

Global Antitrust Enforcement in the Digital Age: Recent Developments in E-Commerce

Skadden

January 2016

This article is from Skadden's *2016 Insights* and is available at skadden.com/insights/2016-insights.

Contributing Partner

Maria Raptis
New York

European Counsel

Thorsten C. Goetz
Frankfurt

Associates

Athanasia Gavala
Brussels

Luke T. Taeschler
New York

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Competition authorities worldwide ramped up scrutiny of e-commerce business practices in 2015. The European Commission (Commission) launched an expansive sector inquiry in May 2015 aimed at identifying anticompetitive barriers affecting European e-commerce markets. While U.S. enforcers have not announced a similarly broad investigation, 2015 marked the Department of Justice's (DOJ) first-ever criminal prosecution in the e-commerce sector. These recent developments suggest that the online realm will be at the forefront of antitrust enforcement in 2016.

European Union

In May 2015, as part of the Commission's broader Digital Single Market strategy, the EU Commission's competition directorate launched a sector inquiry into e-commerce to identify and gather data regarding competitive practices that hinder cross-border online trade or otherwise affect EU e-commerce markets. Commissioner for Competition Margrethe Vestager noted in particular that the Commission will closely examine

"geo-blocking," a practice whereby companies prevent users from accessing certain content based on the users' geographic location. Further, the EU's inquiry will focus on barriers companies have developed in areas where e-commerce is a popular means of purchasing products (e.g., electronics, clothing, footwear and digital content).

As part of the sector inquiry, the Commission has been sending questionnaires to businesses in all 28 EU member states. On November 27, 2015, for example, it sent questionnaires to manufacturers of branded goods such as cosmetics, clothing, toys, electronics and household appliances concerning their online distribution policies. The Commission expects to publish a preliminary report on the status of its inquiry in mid-2016 and a final report in the first

quarter of 2017. If the Commission identifies specific competition concerns, it also may launch more targeted investigations under Article 101 of the Treaty on the Functioning of the European Union, which prohibits restrictive agreements, and Article 102, which prohibits the abuse of a dominant position.

The Commission launched a number of high-profile investigations in the e-commerce sector in 2015 and will continue to do so in 2016. The investigations include:

- March 2015: The Commission confirmed an investigation into the online video game industry.
- April 2015: The Commission sent formal objections to Google, alleging that the company has abused its dominant position in the market for Internet search services by prominently displaying its own comparison-shopping service in its search results pages, and thus artificially diverting traffic from rival comparison shopping services. As a result, according to the [EU Commission](#), Google's competitors "may not get the commercial opportunities that their innovations deserve."



Although U.S. and EU regulators have not always moved in tandem, it is clear that e-commerce will remain at the forefront of global antitrust enforcement in both jurisdictions.

Global Antitrust Enforcement in the Digital Age: Recent Developments in E-Commerce

- June 2015: The Commission opened an investigation into Amazon's "most-favored nation" (MFN) clauses in its contracts with book publishers for the distribution of e-books. MFN clauses require publishers to inform Amazon about more favorable or alternative terms offered by its competitors and/or offer Amazon equal or better terms. The Commission has concerns that such clauses may stifle competition and innovation by other e-book distributors, thus limiting customer choice.
- July 2015: The Commission sent formal objections to a U.K. broadcaster and six major U.S. film studios concerning contractual arrangements that prevent Sky UK from providing access, via satellite or online, to television content available in the U.K. and Ireland to customers located elsewhere in the EU.
- August 2015: The Commission reportedly sought information on pricing and contract terms from online marketplaces such as Amazon and eBay.

National antitrust authorities also have launched a number of high-profile investigations into online sales restrictions at the EU member state level, including sector inquiries and enforcement actions in the online hotel booking sector.

United States

To date, U.S. enforcers have not followed the EU Commission's lead with respect to online giants Amazon and Google. Thus far the Federal Trade Commission (FTC) has declined to challenge Google's practices in court, and neither the DOJ nor the FTC has opened an investigation into Amazon's practices, despite urging by authors, literary agents, booksellers and publishers. U.S. regulators also have not announced a wholesale investigation of the e-commerce industry. Notwithstanding a generally aggressive enforcement posture, U.S. competition authorities have proceeded cautiously when applying traditional antitrust principles to rapidly innovating and technological markets, particularly where companies can offer competitive justifications for their conduct. In its investigation of Google's ranking and displaying of search results, for example, the FTC acknowledged that

Google's conduct had "procompetitive justifications" and "was premised on its desire to innovate and to produce a high quality search product in the face of competition," according to a March 26, 2015, *op-ed* piece in *The Wall Street Journal*. Despite significant concerns about Google's business practices, the FTC voted not to challenge Google's conduct in court and instead settled the matter. (Subsequent reports revealed that the FTC team that investigated Google recommended the FTC take action.)

Since the Google probe, U.S. authorities have continued to expend significant resources to scrutinize e-commerce practices:

- April 2015: The DOJ prosecuted David Topkins, who worked for an online seller of posters and framed art, for price-fixing. According to the plea agreement, Topkins conspired with other online sellers to fix the price of certain posters and then agreed to adopt specific pricing algorithms that would implement the agreed-upon prices. The DOJ's investigation is ongoing, and although the Topkins case involved an affirmative agreement rather than mere use of an algorithm, it remains to be seen whether dynamic pricing models, which can monitor the market and automatically adjust pricing according to competitors' prices, will attract antitrust scrutiny in the future.
- July 2015: The FTC reportedly issued subpoenas to Apple relating to Apple's App Store rules, such as the fee Apple charges to other subscription services that use Apple's store to sign up new users. The FTC also may investigate claims that Apple has illegally stifled competition in the music-streaming market.

Although U.S. and EU regulators have not always moved in tandem, it is clear that e-commerce will continue to remain at the forefront of global antitrust enforcement in 2016 in both jurisdictions. Counsel for companies involved in e-commerce should evaluate their business practices, including pricing and distribution models, for areas of vulnerability and remain aware of the potential antitrust implications in the jurisdictions in which they do business.