

Final report of the European Commission on the e-commerce sector inquiry: what to expect and how to react

Gómez-Acebo & Pombo, Brussels

1. Introduction

On 10 May 2017, the European Commission ("EC") published its Final Report on the e-commerce sector inquiry¹ (the "Final Report") and the accompanying Staff Working Document². The origin of the Final Report dates back to 6 May 2015, when the EC launched a sector inquiry into e-commerce as part of the Digital Single Market strategy, and requested information from nearly 1,900 operators active in e-commerce across the EU. The activities of the targets were mainly related to online sales of consumer goods (*i.e.* electronics, clothing, shoes and sports equipment) and online distribution of digital content (*i.e.* movies, music, etc.).

The initial findings of this investigation were published in March 2016, with a special focus on geo-blocking, which refers to practices used for commercial reasons, when online sellers either deny consumers access to a website based on their location, or re-route them to a local store or website with different prices.

Following these findings, in May 2016, the EC proposed new legislation to combat geo-blocking³.

Subsequently, on 15 September 2016, the EC published a Preliminary Report on the e-commerce sector inquiry, followed by a public consultation in which 66 stakeholders participated.

As a result of some of these preliminary findings, the Directorate-General ("DG") for Competition of the EC launched three different investigations on online sale of consumer electronics, video games and holiday accommodation.

¹ http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf

² http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf

³ <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF>

The main competition concerns identified in the Final Report, divided into two sections, are summarised as follows.

2. Content of the Final Report

2.1. Consumer goods

- **Vertical restraints in selective distribution agreements.** More than half of the manufacturers require (at least for part of their products) that retailers wishing to sell their products online count with brick and mortar shops. While this type of restrictions is normally allowed by the Vertical Block Exemption Regulation⁴ (“VBER”), if the brick and mortar requirement has no apparent link to distribution quality and/or other efficiencies, it may require further scrutiny on a case-by-case basis. Also, a great number of retailers complained about the lack of transparency and objectivity on the criteria used by manufacturers to accept members into selective distribution. Although manufacturers have no legal obligation to publish these criteria, it is advisable to ensure that the criteria are justified by the quality of the product and/or the service to be provided, applied in a non-discriminatory manner and provide the applicant with the minimum information so as to understand the reasons behind a potential refusal.
- **Pricing issues.** 42% of retailers reported some form of pricing restrictions, specifically through resale price maintenance imposed by manufacturers. Manufacturers should refrain from interfering with the retailers’ freedom to establish their prices by, for instance, imposing minimum retail prices or recommended retail prices which, at the end of the day, become compulsory. Any deviations in this sense are easily detected in e-commerce and retaliation measures may lead to collusion between retailers. Maximum resale prices or non-binding recommendations on prices are covered by the VBER below certain thresholds.

Establishing dual pricing for the same product to the retailer depending on whether it sells online or offline is generally considered as a hard core restriction of competition. However, dual pricing agreements shall be individually assessed, as they may be exempted for instance if such practice is indispensable to deal with free-riding.

- **Price comparison tools:** while price comparison tools are not considered a distinct online sales channel, they allow customers to get an overview of different online retailers and their offers. Genuine price comparison tools –those not offering a sales functionality– redirect visitors towards the website of (authorised) distributors where the product can be purchased and which generally fulfil all the criteria set out by the manufacturer within the system of selective distribution. In this scenario, the EC has

⁴ Commission Regulation 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 (Official Journal L 102, 23.4.2010, pp. 1-7).

established that absolute bans of these tools by manufacturers which are not linked to quality criteria potentially restrict the effective use of the internet as a sales channel and may amount to a hard core restriction of passive sales. By contrast, restrictions on the usage of price comparison tools based on objective qualitative criteria are covered by the VBER.

- **Marketplace restrictions.** Marketplaces are multi-sided platforms bringing together sellers, buyers and potential advertisers. Limitations of the use of marketplaces identified by retailers range from absolute bans to restrictions upon certain quality criteria and are mostly found in selective distribution agreements of branded, complex or technical goods. These restrictions, reported by at least 18% of the retailers, do not generally amount to hard core prohibitions and may be justified by the product category in question. Currently, there is a preliminary ruling pending from the Court of Justice of the EU on this issue (Case C-230/16 Coty Germany), in which the Court has been asked to assess whether Coty's agreements preventing retailers from selling on third-party online platforms on the basis of preserving the image and quality of luxury products are in line with EU law.
- **Geo-blocking.** Contractual cross-border sales restrictions have been indicated by more than 11% of retailers, especially by those with higher turnovers in the sector of clothing and shoes. Contractual restrictions regarding the territory in which a distributor may sell are generally a hard core restriction with very few exceptions. In exclusive distribution, active sales restrictions are allowed where the territory is reserved for the supplier or allocated by the latter to another distributor. When appraising whether active sales restrictions are anticompetitive, undertakings should take into account that, in general, where a distributor uses a website to sell products that is considered a form of passive selling. Passive sales restrictions are anticompetitive. As for selective distribution, both restrictions are illegal.
- **Use of big data.** Processing and using large amounts of data is of increasing importance in the e-commerce sector. In this context, exchanging competitively sensitive data between competing marketplaces and third party sellers/manufacturers with own shops and retailers may raise competition law concerns.

2.2. *Digital content*

- **Scope of licensing agreements.** The EC has noticed that the use of exclusivity and/or bundling in licensing technology rights is a common practice. In the second scenario, rights for online transmission of digital content are to a large extent licensed together with the rights for other transmission technologies, such as mobile transmission, terrestrial transmission and satellite transmission. Both practices are not by themselves problematic, but need to be assessed taking into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets. In certain scenarios, bundling online rights may hinder both competition and the

development of new innovative services, which, in turn, can also reduce consumer choice. Bundling is particularly problematic if it leads to a restriction of output. This may happen where acquired online rights are not exploited by the licensee, or are only partially exploited.

- **Geo-blocking.** Online rights are to a large extent licensed on a national basis or for the territory of a limited number of Member States which share a common language. This contractual limitation of the license is often accompanied by technical measures put in place by right holders to monitor the user's location in order to prevent access to their services, if the user does not connect from the licensed territory. Although it differs among Member States, geo-blocking is a remarkably common practice present in 74% of TV series, 66% of movies and 63% of sport content. Geo-blocking comes from contractual restrictions in the agreements with the right holders in almost 60% of the cases. Although exclusive licensing on a territorial basis does not raise competition concerns by itself, it might hinder competition under some circumstances (for example if accompanied by contractual restrictions on cross-border passive sales). The assessment needs to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and/or the characteristics of the relevant product and geographic markets.
- **Duration of licensing agreements.** More than half the agreements scrutinized are concluded for a period exceeding 3 years and they are often subsequently renewed by including clauses such as right of first negotiation, right of first refusal or matching offer rights. This creates contractual relationships lasting one or even two decades, which hinders the entrance of new players into the market and deters existing operators from expanding their current commercial activities into, for instance, other (online) platforms or other geographic markets.
- **Payments structures.** Payment schemes are rather complex in this area. Often, right holders with prime content require advance payments, minimum guarantees and fixed fees per product regardless of the number of users. This situation implicitly creates an advantage for established content providers, which are normally in a better position to make upfront investments, and raises the issue of whether these practices make it harder for new or smaller players to enter existing markets

3. Final remarks and recommendations

Although the EC has concluded that an early review of the VBER will not be necessary, the results of the inquiry will be a useful tool for the scheduled future review of the VBER (expected to expire in 2022) and, most importantly, will enable the EC to target EU antitrust enforcement in European e-commerce markets. This may include opening further antitrust investigations in the short term to address the most common problematic practices.

Since the intention of the EC is to use its findings in the dialogue with the national competition authorities within the European Competition Network on e-commerce-related enforcement, the

conclusions above will not only be used by the EC itself but also by national authorities in the assessment of national cases. An increase of national investigations may also be expected.

Therefore, companies active in e-commerce are recommended to verify that their agreements and commercial practices are in line with Competition Law. This is of particular concern for the following operators:

- Companies heading a selective distribution network: They should verify (i) whether the criteria used to select and refuse distributors are justified and applied in a non-discriminatory manner, (ii) if the brick and mortar requirement imposed on online distributors is linked to distribution quality and/or other efficiencies, and (iii) their policy as regards the use of marketplaces by authorized distributors.
- Manufacturers having set up a distribution network (both selective and exclusive): They should review their policy on the use of price comparison tools, price review and recommendations, as well as geo-blocking provisions.
- Providers of digital content: They should review the scope and duration of their licensing agreements, as well as their pricing policy (especially in cases of high market power). Geo-blocking tools are also to be scrutinized.

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