

European Commission Publishes E-commerce Sector Inquiry Final Report: 4 Key Takeaways

The final report indicates future enforcement trends related to vertical restraints, pricing and big data.

On 10 May 2017, the European Commission (Commission) published its final report on the E-commerce Sector Inquiry (Final Report or Report).¹ The inquiry is part of the Commission's broader Digital Single Market (DSM) strategy, an ambitious program which aims to promote the EU's digital economy. As is often the case when the Commission moves forward with an agenda in a certain sector, antitrust and regulatory instruments are used in parallel to deepen the knowledge of a certain sector and ensure all issues and deadlocks are properly addressed. The mid-term review of the DSM strategy,² published simultaneously with the Report, takes stock of where the Commission stands with its initiatives and sets out how it plans to complete the DSM by 2019.

What does the Final Report cover?

The Final Report identifies business practices that the Commission believes could raise competition concerns, particularly in relation to consumer goods (with a focus on online sales bans and pricing restrictions), data usage and restrictions on digital content transmission.

1. Vertical restraints in the online world – old rules for new practices?

The Commission describes competition concerns mainly in the following types of business arrangements in online sales of consumer goods:³

- ***Selective distribution:*** Selective distribution systems are block exempted, under the Vertical Block Exemption Regulation (VBER),⁴ if the parties fall under the 30% share safe harbor. However, the Final Report specifically mentions restrictions that require the operation of a brick and mortar shop as condition of entry into a selective distribution system. According to the Final Report, if there is no apparent link between the brick and mortar shop requirement and the distribution quality or other efficiencies, these arrangements raise issues under Article 101 TFEU.
- ***Pricing restrictions on resellers:*** The Final Report finds pricing restrictions and recommendations to be widespread in e-commerce. Pricing restrictions (*i.e.* limiting a reseller's ability to price freely) are considered "hardcore" violations of Article 101 TFEU (unless they relate to a *maximum* resale price, which is allowed). Pricing recommendations are allowed *only* if they involve true recommendations and not, effectively, resale price maintenance (RPM). The Commission is concerned that increased pricing transparency in the online world enables manufacturers to monitor any deviations from

recommended prices via pricing software with the consequence that price recommendations may work like RPM.

- **Online Marketplaces:** The Final Report analyzes whether manufacturers act anti-competitively by restricting sales of their products on third-party online platforms/marketplaces such as those operated by Amazon and eBay. The Commission reiterates its view is that such bans are not hardcore restrictions under the VBER. This view is shared by several national competition authorities, while others (like Germany's *Bundeskartellamt*) disagree. The issue is currently pending before the European Court of Justice (ECJ) following a preliminary reference from the German courts in the *Coty* case.⁵
- **Geoblocking:** This is the practice of preventing consumers from making cross-border online purchases. The Final Report recalls that geoblocking measures based on unilateral decisions by non-dominant companies are not caught by EU competition rules. However, when such measures are based on agreements, they can fall within the scope of Article 101 TFEU (and will likely be considered anti-competitive "by object"). Territorial restrictions (and particularly those relating to passive sales) are particularly likely to attract concerns.

Overall, the Commission finds the VBER rules as they stand work fine in the online world. Therefore the Commission will not review them before 2022 (VBER's expiration date). As regards future enforcement, the Commission seems to think it has a solid legal basis under the existing vertical restraints rules. Indeed, the Report mentions that several companies have actually changed their commercial practices to take account of the concerns raised by the Commission's sector inquiry.⁶ Going forward, expect the Commission to take action against vertical restraints in the online space, reflecting the general trend that vertical restraints are once again becoming an enforcement priority.

2. Pricing software and Big Data – new areas of concern?

The Final Report includes passing references on two topical competition law issues that may herald future enforcement:

- **Pricing Software:** The Final Report articulates the concern that (automated) pricing software could allow monitoring of retail prices and thereby reinforce RPM arrangements. In addition, the Report raises the concern that pricing software can create price transparency that potentially facilitates or stabilizes collusion between retailers. This ties in with Commissioner M. Vestager's statements on algorithms and artificially intelligent pricing software over the past months.⁷ While the Report does not explicitly cover this concern, it does hint that this area could be fertile enforcement ground.
- **Big Data:** A distinct concern in the Final Report arises out of the potential exchange of competitively sensitive data between platforms/marketplaces and third-party sellers or manufacturers with their own e-shops and online retailers. While the Report is not about Big Data as such, the reference reflects Commissioner Vestager's key concerns⁸ and adds one more angle to the Big Data discussions that are typically focused on market power and foreclosure.

3. Consistent enforcement of EU competition rules across Member States

The Final Report stresses the need for a coherent approach to EU competition rules in the online sector across Member States. The last few years have seen a proliferation of vertical cases at the national level and this has sometimes led to divergences between Member States or between Member States and the Commission (for example, in the *Hotel booking* cases). The Final Report recognizes that the dialogue

with Member States needs to be broadened to ensure consistency but also prioritizes enforcement of competition rules at the EU level in relation to the most widespread e-commerce business practices.

4. Digital content – wait and see?

In addition to online sales of goods, the Report looks into transmission of digital content. It explores how content licensing restrictions can breach competition rules. The Final Report acknowledges that provisions in digital content licensing agreements (about bundling online rights, territorial restrictions, duration and renewals, as well as payment structures) need to be assessed on a case-by-case basis, always ensuring that such provisions do not function as barriers to entry/expansion for new and existing digital content providers. The Commission's ongoing investigation into *Cross-border access to pay-TV* will provide further guidance on these issues⁹.

DSM – the bigger picture

The Commission's Report cannot be seen in isolation from the Commission's wider DSM strategy as the Report goes hand-in-hand with Commission initiatives in other policy areas. For instance, some geoblocking measures may be caught by Articles 101 and 102 TFEU. But for the cases that fall outside the scope of these provisions, the Commission has proposed a Regulation that is currently pending before the European Parliament. Online platforms/marketplaces are another example. The Report found that exchange of information between platforms and third-party sellers can infringe Article 101 and at the same time, under the DSM strategy, the Commission is considering legislation on platform-to-business trading practices. Finally, Commission initiatives relating to content portability and copyright reform will potentially allay competition concerns on digital content transmission as expressed in the Report.

Further details on the status of the DSM initiatives can be found in our related *Client Alert* "[Digital Single Market: the European Commission Takes Stock and Defines Future Priorities](#)".

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Endnotes

- ¹ See http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf accompanied by a Commission Staff Working Document available at http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.
- ² See http://ec.europa.eu/newsroom/document.cfm?doc_id=44527.
- ³ The sector inquiry had focused on online sales of clothes, consumer electronics, electrical household appliances, computer games and software, toys and childcare articles, media (i.e. books, CDs, DVDs and Blu-ray discs), cosmetics and healthcare products, sports and outdoor equipment, and house and garden products.
- ⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330>.
- ⁵ Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH (Coty Germany).
- ⁶ See http://europa.eu/rapid/press-release_IP-17-1261_en.htm.
- ⁷ See https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en.
- ⁸ See https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en.
- ⁹ See http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=1_40023.