On 6 May 2015 the European Commission launched an inquiry into the e-commerce sector, voicing concerns that the commercial arrangements between private companies are unduly restricting cross-border online trading and are fragmenting the “digital single market”. The primary focus of the inquiry is on “goods and services in which e-commerce is most widespread such as electronics, clothing and shoes, as well as digital content”, but will necessarily constitute an investigation into the sale of any goods or services online in the EU.

The launch of the inquiry signifies that a comprehensive review by the Commission of distribution arrangements across the sector is nigh, and companies will begin to receive questionnaires from the Commission over the coming months. In the interim, companies have a valuable opportunity to conduct their own review of their current practices and consider the possible implications of the Commission’s inquiry on their business.

**Why Has the Inquiry Been Launched?**

The Commission has been closely monitoring the functioning of the e-commerce sector and has seen indications that potential obstacles to cross-border online trade currently exist, including that:

- 50% of the EU population shopped online in 2014, but only 15% of the population purchased from a trader based in another Member State
- 32% of retailers have cited contractual restrictions in distribution agreements as a reason for refusing to supply cross-border

The sector inquiry is being conducted in parallel with the Digital Single Market strategy, which is formed of three strands. One such strand is cross-border e-commerce, which will entail an examination of the public (legal and regulatory) obstacles to cross-border e-commerce (such as geo-blocking, data protection and privacy rules, etc.), whereas this e-commerce sector inquiry focuses on any obstacles to e-commerce posed by the commercial arrangements between private companies.

Commercial arrangements that are likely to face inquiry by the Commission are those which are aimed at, or have the effect of, directly or indirectly restricting the territory into which goods or services may be sold (known as ‘hardcore’ restrictions of competition).

Based on the Commission’s 2010 Guidelines on Vertical Restraints, which describe the Commission’s policy on vertical agreements (that is, those with a vertical relationship between the supplier and distributor), such arrangements may include, for example:

- disparities in prices or rebates offered to distributors which disadvantage exports or online sales
- conditions imposed on online traders that are not overall equivalent to those imposed on bricks-and-mortar traders
- restrictions imposed on internet selling that protect the interests of bricks-and-mortar traders
- requirements as to website language and using geo-blocking to restrict sales to certain territories
- using geo-blocking to limit the availability of digital content (such as films and music) to only users in certain member states and exclude others

**What Are the Practical Implications of a Sector Inquiry?**

A number of companies and industry associations across the EU are likely to receive extensive requests for information from the Commission. These will tend to be voluntary at the initial stages of the inquiry, but could be demanding in terms of the information requested and the timeframe for responding. Information requested is likely to include pricing, costs, chains of supply, customers, barriers to entry and exit, common contractual arrangements, etc.

Subsequent requests may follow with questions focused on particular issues that have arisen, and the Commission also has the power to conduct unannounced inspections on company premises (known as “dawn raids”) should it consider it necessary. In such cases, the Commission can require access to hard copy documents and electronic files on various mediums, and can make copies of anything deemed relevant to the inquiry. Also within the Commission’s powers of inquiry is the ability to conduct oral interviews.

**What Action Should Companies Take?**

The Commission will be sending out requests for information over the coming months, but the interim period is a valuable opportunity for companies to reassess current practices in the light of both the Commission’s current guidelines and the new approach it proposes to adopt under the sector inquiry. Companies should therefore consider conducting an internal audit of their current policies and practices in respect of its distribution systems to ensure that there will be no surprises if the Commission or any other regulator begins to probe. It is recommended that legal advice is sought on interpreting the Commission’s new approach, the recommended scope of a competition compliance audit, and on any potentially thorny issues discovered during the course of an audit.
While most of the Commission’s requests for information will be, or will appear, purely factual, there are certain key considerations that a company should bear in mind at all times during its dealings with the Commission:

- the Commission can impose fines for the provision of false or misleading information, the refusal to comply with an inspection or mandatory request, or the hiding/deletion of documents
- responses must be carefully considered to ensure that the company’s long-term strategy and position is protected, particularly in the event of subsequent infringement proceedings
- responding to information requests will require significant resources to compile the information and prepare an appropriate response
- the Commission does not recognise in-house counsel communications as having legal privilege, so any such documents may be seized by the Commission

It is recommended that companies work alongside their antitrust lawyers, experienced in dealing with investigations and inquiries by the Commission, in preparing any responses to information requests, and in particular that their lawyers are present throughout any dawn raid to ensure that the inspection is carried out in the correct manner.

What Might be the Outcome of the Inquiry?

The Commission is expected to publish its initial findings in mid-2016, on which stakeholders in the sector will have the opportunity to comment, and its final report (which may follow further investigations) is expected for the beginning of 2017.

Companies should bear in mind that the information gathered during such inquiries is often used to initiate infringement proceedings against companies where suspected anti-competitive behaviour has been detected, which can lead to substantial fines being imposed. Indeed, the Commission’s 2008 inquiry into the pharmaceuticals sector resulted in several such infringement proceedings.

Aside from taking enforcement action, both to punish anti-competitive conduct and to establish new precedents in the e-commerce sector, the Commission may seek to modernise the current regulatory framework (consisting of the Vertical Agreement Block Exemption Regulation and the Guidelines on Vertical Restraints, which have not been amended since 2010) to deal with particular issues arising out of the inquiry. The Commission is also hoping that the inquiry will promote greater coherence and coordination between the Commission and national competition authorities, as the varying interpretations of competition law across the EU is often cited as an additional barrier to cross-border trade.

Please feel free to get in touch if you would like any further information on the Commission’s sector inquiry or have any queries on any other aspects of competition law.