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Publication of the European Commission's preliminary report on the e-commerce sector inquiry: Identification of the main business practices that restrict competition

The European Commission has just released its preliminary report (the "Report") on the e-commerce sector inquiry it had launched in 2015.

This inquiry is part of the European Commission's strategy to create a digital single market. It is intended to provide an overview of the major trends in European e-commerce markets and to identify trade practices that restrict competition and limit consumer choice.

1. The objective of the sector inquiry launched by the European Commission

It should preliminarily be recalled that the European Commission is entitled to conduct inquiries in any particular sector of the economy wherever it presumes that competition may be distorted within the EU market.

The European Commission may ask for information from businesses and carry out inspections. Fines may be imposed on businesses that supply incorrect or misleading information.

The main purpose of a sector inquiry is not to adopt coercive measures against respondent businesses but to identify the market access barriers erected by companies and to assess the scope and effects of such barriers on competition. Yet, if the European Commission finds that EU competition rules are breached, it may open investigations.

The decision to launch an e-commerce sector inquiry published on September 15 2016[1] is based on the observation that while more and more goods and services are traded over the internet, cross-border online sales within the EU are only growing slowly.

During the inquiry, the European Commission has gathered evidence from nearly 1,800 companies from the 28 EU Member States and has analyzed approximately 8,000 distribution contracts. Questionnaires on consumer goods were sent to retailers, manufacturers, e-commerce platforms and payment service providers.

Respondent companies operate a wide range of industries to ensure a broad representation of economic players and business models active in e-commerce.

As such, the inquiry covered the following product categories: Clothing, shoes and accessories, consumer electronics (including computer hardware), electrical household appliances, computer games and software, toys and childcare articles, books, CDs, DVDs and Blu-ray discs, cosmetic and healthcare products, sports and outdoor equipment, as well as house and garden furnishings.

Questionnaires were also sent to service providers and right holders offering various types of digital content such as films, sports, fiction TV, children programs, non-fiction TV, music and news.

In general, the Report confirms the growing significance of e-commerce within the European Union. Specifically, according to the Report, more than 50% of European adults have ordered goods or services over the internet in 2015, this percentage being as high as 80% in certain Member States.

2. Main findings in relation to e-commerce of consumer goods

The Report underlines that e-commerce increases price transparency and price competition. More than half of respondent retailers indicated that they track the online prices of competitors and adapt to any change in such prices.

In addition, more than half of respondent manufacturers said that they have opened their own online shops in the last 10 years, which has the effect of making them compete with their own retailers.

The Report also highlights the increased use of selective distribution systems[2] as around one out of five respondent manufacturers said they introduced selective distribution systems for the first time in the last 10 years. As a reaction to the growth of e-commerce, manufacturers have indeed adopted practices that help them better control the distribution of their products and the positioning of their brands.

However, manufacturers also increasingly impose contractual restrictions on sales in their distribution contracts.

These restrictions may take various forms that the European Commission has classified as follows:

- *Pricing restrictions/recommendations*

42% of respondent retailers reported that they have experienced some form of pricing restrictions/recommendations imposed by manufacturers and 30% confirmed that they complied therewith.

80% of respondent manufacturers said that they recommend certain specific re-sale prices to their distributors.

- *Marketplace restrictions*

The sector inquiry shows that 31% of respondent retailers use both their own online shop and marketplaces when selling their products online.

Yet, on average, 18% of respondent retailers reported marketplace restrictions (which range from absolute bans to restrictions based on specific quality criteria) in their contracts with suppliers.

- *Cross-border sales restrictions*

Contractual cross-border restrictions limit the ability of retailers to serve customers in other Member States and require retailers to apply geo-blocking measures, such as blocking access to websites, re-routing customers to websites targeting other Member States, refusing to deliver cross-border or to accept cross-border payments.

More than 10% of respondent retailers reported that they are imposed such restrictions.

It should be noted, however, that the majority of respondent retailers indicated that they unilaterally impose geo-blocking measures.

- *Restrictions on the use of price comparison tools*

More than 30% of respondent retailers reported that they have used price comparison tools in 2014.

But 10% of respondent retailers said that that they have agreements with suppliers that contain some form of restriction in their ability to use price comparison tools, it being specified that such restrictions range from absolute bans to restrictions based on specific quality criteria.

3. Main findings in relation to e-commerce in digital content

All of the respondent digital content providers explained that to be competitive, it is essential to secure an attractive digital content. This requires the availability of licenses from the holders of the copyrights in the content.

Here also, the Report reveals the existence of contractual restrictions in copyright licensing agreements.

- *Contractual restrictions in relation to transmission technologies, timing of releases and territories*

The Report shows that copyright licensing agreements frequently contain clauses that restrict the territories, the transmission technologies and the release windows (or periods) that the digital content providers are authorized to use.

As an illustration, on average, 70% of respondent digital content providers report having contractually agreed with right holders to restrict access to their online digital content services for users from other Member States by means of geo-blocking.

- *Duration of licensing agreements and contractual relationships and exclusivity*

Licensing agreements between right holders and digital content providers are often entered into for relatively long periods. 80% of such agreements have a duration of at least two years and 10% have a duration of over 10 years.

In addition, these licensing agreements often contain an exclusivity clause.

The existence of long and exclusive licensing agreements makes it difficult for new digital content providers, or existing digital content providers seeking to expand their existing business activities, to enter a market, and, thereby, restricts competition.

Such restrictions are sometimes exacerbated by other contractual clauses that are part of licensing agreements, such as for example, automatic renewal clauses.

4. Next steps

The Report is now open to public consultation for a period of two months. Interested parties are invited to comment on the findings of the sector inquiry until November 18, 2016.

The final report should be published in the first quarter of 2017.

[1] Cf. the sector inquiry website: http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

[2] Distribution system in which manufacturers select distributors on the basis of a set of specific qualitative criteria in order to preserve the brand image of their products or secure the distributors' ability to sell the products in accordance with the conditions of operation and information that they have defined.

specific needs.

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