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# The European Commission's E-Commerce Report: Practical Lessons

For the last two years, the European Commission (“EC”) has been carrying out a Sector Inquiry into e-commerce of consumer goods and digital content in the EU. As part of this, the EC has sent companies many questionnaires and, in response, received some 9,000 sales, distribution and licensing agreements.

In parallel, the EC has proposed legislation designed to promote cross-border e-commerce, through the harmonization of rules for the supply of digital content (available [here](#)) and online sales of goods (available [here](#)), rules against unjustified geo-blocking (available [here](#)), and copyright modernization (already adopted, available [here](#)). The EC is also considering legislation “*to address unfair contractual clauses and trading practices identified in platform-to-business relationships*” (available [here](#)).

The EC’s Sector Inquiry primarily focused on potential restrictions of competition in e-commerce markets that unduly limit how *goods* and *digital content* are distributed in the EU. The inquiry resulted in a 16-page report (available [here](#)) that the EC submitted to the EU Council and the European Parliament in May 2017. This report integrates earlier reports (available [here](#) and [here](#)) and is accompanied by an EU Staff Working Document of some 300 pages (available [here](#)).

## **Main concerns**

In the context of *consumer goods*, the main concerns identified by the EC are:

1. **Geo-Blocking:** agreements or practices that are not covered by the EC “safe harbor” on vertical restrictions (see the EC Block Exemption Regulation available [here](#)) and which prevent cross-border sales between Member States in distribution agreements (e.g., restricting retailers from advertising online in a Member State that the supplier has not reserved for itself or exclusively allocated to another distributor; preventing retailers from accepting unsolicited requests from customers located in a different Member State).
2. **Geo-Filtering:** allowing consumers to access and purchase goods and services cross-border, but offering different terms and/or conditions to customers located in a different Member State to the retailer.
3. **“Brick and Mortar” Shop Requirements:** the EC acknowledged that contractual requirements to operate at least one brick and mortar shop are compatible with the EU competition rules provided they are linked to distribution quality or other potential efficiencies such as brand image. The EC made it clear, however, that brick and mortar shop requirements that are *not* linked to such justifications may need further scrutiny in individual cases.

4. **Marketplace Restrictions:** the EC noted that absolute bans on selling via online marketplaces (e.g., Amazon, e-Bay) are not presumed to be in breach of the EU competition rules. However, the EC may still decide to scrutinize marketplace bans when justified by the market situation, e.g. where either the supplier or the retailer's market share is above 30%. A reference for a preliminary ruling on this issue is currently pending before the Court of Justice of the EU (Case C-230/16 *Coty*, relating to a perfumes and cosmetics' selective distribution agreement).
5. **Dual Pricing:** the EC underlined that charging different prices to the same retailer depending on whether this retailer will resell the product online or offline is presumed to be in breach of EU competition rules. However, the EC then stated that it remains open to consider efficiency justifications in particular cases. For example, where a dual pricing arrangement is indispensable to address free-riding between offline and online sales channels of hybrid retailers, when the manufacturer's distribution network also includes pure online retailers.
6. **Resale Price Maintenance and Price Collusion:** these are well-established infringements of EU (and national) competition law, which may be heavily fined. The EC is concerned that online price transparency could facilitate such practices.
7. **Exchange of Sensitive Information** such as future prices is prohibited.

In the context of *digital content*, the EC's main concerns are:

1. **Geo-Blocking:** the EC noted that exclusive licensing on a territorial basis, coupled with contractual restrictions on cross-border sales may restrict competition.
2. The EC observed that the following practices may restrict competitors' entry or expansion in markets:
  - **Bundling** the right to deliver content online with rights to transmit content via other means (e.g., cable, satellite, mobile.);
  - **Long duration** of license agreements and renewal of such agreements;
  - **Payment structures**, such as advance payments or minimum guarantees.

Although the EC was very interested in digital content issues in the inquiry, it did not determine whether the practices it identified in this context infringe EU competition law.

### **Enforcement**

The EC has already launched several investigations. Several Member States are also investigating e-commerce markets.

EUROPEAN COMMISSION'S INVESTIGATIONS IN E-COMMERCE		
Year	Companies	Practice/s
2017	<i>Valve's</i> (game distribution platform) <i>agreements with Bandai, Capcom, Focus Home, Koch Media and ZeniMaw</i> (PC video game publishers) (available <a href="#">here</a> )	Geo-blocking
	<i>Guess</i> (clothing manufacturer and retailer) (available <a href="#">here</a> )	Geo-blocking
	<i>Nike, Sanrio and Universal Studios</i> (licensors of rights of merchandising products) (available <a href="#">here</a> )	Geo-blocking and restrictions of online sales
	<i>Asus, Denon &amp; Marantz, Philips and Pioneer</i> (consumer electronics manufacturers) (available <a href="#">here</a> )	Resale price maintenance
	<i>Meliá Hotels'</i> agreements with <i>Kuoni, REWE, Thomas Cook and TUI</i> (tour operators) (available <a href="#">here</a> )	Geo-filtering

## **Conclusions**

**First**, the EC has indicated that investigating potential anticompetitive practices in e-commerce is a priority. The EC has already launched several investigations and more cases can be expected.

- So, if not done before, companies' EU online sales and distribution practices should be reviewed against the conclusions of the e-commerce report to see if there are compliance issues and modified, as required (see further the attached presentation [here](#)).

**Secondly**, in recent times, the EC has brought few cases on vertical restrictions. The bulk of antitrust enforcement on vertical restrictions has been by the national competition authorities of the EU Member States ("NCAs"). In particular, some NCAs (e.g., Germany and France) have been very active in enforcement against online resale price maintenance and marketplace restrictions.

- Particular attention should also be paid to national enforcement practices.

**Thirdly**, the EC initially appeared to strongly favour the promotion of online sales as a way of developing the EU Single Market. However, in its Final Report, the EC recognized the legitimacy of arguments made by suppliers as to non-price and service competition for consumer goods.

So, the final report appears to respect a balance between the interests of both online and "brick and mortar" retailers of consumer goods. However, the EC's analysis regarding digital content is less conclusive.

- Particular attention should be paid to how the EC deals with such issues, insofar as it may affect strategic issues on how to structure online and physical sales systems.
- Companies should watch out for further developments regarding digital content.

For further details, again please see [the attached presentation](#).

This alert has been prepared by John Ratliff, Itsiq Benizri and Álvaro Mateo Alonso in WilmerHale, Brussels.

For further information on this or any other e-commerce issue, please contact those listed below or another member of WilmerHale's [Antitrust group](#) or [Big Data group](#).

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