

What's Behind The EC's Probe Of The E-Commerce Sector



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The European Commission announced the launch of a inquiry into the e-commerce sector in the European Union. This is the first sector inquiry in the EU since 2008 and is part of the EC's broader digital single market (DSM) strategy. The Directorate General for Competition will examine whether companies selling products online have illegally restricted cross-border ecommerce in the EU.

Scope of the E-Commerce Sector Inquiry

Competition Commissioner Margrethe Vestager expects that the inquiry will (i) strengthen and make more uniform the actions of the EC and national competition authorities regarding restrictions on online sales, (ii) provide guidance to companies active in the sector, (iii) encourage those companies to implement compliance programs and take other preventive measures; and (iv) provide valuable input into the EC's DSM strategy.[1]

The sector inquiry will focus on potential barriers to cross-border online trade in "goods and services in which e-commerce is most widespread such as electronics, clothing and shoes, as well as digital content." [2] In essence, the inquiry will extend to virtually all companies that sell goods or services online in the EU.

Regulation 1/2003 enables the EC to conduct inquiries in a particular sector where there are indicators that competition (and often market integration) is restricted or distorted.[3] Previous sector inquiries have been conducted in the energy, financial services and pharmaceutical sectors. In its press release, the EC stressed that "[t]he purpose of the e-commerce sector inquiry is to gain more market knowledge in order to better understand the nature, prevalence and effects of [...] barriers erected by companies that hinder cross-border e-commerce and to assess them in the light of EU antitrust rules." [4]

In the first phase of the sector inquiry the EC will be fact-finding — using requests for information sent to companies (and industry associations) active in various layers of the online commerce sector, including manufacturers and wholesalers, e-commerce retailers, holders of content rights, broadcasters and the operators of online “platforms” (including price-comparison and marketplace websites). The first round of RFIs will almost certainly be broad in scope, potentially asking for information about costs and prices, customers, barriers to entry and exit, regulatory and legal barriers, common contractual restrictions, etc.

Once the initial round of data gathering is complete, the directorate general is likely to follow-up targeting more specific issues. It could also conduct dawn raids if it concludes that this would advance the inquiry. Once it has drawn its preliminary conclusions, stakeholders will have the opportunity to comment, and the EC has made it clear that it will actively engage with the national competition authorities. The directorate general may also hold a public hearing to discuss its preliminary findings.

The Sector Inquiry as a Component of the EC’s Digital Strategy

Despite an increasing number of goods and services being available on the Internet, cross-border online sales are growing slowly in the EU. Further, while 50 percent of the EU population purchased goods and/or services online in 2014, only 15 percent of the population bought goods and/or services from a retailer in another EU member state.[5] Even allowing for considerations relating to languages, consumer preferences and differences in national legislation, the EC is concerned that the slow growth of cross-border e-commerce may be the result of additional barriers restricting or distorting competition.

While the broader DSM strategy will focus on identifying and addressing regulatory barriers that hinder cross-border e-commerce (e.g., geoblocking, data protection and privacy rules), the sector inquiry will focus on the conduct of individual companies that may create barriers to cross-border e-commerce, particularly through contractual restrictions. As Commissioner Vestager put it, “the inquiry initiative is closely linked to the overall digital strategy of the European Commission.”[6]

It is also worth looking at the inquiry through the prism of the directorate general’s ongoing investigations of restrictions on cross-border supply, including the contractual clauses between certain film studios and European broadcasters that allegedly restrict the ability of subscribers to access satellite and online payTV when they are outside the licensed territory, the online distribution of electronic goods and the alleged geoblocking of certain online PC video games. As these investigations make clear, the sector inquiry will necessarily also link back to the DSM strategies review of the role of geoblocking and other uses of IP rights (including trademarks) to segment the single market.

Timeline and Potential Outcomes of the Sector Inquiry

Sector inquiries are investigations relating to an entire sector, rather than the conduct of individual actors. As a result, the EC does not have the power to impose financial penalties on companies as a result of the sector inquiry. However, the findings could feed into individual investigations (as happened following both the energy and pharmaceuticals sector inquiries). Commissioner Vestager has expressly warned that if “after analysing the results, the commission identified specific competition concerns, it could open case investigations to ensure compliance with EU rules on restrictive business practices and abuse of dominant market positions (Articles 101 and 102 of the Treaty on the Functioning of the European Union - TFEU).”[7] While any such follow-on investigations could clearly require significant changes for companies under investigation, past experience suggests that the EC is likely to use

individual cases to signal to the market place as a whole that certain types of conduct are anti-competitive.

In addition the results of the sector inquiry could feed into the formulation of DSM regulatory proposals, and lead to amendments to the Vertical Block Exemption Regulation and related Guidelines (2010) on supply and distribution agreements (adapting the regulatory framework to an ecommerce sector that has evolved significantly since the last amendments in 2010). Any such regulatory measures could have far reaching implications for the models of companies involved in online sales at all levels.

The EC expects to publish its preliminary findings for consultation in mid-2016, with a view to producing the final report in the first quarter of 2017.

With much potentially riding on RFI responses, it is clearly important for companies to ensure that their responses reflect their long-term strategies and goals in the online sector.

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[1] EC, Press Release IP/15/4701, 26 March 2015.

[2] EC, Press Release IP/15/4921, 6 May 2015: http://europa.eu/rapid/press-release_IP-15-4921_en.htm.

[3] http://ec.europa.eu/competition/antitrust/sector_inquiries.html.

[4] EC, Press Release MEMO/15/4922, 6 May 2015: http://europa.eu/rapid/press-release_MEMO-15-4922_en.htm. See also, EC, Press Release IP/15/4701, 26 March 2015 where Commissioner Vestager indicated that the EC “intend[s] to identify what hampers competition in e-commerce when sales straddle national borders”: http://europa.eu/rapid/press-release_IP-15-4701_en.htm.

[5] EC, Eurostats, ICT survey of Households and Individuals, 2014.

[6] EC, Press Release IP/15/4701, 26 March 2015.

[7] EC, Press Release IP/15/4701, 26 March 2015.