

1 June 2015

## EU E-commerce Probe to Target Online Restrictions for Physical Goods—Not Just Digital Content

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

**Christopher Bright**  
London  
+44.20.7655.5163  
[cbright@shearman.com](mailto:cbright@shearman.com)

**Stephen C. Mavroghenis**  
Brussels  
+32.2.500.9814  
[stephen.mavroghenis@shearman.com](mailto:stephen.mavroghenis@shearman.com)

**James Webber**  
London  
+44.20.7655.5691  
[james.webber@shearman.com](mailto:james.webber@shearman.com)

The European Commission has recently launched an e-commerce sector inquiry. It will complement and inform its policy agenda for a Digital Single Market in Europe, which was announced on the same day. Companies contacted during the inquiry should be prepared to devote significant resources to what is anticipated to be a burdensome and data intensive exercise. The scope will be broader than the supply of digital content. Particular focus is being given to restrictions on the online distribution of consumer electronics and electrical household appliances, clothing, shoes and accessories, healthcare products, digital content and travel services, with the possibility of other goods and services also attracting scrutiny. Targeted firms will include manufacturers, hybrid and e-tailer wholesale and retail distributors, online content providers and online platforms.

### Overview

On 6 May 2015, the European Commissioner in charge of competition policy, Margrethe Vestager, announced the launch of an e-commerce sector inquiry to contribute to the Commission's objective of achieving a 'Digital Single Market' in Europe.<sup>1</sup>

The Commission's Digital Single Market Strategy is aimed at finding solutions to various public (i.e. regulatory) barriers that hinder cross-border e-commerce in the EU.

EU trade statistics and survey data cited by the Commission<sup>2</sup> suggest that, despite the overall increase in the number of consumers shopping online, only a small proportion purchase goods or services from a seller based in another EU Member State.

In part, this may be due to factors such as language barriers, consumer preferences and differences in national legislation (e.g. in respect of copyright). However, the

<sup>1</sup> European Commission, Press Release "Antitrust: Commission launches e-commerce sector inquiry," 6 May 2015, IP/15/4921.

<sup>2</sup> The survey evidence on which this claim is based is surprisingly thin. Nevertheless, at this stage, the Commission appears convinced that cross-border trade is underdeveloped.

Commission is examining whether companies are raising private barriers to limit cross-border e-commerce in the EU, specifically by incorporating contractual restrictions in distribution agreements regarding online sales, and the use of technical barriers such as 'geo-blocking' which prevent customers from completing purchases from certain websites on the basis of their residence or credit-card details.

Such practices are considered by the Commission to fragment the Internal Market along national borders and prevent cross-border competition. The well-established starting point is that all distributors should be allowed to make use of the internet, and that preventing distributors from serving consumers who wish to seek out better deals via the internet is regarded as a 'hardcore' restriction of competition.

Physical goods such as consumer electronics and electrical household appliances, clothing, accessories, shoes and healthcare products have been flagged by the Commission as of particular interest in its current inquiry,<sup>3</sup> as well as the supply of digital content/services, an area where the Commission has already initiated competition probes into the practices of major Hollywood studios and large European pay-TV platforms with respect to audio-visual content, for example.<sup>4</sup>

At present, the Commission is understood to be gearing up to issue information requests to a representative set of market participants across the EU. The first round of requests is due in mid-June 2015. The Commission expects to publish a preliminary report for consultation in mid-2016, with the final report expected in the first quarter of 2017.

### **The EU Sector Inquiry Regime**

Sector inquiries are data gathering exercises carried out by the Commission under the Antitrust Regulation<sup>5</sup> into sectors of the economy and into types of agreements across various sectors, when it believes that a market is not working as well as it should, and it also believes that breaches of the competition rules might be a contributory factor. Evidence of this might include the level of trade between EU Member States, or price rigidity.

The Commission has powers to ask for information from businesses or trade associations, conduct voluntary interviews and carry out unannounced inspections of business premises ('dawn raids'). In general, such inspections are less common during sector inquiries, which, given their public nature, are typically conducted in a more open/cooperative manner, although there have been notable exceptions (e.g. the announcement of a pharmaceuticals sector inquiry in November 2008 was accompanied by dawn raids carried out on the very same day). The Commission has said it currently does not anticipate dawn raids to be a feature of the e-commerce inquiry.

Fines can be imposed for providing false or misleading information to requests for information. The Commission can in principle issue such requests via formal decision, which compels businesses to provide the requested information within a specified time and allows the Commission to impose fines on companies for failure to comply.

The results of sector inquiries are published in an interim report and interested parties are invited to submit comments on the Commission's findings/concerns before a final report is issued.

Unlike market investigation regimes in other countries, such as the UK which grants the Competition and Markets Authority far-reaching powers to impose market-wide and often draconian remedies (including requiring companies

<sup>3</sup> These products accounted for the highest number of complaints reported to ECC-Net under the Services Directive 2006/123/EC between 2010 and 2012 (available at [http://ec.europa.eu/consumers/ecc/docs/ecc-services\\_directive\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/ecc-services_directive_en.pdf)).

<sup>4</sup> European Commission, Press Release "Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services," 13 January 2014, IP/14/15.

<sup>5</sup> Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 17.

to dispose of assets, without the need to prove a breach of the law), the EU sector inquiry regime does not permit the Commission to impose remedies to ‘fix’ a perceived problem in the way that a particular market is functioning. If its fact-finding exercise uncovers grounds for enforcement action, the Commission may choose to pursue cases against specific companies which it believes may have breached the EU competition rules prohibiting restrictive practices and abuses of dominant market positions. As well as or instead of taking specific enforcement action, the Commission may propose legislative or policy changes.

Following the pharmaceutical sector inquiry, for example, the Commission launched competition cases against a number of companies, including Servier and Lundbeck, and instituted a reporting/monitoring system in respect of patent settlement agreements which were perceived by the Commission to be hindering the availability of cheaper generic drugs in the EU.<sup>6</sup>

There have been eight EU sector inquiries to date.<sup>7</sup> Prior to e-commerce, the most recent inquiry was pharmaceuticals (launched in 2008 by the then Competition Commissioner, Neelie Kroes). Joaquín Almunia, Kroes’ successor who held office from 2010-2014, did not launch a sector inquiry during his tenure, making the current e-commerce probe all the more notable.

### What Direction Will the E-commerce Sector Inquiry Take?

Information requests are expected to be issued this month to a variety of market participants across the entire EU28 (although they will be weighted to areas where e-commerce is more prevalent), including manufacturers, pure online ‘etailers’, hybrid ‘clicks-and-mortar’ distributors with a combination of offline and online shops, online content/service suppliers (such as Video-On-Demand (VOD) and Over-The-Top (OTT) content providers) and online platforms (marketplaces and price comparison websites).

Remarks by the senior Commission official in charge of the inquiry indicate that the information requests will be very data intensive.<sup>8</sup> The focus of the forthcoming questionnaires is understood to be on restraints in agreements throughout the distribution chain (vertical restraints), whether enforced contractually or on a *de facto* basis, such as territorial restrictions (banning unsolicited or ‘passive’ online sales; geo-blocking techniques), restrictions on selling online (platform bans) and pricing restrictions (differential pricing as between offline and online sales; price floors).

The initial Commission statements in connection with the inquiry highlighted consumer electronics and electrical household appliances, clothing, shoes and accessories, healthcare products, digital content and travel services. Whilst there is nothing to prevent the Commission from enlarging the scope as its inquiry progresses, it seems likely that these sectors alone will be more than enough for the Commission to handle on a practical level.

Early indications are that the outcome of the inquiry could be guidance to businesses through subsequent enforcement action by the Commission as well as a re-examination of the legal framework on online vertical restraints, even though the current legislation and accompanying Commission guidance document were fairly recently updated (in 2010) and have several years to run before they are due for overhaul in 2022.<sup>9</sup>

<sup>6</sup> European Commission, Memo “*Antitrust: Commission enforcement action in pharmaceutical sector following sector inquiry*,” 31 January 2013, MEMO/13/56.

<sup>7</sup> E-commerce; pharmaceuticals; financial services; energy; local loop; leased lines; roaming; 3G.

<sup>8</sup> Comments of Thomas Kramler, DG COMP, European Commission, at the GCLC Lunch Talk, co-chaired with James Webber (Partner, Shearman & Sterling LLP): “*The E-commerce Sector Inquiry: What, Why and How?*” Brussels, 22 May 2015.

<sup>9</sup> Commission Regulation (EU) No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Notice, Guidelines on Vertical Restraints, [2010] O.J. C 130/01.

From the perspective of companies and their advisors, it would be most welcome if the Commission clarified what restrictions are permissible when setting up a distribution network with online elements, given that the Commission has itself carried out very little in the way of enforcement action in this area,<sup>10</sup> resulting in a paucity of useful legal precedents at the EU level. To date, most enforcement action regarding vertical restraints has occurred nationally—with the courts and national competition authorities in Germany, France, the Netherlands and the UK in particular leading the way.<sup>11</sup> Coupled with the increased use of settlement procedures, and the risk of divergent outcomes across different Member States (with the German competition authority for example, seemingly taking a more aggressive stance than its counterparts in other EU jurisdictions), this trend reduces legal certainty as to what is and isn't permissible from an EU competition law perspective—on top of the already unwieldy vertical block exemption and guidelines.

In this sense, it is more likely than not that the e-commerce inquiry will yield some benefit. Inevitably, however, the inquiry's broad scope will have to be narrowed to a more realistic set of priorities and objectives if its findings are to have real use for businesses active in the EU.

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<sup>10</sup> An on-going Commission probe into the distribution practices of consumer electronics manufacturers and online retailers being a notable exception (see European Commission, Memo "Antitrust: Commission confirms inspections relating to potential restrictions on online sales," 5 December 2013, MEMO/13/1106; Reuters, "EU says raided online consumer electronics retailers on March 24", 10 March 2015).

<sup>11</sup> For example, see our previous client publication, "German Court Joins Increased Trend to Police Internet Sales," 13 October 2014.