The EU Commission investigates e-commerce sector following the publication of its report

EU Commission, Final report on the E-commerce Sector Inquiry, 10 May 2017

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Introduction

The European Commission ("Commission"), on May 6, 2015, introduced a sector inquiry with regard to electronic commerce ("e-commerce") of consumer goods and digital content in the European Union ("EU"). This inquiry is part of the Commission's Digital Single Market Strategy that is designed to provide some leverage in the digital economy. It aimed to understand new market trends, as well as possible competition restrictions that could emerge with the development of e-commerce and business practices.

The Commission first published its Preliminary Report on the e-commerce Sector Inquiry ("Preliminary Report") [1] on September 15, 2016, and then published its final report on May 10, 2017 ("Final Report") [2]. The Final Report states that the EU is one of the largest e-commerce market in the world; therefore, its findings would shed light on the Commission’s concerns, and advice to players in the market.

The Final Report mainly focuses on two issues: e-commerce of consumer goods and digital content [3].

In light of the Preliminary Report, the Commission opened three investigations that it announced in its press release dated February 2, 2017 in order to deal with the issues of price restrictions and preventing cross-border purchases (i.e. geo-blocking).

The sector inquiry has prompted companies to review their commercial practices on their own initiative. In the Final Report, it is stated that such a review can help consumers to purchase products more easily cross-border and benefit from lower prices and a wider choice of retailers.

The first part of this article focuses on the key findings of the Final Report with regard to the e-commerce of goods, and the second part will portray main antitrust practices that the Commission focuses on in its investigations.
Key Findings of the Report

**E-commerce of Goods**

The Commission has obtained information from a variety of market players, such as retailers, manufacturers, and online payment service providers operating in categories including clothing, electronics, household appliances, computer games, software, media, healthcare, cosmetics, etc., in order to conduct its inquiry and to form its Final Report.

**Price Transparency**

In light of this inquiry, the findings of the Commission conclude that online price transparency is the feature that most affects players and customers. Price transparency has multiple effects, both negatively and positively, and is said to directly affect behaviors of customers. Customers could, in a short time, compare products and their prices online, and move from one channel to another, which would help the customer to avail him/herself of the best deal; therefore, this aspect works advantageously for the customer. However, this could also give rise to free-riding.

**Free-Riding**

It is highlighted in the Final Report that free-riding is a major concern to both retailers and manufacturers. Consumers tend to switch between sales channels. Many customers use the benefits of product demonstration and personal advice in brick and mortar shops, but later purchase the product through another sales channel. These types of behaviors have led manufacturers and retailers to grant exclusivity, and to create selective distribution systems.

**Price Competition**

Price competition is created by the ease of comparing prices, and has had negative effects on competition in terms of quality, brand and innovation, as well as its benefit to customers. Quality and brand are very important features in terms of inter-brand competition, and are a key concern for manufacturers and brand owners.

This price transparency is also closely monitored by the companies. It is concluded in the Final Report that most of the retailers track online prices, and almost seven out of ten of them do so through a software program. Retailers use these prices to adjust their own prices according to their competitors’ prices.

**Selective Distribution**

There is an increasing trend to adopt a selective distribution system whereby manufacturers set criteria for quality in order for retailers to become part of their network, and sales to unauthorized retailers are prohibited. Manufacturers reported that they use this system to control distribution quality and prices as a result of the development of e-commerce.

The results of the e-commerce sector inquiry in the Final Report do not call for a change to the Commission’s general approach to qualitative and quantitative selective distribution. However, it is noted that selective distribution may facilitate the implementation and monitoring of certain vertical restraints that may raise competition concerns and require scrutiny.
Vertical Restraints

The growth of e-commerce has also led to the increase of vertical restraints used by manufacturers. These restraints may be seen as pricing restraints, marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks.

In terms of cross-border sales, preliminary findings on restrictions point out that retailers resort to geo-blocking in order to limit cross-border online sales. While products are typically sold throughout the EU, 36% of respondent retailers reported that they do not sell cross-border for at least one of the relevant product categories in which they are active.

Commission’s Investigations

As it is portrayed above, the Preliminary Report puts forth that e-commerce in the EU faces restrictions in terms of retail pricing and geo-blocking. The Commission’s main motivation in investigating sectors of consumer electronics, video games, and hotel accommodation is to question whether the benefits of e-commerce, namely, a wider choice of goods, and providing cross-border purchase is prevented.

Consumer Electronics

The Commission is investigating Asus, Denon & Marants, and Philips and Pioneer, all of which are active in the consumer electronics sector. The anticompetitive practice suspected in this sector is whether these manufacturers restrict online retailers to set prices for products, such as household appliances, notebooks and wi-fi products.

The Commission states in its press release that the suspected price restrictions could be increased through the pricing software used by online retailers, which directly adapts the retail prices for competitors.

Video Games

The Valve Corporation (owner of Steam), Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax (PC video game publishers) are investigated by the Commission with regard to their executed bilateral agreements.

The Commission suspects geo-blocking, which is stated to be a big concern in the EU market in the Report. In this case, the Commission states in its press release that these companies may be preventing consumers from purchasing PC video games due to their country or location.

In order for customers to play the games that they purchase they need to activate the game, this will mean that the game is not pirated. This is achieved through an “activation key” on the Stream. The Commission tries to establish whether the agreements investigated require an “activations key” for geo-blocking. The “activation key” can provide access to a customer only in a certain EU Member States. This could prevent cross-border competition, “parallel trade,” and consumers from purchasing products in other Member States.

Hotel Prices
The Commission is investigating agreements between Kuoni, REWE, Thomas Cook, TUI (tour operators) and Melia Hotels. The Commission suspects that hotels and tour operators discriminate customers because of their location. This would prevent customers to see the full availability of hotels and book the rooms at the best rate.

Conclusion

The insight acquired from this sector inquiry will shape the EU antitrust enforcement. Currently, the consumer electronics and video games investigations that were initiated after the Commission’s sector inquiry on e-commerce are ongoing. Further investigations will follow along with the growth of e-commerce.


[3] For the purpose of this article Commission’s key findings on digital content is not included herein.