

The E-Commerce Sector Inquiry: Can It Stop National Competition Authorities from Adopting an Overly Restrictive Approach?

Francesco Carloni, Scott S. Megregian, and Mélanie Bruneau*

I. Introduction

On 6 May 2015, the European Commission (the ‘Commission’) launched a competition inquiry into the European Union’s (‘EU’) e-commerce sector (the ‘Sector Inquiry’).¹ According to Margrethe Vestager, the EU Commissioner in charge of Competition Policy: *‘European citizens face too many barriers to accessing goods and services online across borders. Some of these barriers are put in place by companies themselves. With this sector inquiry my aim is to determine how widespread these barriers are and what effects they have on competition and consumers. If they are anti-competitive we will not hesitate to take enforcement action under EU antitrust rules.’*²

The Sector Inquiry intends to complement the actions launched within the framework of the Commission’s Digital Single Market (‘DSM’) Strategy,³ which consists of a number of proposals, the most prominent being (i) facilitating cross-border e-commerce, (ii) enhancing telecoms infrastructure and promoting innovative digital services, and (iii) creating conditions for European companies to embrace the opportunities offered by the digital revolution and to defend their commercial position. The Sector Inquiry’s inclusion in the DSM strategy sheds light on the reasons behind the Commission’s decision to launch the Sector Inquiry. A real DSM cannot be achieved in the EU if cross-border e-commerce is perceived as being substantially constrained.

Another reason underlying the Commission’s launch of the Sector Inquiry concerns the market trends in e-commerce. The Commission has observed that although e-commerce is developing and has spread rapidly in the past few years, cross-border on-line sales in the EU have

Key Points

- In the past years, some national competition authorities have adopted a restrictive approach as regards on-line practices in the distribution of goods and services in the European Union.
- As a result of that approach, companies are facing increasing uncertainty as to the legality and enforceability of their distribution agreements.
- A question is to what extent the situation will be changed with the e-commerce sector inquiry launched by the European Commission on 6 May 2015.

only increased slowly. It is estimated that around half of consumers in the EU shopped on-line in 2014, but only 15 per cent of them purchased a product or a service from a vendor located in another EU Member State.⁴ According to the Commission, this is not only due to differences in language and the preferences of consumers, but can also be attributed to the existence of two types of barriers that allegedly hinder cross-border e-commerce, namely regulatory barriers and perceived obstacles to cross-border on-line trade erected by companies. The latter barriers, in the Commission’s view, would include imposing contractual restrictions in supply and distribution agreements that would prevent retailers from selling goods or services on-line to customers located in another EU country. As a result, the Commission considers the EU Single Market could risk being fragmented into national markets and

* Mr Francesco Carloni is a Counsel with K&L Gates, Brussels and Milan; Mr Scott S. Megregian is a Partner with K&L Gates, London and Brussels; and Ms Mélanie Bruneau is a Partner with K&L Gates, Brussels and Paris. All views expressed in this publication are purely personal to the authors and do not reflect the views of K&L Gates. We thank our colleagues Ms Gabriela R. Da Costa (K&L Gates, London), Mr Alessandro Di Mario (K&L Gates, Brussels), and Mr Ilya Levin (K&L Gates, Berlin, Brussels) for their research and assistance in the preparation of the article.

1 Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No. 1/2003, C(2015) 3026 final; the ‘Opening Decision’.

2 Commission: Press release of 6 May 2015, IP/15/4921 (<http://europa.eu/rapid/press-release_IP-15-4921_en.htm>).

3 The DSM Strategy was adopted by the Commission on the same day as the Opening Decision. The new Commission appointed in November 2014 made the completion of the DSM Strategy one of its top political priorities for the next 5 years, with two dedicated Commissioners: Vice President for the Digital Single Market Andrus Ansip and Commissioner for the Digital Economy and Society Günther Oettinger.

4 Eurostat, ICT survey of Households and Individuals, 2014, quoted in the Opening Decision.

facing impediments to cross-border competition in the increasingly evolving on-line sector.

Whilst the regulatory barriers will be addressed within the DSM Strategy,⁵ the Sector Inquiry will focus on the second category, ie the perceived barriers to cross-border on-line trade erected by companies. According to Commissioner Vestager, the Sector Inquiry will ‘contribute to better enforcement of competition law in the e-commerce sector’.⁶

The scope of the Sector Inquiry will be extensive. The initial stage of the Inquiry is likely to involve detailed data and document production requests. It will encompass trade both in goods and in services, particularly electronics, clothing and shoes, digital content, and books. Other areas may also come under review, such as healthcare products and travel services. The companies concerned will include manufacturers, wholesalers, e-commerce retailers, on-line content providers, and on-line platforms (marketplaces and price comparison tools). Across the EU, a large number of these companies have already received or are in the process of receiving requests for information (‘RFI’).⁷

This article provides (i) a description of the legal context of EU sector inquiries; (ii) an analysis of the main issues raised by the Sector Inquiry; and (iii) an overview of the most pertinent legal precedents, notably decisions on vertical restraints and e-commerce at the EU and national levels. The authors will also draw conclusions regarding the potential outcomes of the Sector Inquiry.

II. EU sector inquiries

A. The legal context

The Sector Inquiry launched by the Commission is regulated by Article 17 of the Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (‘Regulation 1/2003’).⁸

Article 17 of Regulation 1/2003 states that the Commission may ‘conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors’, when it suspects that competition may be restricted or distorted within the common market. Such

suspicion could be based on the observation of trade trends between Member States, the rigidity of prices or other circumstances.⁹

Unlike competition infringement proceedings brought under Article 101 or 102 of the Treaty on the Functioning of the EU (‘TFEU’),¹⁰ sector inquiries are not directed at investigating specific cases or specific companies. Rather, they are aimed at studying a sector as a whole, in order to better understand its rules, characteristics, and mechanics, if it works efficiently, and, if not, the reasons why. On the basis of the findings of a sector inquiry, the Commission can decide whether action under competition rules is warranted.

1. The Commission’s powers when conducting sector inquiries

When conducting sector inquiries, the Commission has the power to (i) send RFIs¹¹ to the companies or associations of undertakings concerned (including to request from them detailed data and document production), (ii) take statements from natural and legal persons, and (iii) conduct any inspections.

Responding to the Commission’s RFIs can prove a tedious process. The RFIs tend to be numerous and are sent to a wide range of stakeholders, including companies, their customers, and suppliers. RFIs can take the form of an informal (voluntary) request or a formal (mandatory) decision. The Commission will typically issue a voluntary request in the first instance. It is generally advisable to cooperate with such a request, since a failure to respond may lead the Commission to issue a mandatory request through a formal decision. The Commission is legally obliged to state the legal basis and the purpose of the RFI, specify what information it is requesting, and set the time limit within which the information must be provided. In the RFI, the Commission will also mention the penalties for supplying incorrect or misleading information.

The Commission will also send the RFI to the national competition authorities (‘NCAs’) where the recipient company or association has its seat and to those whose territories it suspects are affected. Moreover, the Commission has the power to request that Member State

5 As stated by Commissioner Vestager: ‘it does not make sense for the countries of the EU to have 28 different rules on telecom regulation, 28 national regulators, and 28 different ways of allocating spectrum within national borders’ (speech at the Bundeskartellamt International Conference on Competition Building the Digital Single Market, Competition policy for the Digital Single Market: Focus on e-commerce, Berlin, 26 March 2015).

6 Press release of 6 May 2015, IP/15/4921.

7 On 19 June 2015, it was reported that the Commission sent the first questionnaires to the companies that own the rights to movies, TV shows, music, and sports. The Commission intends to understand the managing and distribution of their content online, and whether they limit access through contractual or technological restrictions. The questionnaires are

long, detailed, and vary according to the size of the companies and scope of their activities. They contain requests for copies of contracts and data.

8 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4 January 2003).

9 Article 17 of Regulation 1/2003 allows the Commission to start an inquiry, even if this is not supported by any specific allegation of a wrongdoing.

10 Now Articles 101 and 102 TFEU. Article 101 prohibits restrictive agreements, whereas Article 102 prohibits the abuse of a dominant position.

11 Article 18 of Regulation 1/2003.

governments and the NCAs provide information necessary for its inquiry.

Additionally, the Commission has the power to obtain statements from any natural or legal person who consents to being interviewed, to enable the collection of information to assist in its investigation. Should the interview be conducted in the premises of an undertaking, the Commission will have to inform the NCA of the Member State where the interview takes place. The NCA may request to have its officials assist in the interview.¹²

A further power that the Commission may decide to use in its sector inquiries is to conduct inspections of companies (as it did in the pharmaceutical sector inquiry) and associations of undertakings. The Commission has typically used this power to gain immediate access to relevant information, on which it often bases its RFIs. As a result, the Commission may authorise specific persons to (i) enter any premises, property, or means of transport; (ii) examine and take copies of the books and other records related to the business; (iii) seal the premises and the materials under inspection; and (iv) ask questions to the representatives or staff of the companies or associations under inspection, and record their answers. The companies and associations concerned have the duty to submit to the inspection ordered by the Commission.¹³

Although the companies' commercially sensitive information, which has been collected by the Commission during the course of a sector inquiry, will be kept confidential,¹⁴ the Commission will publish aggregated data in its preliminary and final reports.

2. Risk of significant penalties

Regulation 1/2003 provides for penalties for the companies or associations of undertakings that do not cooperate with the Commission in a sector inquiry, when requested to do so. The Commission may by decision impose fines of up to 1 per cent of the company's or association's total turnover in the preceding business year where it finds that it has—either intentionally or negligently—(i) provided incorrect or misleading information in response to an

informal RFI or to questions asked during an inspection; (ii) provided incorrect, incomplete, or misleading information, or not provided information within the required time limit, in response to an RFI adopted by formal decision; (iii) produced incomplete books or other records; (iv) refused to submit to an inspection ordered by decision; or (v) broken the seals placed by the Commission.¹⁵

The Commission is entitled to impose by decision periodic penalties on companies or associations of undertakings of up to 5 per cent of their average daily turnovers in the preceding business year per day, in order to compel them to (i) provide complete and correct information requested by the decision or (ii) submit to an inspection ordered by a decision.¹⁶

The Commission has previously exercised its power to impose fines for misleading and incorrect responses in the context of a sector inquiry.¹⁷

B. The outcomes of the previous sector inquiries

The Sector Inquiry is not the first inquiry conducted by the Commission under Article 17 of Regulation 1/2003.¹⁸ The impact of previous sector inquiries has been substantial, especially as they have not only resulted in costly and intrusive fact-finding exercises for the companies concerned, but also lead to the opening of infringement proceedings and to material legislative changes that have affected the way companies conduct business.

1. Energy sector inquiry

In 2005, the Commission launched a sector inquiry in the energy sector to further investigate perceived concerns relating to the inefficiencies and the costs in the wholesale markets for gas and electricity, as well as the limited choice for consumers. The inquiry included several inspections and a number of RFIs. It was concluded in 2007, with the Commission finding that the concerns in those markets included (i) high levels of market concentration; (ii) vertical integration of supply, generation, and infrastructure,

12 Article 19 of Regulation 1/2003.

13 Should the persons authorised by the Commission encounter any resistance at the inspection, they can request the assistance of the police. There is also the risk of substantial fines being imposed for obstructing the inspection (Article 20 of Regulation 1/2003).

14 Article 28 of the Regulation 1/2003.

15 Article 23 of the Regulation 1/2003.

16 Article 24 of the Regulation 1/2003.

17 In 2010, the Commission sent statements of objections to a pharmaceutical company on the grounds that it had provided misleading and incorrect information in reply to a request for information in the context of the pharmaceutical sector inquiry. The Commission closed the case in 2012 without imposing fines (Commission: Press release of 27 January 2012, IP/12/43 <http://europa.eu/rapid/press-release_IP-12-43_en.htm?locale=en>).

18 In 2000, the Commission launched a sector inquiry into mobile roaming because of perceived concerns about price rigidity and lack of competitive offers. The objectives of the sector inquiry were to (i) establish the existing level of competition in mobile roaming markets across the European Economic Area ('EEA'), (ii) collect comparative data on possible anti-competitive practices, and (iii) identify any potential structural impediments to increased competition in those fields. At the beginning of 2000, the Commission sent RFIs to approximately 200 EU mobile network operators, service providers, and national authorities. Significantly, a proposed regulation—which passed the European Parliament stage in April 2014 but is still subject to the Council's approval—proposes to abolish end-user roaming charges in the EU. The latest proposal of 15 June 2015 has a 2017 effective date for implementing the abolition. For the latest developments, see Council of the European Union: Press release of 30 June 2015, 543/15 (<<http://www.consilium.europa.eu/en/press/press-releases/2015/06/30-roaming-charges/>>).

leading to a lack of equal access and insufficient investment in infrastructure; and (iii) possible collusion between incumbent operators to share markets.

Following the energy sector inquiry, there has been a wave of consolidation in the energy sector through mergers,¹⁹ as well as the opening of several competition proceedings, including State aid investigations.²⁰ In addition, the findings of the sector inquiry formed the basis for subsequent legislative action as regards the liberalisation of the energy markets and, significantly, the adoption of the EU's Third Energy Package in 2007.

2. Pharmaceutical sector inquiry

Between 2008 and 2009, the Commission conducted a sector inquiry in the pharmaceuticals sector. In this inquiry, the Commission also undertook extensive inspections, although the number of questionnaires was lower than in the previous sector inquiry. Notably, the Commission *dawn raided* (ie conducted unannounced inspections) a number of pharmaceutical companies at the start of the sector inquiry.²¹ The pharmaceutical sector inquiry was prompted by indications that fewer new pharmaceuticals were being brought to market and the entry of generic pharmaceuticals appeared to be delayed. As a result, the Commission sought to ascertain the reasons behind these circumstances and looked into settlements in patent disputes and a variety of perceived artificial barriers to entry.

Whilst the final report in the pharmaceutical sector inquiry was adopted in July 2009, there has been an ongoing monitoring of patent settlements between patent holders and generic producers since.²² This has led to a considerable decrease in the number of potentially problematic patent settlements²³ and in the number of

cases being opened.²⁴ In addition, the inquiry resulted in a range of legislative action being taken in the EU.²⁵

3. Other sector inquiries

The Commission has conducted a number of other sector inquiries under Article 17 of the Regulation 1/2003. In 2004, the Commission conducted a sector inquiry into the provision of sports content over third-generation (3G) mobile networks.²⁶ The inquiry was carried out during 2004 and 2005 and involved a throughout review of the behaviour of more than 200 companies and organisations active in the acquisition, resale, and exploitation of mobile rights to sports events. The final report was published in September 2005 and highlighted potential anticompetitive business practices such as bundling, embargoes, or exclusivity agreements.

In June 2005, the Commission launched inquiries into the financial services sector focussing on payments cards, core retail banking, and business insurances. The final report on retail banking was published in January 2007.²⁷ The Commission found indications of potential concerns with regard to a high concentration of banking retail in certain Member States, as well as large differences in interchange fees and technical standards. The final report on business insurances was adopted in September 2007 and questioned some practices in co- and reinsurance areas.

III. The sector inquiry in the e-commerce sector

Consistent with its practice,²⁸ the Commission has established an *ad hoc* task force (the 'DSM Task Force') composed of six officials. The DSM Task Force is led by Mr Thomas Kramler, who will be reporting directly to the Director General of the Directorate-General for

19 See, for instance, COMP M.4180, Decision of 14 November 2006 and COMP M.3696, Decision of 21 December 2005. And right before the launch of the sector inquiry COMP M.3440, Decision of 9 December 2004.

20 In 2005, the Commission opened a State aid investigation into the long-term power purchase agreements in Poland between the State and certain energy suppliers, considered to be advantageous to the latter (COMP SA.18989, Decision of 25 September 2007). Furthermore, the Commission conducted inspections at several companies active in the energy sector in 2006 and opened proceedings in a number of cases. For instance, the Commission started an investigation for abuse of a dominant market position against a Belgian natural gas company. The case was concluded with the decision to accept and make legally binding the commitments offered by the company to open the Belgian gas market to competition (COMP. AT.37966, Decision of 11 October 2007).

21 This was the first time that a sector inquiry began with surprise inspections of companies.

22 The Commission's reports on monitoring of patent settlements are published on its website: <<http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/>>.

23 The number of patent settlements in the pharmaceutical sector that were perceived to raise competition concerns dropped almost immediately from 22 per cent of total patent settlements to 10 per cent. In addition, 92 per

cent of settlements fell into categories that *prima facie* raised no need for competition law scrutiny.

24 In July 2012, the Commission sent statements of objections to more than 14 companies in two cases of alleged distortions of competition in the pharmaceutical sector through anticompetitive agreements and partly unilateral practices (COMP AT.39226, Decision of 19 June 2013; COMP AT.39612, Decision of 9 July 2014). Other investigations were also opened by the Commission (COMP AT.39686, Decision of 19 April 2011; COMP AT.39685, Decision of 10 December 2013).

25 The sector inquiry provided the opportunity to stress the need for the creation of a single Community patent and a unified and specialised patent litigation system in Europe. Those interventions were strongly supported by all stakeholders who took part to the inquiry (see the Technical Annex to the Final Report of the Pharmaceutical Sector Inquiry of 8 July 2009, p. 525).

26 The sector inquiry was a joint initiative by the Commission and the EFTA Surveillance Authority to ensure that sports content, which is critical for the take-up of new mobile services, is not held back by anticompetitive conduct.

27 The final report is available at: <<http://tinyurl.com/pvsbnbt>>.

28 A Task Force was also established in the Pharmaceutical Sector Inquiry.

Competition. The Commission has also created a dedicated page for the Sector Inquiry on its website.²⁹

A. A fast-growing market

The e-commerce sector has been growing for years and continues to grow. By way of illustration, in the USA, the total revenue deriving from e-commerce sales in business-to-business trade alone was USD 5.4 trillion in 2012 (amounting to 18 per cent of the total revenue for business-to-business trade). In Europe, it has been estimated that in 2013, 14 per cent of the revenue of EU companies with ten or more employees (excluding the financial sector) was generated from e-commerce (this compares with 9 per cent in 2004).³⁰

The Commission expects that a properly functioning digital market could increase the EU's gross domestic product ('GDP') by EUR 315 billion.³¹ Whilst this may (partly) explain the economic rationale for the Sector Inquiry, it remains to be seen whether the Sector Inquiry is an appropriate instrument when dealing with fast-growing markets. There is the risk that the results and conclusions of the Sector Inquiry arrive too late (approximately 2 years from now) and thus that they lose much of their significance in relation to the market realities of e-commerce.

B. The objectives of the sector inquiry

The Commission has stated that the main objectives it is trying to achieve with the Sector Inquiry are to (i) obtain a more comprehensive understanding of the perceived competition issues raised by e-commerce over the national borders of the EU Member States, in addition to the dynamics of the markets and the challenges faced by the companies active in those markets; (ii) use the findings of the Sector Inquiry to provide businesses with guidance, through subsequent enforcement, and '*encourage executives to stay on the right side of the law by setting up compliance programmes and other preventive measures*'³²; (iii) consider the current legislative and regulatory framework of on-line vertical restraints in light of

the current market realities; (iv) complement legislative initiatives, especially those dealing with the fragmentation of on-line trade; and (v) strengthen and enhance coherence in the Commission's and NCAs' enforcement action against perceived restrictions of on-line sales.³³

At present, there are no indications that the Commission will use the findings of the Sector Inquiry to propose changes to the existing legislative and regulatory framework pertaining to vertical restraints. The Commission's current regulation block exempting certain vertical agreements (the 'Vertical Block Exemption Regulation') was adopted in 2010 and is due to expire in 2022.³⁴ Similarly, the Commission does not intend to substantially amend the text of its guidelines on vertical restraints (the 'Vertical Restraints Guidelines').³⁵ However, this does not prevent the Commission from relying on the findings of the Sector Inquiry to undertake some 'fine-tuning' of the relevant legal texts or guidance notes.

C. The indications of perceived company-erected barriers

The Commission contends that there are indications of barriers erected by companies in the e-commerce sector. According to the Commission, such perceived barriers could result in territorial fragmentation of the EU single market and restriction of price competition. The Commission's decision to launch the Sector Inquiry has also involved a consideration of its current casework (the consumer electronics³⁶ and the Pay-TV distribution rights investigations)³⁷ and the activism of the NCAs (notably in Germany and France), which have been particularly active in investigating on-line markets in recent years.

The Commission's contention regarding the perceived company-erected barriers mainly relies on the findings of the following studies cited by the Commission: (i) a recent report showing that 32 per cent of retailers mentioned contractual restrictions in their distribution agreements as the reason for refusing to supply services cross-border³⁸ and (ii) a 2015 survey of wholesale and retail sales of goods and services in the EU, showing that

29 <http://ec.europa.eu/competition/antitrust/sector_inquiries_e-commerce.html>.

30 UNCTAD, Information Economy Report 2015, p. 13.

31 Commissioner Vestager's speech of 26 March 2015 (see n5 above).

32 Ibid.

33 Ibid.

34 Commission Regulation (EU) No. 330/2010 of 20 April 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 (OJ L 102, 23 April 2010).

35 Commission Guidelines on Vertical Restraints (OJ C 130, 19 May 2010).

36 In December 2013, the Commission started an investigation into consumer electronics production and distribution. It announced that targeted

companies '*may have put in place restrictions on online sales of consumer electronic products and small domestic appliances. These restrictions, if proven, may lead to higher consumer prices or the unavailability of products through certain online sales channels*' (Commission: Press release of 5 December 2013, MEMO/13/1106 <http://europa.eu/rapid/press-release_MEMO-13-1106_en.htm>).

37 Since 2014, the Commission has been investigating US film studios and European broadcasters in relation to territorial restrictions in licensing contracts. The Commission contends that licensing agreements could affect the ability of existing and new subscribers to access online Pay-TV outside an allocated territory (COMP AT.40023, Document of 13 January 2014).

38 ECC Net report on the application of Articles 20.2 and 21 of the Services Directive, 2013.

19.1 per cent of companies currently active in cross-border e-commerce and 29 per cent of companies that are not yet active stated that ‘suppliers’ restrictions affecting sales on online platforms constituted or would constitute a problem for their business when selling online.³⁹ The Commission also found, through another survey conducted in 2015, that 5 per cent of customers in the EU were redirected and 6 per cent indicated that foreign sellers refused them access.⁴⁰ Other studies suggest that the removal of restrictions imposed by suppliers would increase both the likelihood of companies engaging in cross-border e-commerce (by 10 per cent) and the average volume of on-line sales (by 6 per cent).

D. The Commission’s review of the perceived company-erected barriers

The Sector Inquiry aims to identify the main perceived barriers erected by companies to EU cross-border on-line trade. The Commission has indicated that it will keep an open mind and that the Opening Decision does not preclude the Commission from considering other areas. The RFIs may include general questions about the national regulatory and legislative provisions, the structure of the market, and the identities of the key suppliers and customers, although the Sector Inquiry will focus particularly on vertical restraints. This means that the Commission will predominately look at potential restrictions under Article 101 TFEU and will likely ask the companies concerned to submit their contracts to ascertain whether the agreements or certain contractual provisions result in barriers to cross-border on-line trade in the EU.

1. The types of restrictions that will be reviewed

The Commission considers that the potential restrictions hampering on-line cross-border trade are often the

result of arrangements included in contracts between manufacturers or content owners and their distributors. These arrangements fall within the scope of EU competition law rules as they may constitute contractual bans of so-called passive on-line sales,⁴¹ which are considered to be ‘hard-core’ restrictions of competition that cannot benefit from automatic exemption under the Vertical Block Exemption Regulation and are presumed breach Article 101 TFEU. This is further supported by the Commission’s current policy stance, which Commissioner Vestager has explained as follows: ‘consumers must be allowed to look for the best deals online wherever they want’.⁴²

The Commission indicated that it will refer to the relevant case law of the Court of Justice of the EU (‘CJEU’) regarding the contractual restrictions of on-line trade. It is, therefore, worth revisiting this case law briefly.

(i) *Pierre Fabre*

As regards trade in goods, in *Pierre Fabre*,⁴³ the CJEU considered the Pierre Fabre Group’s selective distribution system,⁴⁴ which allowed products to be sold only through authorised distributors such as pharmacies and ‘parapharmacies’. In particular, distributors were chosen according to (i) the quality of their point of sale, (ii) the qualifications of their staff, and (iii) their ability to guarantee the presence of a pharmacist at all times. Due to the requirement of the physical presence of a pharmacist, Pierre Fabre’s distribution system *de facto* eliminated the possibility of on-line sales. The CJEU found that a contractual clause that prohibits *de facto* the internet as a method of marketing: ‘at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system’.⁴⁵

39 Flash Eurobarometer 413; the studies are cited in the Commission’s Fact Sheet, *Antitrust: Commission launches e-commerce sector inquiry*, of 6 May 2015, MEMO/15/4922.

40 This conduct falls within the ‘geo-blocking’ category, pursuant to which companies prevent consumers from accessing specific websites on the basis of their place of residence or their credit card details.

41 For the application of Article 4(b) of the Vertical Block Exemption Regulation, the Commission interprets ‘passive’ sales as follows: ‘Passive sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors’ (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one’s own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors’ (exclusive) territories or customer groups’ (Vertical Restraints Guidelines, ¶51).

42 Commissioner Vestager’s speech of 26 March 2015 (see n5 above).

43 Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de*

l’Emploi, EU:C:2011, 649, ¶54 (‘*Pierre Fabre*’). The proceedings before the CJEU were the result of a request for a preliminary ruling made by the Paris Court of Appeal, which asked the CJEU the following question: ‘Does a general and absolute ban on selling goods via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a “hard-core” restriction of competition by object for the purpose of Article 101(1) TFEU which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 101(3) TFEU?’

44 Selective distribution is a distribution method whereby the manufacturer chooses retailers for its goods by reference to their compliance with specific criteria. As long as these are objective qualitative criteria, due to the characteristics of the products in question, and are applied uniformly and without discrimination, then this will not infringe Article 101 TFEU or equivalent national laws. If a selective distribution system infringes Article 101 TFEU, it may benefit from the ‘safe harbour’ provided by the Vertical Block Exemption Regulation unless the agreements contain serious ‘hard-core’ restraints to competition.

45 *Pierre Fabre*, ¶54.

The CJEU determined that an internet sales ban could not be justified by customer protection (ie by the need to provide individual advice to the customer) or by the need to maintain the prestigious image of the products.⁴⁶ As a result, the contractual restriction had no objective justification and had to be considered a ‘hard-core’ restriction of competition in breach of Article 101(1) TFEU. It remains to be seen to what extent the Commission will be able to rely on *Pierre Fabre* as a leading case in the Sector Inquiry, given the specific factual context of *Pierre Fabre*, which may render a general application of the judgment to other cases difficult. In the Sector Inquiry, the Commission is also expected to review the role of third-party internet platforms and the scope of the exception in the Vertical Restraints Guidelines, which enables a supplier to ensure that the on-line activity of the distributor remains consistent with the supplier’s distribution model.⁴⁷

Accordingly, as regards the trade of goods, the Commission is expected to mainly focus on the following: (i) restrictions on cross-border trade, including restrictions on passive sales and geo-blocking; (ii) restrictions on on-line sales, including internet platforms bans; and (iii) restrictions imposed on pricing, price differences between on-line and offline channels (also known as ‘dual pricing’), and contractual clauses setting a price floor.

(ii) *Murphy*

As regards trade in digital content, the Commission referred to the CJEU’s ruling in *Murphy* as the leading precedent.⁴⁸ In *Murphy*, the Football Association Premier League granted broadcasters the exclusive live broadcasting right for Premier League matches in the UK and for 3-year terms. In order to protect the territorial exclusivity of each broadcaster, all broadcasters undertook in the license agreement to prevent the public from receiving their broadcasts outside the licensed territory (ie another Member State). In particular, the broadcasters (i) had to ensure that all broadcasts that could be received outside their territory—in particular those transmitted by satellite—were securely encrypted and (ii) were prohibited from supplying decoding devices giving access to the football matches if they were used outside their licensed

territory. Under these contractual restrictions, broadcasters issued decoder cards subject to the condition that customers did not use them outside the territory of that broadcaster.

As a result, absolute territorial protection was afforded to the broadcasters as television viewers were prevented from accessing and watching matches broadcasted by broadcasters established outside of the Member State where they resided.⁴⁹ The CJEU concluded that these restrictions were unjustifiable. It took the view that agreements partitioning national markets and rendering the inter-penetration of national markets more difficult may ‘frustrate the [EC] Treaty’s objective of achieving the integration of those markets through the establishment of a single market’; an objective that the EU Courts qualify as the single market imperative.⁵⁰ Based on this, they ‘must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU.’⁵¹

Accordingly, the Sector Inquiry is likely to focus, when dealing with trade in digital content, on restrictions that entail or create absolute territorial protection and supporting contractual provisions that serve to enforce this. These could include, *inter alia*, geo-blocking requirements, requirements for customers’ terms of service, and enforcement mechanisms.

2. The targeted companies

The companies to be affected by the Sector Inquiry in the short term are those that are most active in the cross-border on-line trade of products and services in the EU, thus best placed to provide the Commission with an informative view of its areas of concern. The following categories of companies are expected to receive the Commission’s RFIs: (i) manufacturers and merchants of goods (including hybrid and so-called ‘e-tailors’); (ii) providers of on-line content (in particular, video on demand and over-the-top TV); and (iii) on-line platforms, in particular marketplaces and price comparison tools.

3. The products and services targeted by the sector inquiry

The targeted products and services are expected to be those that are most frequently bought on-line, namely

46 Ibid, ¶¶44–47.

47 Vertical Restraints Guidelines, ¶54.

48 Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, EU:C:2011, 631 (‘*Murphy*’).

49 Certain restaurants and pubs in the UK started to use foreign decoding devices to access the Premier League matches. They imported decoder card and box to enable them to receive a satellite channel that was broadcasted in another Member State (in this case, Greece) at a less expensive subscription fee than charged by the licensed broadcaster in the UK.

50 On a number of occasions, the CJEU has held that an agreement between a producer and distributor that might tend to restore the national divisions in trade between Member States might frustrate the objective of the Treaty to achieve an integrated single market (eg for parallel exports, see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82, and 110/82, EU:C:1983, 310, ¶¶23–27; Case C-306/96, EU:C:1998, 173, ¶¶13 and 14; and Case C-551/03, EU:C:2006, 229, ¶¶67–69).

51 *Murphy*, ¶139.

(i) digital content; (ii) clothing, shoes, and accessories; (iii) consumer electronics and electrical household appliances; (iv) healthcare products; (v) books, both printed and electronic; and (vi) travel services.⁵²

4. The timing for the sector inquiry

On 19 June 2015, it was reported that the Commission sent the first round of RFIs to the companies that own the rights to movies, TV shows, music, and sports. Further reports indicate that the second round was sent in the course of July 2015. A third round of RFIs is expected to be sent in autumn 2015.

There is no legislative timetable for sector inquiries, and previous sector inquiries have lasted on average 2–3 years. The Commission announced that the preliminary report on the results of the Sector Inquiry will be published in mid-2016. It will invite interested parties to submit their comments on the preliminary report. The final report is expected to be published by the Commission during the first quarter of 2017, following the public consultation on the preliminary report.

IV. Can the sector inquiry provide an opportunity for a more coherent EU-wide policy and guidance to NCAs and companies?

Over the past few years, the Commission's interventions into potential impediments to cross-border trade have been limited, except for the consumer goods and Pay-TV distribution rights investigations.⁵³ This contrasts with the variety of proceedings being opened at national level, where there has been an increasing engagement from a number of NCAs, notably Germany and France, concerning vertical agreements and e-commerce. In particular, NCAs and national courts have not hesitated to intervene and push the boundaries of the law in areas such as selective distribution and on-line platform resale bans, such that companies are facing increasing complexity and uncertainty in designing or assessing their European distribution networks. According to the Vertical Restraints Guidelines, in a selective distribution system, qualitative criteria are permissible where

justified by the nature of the product and objective needs, which may include quality requirements for websites and even potentially bans on third-party marketplaces in some jurisdictions. However, the scope of these possible restrictions has been called into doubt by the strict approach in Germany (and to some extent France). This approach is stricter than the approach taken in the Vertical Restraints Guidelines, which states that where the distributor's website is hosted by a third-party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or the logo of the third-party platform.⁵⁴

Whilst it is not yet clear whether the Commission or other NCAs will follow such a strict line, general trends suggest that producers will need to carefully analyse their restrictions and possible justifications. If the Sector Inquiry were to contribute to restoring a uniform legal paradigm within the EU, this would certainly be welcomed by the business and legal community.

A. Enforcement at the national level

The NCAs' activism over the past few years has resulted in a number of proceedings on selective distribution and bans of distribution via third-party platforms. Although some general trends can be observed in some jurisdictions [eg the tough approach taken by the German Federal Competition Authority (the '*Bundeskartellamt*') against on-line platform resale bans], there is no comprehensive EU legal framework on which companies can effectively rely. This is due to the divergent approaches taken by NCAs, which are further described below.

(i) Germany

The *Bundeskartellamt* made the on-line sector one of its enforcement priorities and has taken action in a number of cases. Significantly, the *Bundeskartellamt* stated it would '*not be concerned*' if enforcement action in Germany becomes more aggressive than it currently is in other Member States.⁵⁵

1. Asics

Asics⁵⁶ operated a selective distribution system where distributors were divided into 20 different categories, in

similar measures' (Andreas Mundt statement of 2 July 2014). In the online hotel booking sector investigation, the *Bundeskartellamt* took a tougher approach than the other NCAs investigating the case. The *Bundeskartellamt* prohibited certain most favoured nation clauses that the hotel booking portal had imposed on hotels. The *Bundeskartellamt* rejected the settlement terms and issued formal charges against a major hotel booking portal, whereas proceedings in France, Italy, and Sweden were closed with commitments.

⁵⁶ Asics is a producer of footwear and sports equipment designed for a wide range of sports as well as lifestyle footwear.

⁵² According to Eurostat 2014 and 2015, clothing, shoes, and accessories accounted for 22 per cent, consumer electronics and electrical household appliances for 20 per cent, books (both printed and electronic) for 11 per cent, healthcare products for 9 per cent, digital content for 32 per cent, and travel services for 10 per cent of total online purchases.

⁵³ For the consumer goods and the Pay-TV distribution rights investigations, see n36 and n37 above.

⁵⁴ Vertical Restraints Guidelines, ¶54.

⁵⁵ Andreas Mundt, president of the *Bundeskartellamt*, stated: '*Our proceedings [...] against Asics (which have not yet been concluded) serve as test cases because currently a number of brand manufacturers are contemplating*

each of which a limited range of products could be supplied. The distribution agreements banned the use of on-line marketplaces and requested the retailers to not allow Asics's products to be accessible for search engines on their homepage. The Asics brand could not be used on third-party websites for marketing or advertising purposes.

On 28 April 2014, the *Bundeskartellamt* concluded its preliminary examination of Asics's selective distribution system, specifically for sales by authorised dealers of running shoes to final customers. The *Bundeskartellamt's* preliminary conclusion is that this system poses competition concerns. In particular, the *Bundeskartellamt* alleges that the existing distribution system forecloses on-line distribution by retailers in an unjustifiable manner.⁵⁷ According to Andreas Mundt, Chairman of the *Bundeskartellamt*: *'It is generally acknowledged that manufacturers can select their dealers according to certain criteria and can set quality requirements. However, ASICS prohibits its dealers from selling on online market places and supporting price comparison engines. This is overshooting the mark. According to our preliminary assessment, ASICS' distribution system in its current form primarily serves to control price competition in both online and offline sales. With its extensive requirements the manufacturer is restricting competition among its dealers in the sale of ASICS running shoes. ASICS is also restricting competition in the running shoes market in general because of its strong position in this market and other major running shoes manufacturers are also restricting online business in a similar fashion.'*⁵⁸ Andreas Mundt also noted that discussions are still ongoing with Asics to seek to obtain commitments from Asics to introduce the requisite changes to its distribution system.⁵⁹

2. Sehnheiser

Each member of Sehnheiser's⁶⁰ selective distribution system had to sign a selective distribution agreement, which allowed the member to offer goods on-line only if it had an offline outlet that fulfilled certain criteria. Furthermore, the agreement prohibited on-line sales via third-party platforms. Sehnheiser authorised a major on-line sales platform to resell its consumer electronic

products on its on-line sales platform but not on its marketplace.

The *Bundeskartellamt* considered that such clauses raise competition concerns regarding the restriction of sales on the marketplace.⁶¹ The authority found no objective justification for, or efficiencies stemming from, the distribution system that could justify the restrictions on competition.⁶² As a result, the *Bundeskartellamt* partly closed its proceedings after Sehnheiser clarified that the third-party platform ban would not apply to the marketplace of a major on-line sales platform and that sales were allowed on such platform. As regards other third-party platforms, the *Bundeskartellamt* has not yet issued an official decision and it will be interesting to see what position it takes in this case, involving high-end consumer electronic products.

3. Other proceedings

There have also been a number of relevant rulings by the German courts concerning the competition law treatment of on-line sales restrictions.

On 19 September 2013, the Berlin Court of Appeal⁶³ ruled in favour of a retailer who sold 'Scout' satchels via a major on-line sales platform in contravention of Scout's distribution terms, which contained a provision that satchels would only be delivered if resellers guaranteed not to sell them via a major on-line sales platform or other auction-based on-line platforms. As a result, Scout refused to supply the retailer further products for resale. Whilst Scout could in principle try to protect its high-quality brand image by prohibiting its retailers from selling via a major on-line sales platform, the Court found that Scout was at the same time allowing offline sales of its satchels in discount stores (which did not appear consistent with the justification of protecting a high-quality brand image). Significantly, the satchels sold in the discount stores were discontinued models, but, according to the Court, this was not communicated sufficiently clearly to customers. Although the Court of Appeal found that such selective distribution terms could restrict competition and that this discrimination against on-line platforms could not be justified, this case is illustrative of some potential inconsistency even in Germany

57 Another investigation concerning an online distribution system that involved a ban on sales via certain online platforms, including not only large marketplaces but additionally some local German platforms, was ended with the commitment that the online sales conditions would be amended so as to permit the authorised distributors to sell over platforms and to use brand-related terms as search words for search engine advertising.

58 Andreas Mundt's statement available at: <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/28_04_2014_ASICS.html>.

59 At the date of publication of this article, the case remains unresolved.

60 Sehnheiser is a producer for consumer audio products (recorders, headphones, etc.).

61 *Bundeskartellamt*, Decision 24 October 2013, B7-1/13-35.

62 Product presentation or quality of service arguments was not accepted either.

63 KG Berlin, Judgment of 19 September 2013, Az. 2 U 8/09, Kart.

since the Court was not opposed to an on-line platform ban so long as it is justified.

The Court of Appeal in Schleswig-Holstein (Oberlandesgericht Schleswig) ruled against a major watchmaker's prohibition of retail sales via open marketplaces,⁶⁴ whilst the Court of Appeal in Frankfurt found a platform distribution ban (in relation to sports backpacks) to be a 'hard-core' restriction that could not be justified on the grounds of brand image protection.⁶⁵

(ii) France

The French Competition Authority (*l'Autorité de la Concurrence* or the 'FCA') has been one of the more active NCAs as regards the enforcement of competition rules with respect to vertical agreements. In addition to the FCA's investigations in *Pierre Fabre* and *Bang & Olufsen*, during 2011 and 2012, the FCA conducted its own sector inquiry into e-commerce and announced that it will 'keep a close eye on the development of competition on and through the Internet'.⁶⁶ Since then, the FCA has remained committed to monitoring the e-commerce sector.

4. Pierre Fabre

On 29 October 2008, the FCA found Pierre Fabre's selective distribution criteria, which required its products to be sold in a physical space with the mandatory presence of a pharmacist, gave rise to an unlawful ban on on-line selling.⁶⁷ Pierre Fabre appealed the FCA's decision, and the case was referred to the CJEU, which determined (as discussed above) that a clause in a selective distribution agreement that prohibits *de facto* distributors from selling products on-line is a restriction of competition by object, unless the clause can be objectively justified.⁶⁸

Following the CJEU's ruling, on 31 January 2013, the Court of Appeal of Paris upheld the fine of EUR 17,000 imposed on Pierre Fabre by the FCA. As a result, Pierre Fabre had to amend its distribution terms and permit the sale of its products on the internet.⁶⁹

5. Bang & Olufsen

On 12 December 2012, the FCA imposed a fine of EUR 900,000 on Bang & Olufsen for banning its approved distributors from selling its products via the internet.⁷⁰ The fine came 10 years after the FCA had started the investigation.⁷¹ Bang & Olufsen's selective distribution system, comprising 48 national distributors, was founded on a standard selective distribution agreement that banned (without any further specification) distance selling. In 2000, Bang & Olufsen clarified its position, indicating that distributors were allowed to mention on their own websites that they were Bang & Olufsen resellers and that they were qualified to give advice on Bang & Olufsen products; however, distributors were not allowed to use Bang & Olufsen's logos and trade marks on their own websites or to sell Bang & Olufsen products on their websites. Certain distributors could ask to obtain a separate page on Bang & Olufsen's global website, from which they could resell Bang & Olufsen products.

Referring to the CJEU in *Pierre Fabre*, the FCA found these contractual restrictions to be a *de facto* prohibition on internet sales. The FCA contended that such a ban restricted intra-brand competition and deprived consumers of lower prices by limiting their available choices without an objective justification.⁷²

6. The French e-commerce sector inquiry

In 2011 to 2012, the FCA conducted its own sector inquiry into e-commerce. The inquiry was prompted by the growing role of internet trade in the French market, with sales of EUR 31 billion in 2010 and extensive growth rates (sales had grown in 2010 by 24 per cent compared with 2009).⁷³ In particular, the inquiry considered (i) the impact of on-line sales on traditional distribution channels, (ii) the reaction of manufacturers and distributors as regards new on-line methods of distribution, and (iii) the role played by e-commerce intermediaries such as price comparison sites and marketplaces. The inquiry concerned

64 OLG Schleswig, Judgement of 5 June 2014, Az. 16 U (Kart) 154/13. The Court found that the major watchmaker's distribution system did not qualify for selective distribution and that the prohibition: (i) relieved the company and its dealers from pressure on prices and (ii) restricted access for dealers to a large group of customers.

65 LG Frankfurt a.M., Judgment of 31 July 2014, Az. 2-03 O 128/13.

66 <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1969>.

67 <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=255&id_article=991>.

68 See above Section III.D (i) and *Pierre Fabre*, ¶¶44–47.

69 Pierre Fabre will approve the online sale of its products by authorised distributors pursuant to the criteria established by the Court of Appeal of Paris: (i) conclusion by Pierre Fabre of a specific Internet agreement with an approved physical sales outlet, (ii) 24 h consumer access to online advice

given by a qualified pharmacist, and (iii) presentation of Pierre Fabre's products in a quality Internet environment matching the image and technical complexity of Pierre Fabre's products. Available at: <<http://www.pierre-fabre.com/en/news/sale-dermo-cosmetic-products-internet>>.

70 Autorité de la Concurrence, Decision No. 12-D-23, Decision of 12 December 2012 ('*Bang & Olufsen*').

71 This initial investigation also involved a number of audio equipment producers that offered commitments made binding by the FCA in October 2006.

72 Cour d'Appel de Paris, Arrêt no. 45, Judgement of 13 March 2014. Bang & Olufsen appealed the FCA's decision to the Court of Appeal in Paris, which reduced the fine from EUR 900,000 to EUR 10,000.

73 <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1654>.

prominent product sectors for on-line retail in France, including electrical domestic appliances (TVs, sound systems, washing machines, computers, cameras, etc.), cosmetic and personal care products, and luxury perfume and beauty products.

The results of the inquiry were published on 18 September 2012.⁷⁴ The FCA identified three major developments: (i) on-line retailers offer lower prices for the same goods than ‘brick and mortar shops’,⁷⁵ (ii) new emerging market players are reshaping market realities,⁷⁶ and (iii) producers try to restrain competition and restrict access for some on-line distributors. As regards the latter finding, the FCA considered that the terms and conditions imposed by manufacturers ‘*must not unjustifiably curb the development of e-commerce*’, ie conditions for on-line sales of products must be similar to those relating to their sale in physical retail outlets. The FCA stressed that a manufacturer ‘*under any circumstances cannot prohibit an approved distributor from selling online on principle*’. Furthermore, any unjustifiable reduction of competitive constraints imposed on traditional retailers would be considered a breach of competition law.

The FCA’s investigations in *Pierre Fabre* and *Bang & Olufsen*, as well as its sector inquiry, demonstrate the FCA’s close monitoring of the developments in on-line trade and the likelihood of it taking a strict view of on-line resale restrictions that cannot be justified on objective grounds.

(iii) UK

The UK has one of the world’s most internet-dependent economies, with 8.3 per cent of GDP generated by on-line-related activities. The Competition and Market Authority (‘CMA’) has announced that on-line markets will be one of its top enforcement priorities over the next few years since their development is fundamental to cross-border and global trade.⁷⁷ The CMA is likely to focus on distribution and price-related restrictions.

7. Roma medical

Following a market study into the mobility aids sector conducted by the Office of Fair Trade (‘OFT’) (the predecessor of the CMA) in 2011 in which it found that Roma Medical Aids Limited (‘Roma Medical’) and other retailers could have breached competition law,⁷⁸ the OFT opened in 2012 formal investigation into Roma Medical.⁷⁹

Roma Medical was one of the three largest mobility scooter suppliers in the UK in 2011, with an estimated market share of 10–15 per cent. Roma Medical supplied 400–500 retailers and had the second largest retailer network in the UK. Access to its selective distribution system would only be granted if the retailer could provide consumers with specified pre- and after-sales support, which required knowledge of the products, expertise in the field, and physically accessible sales premises. The distribution agreements also required certain other criteria to be fulfilled (eg proximity to other authorised distributors).

The OFT concluded that Roma Medical’s terms infringed competition law since ‘*in the context of a distribution system that is selective, and where intra-brand competition has therefore already been limited, a prohibition on online price advertising and a prohibition on online sales undermine benefits of consumer search and choice brought about by the internet*’.⁸⁰ The OFT also determined that Roma Medical did not provide sufficient arguments or evidence to demonstrate that such restrictions would promote technical or economic progress. Whilst pre- and post-sales services could be presented as legitimate objectives, the OFT considered that on-line sales and on-line price advertising prohibitions were not appropriate measures to ensure the provision of such services. Furthermore, the OFT noted that there were other ways of providing customer service, eg service at the customer’s homes. As a result, the restrictions on on-line sales could

74 Avis no. 12-A-20 du 18 septembre 2012 *Relatif au fonctionnement concurrentiel du commerce électronique* (available at: <<http://www.autoritedelaconurrence.fr/pdf/avis/12a20.pdf>>).

75 Price comparisons between online and offline products revealed that, even if shipping costs are taken into account, prices offered online are 5–10 per cent lower than offline; notably, cosmetic products can be acquired for 25–30 per cent less because of large discounts offered by authorised distributors.

76 The FCA observed that the emergence of new market players significantly impacts on market competition and the level of prices. In particular, price comparison sites create downward pressure on prices because they allow consumers to compare prices before purchasing the products. Marketplace platforms influence the retail market by boosting competition. They are mainly used by distributors with low visibility in the offline space (mainly SMEs) because these platforms provide access to potential customers that shop on well-known platforms. Furthermore, thanks to access to the platforms, the number of possible offers for the same product increase, thereby intensifying price competition. The FCA also identified ‘pure

players’, ie sellers with modest or non-existent physical presences, which further impact on price reduction because of lowered distribution costs (employees, commercial property, etc.).

77 Speech given by CMA Inquiry Chair, Philip Marsden, at the 11th Baltic Competition Conference in Vilnius, available at: <<https://www.gov.uk/government/speeches/philip-marsden-speaks-about-competition-enforcement-in-online-markets>>.

78 OFT, Decision 5 August 2013, CE/9578-12. Roma Medical sent instructions to retailers asking them not to advertise online prices or to sell medical aids online. Furthermore, Roma Medical monitored and enforced the online sales and advertising ban, for example, threatening to suspend supplies of mobility aids to retailers who did not comply with its instructions. It was found that it did so to protect local brick and mortar retailers from growing price pressure from online sale offers.

79 Roma Medical is a manufacturer of mobility scooters based in Bridgend, Wales.

80 OFT, Decision 5 August 2013, ¶2.54.

not be justified by a ‘consumer service’ argument in this case.⁸¹

8. Clothing, footwear, and fashion sector investigation

On 20 March 2015, the CMA opened an investigation into suspected anticompetitive arrangements in the UK clothing, footwear, and fashion sector, which it believes could potentially violate Article 101 TFEU and/or the equivalent UK provision (Chapter I of the Competition Act 1998). The CMA is expected to examine the restrictions placed by manufacturers on distributors regarding on-line sales and whether these give rise to concerns. It plans to decide in October whether to proceed with the probe or to close it.

(iv) The Netherlands

The Netherlands *Autoriteit Consument & Markt* (‘ACM’) has not yet investigated restrictions on on-line sales. However, given the increasing activism in other Member States, the ACM decided to clarify its strategy and priorities on vertical agreements with a paper published on 20 April 2015.⁸²

Recognising that vertical agreements such as distribution agreements generally benefit consumers and have pro-competitive effects, the ACM will mainly focus its investigatory and enforcement efforts on vertical agreements that do not benefit from automatic exemption under the Vertical Block Exemption Regulation. The ACM will focus on investigating vertical agreements between companies with a market share of more than 30 per cent on the relevant market and/or involving hard-core vertical restraints, such as restrictions on passive sales (which could potentially include on-line sales restrictions) or resale price maintenance. When deciding to investigate a vertical agreement, the ACM’s main concern will be the effect on consumer welfare. The ACM will mainly rely on the following factors to determine the anticompetitive effects: (i) the parties’ market positions, whether they have market power; (ii) the broader (or market-wide) application of similar vertical agreements; and (iii) potential efficiency claims (ie whether the agreement delivers pro-competitive benefits that will be passed on to consumers).

The ACM’s paper does not give an affirmative answer about what is or is not permitted as regards vertical agreements. However, it provides descriptions of certain hypothetical situations that can assist companies in assessing their conduct. These situations include market-wide application of resale price maintenance and restrictions of

inter-brand competition. However, given the lack of enforcement in e-commerce, the full ramifications of the ACM’s paper are not yet clear.

V. Conclusion

Sector inquiries are burdensome for both companies and the Commission in terms of resources. Companies have to undertake significant efforts to collect the requested information and to comply in a timely fashion with the often broad RFIs or other Commission investigatory efforts. From the Commission’s perspective, a sector inquiry requires the Commission’s services to coordinate, undertake, and consolidate a very far-reaching fact-finding exercise with huge amounts of information from hundreds—if not thousands—of companies and interested parties.

The RFIs may include general questions about the national regulatory and legislative position and request market data. In addition, given the Sector Inquiry’s focus on vertical restraints, they are also likely to ask for copies of distribution and supply agreements and details on distribution practices, including pricing information. On 19 June 2015, it was reported that the Commission sent the first RFIs to the companies that own the rights to movies, TV shows, music, and sports. The RFIs for retailers of tangible goods followed in the course of July.

The Sector Inquiry has been launched against the backdrop of a dynamic and ever-changing market. The information and the data collected by the Commission will be analysed, processed, and used to produce a preliminary report, expected by mid-2016, which will be subject to a public consultation. The Commission intends to publish its final report in the first quarter of 2017. When this process is complete (approximately 2 years from now), many of the results from the Sector Inquiry may have lost much of their significance. Nonetheless, the Commission’s comments suggest that new laws will inevitably be introduced to regulate the e-commerce sector, meaning business practices may need to change, or companies will risk infringing the new laws.

The final report will not impose remedies but will serve as a starting point for the Commission to decide what actions to take. Some of the actions prompted by the Sector Inquiry are likely to complement the DSM Strategy as regards changes to EU legislation (eg copyright and value added tax), which will bring further harmonisation at the national level.

81 Ibid, ¶3.227.

82 <<https://www.acm.nl/nl/publicaties/publicatie/14164/Toezicht-van-ACM-op-verticale-overeenkomsten/>>.

Whilst the Commission has indicated that it does not intend to substantially amend the Vertical Block Exemption Regulation or the Vertical Restraint Guidelines (which will both expire in 2022), it cannot be ruled out that the Commission may rely on the findings of the Sector Inquiry to undertake some ‘fine-tuning’ of the relevant legal texts.

Another possible outcome is the enforcement action against individual companies for alleged breaches of EU competition law. This is what transpired with the previous sector inquiries in the energy and pharmaceutical sectors, where a number of proceedings were opened by the Commission after the conclusion of the inquiries (in the pharmaceutical sector inquiry, the Commission also conducted *dawn raids* at various companies’ premises).

In the past few years, there have been a number of competition proceedings at the national level, with Germany (and to some extent France) taking a particularly active and strict approach. However, the position in the rest of Europe on issues such as on-line marketplace bans is far from clear, leaving companies in some uncertainty as to the legality and enforceability of their European distribution agreements. Clarity from the Commission on such restrictions would therefore be a welcomed outcome of the Sector Inquiry. A uniform and coherent legal framework for the EU e-commerce sector stands to deliver the benefit of certainty for both NCAs, as enforcers of the law, and the business community.

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