

Client Alert

EU Competition Commissioner proposes a competition inquiry in the e-commerce sector

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On 26 March 2015, the European Commissioner in charge of competition policy, Margrethe Vestager, announced a potential competition inquiry in the e-commerce sector. According to the Commission, the proposed inquiry is aimed at identifying and resolving cross-border barriers to e-commerce in digital content and goods, including technical barriers such as geo-blocking. The Commissioner plans to put forward the proposal in the coming weeks to the Commission, and envisages that the preliminary results would be available in mid-2016.

As part of the inquiry, the EU Commission (the "Commission") intends to collect information from a large number of companies across the EU, including holders of content rights, broadcasters, manufacturers, online merchants, and companies running online platforms such as price-comparison and marketplace websites. As in past inquiries, a sector inquiry will often result in cases which the EC elects to bring. Thus, the Commission may also pursue cases against individual companies for suspected infringements of the EU competition rules.

The Commission's proposed inquiry follows the Commission's investigations of individual companies in the sector, most recently in relation to restrictions on online sales of consumer electronic products over the internet, where the Commission has carried out inspections at large manufacturers' and online retailers' premises, and an investigation into the alleged geo-blocking of certain video games sold online for personal computers.

EU sector inquiries

The Commission carries out sector inquiries to identify issues that could restrict competition in a given sector. Previous Commission sector inquiries have included the energy, financial services and pharmaceutical industries. During such an inquiry, the Commission typically requests large amounts of information from many market participants over a lengthy period, with short deadlines. For example, in the pharmaceutical sector inquiry, the Commission sent questionnaires to 70 producers of originator and/or generic medicines and numerous other stakeholders. In previous sector inquiries, the Commission has issued requests for information and also carried out dawn raids, as happened in the pharmaceutical sector inquiry. It would seem unlikely that having given this advance warning, and having announced that it has already conducted some investigations, that the Commission would conduct further on-the-spot investigations in this inquiry.

Once it has analysed the data gathered, the Commission's practice is to publish the results of the sector inquiry in a preliminary report and invite interested parties to comment prior to the publication of a final report. Where the Commission identifies practices it views as restrictive business practices and/or abuses of a dominant market

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position by specific companies during the inquiry, it may then open specific investigations under Articles 101 and 102 of the Treaty on the Functioning of the European Union. Previous sector inquiries, including the energy, financial services and pharmaceutical sector inquiries mentioned above, have led to actions against a number of individual companies.

The proposed inquiry

Context

The creation of a Digital Single Market in Europe is a high priority on the Commission's agenda, and the Commission has expressed concern that cross-border online sales within the EU have not been increasing at as high a rate as national online sales. This is partly due to language barriers, consumer preferences and differences in legislation across the Member States. However, according to the Commissioner: "there are also indications that some companies may be taking measures to restrict cross-border e-commerce".

In addition to the concern exhibited by the Commission, national competition authorities have been focused on the area of e-commerce. The French Competition Authority conducted an inquiry into the sector in 2011-12, the UK's Competition and Markets Authority has identified the sector amongst its enforcement priorities and the competition authorities in, amongst others, France, Germany and the UK have conducted investigations into individual companies active e.g. in online hotel bookings, sports gear and household appliances.

Scope of e-commerce sector inquiry

The Commissioner has indicated that the sector inquiry will focus on private barriers to cross-border e-commerce in digital content and goods. Based on the Commission's press release (IP/15/4701) and the Commissioner's related speech (SPEECH/15/4704), one such barrier identified is geo-blocking: this is where a website prevents consumers from purchasing goods or services based, for instance, on their location or credit-card details, or directs consumers to another country website. In her speech, the Commissioner notes that these types of restrictions may be the result of contracts between manufacturers and content owners on the one hand and their distributors on the other. As such, they fall within the ambit of the EU rules on vertical restraints, under which contractual bans of so-called passive online sales are prohibited. There may be other alleged restrictions targeted by the inquiry.

Timing

The Commissioner announced that a proposal on the inquiry would be put forward to the College of Commissioners for approval in May, and assuming that the competition DG has requests for information ready to be sent soon, companies active in the sector should be prepared to be contacted in the coming months. The information gathering process and the Commission's analysis is expected to take around a year, and preliminary results of the inquiry would likely be available in mid-2016. The publication of the preliminary results will be followed by a public consultation prior to the publication of a final report. Although theoretically possible, it is highly unusual that the Commission would impose fines on individual companies as a direct consequence of the inquiry. In addition, however, where the Commission finds companies to have engaged in behaviour it believes to be restrictive of competition, individual investigations will be opened. Such individual investigations can again be launched by on-the-spot inspections and can lead to sanctions if the companies in question are found guilty of anti-competitive conduct.

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