



“The end is just a new beginning”

The newly released final report on the
EU Commission’s e-commerce sector inquiry

May 19, 2017

On 10 May 2017, the DG Competition of the European Commission, issued its “[Final report on the E-commerce Sector Inquiry](#)”, largely confirming its detailed [preliminary findings](#), published in September 2016. Several competition concerns are reiterated in the Report in relation to recommending prices, geo-blocking, dual pricing, bundling of licensing rights, and other types of vertical restraints which commonly appear in e-commerce. The findings of the Report provide a useful guide for the competition law practitioner when advising on matters of distribution, franchising and licensing agreements. They also sound the alarm to companies which are active online for future antitrust investigations aimed at uncovering anti-competitive practices.

The inquiry formed part of the Commission’s [Single Digital Market](#) strategy which was launched in May 2015 and aimed at boosting digital opportunities for businesses and consumers and “*send a strong signal for innovation and entrepreneurship in Europe*”¹.

The information which the Commission gathered in the context of its inquiry from 1,900 stakeholders active in all EU Member States came down to a 16-page report, separately addressing competition concerns relating to the distribution of [consumer goods](#) and the licensing of [digital content](#). The report contains statistics on the methods used by undertakings across the EU to distribute their goods and services online and extracts useful conclusions on how these practices affect competition and the consolidation of the Union’s e-commerce market.

¹ Speech by Commissioner Jourová on consumers in the digital world at the 8th annual European e-commerce conference, Brussels, 11 May 2017.

Consumer goods

As regards consumer goods, the report’s main findings include the following caveats:

- Charging different prices to customers depending on whether they will resell the products online or offline (**dual pricing**) will generally be considered a hardcore restriction of competition, but it may be justified in exceptional circumstances in order to address free-riding.
- Although pricing recommendations are generally effective in communicating quality and brand position, the Commission reiterates the position reflected in the Vertical Block Exemption Regulation (**VBER**)², that manufacturers should not

² 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, 23.4.2010, p. 1–7.

interfere with their customers' pricing policy. Online price transparency, albeit beneficial for competition in general, facilitates detection of deviations and collusion between retailers.

- Without prejudice to a pending reference for a preliminary ruling on this regard by the Court of Justice of the European Union, the Commission categorizes (absolute) **marketplace bans** as *restrictions by-effect*, expressing the view that they should be examined on a case-by-case basis, rather than as hardcore restrictions of competition.
- As the VBER currently provides, **absolute restrictions** of selective distribution networks on purely online retailers are not *per se* problematic, yet in cases where the requirement to operate brick-and-mortar shops would not provide any conceivable efficiencies, it would not be upheld.
- **Geo-blocking**³ measures will be condemned when they stem from agreements and concerted practices between undertakings, rather than from unilateral conduct.
- Concerns were also raised in relation to **exchange of competitively sensitive data** between undertakings that are examined both vertically and horizontally (e.g. manufacturers with own shops who also distribute at wholesale level).

Digital content

The report's highlights on the licensing of digital content include the following:

- **Bundling** online transmission rights with other transmission methods may also keep new entries at bay, and also lead to reduced output when the bundle is only partially exploited.

- As regards **geo-blocking** of digital content, the Commission expressed concern on the fact that some Member States show increased rates of the practice, whereas in others it is limited in use;
- **Long-term licensing** agreements (exceeding 10 or 20 years), **combined with clauses** of automatic renewal, first negotiation, first refusal, price matching etc. increase market foreclosure and hinder undertakings from entering the market.
- The established framework for the procurement of **"premium" content** (such as films and sports broadcasting) overindulge the established content providers who have easier access to the financing required for acquiring the relevant rights, and reduce the incentive for innovation.

As the Commission concludes, the above concerns herald an **escalation of antitrust enforcement** in the e-commerce market, aimed at removing impediments to effective competition and cross-border trade, as well as an **increased cooperation of antitrust regulators** across the EU so that competition rules are uniformly applied in all Member States.

The [DG Comp's recent initiatives](#), aimed at investigating allegations of (a) resale price maintenance in the consumer electronics market, (b) geo-blocking in the video games distribution market, and (c) price discrimination between the largest EU tour operators, serve as an indicator of things to come in antitrust enforcement at national level.

Companies selling online, either directly or through a network of distributors and franchisees, should review their relevant agreements, and ensure compliance with the new guidance of the EU Commission.

³ Geo-blocking refers to blocking access to websites, re-routing customers to websites targeting other Member States or simply refusing to deliver cross-border or to accept cross-border payments.



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