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E-commerce sector inquiry



May 2015

Announcement of an e-commerce sector inquiry - what is it about?

The new European Commissioner in charge of Competition policy, Margrethe Vestager, recently announced her intention to conduct a competition sector inquiry into the e-commerce sector.

The Commission is concerned that companies are taking measures to restrict cross-border e-commerce. The inquiry will focus on distribution contracts on the sale of goods, services or digital content.

Sector inquiries are general investigations into entire industry sectors. In such inquiries the European Commission has essentially the same investigatory powers as in any other cartel investigation. Information obtained can and will also be used to initiate enforcement actions against individual companies.

Any market player involved in e-commerce may become subject to the announced inquiry, in particular:

- holders of content rights;
- broadcasters;
- manufacturers;
- merchants of goods sold online; or
- companies that run online platforms such as price-comparison and marketplace websites.

The Commission intends to detect and stop any measures which companies might be taking in order to limit cross-border e-commerce. Investigations are already pending regarding:

- licensing contracts for broadcasters;
- online and cross-border trade of consumer electronics; and
- geo-blocking in the gaming sector.

This sector inquiry is therefore the enforcer's next step in implementing a borderless EU digital market. It also fits well within the new Juncker Commission's objective to achieve a genuine Digital Single Market within the EU.

The Commission hopes to publish first results of the inquiry by mid-2016.



How does a sector inquiry work?

In a sector inquiry the European Commission may request any company to supply information or carry out inspections at the company's premises. The Commission has broadly the same investigatory powers as it has in normal cartel investigations, in particular:

- requests for information in writing, on a voluntary or on a mandatory basis;
- oral interviews; and
- inspections, including surprise inspections (“dawn raids”), with the right to enter company premises and examine books and records, including IT data, and make copies of any relevant information.

Normally, the Commission tries to follow a consensual approach in sector inquiries. It operates mostly on the basis of written requests for information. These requests can however be very detailed and require a response within a short time period.

Where companies are not willing to cooperate voluntarily, the Commission always has the power to revert to other means. In particular, the Commission can carry out investigations at a company's premises and impose fines on those companies which fail to cooperate or those that supply incomplete, incorrect or misleading answers.

Following these investigations the Commission will publish its preliminary findings, upon which interested parties are invited to comment. Depending on the comments the Commission may carry out further investigations or publish the final report.



What are the potential antitrust problems in the industry?

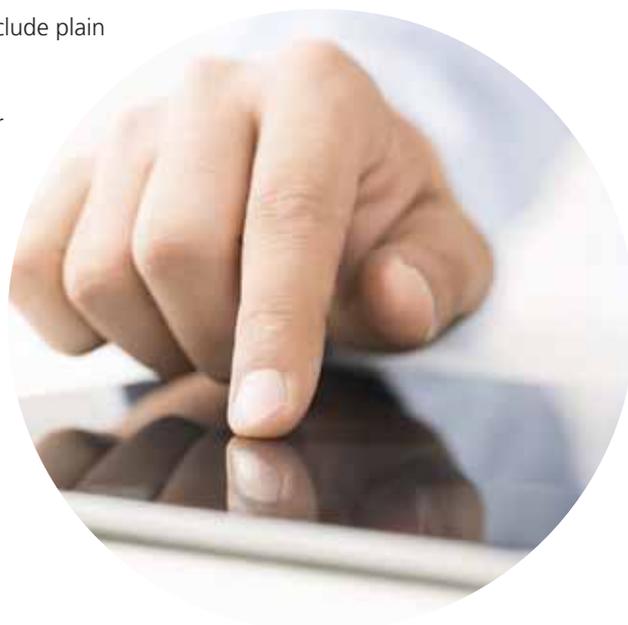
This sector inquiry will focus on private – and in particular contractual – barriers to cross-border e-commerce.

Typical means of restricting cross-border commerce in contracts include plain export prohibitions, or more indirect means such as:

- dual-pricing/rebate systems that disadvantage exports over local sales;
- geo-blocking or re-routing of customers to local websites; or
- limiting language options on websites.

However, a number of other vertical restrictions could also come to light during the sector inquiry; several of which have been or are currently under investigation by national competition authorities. They include:

- retail price maintenance for online (and offline) sales;
- restrictions to advertise prices online;
- restrictions to advertise products on price search engines;
- straightforward prohibitions to sell online;
- restrictions on online sales which are not overall equivalent to any restrictions imposed on offline sales;
- dual pricing/rebate systems that disadvantage online sales;
- unjustified restrictions to sell via third party platforms, e.g. by selective distribution; and
- best price clauses agreed with third party platforms.



What could be the potential outcome of the sector inquiry?

If the inquiry reveals malfunctions in the market the Commission can:

- recalibrate its enforcement priorities;
- initiate separate investigations against individual companies, including the imposition of fines; and
- adapt the legal framework, for example by initiating legislative changes or amending its guidelines and notices.

As a result of several of the previous sector inquiries the Commission did indeed initiate proceedings against individual companies. Fines were also imposed, for example in proceedings initiated following the energy and pharma sector inquiries.

Changes to the legislation as a result of a sector inquiry occur less often; the Commissioner for Competition cannot decide on such changes alone and needs to involve others. For instance, this sector inquiry could address the relationship between competition law and copyrights: Commissioner Vestager wishes to fight geo-blocking, which prevents consumers from accessing digital content EU-wide, such as video on demand. However, her colleague Günther Oettinger, Commissioner for Digital Economy and Society and heading the EU's copyright reform, already raised his finger. He first wants to determine what the elimination of geo-blocking will mean for the film industry before he takes any action with regard to copyright.

Further, it remains to be seen if the Commission is also willing to address “home-made” barriers to trade. For example, national competition authorities apply different standards when applying competition rules on vertical restraints. Some authorities are much stricter than others. The resulting lack of legal certainty provides a substantial barrier to cross-border trade for companies.



How can potential problems be avoided?

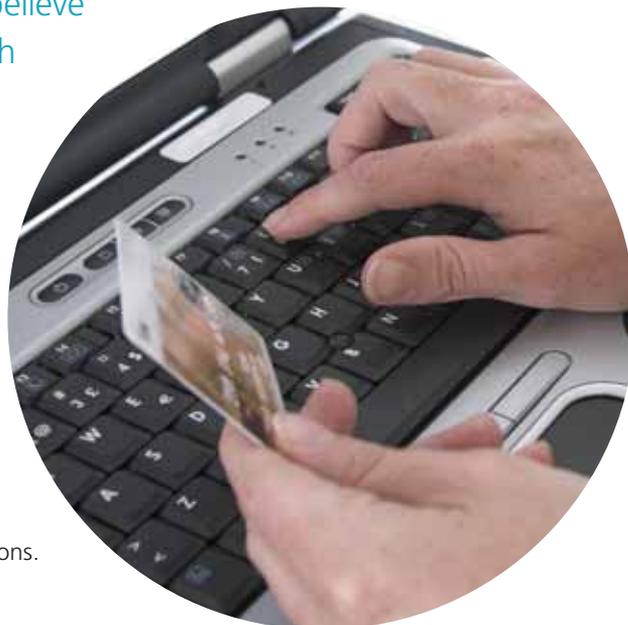
There is an increased risk that any illegal conduct of companies active in e-commerce will come to light as a result of the sector inquiry.

Accordingly, companies which have reason to believe that their past conduct might not be in line with competition rules should now consider their options and prepare a strategy in case they become a target of a separate investigation.

Companies which receive questionnaires or are otherwise subject to the inquiry should ensure that their replies meet the required legal standards in order to avoid fines. Generally, cooperation with the Commission should be carefully prepared under the supervision of experienced lawyers.

For the future, all companies should carefully analyse the findings of the sector inquiry and take appropriate compliance measures where necessary. National competition authorities will also give heed to the sector inquiry's results in their future enforcement actions. Companies should therefore:

- (re-)assess the legality of business conduct; and
- make changes where necessary, e.g. with regard to existing distribution models.



In a nutshell: what should companies be aware of?

- The European Commission intends to carry out an e-commerce sector inquiry.
- A vast number of companies active in e-commerce are likely to receive detailed questionnaires on their business practices in the near future.
- Replies may or may not be obligatory depending on the type of information request, but in any event companies must not give wrong answers. Replies must therefore be prepared with due care.
- Where past infringements come to light companies must expect to be held liable.
- Following the inquiry all companies should reassess their business practices to ensure that they are in line with the final report findings.



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