

European Commission e-commerce report identifies widespread breaches in distribution arrangements

The European Commission's final e-commerce sector report indicates that there is widespread misunderstanding of EU competition rules on exclusive and selective distribution in online and offline channels. It highlights a number of practices uncovered during the inquiry that are considered by the Commission to be hardcore infringements of competition law. It also seeks to clarify the status of certain restrictions, although some of its findings are at odds with the decisional practice of national authorities and courts. Enforcement action may follow. Businesses should check their distribution arrangements against the findings in the report.

Distribution dangers

The Commission's final report covers a number of different issues relating to e-commerce, but one that appears particularly likely to attract follow-up enforcement action is the identification of seemingly widespread breaches of the rules on exclusive and selective distribution (see box for definitions) and contractual restrictions on online sales.

The report highlights the following potential infringements that were uncovered as a result of the Commission's e-commerce sector inquiry.

Territorial restrictions

- Contractual restrictions limiting retailers' ability to make active

and passive sales to customers outside their EU country of establishment or to customers located in certain EU countries.

- Restrictions on active sales by distributors to territories that have not been exclusively allocated to other distributors or reserved to the supplier.
- Restrictions on passive sales into territories that have been

exclusively allocated to other distributors or reserved for the supplier.

- Restrictions on the ability of authorised retailers to actively and passively sell to all customers within a region (covering several EU countries) within which a selective distribution system is operated - in some cases by limiting the

Distribution models

- "Exclusive distribution"**: a distribution system where the supplier allocates a territory or customer group exclusively to the distributor and commits to restrict active sales by other distributors into that territory or to that customer group.
- "Selective distribution"**: a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

ability of the retailers to launch websites targeting other EU countries.

- Restrictions on sales into the territory in which a selective distribution system is operated by distributors located outside that territory.
- Combining the appointment of an exclusive distributor for a certain territory at the wholesale level with a selective distribution system operated across several EU countries, with limits on the ability of the appointed wholesalers to actively sell to all authorised distributors within the EU countries in which the selective distribution network is operated. With respect to this last category, the Commission explains that suppliers can – within a selective distribution system – appoint a single wholesaler in a particular country that is required to sell only to authorised retailers, and can commit not to sell to other wholesalers in that country, provided they do not prevent wholesalers from making active or passive sales to authorised distributors in other territories.

Other practices giving rise to potential concerns

- Quality requirements for online sales that dissuade or prevent distributors from using the internet. These "may" include absolute bans on the use of price comparison tools or the supply of information to such tools, where such bans are not linked to objective quality criteria (the report lists a number of legitimate clauses that can be used to ensure that distributors respect



certain quality standards when selling online).

- Resale price maintenance (including threats or retaliation by suppliers against retailers that did not follow their retail pricing recommendations). These were found to be most common in the clothing, shoes, consumer electronics, and house and garden sectors.
- Restrictions on retailers' ability to use or bid on a supplier's trademarks in order to get a preferential listing on a search engine's paid results for that trademark (e.g. Google Adwords). These "could raise concerns" under the EU prohibition on anticompetitive agreements "should they restrict the effective use of the internet as a sales channel by limiting the ability of retailers to direct customers to their website".
- Bans on distributors using online marketplaces. The Commission considers that (subject to an upcoming ruling of the EU Court of Justice), such bans should not be considered hardcore antitrust infringements as their impact varies significantly. This conclusion is at odds with the approach taken by German courts and the German Federal Cartel Office. However, the Commission indicates that such bans might nevertheless be "scrutinised" where the marketplace is an important online sales channel for the market concerned and there is insufficient justification for the purpose of protecting a brand or ensuring pre- or post-sale advice (which may be the case if the supplier itself sells on the marketplace or accepts it as an authorised distributor).
- Exclusivity and price parity agreements ("most favoured nation" clauses) between retailers and marketplaces and/or price comparison tools. The report confirms the Commission's

view that these are not hardcore antitrust infringements and will be covered by the safe harbour of the block exemption for vertical agreements provided the parties' market shares fall below the relevant thresholds. Again, this conclusion is at odds with the approach taken by German courts and the German Federal Cartel Office. The report states that, in certain circumstances, such clauses may give rise to an infringement due to their anticompetitive effects, e.g. in markets where marketplaces play an important role, and not justified as necessary to avoid free-riding or to recoup investments by the marketplace.

- Exchange of competitively sensitive data (e.g. pricing, inventory levels, supplier data) between online marketplaces and third party seller or manufacturers and retailer, where the same players are direct competitors for sales of the relevant products.

Signs of flexibility

In other areas, the Commission appears open to arguments that its current guidelines are unduly restrictive. For instance, the guidelines broadly prohibit the offer by suppliers of price reductions, discounts or bonuses that differ according to whether the distributor resells the products online or offline and the volume of such sales (dual pricing arrangements).

Many businesses commented that this inhibits their ability to address free-riding between online and offline sales channels (e.g. where distributors build a large online sales presence selling to customers that have viewed and tested a product in a

competitor's physical outlets). On this point, the Commission states that it "remains open to consider efficiency justifications" for dual pricing that can be shown to be indispensable to address such free-riding.

Continued legal uncertainties

As noted above, the report's conclusions highlight a gulf between the position of the Commission on certain restrictions and the decisional practice of the German courts and Federal Cartel Office. This creates a worrying inconsistency in the application of EU competition law. Until this legal uncertainty is resolved, businesses should be mindful of these differences when formulating their EU-wide commercial policies and compliance initiatives.

Implications

The EU competition rules that govern permissible restrictions in distribution arrangements are complex, and the Commission's report noted that comments that it had received during the inquiry revealed potential misunderstandings.

Some of those misunderstandings appear to have resulted in hardcore infringements of the competition rules, which are punishable by fines up to 10% of the infringer's group worldwide turnover, even if there is no evidence that they had harmful anticompetitive effects in practice.

In addition, the report contains additional analysis and clarification on a number of issues that is not available in the Commission's existing guidance on distribution arrangements.

Businesses should therefore check whether the findings of the report necessitate any changes to their distribution arrangements.

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