

EU Issues Final Report on its E-Commerce Sector Inquiry and Updates its Digital Single Market Plans

AntitrustConnect Blog

May 24, 2017

Jay Modrall (Norton, Rose, Fulbright LLP)

Please refer tot his post as: Jay Modrall, 'EU Issues Final Report on its E-Commerce Sector Inquiry and Updates its Digital Single Market Plans', AntitrustConnect Blog, May 24 2017, <http://antitrustconnect.com/2017/05/24/eu-issues-final-report-on-its-e-commerce-sector-inquiry-and-updates-its-digital-single-market-plans/>

On May 10, 2017, the European Commission published the final report on its sector inquiry on competition in the e-commerce sector (the E-Commerce Report) and a mid-term review of its digital single market (DSM) initiative (the DSM Review), both of which were originally announced in May 2015.

The E-Commerce Report confirms that the Commission has no plans to revise the Vertical Restraints Block Exemption before its expiry in 2022 as a result of the sector inquiry, and the report is circumspect in identifying particular online practices as problematic. The Commission has however launched several investigations as a result of the inquiry, and further enforcement action seems likely. The E-Commerce Report mentions big-data concerns, but does not discuss this area in detail since big data were not a focus of the sector inquiry.

The DSM Review presents a mixed picture; the Commission has launched 35 legislative proposals and policy initiatives, but only one has so far been adopted by the European Council and Parliament. The DSM Review describes several future actions, including a legislative proposal to limit Member States' ability to impose data localization requirements; an initiative on accessibility and reuse of public and

publicly funded data; an initiative (possibly including legislation) to address unfair contractual clauses and trading practices by online platforms; and guidance for online platforms on the notification and removal of illegal content and liability rules. The DSM Review does not discuss the European Parliament's call for an initiative to target concerns around robotics and artificial intelligence.

The continued close coordination between the Commission's regulatory and antitrust enforcement agendas is remarkable, and the Directorate-General for Competition can be expected to continue focusing enforcement resources in this area in support of the Commission's broader policy goals. The DSM initiative is one of the Commission's highest priorities; the measures already launched and still to come will have significant implications for all businesses operating in the European Union.

E-Commerce Sector Inquiry Report

During the e-commerce sector inquiry, the Commission gathered evidence from nearly 1,900 companies operating in e-commerce of consumer goods and digital content and analysed around 8,000 distribution and license contracts. The Commission published initial findings on geo-blocking in March 2016 and a preliminary report in September 2016; the detailed findings from the inquiry are set out in a staff working document accompanying the E-Commerce Report.

As noted, following completion of the sector inquiry, the Commission has concluded that there is no need to revise the Vertical Restraints Block Exemption before its expiry in 2022. The E-Commerce Report is circumspect in identifying particular e-commerce practices as problematic, but the Commission linked three investigations announced in February 2017 (into retail price restrictions, discrimination based on location and geo-blocking in relation to consumer electronics, videogames and hotel accommodations) to the e-commerce sector inquiry and noted that a number of companies in the clothing and other sectors had reviewed their online sales practices as a result of the inquiry. The Commission continues to look very closely at this sector, and further enforcement actions are likely.

In relation to consumer goods, the E-Commerce Report confirms that manufacturers increasingly sell their products directly to consumers through their

own online retail shops, thereby competing with their distributors; use selective distribution systems to better control their distribution networks; and use contractual restrictions, such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks, to control product distribution. The Commission notes that “[s]ome of these practices may be justified,” while others may infringe EU competition rules by unduly preventing consumers from benefiting from greater product choice and lower prices.

The E-Commerce Report singles out several issues for discussion:

- *Online market place bans.* The E-Commerce Report highlights the prevalence of manufacturers’ requirements that distributors operate brick and mortar shops, thereby excluding pure online players. The Commission notes that such requirements without any apparent link to distribution quality or other efficiencies may attract further scrutiny, but restates the Commission’s view that online marketplace bans should not be considered *per se* illegal (an issue currently before the European Court of Justice in the *Coty* case).
- *Resale price maintenance.* The E-Commerce Report highlights the prevalence of price tracking software, which can facilitate illegal resale price maintenance or facilitate or strengthen collusion between retailers.
- *Dual pricing.* The E-Commerce Report discusses the common practice of dual pricing, noting that while charging different wholesale prices to different retailers is generally unproblematic, dual pricing for a hybrid retailer is considered *per se*
- *Geographic restrictions.* the Commission notes that some geographic restrictions on distributors’ ability to sell and advertise online may not respect the rules governing prohibitions of active versus passive sales outside of distributors’ allocated territories.

In relation to digital content, the E-Commerce Report notes that the sector inquiry confirmed that digital content providers depend on the availability of licences from content copyright holders and points to certain licensing practices that may make it more difficult for new online business models and services to emerge. As in its discussion of consumer goods, the E-Commerce Report does not take firm positions on practices believed to infringe the competition rules, but highlights certain practices for discussion:

- *Bundling digital content rights.* The E-Commerce Report notes that digital rightholders tend to split their rights into several components and often bundle certain rights together. According to the Commission, such bundling may lead to a restriction of output in situations where online rights have been acquired but are not, or only partially, exploited by the licensee.
- *Geo-blocking digital content.* The E-Commerce Report notes that online rights are often licensed on a national basis and that digital content providers often use geo-blocking. Interestingly, however, the E-Commerce Report does not raise any red or even yellow flags in relation to such practices, which are addressed in legislative proposals as part of the DSM programme.
- *Duration of license agreements.* The E-Commerce Report notes the relatively long duration of licensing agreements and highlights the use of clauses that can facilitate the extension of such rights, but once again the report does not indicate that such practices raise competition concerns.
- *Payment structures and metrics.* The E-Commerce Report notes that licensing payment structures for non-premium content privilege more established content providers and raise a question whether certain licensing practices may create barriers to entry. However, the Commission does not indicate concern with any specific practice.

The E-Commerce Report notes that the competitive role of big data was not covered by the sector inquiry but observes that big data practices can raise competition concerns, in particular where marketplaces and third party sellers, or manufacturers with their own shops and retailers, are in direct competition. These issues have been addressed in a number of studies and speeches, including speeches in [September 2016](#) and [March 2017](#) by Commissioner Vestager.

DSM Mid-term Review

In the Mid-Term Review, the Commission notes that it has acted on all 16 of the originally announced DSM action items, delivering 35 legislative proposals and policy initiatives. Only one has been approved by the European Council and Parliament, however, and the Commission calls for speedy action to adopt other proposed legislation, highlighting a proposed update of EU telecommunications

regulations intended to encourage investment in high-capacity networks, which were [announced](#) in September 2016.

The Commission also identified three priority areas for further action:

- *European data economy.* The Commission plans to publish proposed legislation in Fall 2017 on the cross-border free flow of non-personal data and an initiative in Spring 2018 on accessibility and reuse of public and publicly funded data. Previous to its January 2017 consultation, the Commission has expressed interest in EU legislation to prevent Member States from enacting unjustified data localization requirements but felt it needed more evidence of the ways such requirements harm the single market; the Commission apparently now feels it has enough ammunition to proceed. Significantly, the Commission's initiative on accessibility and reuse of data apparently will not extend to all raw machine generated non-personal data, as proposed in the consultation, although the Commission says it continues to look at data access rights.
- *Cyber-security.* In September 2017 the Commission aims to revise the 2013 EU Cybersecurity Strategy and the mandate of the European Union Agency for Network and Information Security (ENISA). The Commission also intends to propose additional measures on cyber-security standards, certification and labelling to make the Internet of Things more secure.
- *Online platforms.* By the end of 2017, the Commission plans an initiative, possibly including legislation, to address unfair contractual clauses and trading practices in platform-to-business relationships and to improve coordination of platform dialogues, including through the issuance of guidance on procedural aspects of the notification and removal of illegal content and liability rules.

The Commission also describes further action in the areas of e-procurement and e-health and stresses the importance of international negotiations in relation to data protection and transfer. Interestingly, the Commission did not announce specific actions in relation to robotics and artificial intelligence, despite a call for action from the European Parliament in its [resolution and recommendation](#) in February 2017.

This post originally appeared on the [Kluwer Competition Law Blog](#).