

COMPETITIVE EDGE – IN BRIEF

E-commerce sector inquiry final report



Summary

The European Commission published its [final report](#) on its e-commerce sector inquiry, which largely confirms the Commission's findings in its preliminary report.

The growth of e-commerce has had a significant impact both on distribution strategies and consumer behaviour. Price competition has intensified as result of increased price transparency, as well as through the development of online marketplaces. However, this sometimes clashes with the marketing and brand strategies for some goods. Concerns remain over the right level of control exercised over distribution networks to control both price and quality.

Background

The Commission launched its sector inquiry on 6 May 2015 as part of its Digital Single Market strategy, to ensure better access for consumers and businesses to goods and services via e-commerce across the EU.

The preliminary report in September 2016 identified specific concerns about the use of selective distribution systems, territorial restrictions including geo-blocking, the use of RRPs, and restrictions on the use of online marketplaces and comparison tools. For further details see our earlier [update](#).

Since then, the Commission has [launched](#) separate investigations into potentially anti-competitive practices by consumer electronics manufacturers (online pricing restrictions), PC video game distribution (geo-blocking), and holiday accommodation (price discrimination clauses).

The Commission will now use the insight it has gained from its final report to target enforcement of competition law in e-commerce markets, so further investigations can be expected. The findings will also be used by the Commission to engage with national competition authorities on e-commerce-related enforcement to ensure consistent interpretation of competition law.

Key competition concerns

Whilst the Commission has confirmed that its findings do not result in a need to change the Vertical Agreements Block Exemption in advance of its review before 2022, requirements in **selective distribution** systems that distributors operate a bricks and mortar outlet (thereby excluding pure online players) may need further scrutiny where this is not linked to distribution quality or potential efficiencies.

Pricing restrictions were found to be widespread, raising concerns about **resale price maintenance**, particularly where manufacturers and distributors use online methods to monitor retailers' pricing and punish deviations from recommended pricing. The Commission also has concerns that increased price transparency can facilitate collusion between retailers.

Restrictions on sales through **online marketplaces** range from absolute bans to prohibitions on selling on platforms that do not meet certain quality criteria. The Commission has concluded that marketplace bans will not amount to an outright restriction on online selling which would infringe competition law, but the position may evolve. National competition authorities may take a different view and this issue is also due to be considered shortly by the Court of Justice.

A unilateral decision by a non-dominant company to adopt **geo-blocking** measures (such as blocking website access, re-routing or refusing to accept cross border payments) falls outside the scope of competition law. However, cross-border sales restrictions on retailers or distributors will continue to raise concerns.

Practical tips

When devising distribution strategies that will apply across the EU:

- ▶ If adopting a selective distribution model, ensure restrictions are justified by the need to protect the quality of distribution, particularly if requiring distributors to operate a bricks and mortar outlet.
- ▶ Ensure retailers are free to set their own prices. Avoid agreements that set a minimum or fixed price, or using online methods to detect and punish deviation from recommended prices.
- ▶ Exercise caution when using automated online methods to monitor competitors' pricing and adjust your own pricing – competition authorities are paying close attention to the use of pricing algorithms.
- ▶ A ban on selling through online marketplaces may be acceptable in certain circumstances however this should be kept under review with reference to the latest approaches of the courts and national competition authorities.
- ▶ Restrictions on the territories into which a distributor may sell can fall foul of competition law, including restrictions on both active and passive sales. Different rules apply depending on whether an ordinary, exclusive or selective distribution model is adopted – seek advice on how to structure your distribution model appropriately.

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