

# Client Alert



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## EU to get tough on e-commerce barriers

The European Commission is set to turn its attention to e-commerce, looking in detail at the competition law implications of online business practices in Europe. Changes in rules and regulations, as well as investigations leading to fines, may well be the end result.

In this Client Alert, we provide an overview of the key focus areas of the inquiry. Those with experience of any of the issues below will find it of particular interest:

- *Do your distributors complain about unfair competition from “pure” online retailers?*
- *Have you been approached by online dealers wishing to sell your products online and are you concerned if and how to deal with them?*
- *Are you considering terminating a supply agreement with an online dealer?*
- *Do you have a commercial policy on how to deal with online distribution of your products?*
- *Has your supplier imposed restrictions on how, to whom and where you must sell products on the internet or threatened to do so?*
- *Do you believe that your supplier is charging you a higher price for its products simply because you market them online?*

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ISSUED BY MANNHEIMER SWARTLING'S EU AND  
COMPETITION PRACTICE.**

## **E-COMMERCE SECTOR INQUIRY**

Next month, the European Commission (EC) is to launch a competition law inquiry into the e-commerce sector. This means that the way business is done over the internet in Europe will be under the antitrust spotlight like never before. According to Margrethe Vestager, EC Commissioner for Competition, the focus of the inquiry will be on barriers to cross-border sales of goods and digital content erected by private companies, especially in their distribution contracts. 315 million Europeans use the internet every day but obstacles remain to unlock this potential fully. The EC is clearly troubled that while 50 per cent of EU citizens make online purchases, an average of only 15 per cent do so from foreign websites.

## **WHO WILL THE EC TARGET?**

A large number of companies in every one of the 28 countries of the EU will be sent questionnaires by the EC, including holders of content rights, broadcasters, manufacturers, online retailers and online sales platform operators. Different languages and national rules can certainly go some way to explaining the relatively low level of online sales between EU member states but the EC considers that "it is often the companies themselves that undermine cross-border trade by erecting technical barriers such as geo-blocking". Geo-blocking prevents consumers from accessing certain websites on the basis of their nationality, residence, or credit-card details, meaning, for example, that a Swedish citizen hiring a car online will often pay more than a Slovakian using the same website going to the same destination.

## **WHAT IS THE POINT OF THE INQUIRY?**

At its crux, the EC's sector inquiry aims to gather information on how e-commerce works in the EU and identify any anti-competitive practices, such as illegally limiting cross-border trade to push up prices. The driving force behind this being that the European single market should work as well 'online' as 'offline'. In Vestager's words "Think of a French tourist who buys a pair of Italian shoes in Rome. Why is she re-routed to a French website when she tries to buy them online from home?". Such outcomes are often the result of arrangements concluded in contracts between manufacturers or content owners on the one hand and their distributors on the other.

## **E-COMMERCE IS NOT A NEW CONCERN**

The EC and various national competition authorities have in recent years launched a number of specific antitrust investigations into e-commerce business practices, from consumer electric goods, video games and sports footwear to garden equipment, cosmetics and hotel rooms, some of which are still ongoing. It is already clear that restricting so-called online passive sales - when a retailer is prevented from making unsolicited sales to customers from other EU member states - is considered a hardcore infringement of competition law, capable of leading to significant fines. However, the broader focus of the sector inquiry will no doubt seek to identify more about these practices and others in the same vein.

## **WHAT ARE THE POSSIBLE OUTCOMES OF AN INQUIRY?**

A sector inquiry is an investigative tool that allows the EC to identify and address those features of a market that restrict competition. Whilst it is not an investigation into the behaviour of specific companies, this can be the result if illegal practices are suspected. Strong arm tactics like dawn raids have in the past been used in the context of sector inquiries. More typically, however, the EC will begin to gather information by contacting market players to request, for example, business agreements, pricing data and product range information. Companies can be ordered to respond under threat of a fine if the requested information is not provided voluntarily and in full and accurate form. Previous EC inquiries in recent years have probed the energy, financial services and pharmaceuticals sectors. In terms of timescales, an inquiry typically lasts up to 18 months to two years. In this case, preliminary findings can be expected in mid-2016. The EC's sector inquiries conclude with publication of an official report, containing specific recommendations on improving the health of a sector from a competition law point of view.

## **WHAT CAN WE DO TO HELP?**

If you are contacted by the EC in connection with this inquiry, or simply want to make your voice heard, please get in touch for assistance on how to put forward your company's point of view. Given the possible consequences of a sector inquiry, it is important to navigate carefully when, for example, responding to mandatory information requests. Mannheimer Swartling's EU & Competition practice group is also available to give more general advice on drafting and reviewing distribution and sales arrangements. Upon its launch next month, do let us know if you would like to be kept up to date on developments in the e-commerce sector inquiry.

## **OPPORTUNITY KNOCKS – RELATED DEVELOPMENTS**

The EC's e-commerce sector inquiry is closely linked to the overall digital strategy of the EU, for which a new vision is also set to be unveiled in May. It will, amongst other things, look to improving access for consumers and businesses to digital goods and services through, for example, modernising copyright law, simplifying VAT arrangements and tackling cross-border parcel delivery inefficiencies. According to EC data sources, Sweden's 'digital performance' score is second only to Denmark in the EU. The score takes into account factors such as connectivity, digital skills and online activities. Apparently around 4.8% of the Swedish workforce are ICT professionals, almost twice the EU average. Although 80% of Swedish internet users shop online, and 30% of them buy online from other countries, only 7.7% of Sweden's SMEs sell online across borders.

Whilst there is clearly a risk posed by close scrutiny of current e-commerce business practices, there is also an opportunity to get ahead of the curve by ensuring all standard form documents and compliance procedures are up to date and in line with competition law, fully taking advantage of the opportunities of the EU online market place.

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Mannheimer Swartling's EU and Competition practice includes specialists in Sweden and Brussels with over 25 years of experience advising Swedish and international clients on all aspects of competition law. The strength of the practice is consistently confirmed by independent ranking institutes, and the firm's presence in China, Germany, Russia and the United States and full service approach ensures wide-ranging coverage as well as specialist knowledge.