

Kluwer Competition Law Blog

European Commission's e-commerce sector inquiry – increasing antitrust heat

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Online sales are not only attracting the attention of consumers and tech businesses, but also increased review by antitrust regulators. On 15 September 2016, the European Commission published a detailed 290 page preliminary report on its e-commerce sector inquiry. While commenting on the release of the report, EU Competition Commissioner Margrethe Vestager stated that the report should be “*a trigger for companies to review their current distribution contracts and bring them in line with EU competition rules if they are not*”. She states that the information from the sector inquiry will help the European Commission spot cases where there may be a competition law infringement, and, if necessary, take action in those cases. The European Commission is therefore preparing not only for new regulatory proposals, but for infringement actions against individual companies, in particular as regards geo-blocking. Geo-blocking refers to practices used by online sellers that result in the denial of access to websites based in other EU Member States. Businesses should be aware that this is not only relevant for EU-based entities, but for all companies selling online or distributing content in the EU, including many US-based companies.

Foundation of the report

The European Commission launched its e-commerce sector inquiry in May 2015 as part of its Digital Single Market Strategy. The European Commission gathered information (including by sending individual questionnaires) from nearly 1800 stakeholders throughout the EU and collected 8000 distribution agreements. The inquiry covers e-commerce in consumer goods and digital content.

Online sale of consumer goods

In relation to goods, the report examines the prevalence of certain distribution models (such as exclusive and selective distribution agreements). It also investigates any contractual provisions which limit the ability of retailers (i) to sell cross-border within the EU, (ii) to sell or advertise online, (iii) to sell on marketplaces, (iv) to use price comparison tools, and (v) to set the retail price freely. The report's key findings include the following:

- **Selective Distribution: Is brand protection a legitimate justification?** As a result of the

growth of e-commerce, there has been increased recourse to selective distribution as well as the use of new selection criteria. The report notes that the use of certain clauses restricting online sales in selective distribution agreements “*may go beyond what is necessary to achieve the goals of selective distribution*”, and comments that it “*may investigate possible anti-competitive clauses restricting online sales in selective distribution agreements*“. It can be expected that brand protection will be an important factor for these investigations. When drafting commercial agreements, manufacturers should make sure to specify why their products and services warrant a selective distribution system to ensure high quality distribution and coherent brand image in order to guarantee a “shopping experience” for the customer also online.

- **Cross-border sales restrictions.** Over one in ten retailers report that suppliers impose contractual restrictions on cross-border sales. Contractual cross-border sales restrictions are not always written in agreements, but are sometimes communicated orally. The report states that its preliminary findings are that “*a number of territorial restrictions may raise concerns regarding their compatibility with EU competition rules*“. It seems likely that the European Commission will open individual investigations into such cases given that it has access to a large database of agreements from the sector inquiry.
- **Marketplaces: No clear guidance in sight.** 20% of the retailers are contractually restricted from selling on online marketplaces. The European Commission considers that its findings do not show that marketplace bans constitute hardcore restrictions within the meaning of the EU Vertical Block Exemption Regulation. This is because they concern how the distributor can sell the products over the internet, and do not have the object to restrict where and to whom distributors can sell. However, the report states that “*this does not mean that absolute marketplace bans are generally compatible with EU competition law*“. Thus, the report does not fully resolve the issue, which has been the subject of a number of controversial court cases at Member State level, in particular in Germany.
- **RSP and price restrictions: How much does it cost?** Over 40% of the retailers report price recommendations or price restriction from manufacturers. While recommending sales prices (“RSP”) is not illegal under EU antitrust law, there is likely to be an infringement when a recommendation contains a binding element. The report comments that “*increased transparency and the use of price monitoring/pricing software by both retailers and manufacturers may impact the competitive process in e-commerce markets.*” The report concludes that certain pricing agreements between manufacturers and their retailers may merit further investigation on a case-by-case basis. To date, many resale price maintenance cases are dealt with by national competition law authorities.
- **Price comparison website.** The European Commission is also concerned about contractual restrictions for the submission of offers to price comparison websites. “*While such general bans may be a cost effective way to prohibit the use of a promotion channel deemed not fitting for the product in question, they may 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

In relation to digital content, the report examines the presence of territorial restrictions and geo-blocking in the online distribution of digital content. It also investigates the copyright licensing models for online distribution and their potential impact on competition. The report’s key findings include the following:

- **Geo-blocking.** In addition to the fact that rights are often licensed on a national basis, the

European Commission finds that “*a large majority*” of digital content providers are required by right holders to restrict access to their online digital content services for users from other EU Member States by means of geo-blocking. Commissioner Vestager has identified tackling geoblocking as a priority for her activities with respect to online content.

- **Duration of licensing agreements.** Licensing agreements “*are often concluded for rather long durations and contracting parties often renew existing agreements*”, which is sometimes done on the basis of automatic renewal clauses and clauses providing for a right of first negotiation, a right of first refusal or a matching offer right. The European Commission is concerned that this could make it more difficult for new players to enter the market, or for existing operators to expand their current commercial activities into e.g. other transmission means such as online, or to other geographic markets.
- **Payment mechanisms.** There is widespread use of minimum guarantees and fixed/flat fees, often in conjunction with advance payments, in the payment mechanisms which determine the amounts digital content providers have to pay right holders for the licensed online rights. The European Commission notes that this might make it more difficult for new entrants to gain a foothold in the market.
- **Case-by-case assessment.** The European Commission will assess “*on a case-by-case basis, having regard to the characteristics of the specific product and geographic markets, whether certain licensing practices may restrict competition and whether enforcement is necessary in order to ensure effective competition*”. It can be expected that these investigations will be rather lengthy as a number of new questions regarding the relationship between competition law, IP law and the digital market reality need to be aligned.

Next steps

The European Commission has opened its preliminary report for public consultation, which it hopes will trigger a facts-based exchange of views with stakeholders. The deadline for comments is 18 November 2016. The European Commission states that it expects to publish its Final Report in the first quarter of 2017. The report goes hand in hand with new rules for digital content currently being proposed by the European Commission on copyright, portability of subscriptions and geo-blocking.

With the current heating up of antitrust scrutiny in the online world, companies are advised to review thoroughly their distribution agreements.

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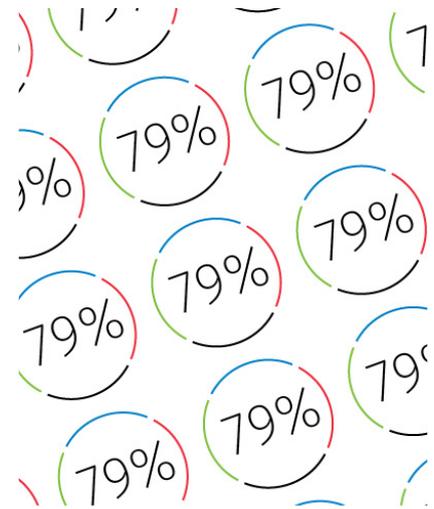
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