



E-commerce sector inquiry:
**provisional concerns identified
by European Commission**

The European Commission has recently published its provisional findings as part of its inquiry into the e-commerce sector. The consequences of the Commission's investigation may, regardless of Brexit, have far reaching implications for the marketing and supply of many thousands of different products through online channels.

So far, the Commission inquiry, which launched the inquiry in May 2015, has gathered evidence from nearly 1,800 companies active in the e-commerce of consumer goods and digital content and has analysed around 8,000 distribution contracts.

While the final report is not expected until the first quarter of 2017 the Commission has provisionally identified a number of concerns in the e-commerce sector.

Selective distribution arrangements

The Commission has noted the use of selective distribution systems has significantly increased with the growth of e-commerce. Selective distribution typically arises when manufacturers attempt to restrict to whom their distributors can re-sell their products, so as to control the environment in which their products enter the market.

There is nothing new about selective distribution; however, the increased adoption of this limited distribution model in certain sectors has prompted the Commission to examine it carefully, and the Commission's ultimate findings may well have implications with regard to the development of this channel.

While selective distribution agreements are not considered to be inherently anti-competitive, they may be unlawful in certain circumstances, for example if the basis for excluding certain distributors is not necessary for qualitative purposes, or if a manufacturer's selection criteria are applied in a discriminatory manner (albeit this depends on the market shares of those involved).

■ **Exclusion of pure online retailers.** The Commission has noted that an increasing number of suppliers require any retailer re-selling its goods to operate at least one bricks and mortar outlet, particularly in the case of high-end, professional and latest product lines. This may be justifiable in certain cases (for example to ensure proper advice to customers by qualified staff) but according to the Commission:

"some retailers expressed concerns regarding the requirement of having a bricks and mortar shop which, in their view, would not be justified by the nature of the products and would not correspond to the actual needs of customers in relation to those products."

■ **Exclusion of discounters.** A number of discount retailers have complained that they are being discriminated against by selective distribution agreements. Such retailers have suggested that even if they fully complied with a supplier's quality criteria, the suppliers would refuse their admission to the distribution network due to the low retail prices they set for the products. The Commission said that:

"due to high price transparency online, these retailers would be seen by manufacturers as driving product prices down, thereby putting at risk the margins of many other authorised retailers in the distribution network."

The Commission has said it may investigate possible anti-competitive clauses restricting online sales in selective distribution agreements.

Although, given the complex and high value nature of certain goods, it seems unlikely that a competition authority would challenge a manufacturer for mandating physical showrooms for such products, the Commission's focus highlights its interest in a wider range of potential restrictions affecting online commerce and their proportionality.



Geo-blocking & cross border e-commerce

The Commission sees cross-border e-commerce as playing an important role breaking down barriers to competition and establishing a digital single market.

In this context the provisional report looked at contractual restrictions preventing retailers from cross-selling goods to customers in different EU territories.

The Commission is concerned that despite clear rules governing when and how an upstream supplier may contractually restrict a downstream distributor from re-selling into different territories, some contractual restrictions inhibiting sales into different territories may go beyond what the rules allow and amount to anti-competitive conduct.

The Commission also made it clear that while there is nothing preventing companies unilaterally using geo-blockers to restrict online access from certain territories (provided the company in question is not in a dominant market position) if geo-blocking measures:

“result from an agreement or concerted practice that is not a genuine agency agreement between two undertakings (such as a manufacturer and a retailer), they may fall within the scope of Article 101(1) TFEU.”

Online market places

18% of respondent retailers reported that their ability to sell products through online marketplaces (such as Amazon or Rakuten) is limited by provisions in their agreements with manufacturers. The restrictions are either in the form of an absolute ban or because the market place does not satisfy certain selective criteria.

The Commission’s preliminary findings do not indicate that absolute marketplace bans should be considered ‘hardcore’ (serious anti-competitive) restrictions within the meaning of Article 4(b) and Article 4(c) of the Vertical Block Exemption Regulation.

However, the Commission makes it clear this does not mean that absolute online marketplace bans are generally compatible with European competition law. In particular, it has identified that such behaviour could in particular be harmful for SMEs with low turnover for whom online marketplaces provide an essential means of connecting with a wider customer base.

As such, the Commission has said that it (or National Competition Authorities) may decide to scrutinise marketplace bans in agreements on a case-by-case basis to determine whether their use is justified.

Price comparison websites

Just under one in 10 respondent retailers reported that they have agreements with manufacturers which contain some form of restriction on their ability to list on price comparison websites or platforms.

The provisional report suggests such restrictions could be a cause for concern. The Commission states that although general bans on listing on price comparison websites may be appropriate in cases where the channel is not fit for the product in question, they could also:

“exclude an effective method for retailers to generate traffic on their website that is providing (potential) customers increased price transparency across a range of different retailers.”

Digital content

The report also considers e-commerce in digital content, looking at the copyright licence agreements between the rights holder and the digital content provider. Such licences are essential in most cases for digital content providers to distribute creative content online.

The Commission has said it will assess such agreements on a case-by-case basis, but did note concerns in relation to territorial restrictions and the exclusive nature of many agreements. It also highlighted the barriers facing new market entrants when trying to acquire copyright licences, such as minimum guarantees and up-front fixed fees.

Next steps

The sector inquiry is now open for public consultation ahead of the final report early in 2017. Stakeholders have until 18 November 2016 to submit any comments to the Commission to:

COMP-E-COMMERCE@ec.europa.eu.

A full copy of the preliminary report is available [here](#).

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