

# European Commission Final Report on E-Commerce Sector Inquiry

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As part of its Digital Single Market strategy, in [May 2015](#) the Commission launched an inquiry into e-commerce with the aim of obtaining an overview of the prevailing market trends, gathering evidence on potential barriers to competition linked to the growth of e-commerce, and understanding the prevalence of certain, potentially restrictive, business practices and the underlying rationale for their use.

In the course of its inquiry, the Commission gathered evidence from nearly 1,800 companies providing consumer goods and digital content (including manufacturers, retailers, marketplaces, price comparison tool providers, etc.) and analysed around 8,000 distribution agreements. Following the publication of its preliminary report on 15 September 2016, the Commission opened a public consultation to all interested stakeholders.

On 10 May 2017, the Commission published its final report. The report is divided into two sections, covering e-commerce issues in relation to consumer goods and digital content. It also identifies business practices that might restrict competition and limit consumer choice.

## **In the context of the publication of the report, the Commission:**

- Intends to target enforcement of EU competition rules at the most widespread e-commerce business practices that may negatively impact competition and cross-border trade and the subsequent functioning of the Digital Single Market.
- Proposes to broaden the dialogue with national competition authorities within the European Competition Network to contribute to a consistent application of the EU competition rules as regards e-commerce.
- Confirms there is no need to anticipate the expiry of the Vertical Block Exemption Regulation (VBER) in May 2022. Rather, the data and information gathered throughout the course of the inquiry can be used as input in a future review.

## **Consumer Goods**

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**With regards to consumer goods, the Commission's main findings are as follows.**

### *Price Transparency and Monitoring*

**A high degree of price transparency and monitoring has led to an increase in price competition that has generated:**

- “Free-riding”: Customers are able to switch quickly from one sales channel (online to offline and *vice versa*) to another. Many of them use the pre-sales services offered by one sales channel, such as a product demonstration or personal advice in a bricks and mortar shop, or a comparison search for product information online, but then purchase the product through another channel.
- Price competition: Although the ability to compare prices across several online retailers may have beneficial effects for consumers, the Commission is concerned that it also has to the potential to affect competition in other areas, such as quality, brand and innovation.
- Price monitoring: 53 per cent of respondent retailers report tracking the online prices of competitors, with almost 70 per cent using automatic software programs to do so. The availability of real-time pricing information may trigger automated price coordination, so the wide-scale use of such software may, in some situations, raise competition concerns.

### ***Increased Direct Retail Activities by Manufacturers***

Of the manufacturers that responded, 64 per cent opened their own online shops in the last 10 years, with the cosmetics and health care products category reporting the highest proportion of manufacturers with their own online shop. As a result, manufacturers are increasingly competing against their own independent distributors.

### ***Expansion of Selective Distribution***

As a reaction to increased price transparency and competition, many manufacturers have sought greater control over distribution networks with the intention of better controlling price and quality. This has led to the increased use of “selective” distribution systems, where manufacturers set the criteria that retailers must meet to become part of their distribution network and where all sales to unauthorised retailers are prohibited.

For example, a majority of the manufacturers polled require retailers to operate and display their products in a bricks and mortar shop, thus excluding pure online players from the distribution of many products.

Having received complaints from retailers about the lack of transparency and objectivity of the selection criteria used by manufacturers to choose members for their distribution networks, the Commission notes that i) manufacturers have no legal obligation to publish their selection criteria, and ii) the bricks and mortar shop requirements are generally covered by the VBER.

The Commission does, however, consider that requirements to operate a bricks and mortar shop, with no apparent link to ensuring distribution quality and/or other potential efficacies, may require further scrutiny. The Commission also confirmed that explicitly, or *de facto*, prohibiting a retailer from

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using the internet constitutes a hardcore restriction under the VBER.

### ***Contractual Sales and Advertising Restrictions***

The report identified several types of contractual sales and advertising restrictions that may, under certain circumstances, make cross-border or online shopping more difficult and ultimately harm consumers by preventing them from benefiting from greater choice and lower prices in e-commerce

### ***Online Pricing Restrictions/Recommendations***

Of the agreements examined, 42 per cent of retailers are subject to some form of pricing restrictions, specifically through resale price maintenance imposed by manufacturers. The Commission also reported respondents' concerns about the current rules on "dual pricing". While manufacturers are generally prohibited from charging different wholesale prices for the same products to the same retailer, depending on whether the products are intended to be sold online or offline, it was submitted that dual pricing can be an efficient tool to address free-riding as it helps to create a level playing field between online and offline sales, taking into consideration differences in the costs of investments.

### ***Restrictions on Selling on Online Marketplaces***

Online marketplaces are considered an important sales channel for smaller and medium-sized retailers, but 18 per cent of respondent retailers report having agreements with their suppliers that either absolutely ban selling on a marketplace or ban selling if a marketplace does not meet specified criteria. The legality of such a restriction has attracted attention throughout the European Union and a reference to the European Court of Justice on this issue is pending (Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*).

### ***Geographic Restrictions: Restrictions of Cross-Border Sales and Geo-Blocking***

The use of "geo-blocking", or measures used by retailers to block consumers' access to websites, re-route consumers to websites targeting other Member States, or refuse to deliver cross-border or accept cross-border payments, have become prevalent. A full 38 per cent of retailers admit to collecting information on the location of the customer in order to implement geo-blocking measures. While geo-blocking measures based on unilateral decisions of non-dominant companies fall outside the scope of Article 101 of the Treaty on the Functioning of the European Union, geo-blocking measures based on agreements or concerned practices may be caught.

### ***Other Restrictions and Price Comparison Tools***

Smaller groups of respondent retailers reported agreements with manufacturers that limited or restricted their use of price comparison tools or ability to use or bid on the trade marks of manufacturers. These could allow a manufacturer to secure a preferential listing on a search engine's paid referencing service, *i.e.*, Google Adwords, while preventing a retailer's website from appearing prominently in a keyword search.

Just 2 per cent of respondent retailers reported having a parity clause in agreements with larger marketplaces. While parity clauses may lead to a reduction of intra-brand competition and reduce competition between online retailers and marketplaces, the Commission considers that they may also lead to efficiencies, such as avoiding free-riding, and so must be analysed on a case-by-case basis.

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## ***The Rise of Big Data in E-Commerce***

While not specifically focusing on the issue, the inquiry also found that the collection, processing, and use of large amounts of data is becoming increasingly important for e-commerce. This could raise competition concerns as it becomes easier than ever to exchange competitively sensitive data between marketplaces and manufacturers.

## **Digital Content**

With regards to digital content, the Commission found that one of the key determinants of competition in is the availability of licenses from the holders of the copyrights in the content.

### ***Restrictions on Technologies, Timings and Territories***

Copyright licensing agreements are complex and often exclusive, and tend to be split between technologies (such as the right to transmit online and the right to deliver the content *via* a certain technology, such as streaming); timings, *i.e.*, restricted periods when the content can be released; and territories.

The report confirms widespread geo-blocking across the European Union, with 68 per cent of digital content providers reporting that they restrict access to their online digital content services from other Member States. Just over half (59 per cent) of respondents stated that they impose such restrictions because of their contractual agreements with the content's right holders. Last year the Commission proposed a regulation that would prevent "unjustified" geo-blocking within the internal market; the regulation has yet to be formally adopted.

### ***Duration of Licensing Agreements and Contractual Relationships***

The report found that a vast majority of licensing agreements with digital content providers were relatively long-term, *i.e.* with durations of at least two years and up to 10 years, which may create difficulties for digital content providers seeking to enter a certain market or expand their existing commercial activities.

According to the Commission, this issue may be exacerbated by certain contractual clauses typically found in licensing agreements, such as automatic renewal clauses and first negotiation clauses providing for the right to a first renewal of the licensing agreement.

### ***Payment Structures***

The inquiry found that rights holders licensing attractive content tend to make use of payment structures such as advance payments, minimum guarantees, and fixed fees per product, irrespective of the number of users. The Commission believes that these practices implicitly privilege more established content providers, which are typically able to commit to greater levels of investment up front. The Commission queries whether or not these practices make it more difficult for new online business models and services to emerge and for new or smaller players to enter existing markets.

## **Comment**

The Commission's goal is to enhance cross-border trade to enable consumers to benefit from wider choices and lower prices. To fulfil that aim, the Commission has made it clear that it will target the

most widespread e-commerce business practices that may negatively impact the functioning of the Digital Single Market.

Indeed, in February 2017 the Commission reported that it had opened three investigations into suspected anticompetitive e-commerce-related practices in the consumer electronics, video games and hotel accommodation sectors, and that other investigations would follow.

It would therefore be advisable for e-commerce businesses to review their commercial practices and revise them as necessary sooner rather than later.

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National Law Review, Volume VII, Number 136

Source URL: <https://natlawreview.com/article/european-commission-final-report-e-commerce-sector-inquiry>