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In order to make the EU's single market fit for the contemporary digital age, the European Commission adopted in 2015 the 'digital single market strategy'. One of the three pillars of this strategy is to achieve better access for consumers and businesses to online goods and services across Europe, by striking down as many obstacles to cross-border online activities as possible. Within this framework, the Commission recently finished its sector inquiry on e-commerce in consumer goods and digital content. The sector inquiry is based on input from multiple companies that are active on the e-commerce market. On 10 May 2017, the final report was published which sets the legal and economic background in the light of which the information provided during the sector inquiry will have to be read. The sector inquiry focused on distribution agreements for goods and services that may raise barriers to e-commerce. Under the current legal framework, undertakings can assess their distribution agreements in the light of the block exemption regulation (and the guidelines on vertical restraints). That regulation expires in May 2022 and the future review will be the keystone of the Commission's inquiry into the competition law effects of consumer goods and digital content in e-commerce in the EU.

What does the report teach us?

It should come as no surprise that the final report confirms that the rapid growth of e-commerce over the last decade had a significant impact on companies' distribution strategies and customer behaviour. In this way, e-commerce has led to increased price transparency. The sector inquiry has signalled that as a result, online operating undertakings predominantly compete on price instead of other product or service features (like quality, brand image and innovation). As a response to that, manufacturers have been taking measures to exercise a higher level of control over the distribution of their products and services, in order to guarantee its quality. According to the final report, manufacturers increasingly sell their products or services through their own online stores directly to customers, without engaging intermediaries. In that way, manufacturers are increasingly competing with their own independent distributors. Besides that, the report shows that suppliers increasingly resort to selective distribution systems (in which the products can only be sold by pre-selected authorized sellers) and that they impose more contractual restrictions on their distributors than before. In the final report, these practices are considered in more detail. The final report comprises two sections: the first section covers e-commerce of consumer goods, the second section focuses on e-commerce of digital content. A summary of the observations from the final report that are important in practice with regard to e-commerce of consumer goods is set out below.

- The exchange of competitively sensitive data (such as selling prices and sold quantities), between online marketplaces and third party sellers or between manufacturers with own shops and retailers, may lead to competition concerns where the same parties are directly competing for the sale of certain products or services.
- Price transparency may give rise to free-riding behaviour. In this way, consumers can first make use of presale

services of brick and mortar shops before purchasing the product online. This leads to free-riding behaviour of the online retailer on the presale services of the offline retailer. The Commission determines that it is essential for manufacturers and retailers to tackle free-riding and retailers must remain stimulated to further invest in high quality services through establishing a level playing field between the online- and offline market.

- The Commission states that applying different prices to different retailers is generally considered as being a normal part of the competition process. However, applying different prices to the same retailer, dependent on whether the product will be sold offline or online, constitutes a hard-core restriction under the block exemption regulation. The Commission indicates that in this context, it will continue to be open for efficiency defences, if for example this form of dual pricing can tackle the issue of free-riding.
- Price transparency enables both manufacturers and retailers to monitor retail prices, which, according to the Commission, on the one hand could pave the way for vertical price fixing and on the other hand could facilitate collusion between retailers. The Commission states that the wide-scale use of pricing software by retailers, that automatically adjusts their own prices based on the observed prices of competitors, may raise competition concerns in some situations, depending on market conditions.
- The Commission intends to assess more closely whether in a certain situation, a brick and mortar shop requirement imposed by the supplier is indeed necessary for quality promotion of distribution, or whether such a requirement is merely adopted to exclude online distributors from the distribution network. In this regard, the Commission leaves it to the national authorities to assess which products within a brand could justify such a “brick and mortar” requirement.
- It follows from the final report that an (absolute) ban on sales via online marketplaces such as EBay and Amazon, should not be considered as a hardcore restriction under the block exemption regulation¹. However, this should not be considered a safe harbor either. Dependent on the market situation, the Commission or a national competition authority can decide to withdraw the protection of such a ban under the block exemption regulation.
- Geo blocking (the blocking or redirection of consumer’s access to certain websites, because of the geographical area in which they live) may give rise to competition concerns. This does not apply to unilateral decisions by non-dominant companies not to sell products across the border.

With regard to the developments related to e-commerce of digital content, the inquiry particularly focused on the online sale of audio-visual and music products. The results confirm that the access to licences and in particular to attractive content is one of the key determinants of competition in digital content markets. The most relevant competition concerns that have come forward from the sector inquiry, concern certain contractual restrictions in licence-agreements that render it hard for both existing market players and newcomers to enter the market to compete and develop innovating services. In this context, the Commission mentions: the long duration of the contracts (combined with possibilities of automatic extension and used payment methods), the bundling of online rights (if licensees not or only partly exploit online rights) and geo blocking.

The Commission indicated in the final report that in the light of the results of the sector inquiry, its focus will be on the enforcement of the most frequent occurring commercial practices that have come up or further developed because of the growth of e-commerce and that could have a detrimental effect on competition and cross-border trade. Besides that, the ACM (Authority for Consumers and Markets) indicated in a 2015 publication called ‘The ACM’s supervision on vertical agreements’ that the results of the sector inquiry will be taken into account in its supervision of vertical agreements. Hence, it is advisable that undertakings active in e-commerce align their business to the findings of the report.

1. A reference for a preliminary ruling on this question is currently pending before the Court of Justice (C-230/16).

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