

## Restrictions on online sales in the spotlight: the European Commission publishes final report on the e-commerce sector inquiry.

### Executive Summary

On 10 May 2017, the European Commission ("**Commission**") published its much anticipated *Final Report on the e-commerce sector inquiry* that was launched in May 2015 (the "**Final Report**"). Over the past two years, the Commission has obtained input from no fewer than 1,740 companies active in the e-commerce sector and has reviewed over 8,000 agreements. The inquiry has not only provided the Commission with a detailed understanding of the sector, it has also prompted a proposal for a regulation on geo-blocking, and the launch of three investigations.<sup>1</sup> Moreover, it is reported that several international companies have reacted by adapting their commercial practices in light of the inquiry.

The Final Report found that the significant growth in e-commerce has given rise to certain types of restrictions, designed to give suppliers (of goods or digital content) greater control over the price and quality of their products. Although the Final Report does not take a formal position as to the legality of most of the business practices identified, it clearly states that the Commission will continue to target its competition enforcement at certain e-commerce practices that may negatively affect competition or cross-border trade. Companies should, therefore, carefully review their business practices and consider modifications where necessary.

Please click [here](#) for further details on the Commission's sector inquiry.

### Key Findings of Sector Inquiry

The results of the Commission's inquiry provide a comprehensive view of the Commission's thinking around "vertical" dealings in the e-commerce sector.<sup>2</sup> The emergence of e-commerce markets has prompted new questions about the Commission's existing practice and guidance, fuelled also by multiple

<sup>1</sup> Press Release of the European Commission of 2 February 2017, *Commission opens three investigations into suspected anticompetitive practices in e-commerce*. Available at: [http://europa.eu/rapid/press-release\\_IP-17-201\\_en.htm](http://europa.eu/rapid/press-release_IP-17-201_en.htm).

<sup>2</sup> In September 2016, the Commission published a Preliminary Report on the e-commerce sector inquiry setting out its initial findings. Also, in March 2016, the Commission published initial findings on geo-blocking in an issues paper.

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investigations by national competition authorities ("**NCA**s") into e-commerce businesses, including online hotel accommodation, e-book platforms, online video platforms and consumer data.

The Commission found that, in response to the expansion of e-commerce, and the resulting increased price transparency, suppliers have found new ways to increase their control over distribution. In addition to forward vertical integration into the retail sector (via their own online shops), some suppliers have also increased the use of vertical restraints in relation to their distributors (e.g. pricing restrictions/recommendations, online sale restrictions and territorial restrictions).

The results of the inquiry demonstrate that restrictions of e-commerce have become prevalent both in e-commerce of **consumer goods** as well as in e-commerce of **digital content**. We expand on this below.

## E-commerce of consumer goods

In relation to consumer goods, the Final Report highlights in particular those business practices which, in the Commission's view, may warrant closer scrutiny by competition authorities and should therefore also be carefully considered by companies:

- > **Selective distribution:** the e-commerce growth has led to a significant increase in the use of selective distribution systems. While the Commission finds that there is no need for a change in the current EU approach on selective distribution systems, it does note that a large majority of the suppliers excluded pure online players from their selective distribution networks, through the requirement to operate at least one "bricks and mortar" shop. The Commission notes that such requirements are only justified if they are necessary to bring about efficiencies or ensure the quality of distribution, and that it will make this assessment on a case-by-case basis. In the absence of any tangible justification, the exclusion of pure online players will not be justified in selective distribution networks.
- > **Online price restrictions/recommendations:** price restrictions and resale price recommendations are the most widespread restrictions that have grown with e-commerce, as reported by retailers. Two out of five retailers indicate that they experience some form of online pricing restriction or recommendation. The Commission warns against price monitoring by means of automatic pricing software by both manufactures and retailers; although monitoring is not prohibited as such, it could become problematic when it is combined with practices designed to put pressure on retailers to follow the recommended list prices (through retaliation) or as a means of collusion amongst retailers.
- > **Dual pricing:** companies should not apply different wholesale prices for online and offline sales vis-a-vis the same retailer (so-called "dual-pricing"). While respondents criticised the prohibition of dual pricing, pointing at economic justifications for the different treatment of online and offline sales, the Commission remains of the view that such practices should generally be considered as *hardcore* restrictions. Only

in exceptional circumstances, for example where dual pricing is indispensable to address free-riding, could dual pricing be exempted under Article 101(3) TFEU. On the other hand, charging different wholesale prices to different retailers does not raise any competitive concerns.

- > **Online marketplace bans:** the second most reported type of restrictions relates to limitations on retailers' possibility to sell products through online market places (so-called "online marketplace bans"). These restrictions have been a hotly debated topic following the judgment of the German Regional Court of Frankfurt in July 2014, in which online marketplace bans were considered to infringe German and EU competition law.<sup>3</sup> While the *Coty* case is currently pending before the Court of Justice for preliminary ruling,<sup>4</sup> the Commission takes the position that online marketplace bans should not be considered *hardcore* restrictions as they generally do not amount to a *de facto* prohibition on online selling, and potential justifications and efficiencies may exist. However, and in line with the *Pierre Fabre* judgment<sup>5</sup>, if a platform ban amounts *de facto* to a total ban of the use of the internet as a method of marketing, it will constitute a restriction of competition.
- > **Price comparison tools:** the Commission found that there is widespread use of price comparison tools, with more than one-third of retailers reporting that they supply data feeds to price comparison tool providers. While the Commission acknowledges that it has not yet taken a formal position on the conditions under which price comparison tools may violate Article 101 TFEU, the Commission also states that absolute price comparison tool bans that are not linked to quality criteria, potentially restrict the effective use of the Internet as a sales channel, and may amount to a *hardcore* passive sales restriction. Conversely, restrictions on price comparison tools based on objective qualitative criteria will generally be justified.
- > **Geo-blocking and geographic restrictions:** Geo-blocking is very common, in fact, the Commission found that more than one in ten retailers are contractually restricted to sell products cross-border. These restrictions are very common, in particular in the clothing, shoes and consumer electronics sectors. Territorial restrictions on online sales into other Member States are in principle incompatible with EU competition rules. The main exception to this rule applies to exclusive distribution networks, but also in these cases manufacturers should not restrict unsolicited (passive) sales into territories exclusively allocated to other distributors or reserved by the manufacturer. In addition, suppliers should ensure that distributors are not restricted in making (active or passive) sales into territories which have not exclusively been allocated to another distributor. The Commission also notes that many geo-blocking restrictions are not covered by competition rules, given that in many instances they are unilaterally applied by non-dominant suppliers.

<sup>3</sup> LG Frankfurt, Urteil vom 31. Juli 2014 – 2-3 O 128/13 –, juris.

<sup>4</sup> CJEU (pending), Case C-230/16, *Coty Germany GmbH v Parfumerie Akzente GmbH*.

<sup>5</sup> CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*.

To address this gap, the Commission has proposed a regulation on geo-blocking, which is currently pending for adoption before the Council and the European Parliament.

- > **Big Data:** the sector inquiry did not focus in particular on data-related competition concerns, but the Final Report recognises that a potential competition concern may arise from the exchange of sensitive data between online marketplaces and third-party sellers or between manufacturers selling directly online and their online retailers. This finding reflects recent concerns voiced by different competition authorities in relation to the use of Big Data.

## E-commerce of digital content

The Commission's inquiry regarding digital content parallels pending legislative actions aimed at facilitating cross-border access to digital content throughout the EU.<sup>6</sup> The Commission analysed more than 6,800 licence agreements and concluded that contractual restrictions were the norm, rather than the exception, in digital content markets, in particular in television, film and sports agreements.

The Final Report highlights several business practices that may warrant closer scrutiny by competition authorities:

- > **Scope of licensed rights:** although pure online players, such as Netflix, have entered the European market in recent years, the sector inquiry shows that 89% of the agreements submitted by rights holders still bundle rights for online transmission with other transmission technologies (e.g. online + mobile, online + satellite, and online + cable). The Final Report notes that such bundling is not problematic in and of itself. However, the Final Report also notes that such practices could potentially be capable of hindering the development of innovative services or limit the available output if bundled rights are not being fully exploited by licensees. The Commission will make that assessment on a case-by-case basis, based on the characteristics of the content industry, the legal and economic context, and/or the characteristics of the relevant markets.
- > **Geographic restrictions:** online rights are largely licensed on a national basis and around 70% of digital content providers widely use geo-blocking measures because of contractual restrictions imposed by their rights holders. The Final Report notes that while territorial licensing on a national basis is in principle allowed, it may raise antitrust concerns when coupled with restrictions on cross-border passive sales. Broadcasters should, according to the Commission, be allowed to accept unsolicited requests from users located in other Member States, even if

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<sup>6</sup> On 25 May 2016, the European Commission proposed a legislative package on e-commerce which is composed of: (i) a regulation to address unjustified geo-blocking and other forms of discrimination; (ii) a regulation on cross-border parcel delivery services; and (iii) a proposal for the reform of the Consumer Protection Cooperation Regulation. The e-commerce package complements two legislative proposals dating from December 2015, a directive on the supply of digital content and a directive on online and other distance sales of goods. In addition, a legislative proposal was also presented in December 2016 to modernise and simplify the VAT regime.

broadcasters do not own such rights in these Member States. This is also the position taken by the Commission in a number of recent investigations related to geo-blocking practices in cross-border pay-TV services.<sup>7</sup>

- > **Duration of licence agreements and payment structures:** the Final Report points out that the long duration and automatic renewal of licensing agreements, as well as payment structures involving advanced payments and fixed fees, may hamper the entry of new players or the emergence of innovative online business models. However, the Commission does not draw any clear conclusions on this issue. Nonetheless, rights holders should carefully consider long-term licence agreements and specific payment structures, which may hamper new entrants and innovative business models.

## Comments

The Commission's sector inquiry is the most extensive investigation ever conducted into the functioning of e-commerce in the EU. The inquiry has been conducted at a time when e-commerce is considered a key driver for growth in the EU. The inquiry has already led to formal Commission investigations, while similar investigations have been underway at the national level. Against this background, the Final Report could not be better timed, allowing the Commission to set a clear mark and demonstrate leadership in this important area.

The sector inquiry has fulfilled its main purpose, by providing a detailed overview of the functioning of the e-commerce markets and identifying potential competition concerns. On this basis, the Commission has drawn the principal conclusion that the existing rules and guidance for assessing vertical restraints do not require adjustments in relation to e-commerce of goods or digital content. It thus appears that companies may (continue to) rely on the existing framework for vertical restraints, also in the context of e-commerce. Some uncertainty nevertheless remains in particular areas in relation to which the Commission has expressed its concerns, such as the exclusion of pure online players from selective distribution networks, online marketplace or price comparison tool bans, geo-blocking, and restrictions on content licensing.

The Final Report must also be read in conjunction with the broader Digital Single Market initiative from the Commission as it goes hand in hand with legislative proposals that have been put on the table to tackle issues identified in the Final Report such unilateral geo-blocking measures, unfair contractual clauses and trading practices in platform-to-business relationships and content portability and copyright.

The e-commerce sector inquiry has put vertical restrictions once again at the top of the Commission's policy agenda. As was the case with prior sector inquiries (e.g. pharma, energy and financial services), the Commission is likely

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<sup>7</sup> In July 2016, the Commission accepted binding commitments from Paramount. Press Release of the European Commission of 26 July 2016, *Commission accepts commitments by Paramount on cross-border pay-TV services*. Available at: [http://europa.eu/rapid/press-release\\_IP-16-2645\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2645_en.htm).

to open further enforcement activities in the e-commerce sector in the near future. The results of the inquiry will also lay the ground work for further co-operation with NCAs, which are likely to continue to play an important role in this area. Both manufacturers and retailers, as well as rights holders and licensees, are thus warned of this increased scrutiny and ought carefully to consider their business practices.

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