectors.

Competition sector inquiries are one of the tools the Commission can use to gather information on the workings of a specific industry and the competitive processes at hand. If, following the inquiry, the Commission concludes that competition in an industry is not working effectively, it can subsequently investigate individual companies. Previous inquiries have involved, e.g., the pharmaceuticals, telecoms, insurance, and financial services, and in some cases have led to the Commission investigating and fining some market participants.

WHAT WILL THE SECTOR INQUIRY BE ABOUT?

The Commission has said that the sector inquiry will be focused on online trade in goods and services where e-commerce is most widespread—for instance electronics, clothing and shoes, and digital content.

The Commission has started to send questionnaires (so-called requests for information) to a large number of companies and organizations active in the sector. It is particularly interested in analyzing distribution agreements between suppliers and retailers active online, which it suspects may contain clauses that oblige retailers to refuse to supply services or products cross-border.

¹ The European Commission can launch a sector inquiry where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market. In this context, the Commission can request information from businesses and carry out dawn raids.

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The Commission is also investigating “geo-blocking”, i.e., when online sellers limit consumer access to websites based on their location, or re-route them to a local site that may have different content and different prices. This practice would only potentially infringe competition law if put in place by a dominant undertaking or as the result of an arrangement between companies. However, in addition to investigating geo-blocking from a competition perspective, the Commission wants to reduce the differences between national copyright regimes, which currently enable companies to limit online access across the EU. The Commission has also said that it will outlaw unjustified geo-blocking, most probably by amending the e-Commerce Directive and the Service Directive.

PROCEDURE AND TIMING

Sector inquiries can place a considerable burden on companies. Commission questionnaires often request broad categories of documents (e.g., distribution agreements that refer to online sales or internal documents, presentations, memoranda, etc., relating to online sales or geo-blocking). Although not always the case, the recipients of questionnaires in this inquiry are required to respond and can be fined for not responding or for providing misleading or incorrect information.

In previous inquiries, initial questionnaires were followed with several additional follow up questionnaires as the Commission identified potential problem areas. This is likely to happen in this sector inquiry, as well.

Respondents to questionnaires can use their responses to express their views on the way in which the e-commerce sector is working. Competition Commissioner Margrethe Vestager has already said she believes there is a problem: “In part, [the low level of cross-border online sales] can be explained by natural barriers, such as language. But other barriers are decidedly artificial.”

The Commission plans to publish its preliminary findings in mid-2016. The final report is scheduled for the first quarter of 2017. Depending on the outcome, the Commission may need to revise its 2010 Guidelines on vertical restraints.

The Commission may also decide on the basis of the inquiry to open investigations against individual companies into potential infringements of competition law. It would try to identify straightforward cases where it would be confident of an infringement decision. Following the pharmaceutical sector inquiry, the Commission fined several companies for hindering or delaying the market entry of generic pharmaceuticals; following the high-speed Internet access inquiry, the Commission fined the French incumbent operator for predatory pricing.

COMMENT

The e-commerce inquiry is a major statement of intent by the new competition commissioner to re-evaluate the working of the e-commerce sector. In revising its Vertical Restraints Block Exemption in 2010 (and revising its vertical Guidelines), the Commission examined the way in which the e-commerce sector was working and chose not to make major changes. The Commission managed to find a delicate balance between the interests of suppliers and bricks and mortar retailers on the one hand, and online traders on the other hand. In launching this inquiry, the Commission appears to be revisiting this approach. In its enthusiasm for opening up e-commerce, the Commission should take care not to overlook the legitimate interests of copyright owners and of suppliers and retailers who invest in selling to consumers in retail outlets.

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An inevitable consequence of sector inquiries is that a huge burden is placed on those companies that receive questionnaires. While the Commission is entitled to request information from companies, the Commission has, in past inquiries, appeared to give insufficient thought to the burden and cost to companies of compiling responses. In private discussions the Commission has stated that it is fully aware of the burden a sector inquiry may impose on the industry. In order to try to alleviate the companies' concerns in this respect, the Commission has indicated it will try to rely on multiple choice Q&A's as much as possible. It remains to be seen how this approach can be reconciled with the stated reason that the inquiry is about industry effects. All too often sector inquiries turn into a witch hunt for contractual clauses that may be considered violations by object without paying any attention to actual effects on competition.

The e-commerce inquiry forms part of the Commission's much vaunted Digital Single Market initiative. In addition to tackling potential competition issues, the Commission wants harmonized rules throughout Europe on contracts and consumer protection when buying online; data protection; and copyright. It will also be looking at cross-border parcel delivery, spectrum coordination, cybersecurity, standards, interoperability, VAT rules, and more. Finally, the Commission will also launch a "comprehensive assessment" of the role of online platforms with a view to evaluating the need for regulating their activities.

The Commission views the overall initiative as a means of unifying the fragmented European digital market. It is likely that, where possible, the Commission will look to use the competition rules to remove perceived barriers to trade. These measures, together with the competition investigations into Google by the Commission and into online booking platforms by national authorities, could lead to significant changes to the online marketplace.

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