

Client Update

European Competition Commissioner Announces Proposed Sector Inquiry into Cross-Border E-commerce

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ANNOUNCEMENT OF E-COMMERCE SECTOR INQUIRY

The European Commissioner in charge of Competition policy (Margrethe Vestager) announced her intention last week to conduct a competition inquiry into the e-commerce sector.¹

WHAT IS A SECTOR INQUIRY?

Sector inquiries are general investigations that are carried out by the European Commission (“Commission”) into those sectors of the economy where it believes competition may not be working effectively, to the detriment of consumers. As such, they are comparatively rare; the most recent inquiry was launched in January 2008 and investigated the EU pharmaceuticals industry. They are, however, particularly suitable for looking at markets that are rapidly evolving and where the future competitive environment will be shaped by a commercial framework that is already in place but whose effects are not fully understood. Importantly, there is no need for the Commission to have evidence of an infringement of EU competition law before commencing a sector inquiry.

The Commission has wide-ranging investigatory powers in the context of an inquiry. In practice, at least initially, the Commission has tended to engage in dialogue with and address questionnaires to the various stakeholders in the sector under investigation. The Commission will request extensive information relating to market structure, customers, distribution and supply agreements, and commercially sensitive economic and pricing information, as well as background information on the relevant national legislative and regulatory frameworks. If a company does not voluntarily reply to questions, then the Commission has the ability to order it to do so; the Commission’s powers in that respect are broadly

¹ SPEECH/15/4704. Speech of Margrethe Vestager at the Bundeskartellamt International Conference on Competition on March 26, 2015 in Berlin.

comparable to those it has in a cartel investigation, including the ability to fine respondents for supplying incorrect, incomplete or misleading information.

Commissioner Vestager stated the companies that will receive questionnaires “include holders of content rights, broadcasters, manufacturers, merchants of goods sold online, and the companies that run online platforms such as price-comparison and marketplace websites.”

FOCUS OF THE INQUIRY

The sector inquiry will focus on identifying and addressing private and in particular contractual barriers to cross-border online commerce in digital content and sales of goods.

In 2014, half of all EU consumers shopped online, but only around 15% bought something from a seller based in another EU Member State. Commissioner Vestager highlighted a number of reasons that may currently be acting to limit cross-border e-commerce:

- language barriers and different national consumer preferences;
- differences in legislation across Member States;
- technical barriers erected by companies, such as geo-blocking, that restrict cross-border online sales by preventing consumers from accessing certain websites on the basis of their residence or credit card details;
- restrictions that are the result of agreements between manufacturers and content owners on the one hand, and their distributors on the other.

The stated intention is that knowledge gained through the inquiry will not only contribute to enforcing existing competition rules in the e-commerce sector, but also to various legislative initiatives which the Commission plans to launch to boost the digital single market. As such, the investigation should be seen in the context of the Commission’s wider digital enforcement and policy agenda (see further below).

TIMING

Commissioner Vestager stated that she will formally propose the inquiry to the wider Commission also in May and – on the expectation that it is endorsed – aim to publish preliminary findings by the middle of 2016. Previous sector inquiries have taken around eighteen months to two years to conclude. Given the complex markets involved and diversity of participants, it is to be expected that this inquiry, too, will last at least as long.

POSSIBLE OUTCOMES AND WIDER CONTEXT

The Commission typically concludes an inquiry by publishing its findings along with its recommendations to address any competitive shortcomings identified.

Information gained through sector inquiries will also inevitably inform the legislative process in that market. This is especially true for a sector inquiry such as e-commerce, which concerns one of the key pillars of the Commission's 2020 Agenda: achieving a digital single market. The Commission under the Presidency of Jean-Claude Juncker has made it a priority to remove obstacles to free movement of goods and services in the digital space, and has identified the following three main areas on which to focus:

- better access for consumers and businesses to digital goods and services, which will in turn mean modernizing copyright law and simplifying VAT arrangements;
- shaping the environment for digital networks and services to flourish, including looking into the growing importance of and role played by online platforms (search engines, social media, app stores); and
- creating a European digital economy and society with long-term growth potential by addressing issues around interoperability, data protection and standards.²

The European Vice-President with responsibility for the Digital Single Market (Andrus Ansip) has said that he will announce his strategy – which can be expected to concentrate on certain of the same concerns as the proposed sector inquiry – on May 6, 2015.

Sector inquiries also often form the basis of major enforcement actions. Where the Commission finds competition infringements in the investigated sector, it will subsequently conduct specific investigations into individual market participants. The previous sector inquiry into the pharmaceuticals industry, for example, sparked an extensive investigation into the practice of patent settlements (so-called “pay-for-delay”) and resulted in a number of companies being fined.

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Please do not hesitate to contact us with any questions.

² IP/15/4653, Press release dated March 25, 2015: “Digital Single Market Strategy: European Commission agrees areas for action”.