Briefing

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E-Commerce Sector Inquiry Final Report

What to expect next



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On the 10 May 2017, the European Commission (the Commission) published their Final Report detailing key findings from the e-commerce sector inquiry. This article will explore the key findings of the report, and what online distributors of goods and content can expect as a result.

Background

In 2013, a report was published alleging that, although over 50% of EU citizens have shopped online, only around 15% of those people have purchased goods or services from a member state other than their own. This caused concern in the Commission and led to the e-commerce sector inquiry being officially launched in May 2015 by the Competition Commissioner, M. Vestager, who declared that:

"It is high time to remove remaining barriers to e-commerce, which is a vital part of the true Digital Single Market in Europe. The envisaged sector inquiry will help the Commission to understand and tackle barriers to e-commerce to the benefit of European citizens and business".

Since launch, the Commission has reviewed responses to information requests from nearly 1,800 stakeholders and considered over 9,000 agreements. The focus of this exercise was to understand the impact of barriers to certain cross-border online trade, in particular in the areas of geo-blocking and other contractual and practical issues, and also whether certain dominant players in the sector were abusing their position of power.

The review was carried out in the context of the EU's competition framework, which prohibits companies from entering into anticompetitive agreements or from abusing a dominant position. The Commission also considered the terms of the 'Vertical Block Exemption Regulation', commonly known as VBER. VBER exempts certain vertical supply agreements, such as those typically entered into in the e-commerce supply chain between manufacturers and distributors, from being found incompatible with competition law, provided the market share of each party to the agreement does not exceed 30% and that the agreements contain no so-called 'hardcore restrictions' on competition law.

On the basis of this review, on 15 September the Commission published its preliminary findings for consultation, as discussed in our earlier article. The Commission has since considered 66 consultation responses to shape its final report.

The Final Report

The final report to a large extent reiterates the preliminary findings of the Commission as published in September. As per the preliminary report, the main findings differentiate between 'consumer goods' and 'digital content'.

Consumer Goods

The report provides an analysis of e-commerce trends and common practices. The Commission draws out in particular the increase in price transparency that has occurred with a rise in online trade. The final report suggests that, although this does have consumer benefit, it also risks 'free-riding' behaviour, (typically where consumers receive sales services from bricks and mortar shops, then purchase cheaper online). The increased transparency has also enabled price monitoring and automated pricing, potentially triggering higher levels of price coordination amongst competitors.

The Commission clearly has considerable concerns in this regard, publishing a paper on 14 June considering the role of automatic pricing algorithms in facilitating tacit collusion amongst competitors, potentially breaching competition law. The Commission makes clear that it is the companies that employ the algorithms that will be deemed responsible for any breach of competition law, setting the tone for future investigations in this area.

The report also explores the change in online distribution models, with the use of major online marketplaces such as Amazon becoming commonplace.

The report observes that these trends have led to a shift in manufacturers' distribution models, with many of them now selling directly through their own online shops, or imposing stricter vertical restraints, in particular pricing restrictions, on their distributors. The Commission has noted that only certain forms of price restriction can be seen as compatible with competition law, such as the provision of an RRP. However, any minimum price, or any 'recommendation' that is equivalent to price fixing, will be considered a hardcore restriction on competition.

Another restriction that has been highlighted is that of geo-blocking. The Commission confirmed that any agreement or practice that facilitated geo-blocking measures (for example where the retailer refuses to send or accept payment from another member state) would be prohibited under competition law.

Another mechanism frequently deployed by manufacturers is the use of selective distribution systems, which allow manufacturers to set the criteria that third parties must meet before they become authorised distributors or retailers of the goods. Although selective distribution models are generally seen as an acceptable for certain goods under the VBER, (in particular branded or luxury goods), the Commission is concerned over selective distribution systems that are excluding online-only distributors, noting that such agreements may need further case-by-case scrutiny to assess whether they are anticompetitive.

Interestingly, the Commission opined that restrictions or prohibitions on the use of online marketplaces in the context of a selective distribution system will not generally be seen as a hardcore restriction of competition. A preliminary reference on this point is currently being examined before the ECJ (Case C-230/16, Coty Germany GmbH v Parfumerie Akzente). Manufacturers and distributors shall find out whether Europe's highest court agrees with the Commission's conclusions later this year.

One new concern that appeared in the final report is in relation to the collection and processing of so-called 'big data' in the context of e-commerce. Although the final report refers to the benefits and efficiencies the appropriate use of such data can bring, it also highlights potential competition concerns regarding its collection and use. In particular, it highlights the possibility for parties to share commercially sensitive data, which may give rise to competition concerns.

Digital Content

The report does not delve into any great detail on digital content, painting a 'bigger picture' in respect of its concerns in this area. It draws out the key developments, commenting on the opportunities online transmission of content has provided to both establish and new entrants, encouraging innovation, lowering costs and giving greater flexibility and scalability.

However, it also lays out a number of concerns in respect of digital content, focussing on the issue of complex and fragmented licensing practices. The report comments on the issue of:

- Certain licence restrictions, e.g. on a geographic basis,
- 'rights bundling' across a number of transmission methods, typically giving one party the right to transmit content both online and through other mediums such as mobile or satellite;
- the typically long duration of licensing arrangements;
- the payment structure for content licenses, which typically involve fixed fees or advanced payments, irrespective of the number of end-users.

The commission is concerned that these licensing practices may prevent new entrants to the market, and makes expansion difficult for existing operators. This is potentially to the detriment of competition and to the development of innovative business models and services.

Implications

It is worth noting that the Commission's power to undertake sector inquiries does not give the Commission the ability to directly impose remedies, or to change the law. Rather, the findings from Sector Inquiries often lay

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the ground work for cases against specific undertakings for breaches of competition law, as was the case with previous sector inquiries (e.g. in the pharmaceutical sector), or for moving towards a change of policy.

In line with past example, the inquiry is already being used as a springboard to change the behaviour of stakeholders and to alter competition policy in the field of e-commerce. The actions of the Commission since the launch of the inquiry are indicative of their strategy to break down barriers to e-commerce going forward and suggests a move towards stronger enforcement of competition law in this sector.

In terms of the commercial practices of manufacturers and retailers, the report specifically highlights that a number of retailers have already altered their arrangements as a result of the inquiry, to ensure they are compliant with competition law.

Furthermore, following the publishing of the preliminary findings, the Commission launched three separate investigations into anti-competitive online sales practices, concerning consumer electronics, video games and hotel accommodation. The concerns are focussed on price restrictions placed on online retailers and geo-blocking practices either preventing transactions or discriminating against consumers based on their location or country of residence.

The number of investigations is now ramping up, with three further investigations launched on 14 June. The cases, involving Hello Kitty, Despicable Me and Barcelona football merchandise, are investigating whether licensing and distribution practices are restricting the sourcing and sale of certain licensed merchandise on a territorial basis, contrary to competition law.

An additional, but stand-alone, investigation was also opened up on 6 June in respect of a clothing provider, Guess, to examine whether it illegally restricts retailers from selling goods online on a cross-border basis.

The number of investigations launched in this sector, and the range of topics covered, is indicative of more enforcement action to come, both at an EU and a national level. The outcome of these investigations should help shape and clarify the rules that e-commerce players are bound to follow.

Of additional concern to larger players in the market will be the focus of the final report on the use of 'big data'. The current Competition Commissioner, M. Vestager, has used a number of recent speeches to focus the public's attention to the issue of 'big data' and the potential anti-competitive consequences of its misuse. Although no specific action has been taken in connection with this yet, given the prominence the issue has been given in recent months it may not be too long before we see investigations in the e-commerce sector spring up on this topic.

In respect of policy change, although the final report made clear that the Commission does not intend to immediately amend VBER, it will use the findings of the inquiry to inform its review of VBER leading up to its expiry in 2022. Although the report does not give any detail on the shape a new VBER regime might take, the review may lead to more limited exemptions for vertical agreements.

This would be troubling for many manufacturers and retailers and lead to a considerable amount of effort in ensuring that existing practices and arrangements were compatible with the new regime.

For now, interested parties will be eagerly awaiting the outcome of the recently launched investigations, and to see who will be the Commission's next target...

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