



International Distribution Institute

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## Internet sales and distribution

A look into the future –what is to be expected  
from the EU Commission e-commerce sector  
inquiry?

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## **A look into the future**

What is to be expected from the sector inquiry on e-commerce launched by the European Commission in May 2015 with respect to the legal framework in which suppliers, distributors and other players make their commercial choices?

- New EU legislation?
- Impact on the application of competition rules?

## The sector inquiry

- The legal basis is Article 17 of Regulation 1/2003: “When the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors”
- The Commission may request the information necessary for giving effect to Articles 101 and 102 TFEU
- It may publish a report on the results and invite comments from interested parties

### Goals and possible outcomes:

- a better understanding of the facts and the reasons behind the facts
- spurring enforcement; refining the application of competition rules in individual cases; revision of VR Guidelines? For Regulation 330/2010, a revision is expected by 2022
- legislative proposals

## The sector inquiry is part of the DSM Strategy

- The sector inquiry is one of the 16 actions contemplated by the Digital Single Market Strategy, which has three main aims:
  - a. improving access for consumers and businesses to goods and services across the EU
  - b. fostering innovation (right conditions and a level playing field for digital networks and innovative services to flourish)
  - c. maximizing the growth potential of the digital economy

Several legislative proposals have been tabled: three of them are particularly relevant for our topic (Internet sales and distribution):

- i. the proposal for a directive on certain aspects concerning **contracts for the online and other distance sales of goods** (9.12.2015)
- ii. the proposal for a regulation on **cross border parcel delivery** (25.5.2016)
- iii. the proposal for a regulation on **geo-blocking and other forms of discrimination** (25.5. 2016)

## The goals of the three legislative proposals

- **Online sales of goods:** stronger protection for consumers, increased confidence in online purchases
- **Parcel delivery services:** easier and less costly parcel delivery (prices for cross border delivery are often up to 5 times higher than domestic prices; non clear correlation with costs)
- **Geo-blocking and other forms of discrimination:** limiting the possibility to discriminate online purchasers on the basis of their nationality, residence or place of establishment

## Impact of the three proposals on undertakings

- stronger protection for consumers with respect to online purchases: for undertakings, the proposal has an impact on the overall economic conditions of online sales
- increased transparency and competition in cross border parcel delivery: increase in efficiency, lower prices for parcel delivery services (if competition not sufficient, regulation is contemplated as an instrument of last resort)=> easier and less costly parcel delivery services reduce the competitive advantage of proximity of retailers to purchasers; broader markets for retail (online and offline) purchases
- stricter rules on territorial restrictions:
  - a. ban on geo-blocking (both unilateral conduct by suppliers or distributors and vertical agreements);
  - b. non discrimination: new legislative constraints on the possibility to differentiate prices on the basis of nationality, place of residence and place of establishment



## Fact-finding within the DSM Strategy

- Study by GfK on consumers' attitudes wrto online purchases (September 2015)
- Questionnaires sent by DG Comp within the sector inquiry
- Consultation on geo-blocking (customers, suppliers, retailers) – first findings
- Consultation on platforms – first findings
- Issues paper on geo-blocking within the sector inquiry– March 2016 (based on the perspectives of customers and retailers); it is used as a basis for the legislative proposal on geo-blocking
- Mystery survey on the use of geo-blocking (results published in May 2016)
- A study by Oxera, commissioned by the UK CMA, explores the economic reasons of vertical restraints in the offline and online context
- Evidence on the decisions adopted by national competition authorities within the ECN

## Assessment of the facts and policy measures

- Is the Commission taking all the emerging evidence into account?  
The sector inquiry is expected to foster a better understanding of what is going on
- The Commission aims to strengthen ‘freedom of access’ to goods and services in the common market.
- Focus on drivers of e-commerce versus offline purchases
- Focus on consumers willing to purchase goods and services online but frustrated (geo-blocked; discriminated; lacking adequate remedies; facing costly and inefficient parcel delivery; worried about the risk of fraud and unfair commercial practices, etc.)
- Evidence shows that geo-blocking (obstacles to the possibility to obtain access to a specific website related to nationality, residence, location of the purchaser) is widespread. Pursuant to the 2015 Mystery Shopping Survey only 37% of more than 10.000 attempted cross border purchases were successful



## Perceived need to strengthen the legal framework for ‘territorial’ restrictions

- The Commission acknowledges that in principle there may be justifications for not selling abroad (e.g. differences in consumer laws, VAT, bottlenecks in cross border delivery channels) or for applying different conditions based on place of residence or establishment or nationality
- However, on the basis of the results of the fact-finding activities, the Commission concludes that the legal framework ensuring that, when restrictions “do not seem justified”, customers may make their online purchases anywhere in the EU has to be strengthened =>proposal on geo-blocking and other forms of ‘territorial’ discrimination
- Useful to remind that, on these issues, the current legal framework includes competition rules and internal market legislation (e- commerce directive, services directive)

## Current legal framework: competition rules (a)

### Key issues:

- Competition rules are applicable only to agreements (Art. 101 TFEU) or unilateral conduct by dominant companies (Art. 102 TFEU)
- The approach to territorial restrictions is a EU choice, not a typical competition law approach (EU competition law is part of the internal market project) (Art. 4, letters b) and c) Reg. 330/2010; Guidelines on Vertical restraints –Vertical GL- §7, 100)
- The distinction between passive and active sales plays an important role in the application of Article 101

## Current legal framework: competition rules (b)

As for Internet sales, pursuant to the Vertical GL:

- in principle every distributor must be allowed to use the internet to sell products (§52)
- some restrictions on online sales are considered ‘restrictions on passive sales’ and treated accordingly (considered hardcore restrictions); other restrictions on online sales are considered restrictions on active sales and treated accordingly (§52-53);
- suppliers may require quality standards for the use of the internet to resell their goods (§54)
- in *Pierre Fabre* (C 439/09) the ECJ states that within a selective distribution system, a ban on the use of the internet by the distributor is a restriction by object pursuant to Art. 101(1) provided that the clause is not “objectively justified”; the block exemption regulation is not applicable (hardcore restriction). In principle, Art. 101(3) is applicable on an individual basis if its four requirements are satisfied (difficult in practice)

# The current framework: Internal market legislation

- **Directive 2000/31-** freedom to provide online services in other MS
- **Art. 20 of the services directive 2006/123/CE** (no discrimination principle):
  - the recipient shall not be made subject to discriminatory requirements based on his nationality or place of residence
  - the general conditions of access to a service which are made available to the public at large by the provider shall not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria  
Comment: reasonable approach – but apparently unable to limit widespread geo-blocking

# The proposed regulation on geo-blocking and its links with the sector inquiry

## **The issues paper on geo-blocking contains the first results of the sector inquiry**

The legislative proposal on geo-blocking and other forms of discrimination based on nationality etc. is based, inter alia, on a subset of the first results of the e-commerce sector inquiry, which have been published in the Issues paper on geo-blocking of March 2016 (in advance with respect to the sector inquiry preliminary report, which will be published by mid-2016)

In this perspective, although the proposal on geo-blocking is one of the 16 actions of the DSM Strategy, it may also be seen as an outcome of the sector inquiry

## Aim and scope of the regulation on geo-blocking

- **Objective:** contribute to the proper functioning of the internal market by preventing discrimination based, directly or indirectly, on the nationality, place of residence or place of establishment of customers (no prejudice to taxation rules) . It prevails over Art.20(2) of Services Directive: prohibited discrimination cannot be justified
- **Scope:** all traders selling to EU customers (consumers and undertakings, except for customers intending to purchase for resale. Broader than the services directive (not applicable to traders located in 3rd countries). No need to prove the existence of an agreement or, for unilateral conduct, a dominant position
- 3 main substantive rules:

Article 3 Access to online interfaces (geo-blocking)

Article 4 Access to goods and services (geo-discrimination)

Article 5 Non discrimination for reasons related to payment

## Access to online interfaces (art. 3)

- Ban on blocking or limiting access to websites, apps etc., as well as on automatic rerouting (unless active consent is given by the customer) for reasons related to nationality, place of residence or place of establishment. If rerouting is accepted, the original interface should remain easily accessible. Exception: need to comply with EU or national legal requirements (eg. prohibition to display specific content in certain Member States)
- The recitals argue that the prohibition of discrimination with respect to access to online interfaces should not be understood as creating an obligation for the trader to engage in commercial transactions with customers (it would be disproportionate)



## Access to goods and services (art. 4)

- Prohibition on geo-discrimination: undertakings shall not apply different general conditions of access to their goods or services for reasons related to nationality, place of residence or place of establishment **in 3 specific situations** in which geo-discrimination does not seem justified:
  - a. for tangible goods, if the customer arranges for cross-border transport (goods are not delivered cross border by the trader or on his behalf, so no need to register for value added tax in the MS of the customer and to arrange for delivery)
  - b. for services which take place in a physical location where the trader conducts its business
  - c. for electronically delivered services e.g. cloud service -no physical delivery problem (in this case, the trader can declare and pay VAT through the mini one stop shop (MOSS) set out by reg. 282/2011). Services the main feature of which is providing access to and use of copyright protected works are not covered

## Some remarks on Article 4

- Traders remain free to apply different prices to customers in certain territories where required by national legislation in accordance to EU law
- “General conditions of access” means all terms, conditions and other information, including sale price, offered by the trader to the public at large and not individually negotiated. Recital 17 indicates that the notion includes the outright refusal to sell
- Traders remain free to direct their activities at different MS or group of customers with targeted offers and differing terms and conditions, including through the setting up of country specific online interfaces

## **Non discrimination for reasons related to payment (Art. 5)**

- Traders shall not, for reasons related to nationality etc., location of payment account, place of establishment of payment service provider or place of issue of payment instrument within the Union, apply different conditions of payment for any sales of goods or provisions of services, provided that:
  - payments are made through electronic transactions by means of credit transfer, direct debit or card based payment instrument within the same payment brand
  - the payee can request strong customer authentication by the payer pursuant to PSD2 (level playing field for risk of fraud)
  - the payments are in a currency that the payee accepts

## The proposed regulation as part of the future framework

- Relation with competition rules: Art. 101 and reg. 330/2010 remain applicable; the new rules should not affect the possibility to limit active sales according to the BER
- Agreements, requiring the trader to act, in respect of passive sales, in violation of the geo-blocking regulation are automatically void
- Enforcement of the regulation is entrusted to national authorities. Sufficient penalties should be provided. The mechanisms for cooperation contained in reg. 2006/2004 and the rules on collective actions for injunctions shall apply
- The Commission has decided to propose a legislative measure. Compared to the mere application of competition rules, it is more predictable; no need to show existence of an agreement or of a dominant position
- A regulation, not a directive – uniform rules

## Expected impact: geo-blocking

- Currently traders may use geo-blocking as a means to apply different economic conditions relating to the nationality/residence/location of purchasers or, in case of vertical agreements, to ensure some territorial protection to retailers
- With the new rules, in addition to the competition law framework, all traders (suppliers, distributors and other players selling online) are prevented from geo-blocking potential purchasers – geo-blocking seen as a restriction on passive sales
- For undertakings, need to revise contractual clauses and technical conditions for access to websites, apps etc. (geo-blocking restrictions, automatic rerouting) – no online ‘territorial’ protection

## Expected impact: geo-discrimination

- The provisions on access to goods/services (geo-discrimination) entail for customers an enhanced possibility to purchase online on equal terms across the EU
- They should be seen in combination with the proposal for more efficient and cheaper parcel delivery services
- both online traders and brick and mortar traders will face stronger competition from online sales

Estimated impact according to the Commission (electronic goods):

- distance selling : + 1.1%; reduction of domestic offline sales but net trade expansion impact :+ 0.4%
- price decreases estimated at 0.5% offline and 0.6% online, on average across the EU
- consumer surplus estimated to increase by 0.8%.

## Challenges

- Challenge for online and offline traders: how to differentiate your retail service?
- The possibility to apply different economic conditions for sales (with no delivery) is substantially reduced. In the consultation, several respondents stressed that the application of different economic conditions (including price discrimination) is not necessarily bad for consumers, may increase total quantities and ensure that firms recover their fixed costs. The approach of the Commission is that discrimination should never be based on nationality etc.. Product differentiation, dynamic pricing (location may be one of the relevant parameters) are still allowed, subject to the general principles of competition law. Need to revise price differentiation strategies?

A look into the future:  
other issues relevant for the  
sector inquiry



## The sector inquiry is ongoing...

- The initial findings on geo-blocking were published in the Issues Paper of 18 March 2016
- A preliminary report on all findings from the sector inquiry is scheduled for mid-2016. It will address not only geo-blocking but also other potential competition issues in the e-commerce sector
- The preliminary report will be followed by a public consultation
- A final report is expected in the first quarter of 2017

## 1. Approach to vertical restraints

- the rise of e-commerce has led to increased competitive pressure on manufacturers and retailers and makes more difficult to maintain price differentials between sales channels and against rival products; however, it has also a market expansion effect (see Oxera study)
- the main reasons for vertical restraints are the **prevention of free riding** (incentive to stock products, to provide services) and **the protection of brand image**; selective distribution may increase interbrand competition
- Absent vertical restraints, cheaper prices and wider product availability in the short run, but risk of lower retail service standards and poorer perceived quality, maybe lower availability in the long run – what happens if bricks and mortar retailers are no longer viable? **the sector inquiry should acknowledge the procompetitive rationales of vertical restraints** – need for a careful case by case analysis in the **economic and market context**

## 2. Vertical price restrictions

Apparently vertical price restrictions are still widespread – at least in the form of recommended resale prices. Direct or indirect RPM are considered hardcore restrictions. The application of Art. 101.3 is extremely difficult

As for the application of Art. 101(1), in *Expedia* the Court of Justice excludes that a restriction by object may be found not to infringe the law because it is not appreciable (‘restrictions by object are always appreciable’).

However, for restrictions different from hardcore cartels it may remain possible to exclude infringement when, apart from the terms of the agreement, in the specific economic and legal context the agreement is clearly not capable of being harmful (OFT in *Tobacco*; AG Wahl in *ING Pensii*; AG Wathelet in *Toshiba*)

### 3. Restrictions on Internet sales

- This is one of the topics that the sector inquiry is supposed to address
- The sector inquiry provides the opportunity to explain the reasons of some restrictions and to help undertakings to manage the uncertainties/difficulties in the application of the Vertical GL – is the possibility to introduce qualitative requirements, accompanied by a proper interpretation, sufficient to mitigate concerns?
- On these issues, there are still different approaches by the national competition authorities in different Member States, (e.g. to what extent can suppliers using a selective distribution system can exclude the use of platforms? See *Coty Germany*). **Need for a uniform approach at the EU level. The role of the Commission is of paramount importance**

## 4. MFN clauses and price parity clauses

There have been several cases concerning most favoured nation clauses and price parity clauses.

MFN clauses are agreements between a supplier and a distributor, by which the former agrees that it will extend to the latter any better conditions offered to competing distributors

Price parity clauses prohibit sellers from offering products which they sell on a platform more cheaply on any other online sales channels

In the national cases on online hotel booking (UK, F, Sw, I, D) some national competition authorities acknowledge that such clauses may be beneficial when they help resolving a free riding problem, but there isn't a uniform approach across the EU

=> also in this area, the sector inquiry should stress the need for a **consistent approach** and support a more active role of the Commission within the ECN

## 5. Other issues

The sector inquiry provides the opportunity to **clarify how the traditional notions and approaches of competition law should be applied/revised/integrated in the digital context.**

- For instance, in *Eturas* (C-74/14), the ECJ indicates that in the digital environment the way to distance yourself from an agreement can be different from the way which is usually considered in the offline context – it may be sufficient to tell the platform that you do not agree, since you may not know the other participants
- To what extent is the agency notion under competition law useful with reference to the different commercial relations in the digital ecosystem?
- How should Article 102 be applied with reference to unilateral<sub>30</sub> conduct by platforms?

## **The public consultation on the preliminary report**

The forthcoming public consultation on the sector inquiry preliminary report will give suppliers, distributors and other players, associations, practitioners and academics the possibility to further explain the economic reasons of commercial conduct and agreements in the area of Internet sales. Thus, the consultation may provide an important contribution to an informed and well balanced future application of competition rules in this area