



E-COMMERCE SECTOR INQUIRY

E-commerce businesses heard on 26 March 2015 that they will face a sector inquiry. Competition Commissioner Margrethe Vestager said that a focus of the inquiry will be on identifying and addressing obstacles to creating a fully connected **Digital Single Market**. Vestager is set to table her proposal in May. So what are sector inquiries and what is the current e-commerce one all about?

Sound competition policy in fast-moving markets requires thorough market knowledge. To acquire this knowledge, under Article 17 of Regulation 1/2003 the European Commission can conduct inquiries into sectors of the economy where there are indications that competition is restricted or distorted. If it finds grounds for doing so it may at a later date open specific investigations. The results of sector inquiries are published in a report and interested parties are invited to submit their comments.

Why this inquiry?

European citizens are enthusiastic users of online services. While more and more goods and services are traded over the internet in Europe, cross-border online sales within the EU are only growing slowly: in 2014 around half of all EU consumers shopped online, yet only around 15% of them bought from online vendors based in another EU Member State. While this is partly due to language barriers, consumer preferences and differences in legislation across Member States, there are also indications that some companies may be taking measures to restrict cross-border e-commerce.

The Commission has one main goal: to find out what is hampering competition in cross-border e-commerce sales. Targeted companies could include holders of content rights, broadcasters, manufacturers, online traders of physical goods, and companies that run online platforms such as price-comparison and marketplace websites. The Commission intends to gather information from a large number of stakeholders in all Member States, which will not only contribute to enforcing competition law in the e-commerce sector but also to planned legislative initiatives to boost the Digital Single Market. This is why this sector inquiry has been launched. It is expected to kick off in May 2015 and the first preliminary findings will be published in mid-2016.

Why now?

In EU policy competitiveness and e-commerce are tightly linked. E-commerce is seen as a critical component in achieving the **Digital Single Market**. That is why Vestager's contribution will be crucial.

So why are so few European online shoppers shopping abroad? One of the reasons can be attributed to the different national rules that make it difficult for companies to sell their products across borders. But often it is the companies themselves that undermine cross-border trade by erecting technical barriers such as geo-blocking, which prevents consumers from accessing certain websites on the basis of their residence or credit-card details.

Many contend that European consumers should be able to access goods, content, and other services no matter where they live and travel in Europe, and that open digital markets can bring benefits to both consumers and businesses: wider choice, better prices, and scale. Opponents of geo-blocking maintain that the EU must extend to the online market the opportunities created by the internal market for goods and services.

The Commission says it wants to ensure that the Digital Single Market is a place where all players – large and small – can compete. The idea is that competing in a Digital Single Market prepares companies to take on their rivals around the world. But according to the Commission many barriers that keep companies fragmented persist.

This is where competition policy comes into play. Currently, existing agreements between companies are regulated in the *Guidelines on vertical restraints*. This was last updated in 2010, but Vestager recognises that the digital market moves very quickly, that this regulation only serves as a general framework, and that a more specific approach is needed.

Peculiarities of the current inquiry

Media reports suggest that the danger of this inquiry is that through it Brussels may inadvertently hamper the development of the digital single market by hobbling companies whose activities are already contribute to boosting intra-EU digital commerce. Platforms that allow SMEs to trade across borders which they would otherwise not be able to do due to the heavy IT investments required may be targeted. Vague language in the DSM strategy talks about regulating "online platforms".

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Does Europe's digital strategy need more 'market' and less bureaucrat-imposed 'single'? (Wall Street Journal)

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Amazon and Netflix have both been cited in recent media reports as likely targets of the inquiry, but the net will surely be cast much more widely.

What remains to be seen in this inquiry is whether Vestager will be tempted, or indeed able, to bundle many of the current DG Comp activities in this e-commerce sector inquiry, such as dawn raids on video-game companies and major music labels; geo-blocking; the

investigation into Google, and copyright harmonisation, to name but a few. If she does, how much public and private resources will be spent on this, and would such an approach yield any better results?

With these developments in mind, many will await Vestager's next steps on the e-commerce inquiry with baited breath to see if she is serious when she asserted: *"when we say that digital markets are a priority for competition policy, we mean it"*. But what is sure is that anyone who is a serious player in the digital market will very likely be on Vestager's radar.

How do sector inquiries work in practice?

A sector inquiry is different from a competition case as it does not investigate particular companies or cases and it is not based on specific evidence of wrongdoing. Rather, it looks at the sector as a whole, determines what companies in a particular sector are doing, and finds out how the sector works (or why it is not working effectively). Only then does it draw conclusions as to whether action under competition rules is necessary.

There is no established methodology prescribed for DG COMP to follow in its sector inquiries, and our analysis of the evidence suggests that its approach is often varied. Dawn raids are often (but not always) carried out, as happened in the case of the pharmaceutical sector. These allow the Commission immediate access to information to guide its next steps and typically are followed by requests for information (RFIs) (Article 18 letters of Regulation 1/2003). RFIs usually are many (often more than 200 per inquiry) and are addressed not only to the companies involved but to other sector stakeholders, such as customers. Relevant parties have the opportunity to see preliminary results and the right to comment. The Commission may also discuss preliminary findings with national competition authorities in the framework of the European Competition Network. National competition authorities may also organise their own inquiries. Experts may be invited to discuss preliminary findings during a public hearing organised by the Commission.

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It is high time to remove remaining barriers to e-commerce, which is a vital part of a true Digital Single Market in Europe. The envisaged sector inquiry will help the Commission to understand and tackle barriers to e-commerce to the benefit of European citizens and business. (Commissioner Vestager)

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A special task force is often established: this was the case in the pharmaceutical sector inquiry and one has again been created for this inquiry. This task force will be led by Thomas Kramler, Deputy Head of the Unit responsible for antitrust cases in the information industries, internet and consumer electronics sectors, and will report directly to the Director General of DG COMP.

The average timeline for completion of the inquiry is six months for the preliminary report and a year-and-a-half for the final report.

Depending on its findings, the Commission may continue its monitoring exercises (five exercises continued in the pharmaceutical sector inquiry).

Highlights of previous inquiries

The following are recent notable sector inquiries:

• **Pharmaceuticals (2008):** The Commission examined patent settlements between originator and generic companies to identify those settlements that delay generic market entry. On 8 July 2009 the EC adopted its Final Report, but monitoring continues today. The latest report (fifth in the series) was published in December 2014.

Outcome: The number of patent settlements in the pharmaceutical sector that were potentially problematic dropped almost immediately from 22% of total patent settlements to 10%. In addition 92% of settlements fell into categories that prima facie raised no need for competition law scrutiny.

Sector inquiries at a glance

- Possible dawn raids Article 18 RFIs sent widely (>200 is usual) and often sent also to stakeholders like customers Additional data may be gathered from other sources (roaming: from the GSM Association)
- Often but not always a two-phased inquiry
- Preliminary results may be shown to parties, which might be given the possibility to make statements and to submit written comments during normally, a four-week period
- Other authorities might be involved like EFTA Surveillance Authority
- NCAs may be also involved to discuss findings and to organise their own inquiry
- Public Hearings
- The Commission services may consult relevant national associations and official sources
- The Commission may present preliminary findings
- Creation of a task force is possible

• **Energy (2005):** The energy inquiry responded to concerns voiced about the development of wholesale gas and electricity markets and limited choice for consumers.

Outcome: The final report identified serious shortcomings in the electricity and gas markets: too much market concentration in most national markets; a lack of liquidity, preventing successful new entry; too little integration between Member States' markets; an absence of transparently-available market information,

leading to distrust in pricing mechanisms; an inadequate current level of unbundling between network and supply interests which has negative repercussions on market functioning and investment incentives; customers being tied to suppliers through long-term downstream contracts, and current balancing markets and small balancing zones which favour incumbents. The Commission pursued individual cases (mergers: EDP & GDP, DGF & Suez and E.On & MOL; state aid: in-depth investigation procedure regarding long-term energy supply contracts in Poland and Hungary between the state and certain energy suppliers; antitrust: proceedings in a number of cases and adoption of a Decision against Distrigas) and has taken further action to improve the regulatory framework for energy liberalisation, including the third legislative package on the EU Electricity & Gas markets (2007).

• **Roaming (2000):** The aim was to establish the existing level of competition in mobile roaming markets across the EEA, to collect comparative data on possible anti-competitive practices, and to identify any structural impediments to increased competition in those markets.

Outcome: A proposed regulation – which passed the European Parliament in April 2014 but still needs to be approved by Council – proposes to abolish end-user roaming charges in the EU. While originally proposed to go into effect in December 2015, the change has proven controversial, and the latest proposal as of January 2015 has a 2018 effect date.



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