

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Implications of E-commerce for Competition Policy - Note by Spain****6 June 2018**

This document reproduces a written contribution from Spain submitted for Item 5 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm

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Spain

1. Spain is experiencing the same trend as other countries in relation with the booming of e-commerce; in 2016 retail e-commerce sales amounted to 24 billion euro, with an annual growth of 20,8%¹
2. However, this increasing relevance of e-commerce in the Spanish economy is not matched by an increase in antitrust complaints received by the Spanish Competition Authority (CA or CNMC) involving e-commerce.
3. The only complaint that led to a detailed investigation was case S/DC/0592/16 LABORATORIOS MARTI TOR.² This case involved a parapharmaceutical company who enforced a minimum resale price on certain products, whether sold offline or online. The Spanish CA decided not to open formal proceedings because of the limited extent of the market covered by the affected products.
4. Given the relevance e-commerce is gaining in the Spanish economy, the Spanish CA took the initiative to open two *ex officio* preliminary investigations regarding Amazon and eBay, which operate the biggest e-commerce platforms for physical goods in Spain. The focus of both investigations was their contractual arrangements with sellers using these platforms in order to detect possible anticompetitive restraints affecting platform competition, with a particular focus on (i) exclusivity clauses, (ii) price parity clauses,³ and (iii) tying between the marketplace services and logistic services or the use of a particular payment service.
5. As already mentioned, the focus of these investigations was competition between online marketplaces, so we were not able to ascertain the degree to which marketplace bans are prevalent in the Spanish market.
6. After a detailed analysis of the answers provided to several requests for information, the Spanish CA did not find cause for concern and no formal proceedings were opened against these companies.
7. However, one lesson the Spanish CA drew from these investigations is the risk for competition arising from the misuse of confidential information of sellers in a platform by the platform itself when the platform competes downstream with these sellers. Though this risk remains theoretical, as far as the Spanish CA knows, CAs would do well in making sure dominant platforms who are vertically integrated put in place the appropriate check and balances to avoid running afoul of competition law in this regard.

¹ According to figures gathered by the Spanish Competition Authority or CNMC <https://www.cnmc.es/node/363937>

² For further information, see <https://www.cnmc.es/expedientes/sdc059216>

³ It is worth noting that in 2013 the German and British CAs terminated their proceedings against Amazon for enforcing price parity clauses on its Marketplace platform, without sanction, after the company had agreed to drop these clauses. Following this settlement with the German and British CAs, Amazon chose unilaterally to end this practice in the whole of the EU.

8. The Spanish CA is currently conducting three preliminary investigations related to e-commerce. Though the identity of the companies being targeted remains confidential, the main issues being investigated are as follows:

- The use of wide price parity clauses by platforms
- The absolute ban on internet sales
- Price divergence between the good being sold online and that offline (so called dual pricing), through the granting of discriminatory discounts by the supplier.

9. The similarities between these investigations and some cases already closed by the CAs of other Member States of the EU illustrate the need to develop a common answer to problems experienced across Europe, given the international dimension associated with e-commerce.

10. However, the difficulties involved in reaching this consensus should not be understated because competition enforcement in e-commerce does not usually lend itself to a straightforward answer.

11. The factors that complicate the analysis of CAs are, among others:

- The new business models of the internet economy, where one side of the platform is often cross-subsidized by another side of the platform.
- The natural concentration that markets with platforms experience.
- The inherent dynamism of e-commerce, which makes uncertain the welfare evaluation of a practice (hard to ascertain its dynamic effects).
- The lack of a general theory of platform competition with clear welfare implications.

12. Digital markets (and e-commerce, in particular) pose old questions that are related to imbalances between parties at stake, such as those experienced in the past by other sectors such as food providers and big distribution chains. However, it is worth reminding that the answer to these perceived imbalances has been traditionally tackled with other instruments like consumer protection laws, unfair practices legislation or specific regulation.

13. For this reason, the Spanish CA believes that the appropriate way to approach these imbalances is to look whether there are market failures that competition cannot solve and, if it is the case, then regulation should be proposed, evaluated and eventually implemented. This is the path that the European Commission seems to have followed with its public consultation regarding online platform regulation, which seeks to redress perceived imbalances in platform-to-business relations.

14. Conversely, the core antitrust provisions (basically, articles 101 and 102 of the Treaty on the functioning of the EU, for Spain and the EU) should not be used to solve market failures that need a specific regulation. Trying to artificially enlarge the reach of competition law to condemn practices that are not the result of the exercise of market power, could undermine the sound application of antitrust principles based on robust economic analysis and solid theories of harm.

15. In the field of vertical restraints, experience shows that these practices call for a careful balance between their efficiencies and anticompetitive effects, an analysis which is made more difficult by the dynamism of the e-commerce sector. In addition, we know

from well-established literature that vertical restraints do not pose a direct threat to competition as horizontal agreements do and, as a result, the Spanish CA tends to prioritise e-commerce investigations where the level of concentration is high, since vertical restraints in concentrated markets will have a higher impact on competition.

16. The novel issues posed by the digitization of the economy have led the Spanish CA to set an internal Working Group composed of case handlers from the different units horizontally affected by this economic trend. This Working Group is actively following developments affecting e-commerce, among other issues, with a particular focus on two areas:

- Restraints on the use of online advertising imposed by suppliers of branded goods that may impair retailers' ability to compete downstream, without an objective justification.
- Price discrimination against the online channel which is not proportionate and lacks an objective measure for justifying it.