

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

This document reproduces a written contribution from the European Union 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

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03432679

European Union

1. Introduction

1. This paper contains the European Commission's ("Commission") contribution to the OECD Roundtable on e-commerce and competition scheduled for June 2018 in Paris. The Commission addresses the suggested topics to be discussed at the Roundtable with a particular focus on the main findings of the Commission's e-commerce sector inquiry which was finalised in 2017.¹

2. *Background*

3. The EU is today one of the largest e-commerce markets in the world. The percentage of people aged between 16 and 74 that have ordered goods or services over the internet in the EU has grown from 30% in 2007 to 57% in 2017.² In view of the growing importance of e-commerce in the EU, the Commission adopted the Digital Single Market Strategy in May 2015.³ The Digital Single Market strategy outlines several key actions under three pillars. One of these pillars relates to ensuring better access for consumers and businesses to goods and services via e-commerce across the EU.⁴

4. Under this pillar, the Commission carried out a sector inquiry⁵ into e-commerce between 2015 and 2017.⁶ The sector inquiry showed that consumers and businesses alike are affected by the rapid growth and development of e-commerce. The e-commerce sector inquiry took into account around 1800 responses from stakeholders (e.g. retailers, marketplaces, price comparison tool providers, payment system providers, manufacturers, digital content providers and right holders) and analysed about 8000 agreements in total related to online sales of consumer goods and licensing of digital content. The e-commerce sector inquiry is the most recent analysis of competition policy aspects of e-commerce at EU level.

5. As a follow-up to the e-commerce sector inquiry and in the context of the Digital Single Market strategy, the Commission has decided to target the enforcement of the EU competition rules to the most widespread business practices that have evolved as a result of the growth of e-commerce and that pose a risk to competition and cross-border trade within the European Single Market. At the same time, the Commission actively participates in the dialogue with national competition authorities within the European Competition Network ("ECN") to contribute to a consistent application of EU competition rules in e-commerce markets. Legal certainty and a uniform application of the law is an essential requirement for companies wishing to be active across the EU's Digital Single Market.⁷

1.1. Main results of the sector inquiry

6. The results of the sector inquiry show that some business practices which have emerged in e-commerce markets may raise competition concerns. These business practices mainly relate to restraints in vertical agreements between undertakings active at different levels of the production or distribution chain.

7. Price transparency and price competition have increased with online trade. Consumers are able to instantaneously obtain and compare product and price information

online, and switch swiftly from one channel (online/offline) to another which may result in free riding.

8. While increased price competition has beneficial effects for consumers, it may affect competition on parameters other than price, such as quality, brand and innovation.

9. Additionally the price transparency which comes with e-commerce provides possibilities to easily monitor the price setting behaviour of competitors and retailers. Many companies use pricing software which automatically adjusts prices to those of competitors.

10. A particular concern for European competition law is related to market segmentation which can be the consequence of territorial restrictions in vertical distribution and license agreements. Such restrictions limit the potential of e-commerce in terms of fostering market integration in the EU which is an explicit goal of EU competition policy. In the last 60 years the EU Courts have constantly found that vertical restrictions that hinder market integration within the EU restrict competition.⁸ While cross-border trade within the EU has become much easier with e-commerce, technical measures allow companies to implement or monitor such vertical restrictions with little effort, for example through geo-blocking practices.

11. Many of the restrictions found in the e-commerce sector inquiry are well-established vertical restraints in a "new guise" such as resale price maintenance (RPM) or territorial sales restrictions. Other restrictions raise new issues such as sales or advertising restrictions concerning online platforms or enforcement of so-called "most-favoured-nation" (MFN) clauses.

1.2. Follow-up investigations

12. Following-up on the e-commerce sector inquiry, the Commission has initiated a number of follow-up investigations⁹ (explained in more detail in this submission) with a particular focus on territorial restrictions that run counter to the objective of creating an EU Digital Single Market.¹⁰

13. In the following, the Commission will address the topics proposed for discussion at the Roundtable meeting.

2. Market definition in e-commerce markets

14. The issue of market definition as such was not looked at and analysed in more detail in the e-commerce sector inquiry. Nonetheless, some findings of the sector inquiry may be of interest in the context of discussing market definition. These findings are without prejudice to the assessment of the relevant product and geographic markets in individual cases.¹¹

15. First, the results of the e-commerce sector inquiry show that e-commerce allows consumers to switch swiftly between online and offline sales channels when searching for and ultimately purchasing products.¹²

16. Second, the e-commerce sector inquiry points at business models with increased relevance such as online marketplaces which intermediate e-commerce transactions between third-party sellers and customers. Such online platforms have become

particularly important for SMEs as they offer easy access to new markets, customers and business opportunities.

17. Such business models also pose new questions and challenges in terms of market definition which relate to the fact that they are multi-sided platforms bringing together different user groups.

18. Another important question in relation to market definition is how to qualify the agreements between platforms and third party businesses selling on the platform. Should e-commerce platforms be considered as distributors in a vertical distribution chain? Or should they be considered providers of intermediation or platform services? What are the relevant criteria to distinguish between the two? What about platforms that also compete with third party sellers on the platforms? The answer to these questions will have important consequences for market definition and ultimately the analysis of market power. To provide answers to these questions will require a case-by-case analysis of each platform and each business model. The concrete function of the platform and its actual involvement in the transaction with the consumer will be important elements in such an analysis.

3. Horizontal restrictions

19. A majority of retailers consulted in the e-commerce sector inquiry track the online prices of competitors. The wide-scale use of price tracking software may in some situations, depending on the market conditions, raise competition concerns.¹³ Price transparency could also make it easier to detect deviations from collusive agreements and reduce the incentives to deviate from a collusively set price by limiting the expected gains from such deviation.¹⁴

20. The findings of the e-commerce sector inquiry contributed to the general discussion on whether and to what extent automated computer algorithms - especially pricing algorithms - may have implications for competition. The various aspects and effects of algorithms on competition are set out in the Commission's written contribution for Item 10 of the 127th OECD Competition committee on 21-23 June 2017.¹⁵

21. Concerns may also arise with a view to the collection, processing and use of large amounts of data, often referred to as "big data", which is becoming increasingly important for e-commerce. Analysing large volumes of data can bring substantial benefits in the form of better products and services, and can allow companies to become more efficient. However, the e-commerce sector inquiry points to possible competition concerns relating to data-collection and usage. For example, the exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own webshops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services.¹⁶

4. Vertical restrictions in the area of consumer goods

22. While the Commission recognises that vertical restraints are typically less harmful than horizontal restraints between competitors, they may also negatively affect competition, especially when they are widespread like some restrictions that were found

in the e-commerce sector inquiry. Vertical restraints may lead to foreclosure of other suppliers or buyers and facilitate collusion at the supplier or buyer level.¹⁷

23. The results of the e-commerce sector inquiry show that as a reaction to the high level of price transparency and price competition in e-commerce, there is an increased recourse to (vertical) restrictions in agreements or concerted practices between manufacturers and retailers, affecting in particular competition between retailers selling the same brand ("intra-brand competition").¹⁸ The main vertical restrictions which may give rise to competition concerns that were highlighted by the e-commerce sector inquiry can be summarised as follows.

4.1. Selective distribution

24. Selective distribution agreements, as defined in Article 1(1)(e) of the Vertical Block Exemption Regulation ("VBER")¹⁹ restrict on the one hand the number of authorised distributors and on the other hand the possibilities of resale by prohibiting sales by non-authorised distributors. Selective distribution is almost always used to distribute branded final products.²⁰

25. The VBER contains, together with the Guidelines on Vertical Restraints,²¹ the framework for the analysis of selective distribution under EU competition rules. It exempts qualitative and quantitative selective distribution agreements from the prohibition under Article 101(1) TFEU, provided that the market share of both the supplier and the buyer each do not exceed 30 %. This exemption applies regardless of the nature of the product concerned and regardless of the nature of the selection criteria, provided they do not contain hardcore restrictions (as listed in Article 4 of that Regulation).²²

26. Given the competitive environment in the e-commerce sector, incentivising distribution innovation and quality, and keeping control over the image and positioning of their brand are of major importance for most manufacturers to help them ensure the viability of their business in the mid to long term²³. It is therefore not a surprise that the results of the e-commerce sector inquiry indicate that both the number of selective distribution agreements and the use of selection criteria have increased significantly over the last ten years. Manufacturers use selective distribution as a reaction to the growth of e-commerce as it allows them to better control their distribution networks, in particular in terms of the quality of distribution but also in terms of price.²⁴

27. The Commission is of the view that the results of the e-commerce sector inquiry do not call for a change to the Commission's general approach to qualitative and quantitative selective distribution as reflected in the VBER. The Commission emphasised however that selective distribution may facilitate the implementation and monitoring of certain vertical restraints that may raise competition concerns and require scrutiny.

28. For example, more than half of the manufacturers require in their selective distribution agreements, for at least part of their products, the operation of a brick and mortar shop by retailers, thereby excluding pure online players from the distribution of the concerned products. Most of these brick and mortar requirements seek to promote competition on distribution quality.

29. At the same time, certain brick and mortar requirements essentially aim at excluding pure online players from the selective distribution network, without enhancing competition on other parameters than price, such as the quality of distribution and/or

brand image. As a result, while acknowledging that brick and mortar requirements are generally covered by the VBER, certain requirements to operate at least one brick and mortar shop without any apparent link to distribution quality and/or other potential efficiencies may require further scrutiny in individual cases.²⁵

4.2. Restrictions on selling and advertising online

30. The e-commerce sector inquiry revealed certain vertical restraints typically faced by online retailers, the most frequent ones being pricing limitations and/or recommendations (a.), followed by limitations to sell on online marketplaces (b.) and limitations to sell cross-border (c.).

4.2.1. Pricing restrictions

31. Pricing restrictions and/or recommendations, especially in the form of resale price maintenance (i.) and dual pricing (ii.), are by far the most widespread restrictions reported by retailers.²⁶

Resale price maintenance

32. Under EU competition rules, manufacturers should not take any actions that interfere with the freedom of retailers to set their final prices to customers by making a recommended retail price or a maximum retail price equivalent to a minimum or fixed price. Agreements that establish a minimum or fixed resale price or price range ("resale price maintenance" or "RPM") are a restriction of competition by object under Article 101(1) TFEU²⁷ and a hardcore restriction within the meaning of Article 4(a) of the VBER. At the same time, the practice of recommending a resale price or requiring a retailer to respect a maximum resale price is exempted by the VBER provided that the market share thresholds set out in that Regulation are not exceeded and that the recommendation does not amount to a minimum or fixed resale price as a result of threats, pressure or incentives. Price recommendations are considered important to communicate quality and brand position.

33. Various comments received from retailers in the e-commerce sector inquiry point to recourse to resale price maintenance by manufacturers. Both manufacturers and retailers frequently monitor online retail prices, often by means of pricing software. As a result, it is easier in e-commerce markets to detect deviations from manufacturers' pricing recommendations. This could allow manufacturers to retaliate against retailers that deviate from the desired price level. It may even limit the incentives for retailers to deviate from such pricing recommendations.²⁸

34. Against this background, the Commission is currently investigating whether manufacturers may have breached the EU competition rules by restricting the ability of online retailers to set their own prices for widely used consumer electronic products. The effect of these suspected price restrictions may have been aggravated by the use by many online retailers of pricing software that automatically adapts retail prices to those of leading retail competitors.²⁹

Dual pricing

35. Under the current EU competition rules on dual pricing manufacturers are generally prohibited from charging different wholesale prices for the same products to the same retailer (hybrid retailer) depending on whether the products are intended to be sold

online or offline. Dual pricing is often viewed by stakeholders as a potentially efficient tool to address free-riding. It is argued that dual pricing may help to create a level playing field between online and offline sales, taking into consideration differences in costs.

36. Currently European competition rules require a differentiation between practices where the manufacturer sets a different (wholesale) price for the same product to the same (hybrid) retailer, depending on the resale channel through which the product is to be sold (offline or online) and practices where the manufacturer sets a different (wholesale) price for the same product to different retailers. The final report on the sector inquiry clarifies that charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process. Conversely, dual pricing for one and the same (hybrid) retailer is generally considered a hardcore restriction under the VBER as it restricts online sales. Moreover, the final report points to the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding.³⁰

4.2.2. Restrictions on selling on online marketplaces

37. The final report on the e-commerce sector inquiry also addressed agreements limiting the ability of retailers to sell via online market places ("marketplace restrictions" or "platform bans") which may raise competition concerns.³¹ One of the aims of the e-commerce sector inquiry was therefore to better understand the prevalence and characteristics of marketplace restrictions and the importance of marketplaces as a sales channel for retailers and manufacturers.³²

38. In this context, the European Court of Justice ("ECJ") recently rendered an important judgment in December 2017. In the *Coty* judgment³³ the ECJ gave guidance on how to approach such practices and largely confirmed the Commission's position that (absolute) marketplace bans should not be considered as hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the VBER.³⁴

39. The case concerned a contractual restriction included in a selective distribution agreement between Coty Germany GmbH (Coty), which is one of Germany's leading suppliers of luxury cosmetics, and one of its distributors, Parfümerie Akzente GmbH (Parfümerie Akzente). The contractual clause prohibited the discernible engagement by Parfümerie Akzente of a third-party undertaking which is not an authorised retailer of Coty. Coty sought to prohibit Parfümerie Akzente from distributing its products on Amazon.de through Amazon's marketplace which enables third-party sellers such as Parfümerie Akzente to sell products alongside Amazon's offerings. Based on the diverging interpretations of the applicable EU competition rules in Germany, the Higher Regional Court of Frankfurt am Main decided to stay the proceedings and submit several questions to the ECJ for a preliminary ruling.

40. First, the ECJ held that a selective distribution system compliant with Article 101(1) TFEU can also be operated for luxury goods in order to preserve the luxury image of those goods, provided that the so-called "Metro-criteria"³⁵ are met. This is an important clarification of the ECJ's 2011 *Pierre Fabre* judgment³⁶, according to which the "aim of maintaining a prestigious image is not a legitimate aim for restricting competition". The *Pierre Fabre* judgment dealt with distribution contracts for cosmetics and personal care products, which stipulated that all sales had to be made exclusively in a physical space. In practice, these distribution contracts banned all forms of selling by Internet. In *Coty* the ECJ now clarified that the findings in *Pierre Fabre* are confined to the goods and contractual clause in question rather than to selective distribution systems in general.

They can therefore only be applied to absolute bans of online sales but not to marketplace bans or selective distribution systems as such.

41. Second, the ECJ provided guidance on the application of the Metro-criteria to the scenario in question. According to the *Metro*-judgment, resellers must be chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, the characteristics of the product in question must necessitate such a network in order to preserve its quality and ensure its proper use and, finally, the criteria laid down must not go beyond what is necessary. In *Coty* the ECJ now clarified that the marketplace ban at stake was appropriate for the legitimate objective of preserving the luxury image of the goods concerned, as it allowed the supplier to verify that the goods would be sold in an environment that corresponds to the qualitative criteria that the supplier has agreed with its authorised distributors. The ECJ also considered the marketplace ban to be proportionate as it only limits online sales via discernible third party platforms and does not contain an absolute prohibition to sell online.

42. Finally, as indicated above, the ECJ found that marketplace bans do not amount to hardcore restrictions within the meaning of Article 4 VBER, and are therefore block-exempted, provided that the shares of the parties are not above the 30 % market share threshold of Article 3 VBER. The ECJ found that marketplace bans have to be differentiated from a prohibition of the use of the internet as such and therefore neither amount to a restriction of the customers to whom distributors may sell within the meaning of Article 4(b) VBER nor to a restriction of passive sales to end users by authorised distributors within the meaning of Article 4(c) VBER.

43. The ECJ also emphasised that in the case at hand distributors were allowed to advertise the products via the internet on third party platforms (e.g. price comparison websites) and use online search engines with the result that customers were usually be able to find the online offer of authorised distributors. These findings are consistent with the information obtained in the e-commerce sector inquiry, which indicates that the importance of marketplaces as a sales channel varies significantly depending on the size of the retailers, the EU Member States concerned, and the product categories concerned. On that basis, in the final report on the e-commerce sector inquiry the Commission considered that marketplace bans do not generally amount to a *de facto* prohibition on selling online or could not be considered to restrict the effective use of the internet as a sales channel irrespective of the markets concerned.³⁷ This does not mean that absolute marketplace bans are generally compatible with the EU competition rules. As indicated, the Commission or a national competition authority may decide to withdraw the protection of the VBER in particular cases when justified by the market situation.³⁸

4.2.3. *Geographic restrictions to sell and advertise online*

44. The growth and development of e-commerce has the potential of contributing to the integration of the EU's Single Market, as consumers may find it easier to purchase products from another EU Member State online, rather than cross the borders and buy products in brick and mortar shops. However, the e-commerce sector inquiry shows that the ability of consumers to make cross-border online purchases is limited on account of so-called "geo-blocking"³⁹ and "geo-filtering"⁴⁰ measures applied by retailers.

45. The European Courts have on several occasions held that agreements or concerted practices which are aimed at partitioning markets according to national borders or which make the interpenetration of national markets more difficult, in particular those which are

aimed at preventing or restricting parallel exports, have as their object the restriction of competition pursuant to Article 101(1) TFEU.⁴¹

46. As set out in the final report on the e-commerce sector inquiry, certain of these territorial restrictions may raise competition concerns under EU competition rules. First, contractual restrictions of the territory into which a distributor may sell the relevant goods are generally considered a hardcore restriction of competition under the VBER, with only a limited number of exceptions (see Article 4(b) VBER). The VBER distinguishes in this context between active and passive sales restrictions. Active sales restrictions are allowed insofar as they concern sales into an exclusive territory reserved for the supplier or allocated by the supplier to another distributor, whereas passive sales restrictions provide absolute territorial protection and are normally unlawful. Within a selective distribution system, neither active nor passive sales to end-users may be restricted. Second, territorial restrictions limiting retailers' ability to actively and passively sell to customers outside their Member State may also raise concerns. For example, certain of the reported active sales restrictions are not limited to territories that have been exclusively allocated to other distributors or reserved for the supplier. Moreover, certain suppliers operating a selective distribution system across several Member States are reported to have limited the ability of authorised retailers to sell to all customers within the territory where the selective distribution system is applied.⁴²

47. With regard to online sales restrictions in *Pierre Fabre* the ECJ held that a contractual provision prohibiting *de facto* the internet as a method of marketing amounts to a restriction of competition by object within the meaning of Article 101(1) TFEU.⁴³ It has at the very least as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.⁴⁴

48. Following complaints from customers on the issue of geo-filtering, the Commission is currently investigating agreements regarding hotel accommodation concluded between European tour operators on the one hand and hotels on the other hand. The Commission is investigating whether the agreements contain clauses that discriminate between customers, based on their nationality or country of residence – as a result customers would not be able to see the full hotel availability or book hotel rooms at the best prices.⁴⁵

49. As regards internet sales restrictions, the Commission is investigating whether the distribution agreements of Guess, a company which designs, distributes and licenses clothing and accessories, restrict authorised retailers from selling online to consumers or to retailers in other Member States.⁴⁶

50. Similarly, another set of ongoing investigations deals with licensing and distribution practices of Nike, Sanrio and Universal Studios that may restrict their licensees from selling licensed merchandise cross-border and online within the EU Single Market.⁴⁷

5. Contractual restrictions in licensing agreements for digital content

51. The results of the e-commerce sector inquiry confirm that one of the key determinants of competition in digital content markets is access to licensing rights to content, and in particular to attractive content. The availability of online rights is largely

determined by the decision of a given right holder on whether to license them and, if relevant, on their scope, as defined in the licensing agreements.⁴⁸

52. Licensing agreements between right holders and digital content providers use complex definitions to precisely define the scope of rights. It is also common for rights to be split up in the same or in different licensing agreements, particularly in terms of their technological, temporal and territorial scope.⁴⁹

53. Exclusivity is widely used in relation to the licensed rights since access to exclusive content increases the attractiveness of the offer of digital content providers. The Commission considers that the use of exclusivity is not problematic in and of itself.⁵⁰

54. More concretely, the sector inquiry revealed certain contractual restrictions in licensing agreements that may raise competition concerns. The main concerns relate to (i) the scope of licensed rights, (ii) territorial restrictions and geo-blocking, (iii) the duration of the licensing agreements, and (iv) payment structures and metrics.

5.1. Scope of the licensed rights⁵¹

55. Right holders tend to split up the rights into several components, and license part or all of them to different content providers in different Member States. The scope of the licensed rights, as determined by the licensing agreement, might vary as regards: (i) the technology used to distribute and access content, in terms of transmission, reception and usage technologies; (ii) the product release and/or the duration of the licensed rights; and (iii) the territorial scope.

56. According to the results of the sector inquiry, it is common to bundle transmission rights. Rights for online transmission of digital content are to a large extent licensed together with the rights for other transmission technologies. Agreements submitted by digital content providers in the framework of the sector inquiry indicate that online rights in particular are most often licensed together with rights for mobile transmission, terrestrial transmission and satellite transmission. Bundling rights for online transmission with rights in other transmission technologies protect exclusive rights to a digital content product and thus confers to a single content provider the possibility to use them in relation to the same product. Any alternative allocation of rights would imply that different content providers can offer the same product.

57. The Commission is of the view that bundling online rights may hinder existing operators and new entrants from competing and developing new innovative services, which in turn may reduce consumer choice. Bundling may be of particular concern when it leads to a restriction of output, in situations where online rights have been acquired but are not, or are only partly, exploited by the licensee.

5.2. Territorial restrictions and geo-blocking

58. The e-commerce sector inquiry found that online rights are to a large extent licensed on a national basis or for the territory of a limited number of Member States which share a common language. This is particularly prevalent in relation to content types that may contain premium products, such as sport, films and fiction TV.⁵²

59. Furthermore, digital content providers often use geo-blocking measures. The vast majority of digital content providers restrict access to their online digital content services from other Member States, and the majority of them do so because of contractual

restrictions in the agreements with right holders. Geo-blocking is most prevalent in agreements for TV series (74%), films (66%) and sport events (63%). It is less prevalent in agreements for other digital content categories such as music (57%), children's TV (55%), non-fiction TV (51%) and news (24%). There are, however, differences across EU Member States and content sectors when it comes to the prevalence of geo-blocking. In some EU Member States only a minority of respondents use geo-blocking, while in others the vast majority of respondents do so. Certain operators appear to use geo-blocking more than others. This leads to differences in the extent to which geo-blocking is implemented in the EU.⁵³

60. In January 2014 the Commission opened proceedings against Paramount, NBCUniversal, Sony Pictures, Disney, Fox and Warner Bros., and the pay-TV broadcaster Sky UK. In July 2015, the Commission adopted a Statement of Objections in which it preliminarily concluded that certain restrictions on the provision of cross-border services contained in the licensing agreements between the film studios and Sky UK for the studios' future output of popular films were in breach of Article 101 TFEU. On 26 July 2016, the Commission made commitments offered by Paramount legally binding. The commitments address the Commission's concerns regarding certain clauses in film licensing contracts for pay-TV between Paramount and Sky UK. These clauses prevented Sky UK from allowing EU consumers outside the UK and Ireland to access films via satellite or online. They also required Paramount to ensure that broadcasters other than Sky UK are prevented from making their pay-TV services available in the UK and Ireland. Paramount has committed that it will neither act upon nor enforce these clauses in existing film licensing contracts for pay-TV with any broadcaster in the European Economic Area (EEA).⁵⁴ The investigation continues regarding NBCUniversal, Sony Pictures, Disney, Fox, Warner Bros. and Sky.

61. The Commission initiated on 2 February 2017 proceedings concerning geo-blocking practices, where companies prevented consumers from purchasing PC video games because of their location or country of residence.⁵⁵

5.3. Duration of licensing agreements

62. Another aspect that may raise concerns is the duration of licensing agreements for digital content. The duration of licensing agreements is, together with the technological and territorial scope of the agreement, a key component of rights licensing. The fact that contracting parties often decide to contract again or renew or extend existing licensing agreements instead of concluding contracts with new parties is likely to make it more difficult for new players to enter the market. It may also make it harder for existing operators to expand their current commercial activities, for example into other transmission means such as online, or into other geographical markets. Certain contractual clauses may facilitate the extension of an existing exclusive licensing agreement such as automatic renewal, first negotiation, first refusal, price matching or similar clauses.⁵⁶

5.4. Payment structures and metrics

63. While the payment structures for non-premium content (such as news and non-fiction TV) vary greatly, right 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. These practices implicitly privilege more

established content providers, which are typically able to commit to greater levels of investments upfront.⁵⁷

6. Unilateral conduct

64. Digital markets may be characterised by network effects which can lead to switching costs and positions of entrenched market power. Therefore, effective competition law enforcement needs to ensure that companies with a dominant position do not abuse such a position. The Commission has used its powers to adopt important decisions in this field on the basis of Article 102 TFEU in the recent past.

65. A recent example of the Commission's practice regarding digital platforms is the Amazon e-books case⁵⁸ which shows that the Commission's enforcement in digital markets is delivering results and is delivering them quickly: the commitments offered by Amazon were declared legally binding by the Commission in May 2017, less than two years after the opening of the investigation.

66. In this case, it was considered that Amazon had abused its dominant position on the markets for the retail distribution of English and German language e-books to consumers by requesting parity conditions in its e-books agreements with publishers. These so-called "most-favoured-nation" (MFN) clauses required publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors. The Commission decision is based on Article 9 of Regulation 1/2003, a decision by which the Commission concluded the proceedings after having received commitments from Amazon which effectively address the identified competition concerns under Article 102 TFEU. The clauses involved not only pricing but also virtually every other aspect, such as other distribution models or promotional offers, which competitors could use to differentiate themselves from Amazon. The Commission's preliminary assessment showed that such clauses could make it more difficult for other e-book platforms to compete with Amazon. They reduced the ability and incentives of publishers and Amazon's competitors to develop new and innovative e-books and alternative distribution services. The clauses may have led to less choice, less innovation and higher prices for consumers due to less overall competition in e-book distribution in Europe. In order to address these competition concerns, the Commission rendered legally binding the commitments offered by Amazon. On this basis, for a period of five years, Amazon will not enforce the respective MFN clauses Europe-wide and will not include similar clauses in any new contracts.

67. Another example from the Commission's decisional practice is the Google shopping case.⁵⁹ In this case, the Commission found that Google abused its market dominance as a search engine by giving an illegal advantage to another Google product in an adjacent market, its comparison shopping service. Google systematically gave prominent placement in its search results only to its own comparison shopping service, whilst demoting rival services. It was not the design of the algorithm nor the presentation of comparison shopping results in a prominent matter as such that was the issue, but rather that Google treated its own product more favourably. As a result of the abuse, traffic to Google's comparison shopping service increased significantly, whilst rivals suffered substantial losses of traffic on a lasting basis. Google was found to have foreclosed competition in the market of comparison shopping services in the 13 EEA

countries concerned. The practices have stifled competition on the merits, depriving European consumers of genuine choice and innovation.

68. Evolving business models might require evolving approaches in the assessment under competition law. The Commission believes that the particularities of online platforms require an adaptation and refinement of the application of the existing tools, to allow competition authorities to tackle harmful practices and capture the particularities of the market concerned properly. In the Commission's view it is therefore important to keep platform markets open and contestable and allow competition between multiple online platforms.⁶⁰

69. The task of competition enforcers is to make sure that the disruption translates into tangible benefits for consumers.

7. Legislative initiatives related to e-commerce

70. Competition policy and the enforcement of competition law is part of a broader policy toolkit deployed by the Commission that aims at creating a European Digital Single Market.⁶¹ In addition to the enforcement of EU competition law, legislative initiatives help to make the EU Digital Single Market work better for consumers.

71. For example, the Portability Regulation⁶² became applicable in all EU Member States on 1 April 2018. In essence, the Portability Regulation enables consumers to access their portable online content services when they travel in the EU in the same way they access them at home. For instance, when a French consumer subscribes to CanalPlay film and series online services, the user will be able to watch the films and series available from that service in France, when he or she goes on holidays to Croatia or on a business trip to Denmark.

72. Regulation 2018/302 of 28 February 2018 prohibits unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market in cases where it cannot be objectively justified.⁶³ The Regulation addresses, in particular, the problem of (potential) customers not being able to buy goods and services from traders located in a different EU Member State for reasons related to their nationality, place of residence or place of establishment, hence discriminating them when they try to avail themselves of best offers, prices or sales conditions compared to nationals or residents of the traders' Member State. In terms of access to online interfaces, the Regulation bans the blocking of access to websites and the re-routing without the customer's prior consent. In terms of access to goods or services, the Regulation defines specific situations when there can be no justified reason for geo-blocking or other forms of discrimination based on nationality, residence or establishment. In these situations, customers from another EU Member State must have the same access to goods and services as local customers. As regards non-discrimination for reasons related to payment, while traders remain free to accept whatever payment means they wish, the Regulation includes a specific provision on non-discrimination within the range of means of payment the traders accept. The provision of (non-audiovisual) copyright protected content services (e.g. e-books, online music or videogames) is not covered by the Regulation. These services, however, remain subject to the Regulation's prohibition to block or limit access to on-line interfaces on the basis of the nationality, residence or establishment of the customer. Audiovisual services are also not covered Regulation.

73. In order to address unfair contracts and trading practices in platform-to-business relations, on 26 April 2018 the Commission proposed an EU Regulation on fairness and transparency together with the creation of an Observatory on the online platform economy.⁶⁴

74. In order to increase transparency, the proposed rules oblige providers of online intermediation services to ensure that their terms and conditions for professional users are easily understandable and easily available. This includes setting out in advance the possible reasons why a professional user may be delisted or suspended from a platform. Providers also have to respect a reasonable minimum notice period for implementing changes to the terms and conditions. If a provider of online intermediation services suspends or terminates all or part of what a business user offers, this provider will need to state the reasons for this. In addition, the providers of these services must formulate and publish general policies on (i) what data generated through their services can be accessed, by whom and under what conditions; (ii) how they treat their own goods or services compared to those offered by their professional users; and (iii) how they use contract clauses to demand the most favourable range or price of products and services offered by their professional users. Finally, both online intermediation services as well as online search engines must set out the general criteria that determine how goods and services are ranked in search results.

75. Additionally, providers of online intermediation services are required to set up an internal complaint-handling system. All providers of online intermediation services will have to list in their terms and conditions the independent and qualified mediators they are willing to work with in good faith to resolve disputes. Moreover, associations representing businesses will be granted the right to bring court proceedings on behalf of businesses to enforce the new transparency and dispute settlement rules.

76. Finally, to monitor the impact of the new rules an EU Observatory will be set up to monitor current as well as emerging issues and opportunities in the digital economy and to enable the Commission to improve the legislative framework.

77. These examples show that competition law enforcement and legislative action can be fully complementary.

¹ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, for a complete overview see http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

² See <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tin00096&plugin=1> (last visited 15.05.2018).

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Digital Single Market Strategy for Europe", COM(2015) 192 final.

⁴ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 2.

⁵ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final.

⁶ A Digital Single Market Strategy for Europe, COM(2015) 192 final.

⁷ Final report on *the E-commerce Sector Inquiry*, COM(2017) 229 final, p. 16.

⁸ See for example, Judgment in *Établissements Consten S.à.R.L. and Grundig – Verkaufs-GmbH*

v *Commission of the European Economic Community*, 56/64 and 58/64 and Judgment of 6 October 2009, *GlaxoSmithKline Services v Commission*, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610; Judgment of 4 October 2011, *Football Association Premier League and Others*, Joined cases C-403/08 and C-429/08 C, EU:C:2011:631.

⁹ Vertical restraints, digital marketplaces, and enforcement tools, Speech of DG Johannes Laitenberger, New Delhi, India ICN Annual Conference 2018, http://ec.europa.eu/competition/speeches/text/sp2018_04_en.pdf.

¹⁰ See: Commission press release of 2 February 2017, IP/17/201 Antitrust - Commission opens three investigations into suspected anticompetitive practices in e-commerce, http://europa.eu/rapid/press-release_IP-17-201_en.htm; Commission press release of 14 June 2017, IP/17/1646 - Antitrust: Commission opens formal investigations into Nike's, Sanrio's and Universal Studios' licensing and distribution practices, http://europa.eu/rapid/press-release_IP-17-1646_en.htm; Commission press release of 6 June 2017, IP/17/1549 – Antitrust: Antitrust: Commission opens formal investigation into distribution practices of clothing company Guess, http://europa.eu/rapid/press-release_IP-17-1549_en.htm.

¹¹ As matter of principle, the concepts laid down in the Commission notice on the definition of relevant market (Commission notice on the definition of relevant market for the purpose of Community competition law, 9.12.1997, OJ 1997 C 372/5), notably the demand- and supply-side substitutability analysis, remain the starting point when establishing the appropriate market definition including in cases involving digital markets.

¹² Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 11.

¹³ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 13.

¹⁴ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 33.

¹⁵ Algorithms and Collusion - Note from the European Union, written contribution for Item 10 of the 127th OECD Competition committee on 21-23 June 2017, DAF/COMP/WD(2017)12.

¹⁶ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 54-56.

¹⁷ Vertical restraints, digital marketplaces, and enforcement tools, Speech of DG Johannes Laitenberger, New Delhi, India, ICN Annual Conference 2018, http://ec.europa.eu/competition/speeches/text/sp2018_04_en.pdf.

¹⁸ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 15.

¹⁹ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

²⁰ Guidelines on vertical restraints, OJ C 130, 19.5.2010, p.1, paragraph 184

²¹ Guidelines on vertical restraints, OJ C 130, 19.5.2010, p.1, paragraph 6.

²² Where the 30% threshold is exceeded, the restrictive agreement needs to be assessed individually under Art. 101 TFEU.

²³ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 12.

²⁴ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 15.

²⁵ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 24-27.

²⁶ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 29.

- ²⁷ Judgment of 2 April 2009, *Pedro IV Servicios SL v. Total España SA*, C-260/07, ECLI:EU:C:2009:215 ; Judgment of 21 September 2006, *JCB Service v. Commission*, Case C-167/04 P, ECLI:EU:C:2006:594.
- ²⁸ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 30-33.
- ²⁹ Commission press release of 2 February 2017, IP/17/201 Antitrust - Commission opens three investigations into suspected anticompetitive practices in e-commerce, http://europa.eu/rapid/press-release_IP-17-1646_en.htm.
- ³⁰ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 34-37.
- ³¹ This issue has attracted some attention in recent years in some EU Member States.
- ³² Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 38 *et seq.*
- ³³ Judgment of 6 December 2017, *Coty Germany GmbH vs Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941; Commission, April 2018, competition policy brief – EU competition rules and marketplace bans: Where do we stand after the Coty judgment? <http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>
- ³⁴ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 42.
- ³⁵ Judgment of 25 October 1977, *Metro I, Metro SB-Großmärkte v Commission*, 26/76, EU:C:1977:167.
- ³⁶ Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649.
- ³⁷ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 41, 42.
- ³⁸ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 43.
- ³⁹ E.g. blocking access to websites, re-routing customers to websites targeting other Member States or refusing to deliver cross-border or to accept cross-border payments.
- ⁴⁰ I.e. commercial practices whereby online retailers allow consumers to access and purchase goods or services cross-border, but offer different terms and/or conditions if the customer is in a different Member State.
- ⁴¹ See, for example, judgment in *Établissements Consten S.à.R.L. and Grundig – Verkaufs-GmbH v Commission of the European Economic Community*, 56/64 and 58/64 and judgment in *Football Association Premier League and Others*, C - 403/08 and C - 429/08, EU:C:2011:631, paragraph 139; Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 48.
- ⁴² Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 50-53.
- ⁴³ Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 47.
- ⁴⁴ Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 54.
- ⁴⁵ Commission, 2.2.2017, press release IP/17/201.
- ⁴⁶ Commission press release of 6 June 2017, IP/17/1549 – Antitrust: Antitrust: Commission opens formal investigation into distribution practices of clothing company Guess, http://europa.eu/rapid/press-release_IP-17-1549_en.htm.
- ⁴⁷ Commission press release of 14 June 2017, IP/17/1646 - Antitrust: Commission opens formal investigations into Nike's, Sanrio's and Universal Studios' licensing and distribution practices, http://europa.eu/rapid/press-release_IP-17-1646_en.htm.

- ⁴⁸ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 57.
- ⁴⁹ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 58.
- ⁵⁰ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 59.
- ⁵¹ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 61-64.
- ⁵² Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 65.
- ⁵³ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 66, 67
- ⁵⁴ Commission press release of 26 July 2016, IP/16/2645 – Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services, http://europa.eu/rapid/press-release_IP-16-2645_en.htm.
- ⁵⁵ Commission, 2.2.2017, Case AT.40424 – Capcom – Video Games, Commission press release of 2 February 2017, IP/17/201 Antitrust - Commission opens three investigations into suspected anticompetitive practices in e-commerce, http://europa.eu/rapid/press-release_IP-17-201_en.htm.
- ⁵⁶ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 68 and 69.
- ⁵⁷ Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 70.
- ⁵⁸ Commission, 4.5.2017, Case AT.40153 – E-book MFNs and related matters (Amazon).
- ⁵⁹ Commission, 27.6.2017, Case AT.39740 – Google Search (Shopping).
- ⁶⁰ From: Vertical restraints, digital marketplaces, and enforcement tools, DG Johannes Laitenberger, New Delhi, India ICN Annual Conference 2018, http://ec.europa.eu/competition/speeches/text/sp2018_04_en.pdf.
- ⁶¹ See Vertical restraints, digital marketplaces, and enforcement tools, DG Johannes Laitenberger, New Delhi, India ICN Annual Conference 2018, http://ec.europa.eu/competition/speeches/text/sp2018_04_en.pdf.
- ⁶² Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.
- ⁶³ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.
- ⁶⁴ Commission, 26.4.2018, COM(2018) 238 final, proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services; Commission Decision of 26.4.2018 on setting up the group of experts for the Observatory on the Online Platform Economy, C(2018) 2393 final.