On 10 May 2017 the EU Commission published its final report in the e-commerce sector inquiry launched in May 2015 as part of a wider Digital Market Strategy which aims to achieve better access for consumers and businesses to online goods and services across the EU.

The aim of the sector inquiry was to examine prevailing market trends in the e-commerce sector and identify potential barriers to competition in e-commerce markets. In relation to consumer goods, the report identifies a number of trends in retail business practices as a result of rapid growth in online sales (increased use of selective distribution and of contractual restrictions in order to increase control over product distribution) which raise potential competition concerns. In relation to digital content (audio-visual and music products), certain licensing practices may make it more difficult for new online business models and services to emerge, but the Commission accepts that any assessment of these practices under the competition rules needs to take into account the characteristics of the content industry.

As a result of some of the findings from the inquiry the Commission opened three investigations earlier this year into the online sale of consumer electronics, video games and holiday accommodation and Commissioner Vestager has indicated that further investigations are to follow. A number of businesses have also adjusted their commercial practices on their own initiative in order to make it easier for consumers to make cross-border purchases which in turn allows them to benefit from lower prices and wider choices.
We have summarised the key findings of the report in relation to consumer goods and digital content below. Businesses should carefully consider the report's findings in order to ensure their online retail practices do not give cause for concern. The issues identified in the report can be expected to guide a number of Commission investigations in this area for years to come.

1. CONSUMER GOODS

In response to increased price transparency and price competition as a result of the growth of e-commerce over the last decade, manufacturers have adjusted their distribution strategies in order to maintain greater control over the price and quality of their products. Manufacturers are increasingly looking to vertically integrate and sell their products directly to customers, which allows them to claim back some control over downstream pricing. There has also been increased use of selective distribution systems, in order to protect market positioning and ensure that the online sales environment reflects the reputation of the brand. Manufacturers are also making greater use of vertical restrictions aimed at greater control over the distribution of their products, such as pricing restrictions, platform bans, restrictions on the use of price comparison tools and the exclusion of pure online distributors from their networks.

The report identifies potential competition law issues in the following areas:

SELECTIVE DISTRIBUTION

In the context of selective distribution the final report focuses on the requirement imposed on online distributors to also operate a brick and mortar shop, thereby excluding pure online distributors from the network. Such a requirement is permitted under the vertical agreements block exemption Regulation (VABER) as one of the quality standards for the use of internet sites, but only as long as it is justified by the nature of the products involved. The Commission may therefore assess on a case by case basis whether a brick and mortar requirement imposed on online distributors is indeed necessary for the quality of distribution and brings about efficiencies, or whether it is simply used as a device to exclude pure online distributors from the network.

ONLINE PRICING RESTRICTIONS

Increased price transparency and easier price monitoring (including the use of automatic software programmes in the e-commerce sector) has also made it easier for manufacturers to monitor and enforce price restrictions imposed on their retailers. Under competition law manufacturers are permitted to suggest recommended retail prices to their distributors, as long as these do not in practice result in resale price maintenance (RPM) under which a fixed or minimum price is imposed on the distributor.
The inquiry highlights that RPM is becoming increasingly common in the online sector. In particular, the Commission saw evidence of widespread monitoring of retail pricing by manufacturers and of adherence by retailers to recommended retail prices. Some retailers reported manufacturers applying pressure to maintain recommended resale pricing, which included threats to remove discounts, delay or cease supply. Such conduct amounts to indirect RPM which is in breach of competition law. The Commission is currently investigating the pricing conduct of a number of consumer electronics manufacturers as a result of some of the evidence that came out of the e-commerce sector inquiry. The investigation focuses on the restrictions imposed on online retailers to set their own price for widely used consumer electronics.

In the course of the inquiry several manufacturers expressed concern over the current rule on dual pricing, under which they are prohibited from charging different wholesale prices for the same products to the same retailer depending on whether the products will be sold online or offline. Such dual pricing is indeed considered as a hardcore restriction under the VABER, but the report also makes it clear that these restrictions may be exempt under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be necessary to address free-riding. Charging different wholesale prices to different retailers on the other hand is generally considered a normal part of the competitive process.

RESTRICTIONS ON SELLING ON ONLINE MARKETPLACES

Contractual restrictions on sales via marketplaces range from outright bans to restrictions on sales via marketplaces that do not meet quality standards, or restrictions on resale via marketplaces that also permit auctions. Manufacturers typically justify such restrictions with the need for brand and image protection, the need to combat the sale of counterfeit goods and the need to provide adequate pre and post-sale customer service. Retailers on the other hand claim the restrictions are aimed at reducing online sales and avoiding increased pricing transparency and price competition.

The question to which extent restrictions which limit the ability of retailers to sell on online marketplaces raise concerns under competition rules has increasingly been considered in a number of Member States over the last few years and has resulted in conflicting approaches. A preliminary ruling from the Court of Justice which should clarify the position has been requested by a German court in the Coty case (Case C-230/16 Coty Germany GmbH v Parfumerie Akzente), with a ruling expected later this year.

Without prejudice to the Court of Justice's ruling in the Coty case the Commission concludes, based on the findings of its inquiry, that a marketplace sales ban does not amount to a de facto ban on online sales and should not be seen as a hardcore restriction of competition. Whilst it does not condone all marketplace bans, it does take the view that each restriction must be considered on its specific facts. This is in line with the current VABER guidelines and the Commission has made representations before the Court of Justice in the Coty case recommending that the Court follows this approach.

RESTRICTIONS ON THE USE OF PRICE COMPARISON TOOLS
As with the restrictions on online marketplaces, there is significant variation in the approach between Member States in respect of restrictions which prevent retailers from using price comparison websites. The main difference between the two platforms is that the actual sale does not take place on the website of the price comparison tool, but on the website of the retailer to which the customers are directed via the price comparison tool.

The Commission considers that absolute price comparison tool bans which are not linked to quality criteria may make it more difficult for (potential) customers to find the retailer's website and thereby limit the distributor's ability to effectively promote its online service and generate online traffic. Absolute price comparison tool bans therefore potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction of passive sales (under Article 4(b) and 4(c) of the VABER). Restrictions which are based on objective qualitative criteria will generally be covered by the VABER.

**RESTRICTIONS ON CROSS-BORDER SALES AND GEO-BLOCKING**

Contractual restrictions on cross-border sales were observed in all product categories considered by the Commission and ranged from outright bans on retailers selling outside a given territory to more indirect measures, such as a requirement to seek manufacturer approval before reselling online in other territories. Where such restrictions are imposed outside the context of exclusive distribution agreements (which allow restrictions on active sales into territories exclusively allocated to another reseller or exclusively reserved for the manufacturer), are not related to the designated area or prohibit passive sales, they are likely to infringe competition law.

The competition rules do not apply to geoblocking measures that are unilaterally enforced by the manufacturer (unless the manufacturer is dominant). In order to address these issues the Commission has proposed a Regulation on geoblocking earlier on in the inquiry, which aims to boost e-commerce and remove unjustified discrimination based on customers' nationality, place of residence or place of establishment. The proposed Regulation is currently under discussion in the Council and the European Parliament.

**USE OF DATA IN E-COMMERCE**

Market places, price comparison tools and retailers all collect data in the course of their transactions which are used for different purposes. The inquiry found that the collection and processing of a large amount of data is becoming increasingly important for e-commerce. Whereas such 'big data' allow companies to become more efficient and provide more tailored and targeted offerings to consumers, there are also potential competition concerns relating to data collection and its usage. If commercially sensitive information, such as information on prices and quantities, is exchanged between market players who also compete with each other this is likely to raise competition concerns and business should make sure appropriate safeguards are put in place.

**2. DIGITAL CONTENT**
The sector inquiry also considers e-commerce in digital content and identifies potential contractual restrictions between suppliers (right holders) and providers of online digital content services (licensees) which may make it more difficult for new online business models to emerge or for new businesses to enter the market.

The provision of online content services offers the possibility to innovate the provision of access to products and services (lower transmission costs, user interfaces via multiple devices), but the report concludes that the key driver of competition in relation to the distribution of digital content remains the quality of the content. The terms on which rights are licensed to digital content providers are therefore one of the most important drivers of competition and the key concerns identified in the inquiry relate to certain restrictions in the licensing agreements:

**SCOPE OF THE LICENSED RIGHTS**

In order to offer online services digital content providers need to secure licences to a minimum set of rights to market the content. Whether these are available depends on a number of factors. The practice of bundling of online rights will often make it difficult for new entrants to secure licences to provide digital content online, even where they already provide offline content or are active in other geographic markets.

**TERRITORIAL RESTRICTIONS AND GEO-BLOCKING**

Rights are often licensed on a national basis. The Commission does not question the practice of territorial licensing in itself, but the inquiry has highlighted that the majority of digital content providers are required by rights holders to restrict access to their online digital content services for users from other Member States by means of geo-blocking.

**DURATION OF THE AGREEMENTS**

It is difficult for new entrants and smaller operators to grow their digital content businesses because of long term and exclusive contractual relationships between right holders and established digital content providers.

**PAYMENT STRUCTURES**

Right holders who license attractive content often use payment structures (advance payments, minimum guarantees, fixed fees irrespective of number of users) which put smaller digital content providers or new entrants at a disadvantage.

The report raises the question whether these licensing practices make it harder for new online business models and services to emerge and whether they make it harder for new or smaller players to enter existing markets or grow and expand their activities in other markets.
The Commission recognises the complexity of the distribution of digital content and accepts that any assessment of licensing practices under the competition rules would need to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and the characteristics of the relevant product and geographic markets.

The Commission is currently investigating territorial restrictions in the movie licensing agreements between the major Hollywood studios and Sky, and recently also opened an investigation into the alleged geo-blocking of online video games.

3. COMMENT

Online retail practices are on the radar of the competition authorities in several of the Member States. In the UK, the CMA has recently concluded a number of cases involving the practice of imposing internet minimum advertised prices (IMAP), which it treats as a form of RPM. The Commission intends to increase the dialogue on e-commerce enforcement with national competition authorities in order to ensure a consistent application of the EU competition rules in this area. It will also continue to target business practices that have emerged as a result of growth of e-commerce and have a negative impact on competition and on cross-border trade.

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