

# The European Commission Publishes its Final Report on the E-commerce Sector Inquiry

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On 10 May 2017 the European Commission published its Final Report on the E-commerce Sector Inquiry (the “[Report](#)”). The Commission’s E-commerce Sector Inquiry, launched on 6 May 2015 as part of the Digital Single Market Strategy, gathered evidence from nearly 1,900 companies connected with the online sale of consumer goods and digital content. The Commission published its initial findings on geo-blocking in an issues paper in March 2016, and its Preliminary Report in September 2016. The Final Report sets out the Commission’s definitive findings from the Sector Inquiry.

The Report identifies market trends such as increasing supplier.com sales (increasing direct competition between brands and their distributors and retailers), increasing use of selective distribution systems (increasing the control brands exert over their distribution chains) and the introduction of contractual restrictions controlling online distribution. While acknowledging that some of the restrictions imposed in the context of these developments may be justified, the Commission expresses concern that others may unjustifiably restrict consumer choice or reduce price competition, such that action by the Commission may be warranted. Specifically, the Commission identifies three types of restrictions that it considers may raise competition concerns.

In relation to selective distribution, the Commission’s position reflects its general approach that the restrictions inherent in such distribution structures may be justified and compatible with EU competition law. However, it warns that certain requirements, such as requiring retailers to operate at least one brick and mortar shop, may require further scrutiny since they appear to be essentially intended to exclude pure online players.

The Commission also addresses restrictions on the ability of retailers to sell or advertise online, including, for instance, prohibitions on the use internet marketing. It notes that these may be ‘by object’ infringements of EU competition law. The Commission also addresses more specific restrictions, including geographic restrictions (e.g., the fact that many retailers do not sell cross-border) that may be incompatible with EU competition law, and restrictions on the use of marketplaces. While the Commission acknowledges that marketplace bans are not generally a *de facto* prohibition on online selling, it notes that marketplace bans may not be generally compatible with European competition law, and suggests that competition authorities may decide to scrutinise such restrictions. Further, pricing restrictions (including “by object” restrictions such as resale price maintenance through minimum or fixed price setting) relating to online sale or advertising were

reported by at least a third of the retailers involved in the Sector Inquiry. In this context the Commission notes that increased price transparency through price-tracking software may both facilitate resale price maintenance and strengthen collusion between retailers.

Also reflecting this broader focus on data and algorithms, the Commission notes that the accumulation of large amounts of data is becoming increasingly important in e-commerce, and that this could raise competition law concerns. It cautions that the exchange of competitively sensitive data between marketplaces and third party sellers or between manufacturers and retailers might be problematic if these players compete with each other.

The press release relating to the Report welcomes the changes that many companies in the clothing and retail sectors have already made to their online commercial practices as a result of the sector inquiry's focus on these practices, and goes on to suggest that the Commission may open antitrust investigations in addition to the three investigations (in the holiday accommodation, PC video games and consumer electronics sectors) opened in February 2017.

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