

The European Commission's Inquiry into the E-Commerce Sector: What has been found so far and what it could mean for you

On 15 September 2016, the European Commission published a report presenting the preliminary findings of its ongoing antitrust inquiry into the e-commerce sector. The Preliminary Report reveals the existence of business practices potentially limiting competition in the online space such as contractual sales restrictions imposed on retailers and an extensive use of geo-blocking in the sale of both goods and digital content.

What is the European Commission's e-commerce sector inquiry?

The European Commission launched its inquiry into the e-commerce sector in May 2015. It is the eighth antitrust sector inquiry that the European Commission has launched to date, with earlier ones addressing among others the pharmaceuticals, energy, and financial services sectors.

As was the case with previous sector inquiries, the intent is not to investigate specific competition law violations but to allow the European Commission to understand the functioning of e-commerce in the EU, recognise market trends and identify areas of potential antitrust concern.

The wide-ranging scope of the inquiry covers manufacturers/suppliers,

retailers, e-commerce platforms such as marketplaces and price comparison websites, as well as payment service providers. Product categories include, among others, clothes, consumer electronics, computer software, books, CDs, DVDs and Blu-ray discs, as well as digital content (e.g., TV programmes, music, news).

Respondents were asked to provide data on the business relationship with their upstream and/or downstream counterparties, e.g., manufacturers, licensees, distributors etc

The inquiry is focused on conduct and agreements in all 28 EU member states and does not touch upon issues arising outside of the EU.

The Preliminary Report is subject to public consultation until 18 November

The Preliminary Report at a glance

- Cross-border sales restrictions in online distribution and geo-blocking are at the heart of the European Commission's concerns
- The sector inquiry may ultimately lead to competition enforcement action by the European Commission in individual cases
- The Preliminary Report is subject to public consultation until 18 November 2016
- The final report is expected in Q1/2017

2016. The final report is expected in the first quarter of 2017.

What is the Preliminary Report and what are its key findings?

The Preliminary Report presents the initial conclusions of the European Commission's analysis of over 8000 distribution contracts, as well as responses to questionnaires that were sent to over 1800 companies active in e-commerce. It identifies issues unearthed to date and provides a high level legal analysis of why they could potentially be problematic from antitrust perspective.

It is a "Preliminary Report" because its purpose is to launch an exchange of views with stakeholders in the context of a public consultation. Stakeholder views will be taken into account in the final report.

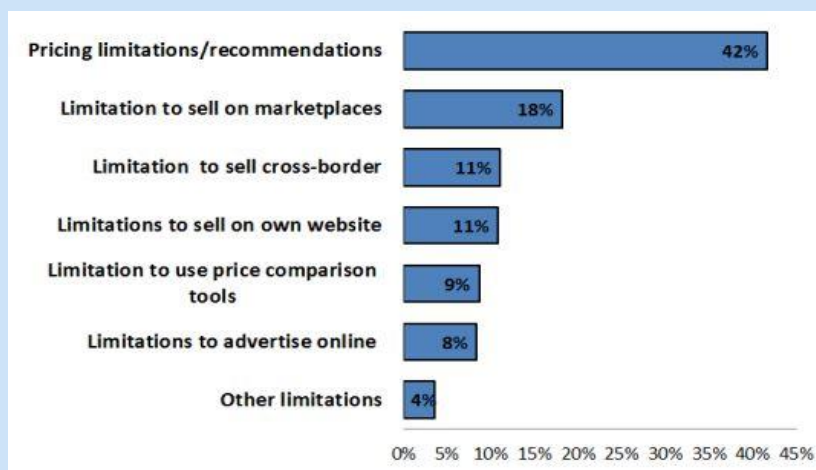
According to the Preliminary Report, key characteristics of e-commerce and the core elements of context in any antitrust analysis in the sector are (a) a high degree of price transparency between competitors and the tendency to conform to price changes by competitors; (b) ease of swiftly switching between online and offline sales channels; (c) direct retail activity by manufacturers; and (d) a widespread use of selective distribution.

The Preliminary Report identifies business practices that have come to light as a result of the investigation which could be problematic from a competition law perspective affecting e-commerce in goods and e-commerce in digital content:

E-commerce in goods

Distributors have reported to the European Commission that, in their desire to exert control over online distribution, suppliers are making extensive use of potentially problematic contractual provisions

Figure 1 – Proportion of retailers having contractual restrictions (per type of restriction)



Source: European Commission's Preliminary Report, page 107

regarding pricing, restrictions of cross-border sales, restrictions on the use of online marketplaces and price comparison tools.

Pricing

According to the European Commission, more than a third of the retailers contacted report having received some form of pricing recommendation from suppliers. At the same time 30 per cent of suppliers say they systematically track the prices of their products sold through independent retailers, using either manual tracking or price tracking software. A significant proportion of retailers (approximately one third) report that as a matter of course they comply with a supplier's price indications.

Such practices may signal resale price maintenance (imposing minimum retail prices), which remains one of the most serious breaches of EU competition law. The Preliminary Report further notes the risk that price monitoring by suppliers facilitates collusion by enhancing the already

existing price transparency in the online space.

Cross-border sales restrictions

Restrictions on sales of goods across EU member state borders were reported by one in ten retailers and were particularly prevalent in relation to online sales of clothes, shoes and consumer electronics.

Such contractual restrictions force retailers into using geo-blocking features on their websites. Geo-blocking in this context refers not only to blocking access to a retailer's website, but also to re-routing customers to websites servicing other member states, as well as refusing to deliver and accept cross-border payments.

However, even in the absence of contractual restrictions many EU e-commerce retailers are unilaterally choosing to apply geo-blocking.

Marketplace restrictions

18 per cent of retailers in the EU reported that suppliers are imposing contractual restrictions, preventing

these retailers from offering the suppliers' goods via marketplaces.

Image and positioning of brands is the rationale most often cited by manufacturers for restricting retailers' access to marketplaces. The Preliminary Report confirms that a case-by-case analysis will be required to determine the impact of individual marketplace restrictions on competition.

Restrictions on the use of price comparison tools

Nine per cent of retailers reported having entered into agreements with manufacturers restricting their ability to use price comparison tools. Restrictions range from absolute bans to limitations based on certain quality criteria. Absolute bans on the use of price comparison tools may limit one of the available avenues for retailers to generate website traffic.

E-commerce in digital content

Concerns about geo-blocking have been at the heart of the European Commission's e-commerce sector inquiry in relation to digital content from the outset. It is a widespread practice for licenses granted by rights holders for digital content to be national in scope or to cover only a limited number of EU Member States. Moreover, seven out of ten digital content providers stated that they have implemented at least one type of geo-blocking measure, while 59 per cent are contractually required to do so by digital rights holders. As previously stated in a March 2016 European Commission (DG COMP) report specifically addressing geo-blocking, unilateral decisions to engage in geo-blocking by non-dominant firms are not problematic from a competition law perspective. However, in the Preliminary Report,

the European Commission notes that it intends to take a closer look at geo-blocking occurring due to agreements between distinct undertakings (such as suppliers and retailers), as such agreements may potentially be considered anticompetitive.

What are the next steps in the Commission's e-commerce sector inquiry?

The release of the Preliminary Report launches a public consultation on the issues raised therein. Any stakeholder wishing to comment on the Preliminary Report has the opportunity to do so until 18 November 2016. The European Commission will take into account stakeholder views to draft its final report expected to be published in the first quarter of 2017.

Recent experience with the European Commission's Pharmaceutical Sector Inquiry (2008-2009) suggests that the final report is unlikely to be very different from the Preliminary Report.

The results of the European Commission's sector inquiry are likely to help shape the EU's rule-making initiatives related to e-commerce in the area of competition law as well as other areas. For example, the findings of the sector inquiry have informed two European Commission legislative initiatives launched on 14 September 2016: a proposal for copyright reform and a proposal for a Regulation on the promotion of internet connectivity.

The results may also trigger own-initiative investigations by the Commission into particular companies and practices. This was the case for example in relation to the Commission's pharmaceutical sector

inquiry, which triggered the investigations into reverse payment patent settlements, of which the resulting decisions are currently before the EU courts (Case T-472/13 *Lundbeck v European Commission* and Case T-691/14 *Servier v European Commission*). Moreover, national competition authorities may decide to initiate investigations into behaviour highlighted as potentially problematic in the European Commission's preliminary findings.

A number of the preliminary conclusions differ from the approach previously taken by the European Commission, or clarify positions that were not expressly stated in previous guidance. Consequently, companies active in e-commerce may benefit from an in-depth review of their contracts with suppliers and/or distributors in light of the assessments presented in the Preliminary Report and take measures to appropriately mitigate antitrust risk – particularly those companies using selective distribution networks and/or imposing online advertising restrictions.

Useful Links

[European Commission Press Release on the Preliminary Report](#)

[European Commission Fact Sheet on the Preliminary Report](#)

[Preliminary Report on the E-commerce Sector Inquiry \(full document\)](#)

[European Commission Press Release on the Geo-blocking Report](#)

[European Commission Decision Initiating the E-commerce Sector Inquiry](#)

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