

CLIENT MEMORANDUM

E-commerce sector inquiry: EU Commission ready to issue questionnaires next week

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In the context of the European Digital Single Market Strategy, [the European Commission launched on 6 May 2015 a sector inquiry into e-commerce](#) pursuant to Article 17 of [Regulation 1/2003](#). The Commission will commence the inquiry by issuing questionnaires to approximately 2,000 market participants next week. The scale of the inquiry is expected to be similar to that of the inquiry into the energy sector between 2005 and 2007. Like the energy and pharmaceutical sector inquiries, it could lead to the opening of investigations into competition law infringements by individual companies.

THE “RENAISSANCE” OF INVESTIGATIONS INTO VERTICAL RESTRAINTS

A Commission official last week spoke about a “renaissance” of investigations into vertical restraints due to new online challenges. Indeed, in the past decade, the European Commission has been rather inactive in the field of vertical restraints; antitrust authorities of the Member States filled the gap, in particular with respect to novel issues related to online distribution (cf. in particular the [booking.com](#) case).

Recognizing that markets have shifted online to a very significant extent over recent years and that vertical restraints issues may become a pan-European issue, the Commission has now launched a sector inquiry into e-commerce. This inquiry will give the Commission the opportunity to gather information on existing business models and practices and

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verify the compatibility with EU antitrust rules of various vertical restraints, while providing coherent EU-wide guidance to Member State competition authorities and companies.

THE SECTOR INQUIRY

After having looked into the energy, financial and pharmaceuticals sectors, the Commission has decided to carry out an inquiry in the e-commerce sector, initially covering all EU Member States. [The aim of this sector inquiry](#) is to allow the Commission to gain a more comprehensive understanding of the functioning of e-commerce markets so as to identify possible competition concerns. According to the Commission, several studies have in fact indicated the presence of company-erected barriers, primarily aimed at territorial fragmentation and restriction of price competition; these restrictions would limit cross-border online trade in goods, thereby reducing sales volumes and consequently consumers' choices.

The announced inquiry will primarily focus on the sectors where e-commerce is most widespread, that is clothing/shoes/accessories, consumer electronics and electrical household appliances, books (printed and electronic), healthcare products, digital content and travel services. The targeted undertakings will be manufacturers and merchants of goods (hybrid, e-tailers), online content service providers (VOD, OTT) and online platforms (price comparison websites and marketplaces).

The Commission's main areas of focus will be contractual arrangements (e.g. exclusivity issues) and technical practices (such as MFN clauses), as well as national laws and regulation (payments, copyright, data protection, etc.). In particular, with regard to goods, prohibited practices will cover restrictions on cross-border sales (passive sales, geo-blocking), restrictions on online sales (platform bans) and pricing restrictions. Conversely, with respect to the digital content, restrictions will be identified in absolute territorial protection and supporting contractual provisions (geo-blocking requirements, requirements for customers' terms of service and enforcement mechanisms).

In terms of timing, the first round of requests for information will commence next week, with a preliminary report for consultation to follow in mid-2016. The final report is expected in the first quarter of 2017.

If you have any questions regarding this memorandum, please contact Jacques-Philippe Gunther (jgunther@willkie.com), Adrien Giraud (agiraud@willkie.com) or the Willkie attorney with whom you regularly work.

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