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Competition Inquiry into the E-commerce Sector – What Does the Future Hold for Online Sales Restrictions?

The legal framework on vertical restrictions and e-commerce could see a significant change in Europe after the European Union (EU) Commission's plan to fully embrace the "digital revolution" and open up digital opportunities for its citizens and businesses.

On May 6, 2015, the EU Commission announced a Digital Single Market strategy for Europe. The aim of this strategy is to create in the near future a "connected digital single market," which in the words of Mr. Jean-Claude Juncker (President of the EU Commission), could "generate up to EUR 250 billion of additional growth in Europe in the course of the mandate of the next Commission."¹

According to even more optimistic figures released by the Commission, a fully functional Digital Single Market "could contribute EUR 415 billion per year to the European economy and create hundreds of thousands of new jobs."²

The Commission intends to achieve its ambitious goals (rather optimistically) by the end of 2016, through a set of

targeted actions aimed at tearing down (public and private) online barriers and "regulatory walls" that currently hinder a "seamless" access and exercise of online activities by consumers across the 28 national markets of the EU.

The overall strategy is built on three pillars and 16 key actions. The first pillar focuses on granting a better access for consumers and businesses to digital goods and services across Europe.

Within the first pillar, as a complementary action of the Digital Single Market strategy, the Commission also launched an Antitrust Competition Inquiry into the e-commerce sector, with a particular focus on "potential barriers erected by companies to cross-border online trade in goods and services where e-commerce is most widespread," such as "electronics, clothing and shoes, as well as digital content."³

According to the Commission's May 6 decision, despite an upward trend, cross-border e-commerce remains rather limited in the EU. In 2014 only 15 percent of the EU population shopped online from

a trader of goods or a provider of services based in another EU member state. This is not only because of language barriers, consumer preferences and differences in legal frameworks between member states, but also due to contractual restrictions which may be "deliberately" created by players in the e-commerce sector.

The purpose of the e-commerce inquiry is to gain more market knowledge in order to better understand the nature, prevalence and effects of the (private) barriers and identify competition concerns, to then be assessed in the light of EU antitrust rules.

In the course of the inquiry, the Commission may request the companies and the subjects concerned, to supply the information necessary for giving effect to Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and carry out any inspections necessary for that purpose. In particular, the Commission may request these entities – including service providers, suppliers and distributors of



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goods, online market places and price comparison websites⁴ – to communicate all agreements, decisions and concerned practices and to supply information, documents or statements.

Indeed, starting in June 2015, the Commission has sent out rather data intensive questionnaires to a wide range of stakeholders across the EU, planning to publish a preliminary report in mid-2016. Then, following a public consultation on the preliminary report, the Commission expects to publish the final report in the first quarter of 2017.

If, after analyzing the results, the Commission should identify specific competition concerns, it could open case investigations to ensure compliance with EU rules on restrictive business practices and abuse of dominant market positions.

Only the outcome of this inquiry will reveal its real impact on the existing legal framework of internet sales in the EU. However, companies and businesses involved in this inquiry should definitely expect some changes in the regulation of commercial practices resulting in barriers to cross-border online sales and should be ready to revise their present agreements.

In particular, the following online sales restrictions will be, most probably, under the attentive scrutiny of this investigation:

- (i) territorial restrictions imposed by manufacturers/suppliers throughout the distribution chain with the aim of limiting the geographical scope of online sales. The Commission is firmly determined to tackle and stop “unjustified geo-blocking” (i.e. practices used by online sellers for commercial reasons and often resulting from specific contractual provisions, when consumers are either denied access to a website based on their IP address/location/credit-card details or re-routed to a local store with different prices);
- (ii) restrictions to online sales obtained through contractual clauses limiting the use of third party platforms, especially in exclusive and/or selective distribution agreements (i.e. “platform bans”).

In particular, online platform bans will certainly be in the near future a hot topic, as competition concerns could arise in connection with contractual clauses imposing restrictions on distributors in the use of third party platforms. These are restrictions that are very common in selective distribution systems and that, at present – but probably not for much longer – are allowed under § 54 of the Commission’s Guidelines (Vertical Block Exemption Regulation “VBER” No. 330/2010).

In fact, this provision appears at odds with some recent court decisions

in the cosmetics (Pierre Fabre case: ECJ Judgement of October 13, 2011) and sports and leisure equipment sectors (Adidas case: German Federal Cartel Office proceedings closed in June 2014), where the European Court of Justice and the German Antitrust Authority have ruled that online (general) bans require “objective reasons,” and that “the aim to maintain a luxurious brand image is not a legitimate aim for restricting competition through a de facto ban of internet sales.”

Based on these antitrust precedents and also on the possible results of the Commission’s inquiry, the VBER and relevant guidelines (despite having been updated only five years ago) will probably be subject to further revision.

In the light of this trend, companies operating in the e-commerce sector will certainly need to check up soon on their existing distribution agreements and seek specialized legal guidance for revising or setting up the same. **P**

1 Extract from the Political Agenda for the next European Commission – *A new Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change* (15 July 2014).

2 European Commission - Press release (*A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen* – 6 May 2015).

3 European Commission - Press release (*Commission launches e-commerce sector inquiry* – 6 May 2015).

4 European Commission Decision of May 6 2015, initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No. 1/2003.