

Antitrust | 15 September 2016

E-Commerce Inquiry – A Threat to Rights Holders and Retailers

The European Commission today published its preliminary report on the e-commerce sector inquiry (the “Preliminary Report”). The Preliminary Report focuses on the online sale of consumer goods and on digital content and has found that consumers may be prevented from receiving the best online deals due to restrictive practices. Regarding the online sale of consumer goods, such restrictions include price limitations, limitations on cross-border sales and restrictions on the use of price comparator websites, among others. With regard to digital content, the Commission found copyright licences to be complex, often exclusive, and to limit the territories, technologies and release windows digital content distributors may use.

The Commission notes that these practices may, in certain circumstances, breach EU competition law and advises companies to review their contractual arrangements in light of the Preliminary Report. The Commission has stated that it may open case-specific investigations to ensure compliance with EU competition law.

The E-Commerce Sector Inquiry

The Commission launched the e-commerce sector inquiry in May 2015 as part of its Digital Single Market Strategy, with a key aim of ensuring better access for consumers and businesses to goods and services. The inquiry’s purpose is to obtain an overview of the main market trends, collect evidence of possible competition barriers and analyse certain potentially restrictive business practices. The Commission gathered information from nearly 1,800 respondents from across the EU, including from manufacturers and sellers of a wide range of products, from e-commerce platforms as well as from digital service providers and digital content rights holders.

Similar past inquiries in energy and pharmaceutical industries resulted in separate investigations into specific companies. The Commission has indicated that it may open case-specific investigations to ensure compliance with EU antitrust rules. The Commission has advised companies to use the Preliminary Report as an opportunity to review their current arrangements, and if needed, to bring them in line with EU antitrust rules.

Online Sale of Consumer Goods

The inquiry notes that manufacturers increasingly use contractual sales restrictions in their distribution agreements—including some form of price recommendation or price restriction from manufacturers, restrictions on selling online, restrictions on submitting offers to price comparison websites and limitations on cross-border sales. The Commission considers that these restrictions may, under certain circumstances, restrict cross-border sales or online sales generally, preventing consumers from benefiting from greater choice and lower prices and potentially breaching EU competition law.

Digital Content

The Commission views the availability of copyright licences for content as essential for digital content providers and key to competition. The Preliminary Report states that copyright licensing agreements are often exclusive

and limit the territories, technologies and release windows digital content providers are allowed to use, and may in certain cases breach EU competition law.

The Commission Attacks Geo-blocking

The Commission is seeking to stop retailers and others from blocking consumers from buying content and products across EU Member States, so-called geo-blocking. The Commission wants to ensure that online retailers do not segment markets across national lines or restrict cross-border access to content. While suppliers are generally entitled to decide where to sell their products, the Preliminary Report states that if geo-blocking results from agreements between suppliers and distributors, then it may restrict competition and breach EU competition law. The Commission states that enforcement measures against geo-blocking would need to be based on a case-by-case assessment including an analysis of potential justifications.

The Commission published its initial findings on geo-blocking in March 2016, which noted that the practice was widespread in e-commerce across the EU, and in particular for digital content—where over 60% of responding digital content providers had agreed with rights holders to geo-block. The Commission already has pending investigations into Hollywood movie studios and video games makers in relation to alleged anti-competitive geo-blocking. The Commission also intends to limit geo-blocking through legislation, including the proposed Geo-blocking Regulation, the proposed Portability Regulation and through proposed amendments to the Satellite and Cable Directive.

Next Steps

The Preliminary Report is now open to public consultation for two months. The Commission has invited stakeholders to comment on it, to submit additional information and to raise any further issues. The Commission expects to publish the final Report in the first quarter of 2017.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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