



## EBAY'S COMMENTS ON THE PRELIMINARY REPORT OF THE E-COMMERCE SECTOR INQUIRY

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### **I. ABOUT EBAY**

eBay is a global commerce leader, providing a robust platform where merchants of all sizes can compete and win. eBay connects over 165 million buyers with 25 million sellers and over one billion listings live at any given time. Last year alone, the total value of all the goods, so called Gross Merchandise Volume (GMV) that were bought and sold on our sites globally was \$82 billion.

Our business model and pricing is designed so that our Marketplaces business is successful when our merchants are successful. The majority of our Marketplaces revenue comes from a fee based on a percentage of the GMV, of transactions closed on our Marketplaces trading platforms.

Our Marketplaces platforms are accessible through a traditional online experience (e.g., an Internet-connected computer), from mobile devices (e.g., smartphones and tablets), and to a limited extent, via screens in the physical world (e.g., dedicated terminals located within retail stores). We offer



downloadable, easy-to-use mobile applications for the iPhone, the iPad, Android and Windows mobile devices that allow access to our site and some of our other websites and vertical shopping experiences.

We have developed a number of features on our Marketplaces platforms in the areas of trust and safety, customer support and value-added tools and services, as well as loyalty programmes. These enabling features are designed to make users more comfortable trading with unknown partners and completing transactions online or through mobile devices, as well as rewarding our top buyers and sellers for their loyalty.

The global reach of our Marketplaces platforms together with the enabling features make commerce over large distances something also very small businesses can engage in. Indeed, 93% of Small, Medium, and Micro-Sized Enterprises (MSMEs) using the eBay marketplace in the EU export.

Furthermore, we continuously invest in innovation and technology aimed at more efficiently connecting buyers and sellers on our platform. For example, in recent years we have heavily invested in machine learning and artificial intelligence technology that can be deployed in areas such as machine translations of listings, trust and safety measures, and improving the search and site user experience. eBay recently launched eBay ShopBot, an artificial intelligence shopping assistant (integrated with Facebook Messenger) that helps people find the best offers from eBay's more than one billion listings.

Our continuous investments into enabling features and technology directly benefit in particular small business merchants, which would otherwise not have access to the online commerce landscape of today or tomorrow.

However, anticompetitive practices in the market can have a devastating effect on MSMEs seeking to use online marketplaces. As small businesses account for about half of the revenue of the 206 billion Euro online retail economy,<sup>1</sup> eBay strongly welcomes the Commission's e-Commerce Sector Inquiry initiative, which seeks to identify and take action against contractual barriers to the EU Digital Single Market. Along with policy measures aimed at removing administrative and legal barriers to online commerce within the EU, we believe the Commission's initiative can significantly contribute to growth in European e-Commerce.

## **II. EBAY WELCOMES THE COMMISSION'S PRELIMINARY REPORT ON THE SECTOR INQUIRY**

The Commission's preliminary report on the e-Commerce Sector rightly notes that a growing number of suppliers of consumer goods prevent their authorized distributors from offering their goods for sale on open online marketplaces and also enforce these prohibitions aggressively. In its preliminary report, the Commission finds that marketplace bans are at the top of brands' tool box to restrict competition, along with pricing restrictions and territorial restrictions.

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<sup>1</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 8; available: <https://www.copenhagoneconomics.com/publications/publication/economic-effects-of-online-marketplace-bans>

The use of marketplace bans is a wide-spread anti-competitive practice in many consumer product markets. In some industries, nearly all leading brand manufacturers have imposed a marketplace ban on their retailer.

We welcome the Commission's recognition of the importance of online marketplaces for small businesses and cross-border trade. The report also shows that marketplace bans prevent a significant number of small business entrepreneurs from selling products on online marketplaces and that these bans harm consumers by limiting choice, increasing prices and hindering cross-border trade. We believe e-commerce should be open for all and support the Commission's conclusion that platform bans may breach competition rules. We encourage the Commission to launch targeted investigations to enforce its findings.

However, we have identified certain shortcomings in Preliminary Report's analysis. This paper seeks to further inform the debate in these specific areas. Specifically, we believe that the Preliminary Report fails to sufficiently recognize that (1) online marketplace bans significantly restrict access to the Internet as a distribution channel, (2) selling exclusively through an online shop is not a viable option for many micro and small businesses, (3) brands' justifications for bans are not credible and (4) the underlying data available to the Commission is too weak to support certain findings.

Furthermore, the Commission failed to take into account (5) the consumer perspective on marketplace bans, (6) the implications of the rise of mobile commerce and new technologies, and (7) the future developments in national online commerce markets.

As to the legal arguments brought forward by the Commission, we emphasise (8) there is a practical and legal difference between blanket platform bans and qualitative criteria. Moreover, we contest (9) the Commission's applications of different standards for different restrictions and (10) the wrong application of the EU Court of Justice's Pierre Fabre ruling.

### **III. SHORTCOMINGS OF THE PRELIMINARY REPORT AND PROPOSALS FOR THE FINAL REPORT**

#### **(1) Marketplace bans significantly restrict access to the Internet as a distribution channel**

The Preliminary Report on the e-Commerce Sector Inquiry ("Preliminary Report") states that the impact of marketplace bans on Internet distribution varies from Member State to Member State and from one product group to another. Due to this „scattered picture“ the Preliminary Report was not able to identify a consistent form of harm that would justify qualifying absolute marketplace bans as hardcore restrictions of competition.<sup>2</sup>

eBay strongly disagrees with the Commission's assessment and respectfully submits that the Preliminary Report failed to accurately appreciate that marketplace bans always have a negative impact on competition irrespective of the Member State or the product group concerned. In eBay's view, there are two consistent forms of harm present in every case where an absolute marketplace ban is imposed.

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<sup>2</sup> Preliminary Report, p. 153, paragraph 469.

First, a ban on the use of marketplaces always limits retailers' distribution possibilities on the Internet and handicaps their ability to be present online and on mobile platforms. Since absolute marketplace bans reduce retailers' visibility online, they can result in limited online sales and hinder retailers' access to more and different customers online.

Second, absolute marketplace bans lead to a substantial reduction, and sometimes even the termination, of online sales activities for a significant percentage of MSMEs.<sup>3</sup> Many MSMEs retailers operate their business models with dependency on the online marketplace sales channel and cannot substitute it by other means.

These two specific forms of harm justify qualifying absolute marketplace bans as a hardcore restriction.

#### **a. How marketplace bans reduce visibility online**

Absolute marketplace bans limit the ability of retailers to use marketplaces as a distribution channel to generate traffic for their products. Such bans make it more difficult for potential customers to find retailers and their products,<sup>4</sup> thereby limiting the distributor's freedom to promote its online offer. Such bans make it more difficult to attract customers outside the geographic space they live in. Such general bans, therefore, exclude an effective method for retailers to generate traffic to their products and deprive customers from the benefit of increased price transparency across a range of different retailers.

#### **b. How marketplace bans increase entry barriers for MSMEs**

MSMEs use online marketplaces as a stepping stone to grow their operations through online. In a study conducted by the law firm Sidley Austin LLP, it was found that 70% of the surveyed sellers had started their online presence with eBay or other online marketplaces, while 19% had started with both marketplaces and their own online shop at the same time (only 10% had started online through their own online shop).<sup>5</sup> Furthermore, according to the European Commission's data, 46% of SME retailers use online marketplaces and SMEs selling both on their own website and on online marketplaces get 54% of their overall revenue from their sales on marketplaces. For micro retailers, the importance of marketplaces is even higher, accounting for up to 75% of their revenues.<sup>6</sup> Imposing a general marketplace ban on such companies (and even on larger businesses) thus impedes access to the market.

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<sup>3</sup> A survey, conducted by the seller initiative Choice in eCommerce, shows that 51% of the respondents have losses due to sales restrictions and 25% said, that their future is threatened. See here: <http://www.choice-in-e-commerce.org/e-commerce-in-danger/the-results-of-the-survey/>

<sup>4</sup> In a commissioned study conducted by Forrester Consulting on behalf of Mirakl and ChannelAdvisor (dated March 2016) 83% of consumers who have shopped in a marketplace stated that "Marketplaces have introduced [them] to new retailers that [they] may not have otherwise found". Additionally, 85% of said consumers stated that "Marketplaces allowed [them] to locate items [...] that [they] may not have otherwise found" - Figure 2 in „Retailers must seize the marketplace opportunity“ by Forrester Consulting, April 2016.

<sup>5</sup> Sidley Study on the effects of platform sales restrictions for German FCO, 02/22, 2013.

<sup>6</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 8.



On eBay there are 165 million potential buyers worldwide. A huge market is open to practically all retailers with very low entry barriers, as the investment in technology, marketing, back-end functionality, and user experience are borne by the marketplace (i.e. small businesses do not need to invest in building a website and attracting traffic through marketing spend / SEO). This leads to a very competitive landscape where the online marketplace indiscriminately facilitates market entry and participation.

Indeed, the ability of new enterprises to enter the market is seen as a key element of economic growth. Admittedly, it is difficult to identify the birth of new enterprises. Eurostat defines “enterprise birth” as “when an enterprise starts from scratch and actually starts activity”. OECD defines a birth as when an enterprise goes from zero to one employee. In the context of an online marketplace, we suggest enterprise birth to be defined as when the annual sales of one seller got from zero to at least USD 10,000 in the following year.

Based on that definition, the birth rate on the eBay marketplaces ranges between 10% and 19% across the EU (calculated as an average for the period 2012 to 2014). Eurostat estimates the birth rate across the EU from 2011 to 2012 to be less than 10%, counting enterprises that go from scratch to activity. OECD measures birth rate as when an enterprise goes from zero to one employee. Using OECD’s data on birth rates, we find that Italy and Spain for example have had over 50% and 90% higher birth rates on the eBay marketplace compared to the traditional marketplace.<sup>7</sup>

New enterprises on eBay are able to participate immediately in the market thanks to the transparency, traffic generation and services provided by the online platform model. Within one year, newcomers on eBay – again defined as those taking the leap from zero sales to sales of USD 10,000 – are able to secure a market share of between 3% and 16%. This can be compared with data from the World Bank. The World Bank has measured the market share that new entrants into the export market are able to gain within one year. For the six European countries covered by the World Bank’s analysis, the market share ranges between 1% and 8%, well below what new eBay sellers reach.

In essence, the online marketplace model supports retailers (mainly MSMEs) to get access to the kind of support with marketing, traffic, delivery, translation, technology development, and payments that had previously been out of reach for firms of their size. That combination is proving a powerful model for connecting businesses with consumers across national and cultural borders, and helping them to punch above their weight with larger competitors. To businesses small, remote or located in challenged economic regions, these opportunities are unprecedented and point to a far more inclusive economic model for growth.

Indeed, the Commission has acknowledged in its Online Platforms Communication that, in particular for smaller businesses and micro-enterprises, some online platforms constitute the main point of entry to certain markets.<sup>8</sup> This view was echoed by the Bundeskartellamt (“FCO”), which noted in the *Asics* case

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<sup>7</sup> eBay report on Europe’s potential, p. 16, see:

[http://www.ebaymainstreet.com/sites/default/files/ebay\\_europe\\_dsm\\_report\\_10-13-15\\_0.pdf](http://www.ebaymainstreet.com/sites/default/files/ebay_europe_dsm_report_10-13-15_0.pdf)

<sup>8</sup> Online Platforms Communication, page 12. This finding is also supported by a survey, conducted by ibi research at the University of Regensburg, where 75% of the asked Germany entities agree / rather agree that the use of marketplaces facilitates the entry into the online market; additionally, 64% of German retailers who already use

that, for small and medium-sized online shops, presence in an online marketplace is “decisive” for customers being able to find them.<sup>9</sup>

Online marketplaces promote a dynamic and more diverse environment where new and small firms can prosper. This is important, as diversity in markets can indicate stronger resilience to supply and demand shocks.<sup>10</sup> In fact, retailers also see marketplaces as an important tool for growth. In a recent survey, 24% of UK retailers stated that they planned to increase their use of online marketplaces.<sup>11</sup>

### **c. Cumulative effects intensify negative impact of marketplace bans**

The negative impacts of marketplace bans are often intensified by the fact that such bans are imposed simultaneously by several players in a respective market. We typically see similar practices to prohibit or restrict the sale on open online marketplaces of several if not the majority of all relevant brands in a specific sector.<sup>12</sup> When bans are introduced by several leading brands in a sector, the potential loss of sales to a brand from introducing a ban is significantly reduced. Other brands have an incentive to introduce their own ban and move all online sales to independent websites or offline channels, where pricing comparisons are less transparent and pricing is less competitive. The cumulative negative effects of bans being implemented by several leading brands in a given sector is substantial and significantly reduces inter-brand competition. This view has been shared by the national competition authorities that have dealt with this issue<sup>13</sup> and is supported by courts<sup>14</sup> and academics.<sup>15</sup>

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online marketplaces stated that they use marketplaces in order to access new markets – p. 48 & 20 of “Online-Marktplätze als Vertriebskanal” by ibi research, Universität Regensburg, 2015.

<sup>9</sup> See decision in re. Asics of 26 August 2015 (B2-98/11)) – ASICS. Note that the FCO did not, however, make any formal findings on this point.

<sup>10</sup> OECD (2015).

<sup>11</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 12.

<sup>12</sup> A comprehensive list can be found here: <http://www.choice-in-ecommerce.org/ecommerce-in-danger/the-list-of-brands-restricting-ecommerce/>

<sup>13</sup> Namely the German FCO (see case report in re. adidas of 19 August 2014 (B3-137/12) and decision in re. Asics of 26 August 2015 (B2-98/11)) and the French Autorité de la Concurrence in re. Adidas, press release of 18 November 2015.

<sup>14</sup> Cf. Higher Regional Court of Schleswig, 5 June 2014, 16 U Kart 154/13 – Casio and Lower Regional Court of Frankfurt, 31 July 2014, 2-03 O 128/13 – Coty.

<sup>15</sup> See e.g.

- Lohse, Andrea, Drittplattformverbote: Kernbeschränkungen des Internetvertriebs?, *Wirtschaft und Wettbewerb* (WuW) 2014, p. 120-130
- Mäger, Thorsten/von Schreitter, Florian, Vertikale Wettbewerbsbeschränkungen und das Internet: Schutz des Verbrauchers oder Behinderung effizienter Vertriebsstrukturen?, *Neue Zeitschrift für Kartellrecht (NZKart)* 2015, p. 62 – 73
- Neubauer, Arne, Internetvertrieb im Kartellrecht - Eine kritische Auseinandersetzung mit herstellereitigen Vertriebsbeschränkungen, *Dissertation*, 2015, p. 55 ff.
- Schweda, Marc/Rudowicz, Jan-Christoph, Verkaufsverbote über Online-Handelplattformen und Kartellrecht, *Wettbewerb in Recht und Praxis (WRP)* 2013, p. 590 – 600

## **(2) Retailers' own online shops are not a sufficient alternative to selling via online marketplaces**

The Preliminary Report finds that selling via the authorized distributors' own website represents a sufficient alternative to selling via online shops operated on open marketplaces. According to the Preliminary Report, for the majority of retailers (61 %) „marketplaces are not important as a sales channel as they sell their products only via their online shop“.<sup>16</sup> The Preliminary Report also concludes that absolute marketplace bans do not prevent retailers from using the Internet as a sales channel because retailers banned from marketplaces can still sell products through their own online shops.<sup>17</sup>

eBay submits that these conclusions do not accurately reflect the reality of online sales. Retailers' own shops are not a sufficient alternative to selling via online marketplaces due to their lower online visibility, lower conversion rates, higher marketing costs and lower ability to reach foreign markets. Retailers, who are prevented from using online marketplaces, will not be able, in the majority of cases, to compensate for this loss with the use of their own online shop. This loss is even more acute in the mobile environment where visibility of a retailer's own online shop is further reduced.

### **a. The average conversion rate on retailers' own website is significantly lower than the conversion rates achieved on marketplaces**

In paragraph 415 of the Preliminary Report the Commission states that “the average conversion rate, that is, the proportion of website visits which result in a purchase, on retailers' own website tends to be slightly lower (4 %) than the conversion rates achieved on marketplaces (5 %)”.

However, in a survey conducted by the German Bundeskartellamt ("FCO") 89% of the surveyed merchants for sports shoes stated that the great reach of online marketplaces is in their view a significant advantage (71% attached very great and additional 17 % attached great importance to this).<sup>18</sup> 83.3% of the surveyed merchants who exclusively run an online shop on an open marketplace said that a compensation of the traffic that can be generated via online marketplaces was not possible for them at all. Of those merchants who have their own website this view was shared by 37.5% and an additional 23% said that it would only be possible at unacceptably high costs (so in total over 60% did not see any viable alternative to achieve the same traffic as on an online marketplace).<sup>19</sup>

The visibility of retailers own online stores is further reduced in the mobile environment. Consumers show a lack of willingness to use or even consult a variety of shopping apps when shopping mobile. In 2014, only two of the top 25 smartphone apps were shopping apps (Amazon and eBay).<sup>20</sup>

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<sup>16</sup> Preliminary Report, p. 156.

<sup>17</sup> Preliminary Report, p. 153, paragraph 469.

<sup>18</sup> ASCIS, para. 544.

<sup>19</sup> ASICS, para. 547.

<sup>20</sup> <http://www.techlicious.com/blog/top-25-mobile-apps-for-ios-and-android/>.



**b. Marketing expenses are substantially higher for retailers running their own online stores**

A distributor's own website can only be successful if it can be found by potential customers, and this requires enormous efforts in search engine optimisation (SEO). For smaller distributors this alternative is, therefore, often too costly. As a result, they can hardly compete with bigger online shops that usually have considerably greater financial resources and are often operated by the brand manufactures themselves.

**c. The ability to reach foreign markets is different for retailers' online stores and marketplaces**

The Preliminary Report concludes that marketplaces facilitate cross-border sales and that retailers that sell (also) via marketplaces are more likely to sell cross-border compared to those which only sell via their own website.<sup>21</sup> However, the report underestimates the corollary detrimental impact of marketplace bans on cross-border trade. Approximately 44 % of retailers that sold only via their own website reported not to sell cross-border (in any product category), whereas approximately only 20 % of retailers that sold only or also on marketplaces reported not to sell cross border. A recent Commission survey also revealed that the smaller the retailer, the more they rely on marketplaces for cross-border online sales and the less they rely on selling through their own website. On average the surveyed SMEs rely on online marketplaces for 73% of their cross-border sales.<sup>22</sup> Moreover, approximately two thirds of the marketplaces report to be open to professional sellers from all 28 Member States.<sup>23</sup>

eBay welcomes the Commission's findings in this regard and submits that, unlike retailers' own online shops, marketplaces make it easier for companies to sell cross-border for a number of reasons. Sellers that want to increase sales into another Member State are able to do so without incurring the cost of launching a new dedicated website for this Member State. Moreover, some marketplaces facilitate cross-border delivery or provide advice on the applicable rules when selling cross-border.

As the Commission has recognized through its Digital Single Market agenda, firms that are connected to the global economy are generally more productive than firms that serve the domestic market only. A large body of research confirms this. For example, OECD finds that "exports play an important role in fostering economic progress". Higher productivity is in turn associated with more prosperous communities.<sup>24</sup> As those communities are largely dominated by MSMEs, including in particular micro and small firms in cross-border trade becomes an obvious priority.

For instance, MSMEs represent 99% of EU's total enterprise population and micro enterprises account for as much as 93%. Nevertheless, across OECD countries, less than 5% of micro enterprises are exporters while typically half of large enterprises export.<sup>25</sup> According to data presented in the European Commission's Annual Report on SMEs 2013/2014, fewer than 9% of micro enterprises in the UK, Spain, Italy, France and Germany export. The Commission also reports that 12% of EU firms in retail exported in

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<sup>21</sup> Preliminary Report, paragraph 332.

<sup>22</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 9

<sup>23</sup> Preliminary Report, paragraph 332.

<sup>24</sup> "Inclusive Global Value Chains", OECD and World Bank (2015).

<sup>25</sup> "Enterprise at a Glance", OECD (2013).





2014. To serve as an illustration, 6% of the UK's micro sized retailers engaged in exporting in 2013, compared to 57.5% of the large retailers.<sup>26</sup>

In the EU, 93% of small businesses using the eBay marketplace export – and these are predominantly micro and small firms. These technology-enabled exporters reached on average 18 different countries in 2014; 8 were extra-EU countries and 10 EU countries. A good illustration of how the online marketplace enables direct market reach is the pilot carried out in the German city of Mönchengladbach. It encompassed 79 local sellers, who were introduced to eBay as a model for selling online. International selling was in fact not a focus of the project; nevertheless, during the pilot's first phase (between October 2015 and July 2016), the merchants sold goods into more than 84 countries (including exotic destinations like Guadalupe and New Zealand).

This situation of small businesses independently internationalizing their operations should be contrasted with trade in the traditional marketplace. Across OECD countries, 50% or more of exporting enterprises trade with only one country.<sup>27</sup> The World Bank estimates that the average number of countries reached by exporting firms in Belgium, Bulgaria, Estonia, Portugal and Spain is around four.<sup>28</sup>

Indeed, the ability of eBay-enabled enterprise to reach multiple foreign markets helped them in the recent financial and economic crisis. For example, eBay-enabled businesses in Spain, Italy and Portugal saw their sales growth outpace their country's GDP growth by on average approximately 15-20% each year from 2010 to 2014; Greek firms exceeded GDP growth by about 25% on average every year during that time period.<sup>29</sup>

Online marketplaces offer retailers the opportunity to reach at low cost a huge number of potential customers outside of their home country.

#### **d. Revenue losses resulting from marketplace bans cannot be compensated via other sales channels**

The experience of merchants subject to marketplace bans has confirmed that revenue losses due to such bans are very difficult to compensate via other sales channels, be it offline or online.

In an eBay survey three quarters (75%) of online sellers said that they would lose up to half of their revenue if all brands imposed platform bans.<sup>30</sup> Only 4% of online sellers say they could recoup between 81% and 100% of lost online marketplace sales through brick and mortar retail or their own websites, if

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<sup>26</sup> Own calculation using the OECD Trade by Enterprise Characteristics database, year 2013.

<sup>27</sup> OECD (2015).

<sup>28</sup> World Bank Exporter Dynamic Database.

<sup>29</sup> "Empowering People and Creating Opportunity in the Digital Single Market: an eBay Report on Europe's Potential", available at [http://www.ebaymainstreet.com/sites/default/files/ebay\\_europe\\_dsm\\_report\\_10-13-15\\_0.pdf](http://www.ebaymainstreet.com/sites/default/files/ebay_europe_dsm_report_10-13-15_0.pdf)

<sup>30</sup> eBay Seller survey: This research surveyed 2600 respondents across the UK, France, Spain, Italy and Germany. All respondents earn over \$10,000 per year through selling via online marketplaces.

all brands imposed platform bans.<sup>31</sup> In another survey conducted by the FCO, 93% of the merchants for sportswear surveyed who run an online shop on an open marketplace were of the opinion that other sales channels are not a suitable alternative to compensate for loss of sales in consequence of a marketplace ban.<sup>32</sup> The average estimate of these merchants for such loss of sales was 46.3%.<sup>33</sup> 58% of the merchants that use open marketplaces would expect a drop of sales as a result of a ban, 24% said that they would fear insolvency and 14% said that they would effectively be prevented from selling online at all.<sup>34</sup> These figures are even more dramatic for merchants who exclusively use online marketplaces. In this group, one third doesn't see an alternative and thinks that online trade would not be possible for them any longer.<sup>35</sup> In fact, SME retailers indicate that they stand to lose 53% of their total online revenue from pervasive online marketplace bans, depriving SME retailers of an estimated 26 billion euros of online retail sales.<sup>36</sup>

### **(3) Brands' justifications for marketplace bans are not credible or supported by evidence**

The Preliminary Report mentions a few concerns that were raised by some manufacturers. The Preliminary Report only lists these concerns without scrutinizing them. We believe that some (if not all) of the manufacturers' justifications are not supported by the evidence and are put forward to detract from their fear of the price transparency that is inherent to marketplaces. The Preliminary Report lists the following concerns: (a) Protection of brand image, (b) the sale of counterfeits, (c) pre- and post-sale services, (d) free riding, and (e) market position and the lack of relationship with the costumers. Broad claims regarding preservation of brand image or the need to prevent free riding cannot constitute a sufficient justification to outweigh the benefits that marketplaces bring to consumers, in particular as less restrictive measures are usually available to address these concerns.

#### **a. Protection of the image and positioning of the brand**

Some manufacturers have argued that marketplace bans are needed to protect the image of their brands. However, these allegations that the sale on eBay may damage a brand's image cannot be supported by robust empirical facts.<sup>37</sup> To eBay's knowledge, brand manufacturers have never been successful in supporting their allegations with convincing consumer surveys or the like. In fact, eBay is convinced that rather the opposite is true.<sup>38</sup> From the perspective of the large majority of consumers, selling via eBay does not entail any negative effect for a brand's image. Quite to the contrary, consumers are rather

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<sup>31</sup> eBay Seller survey: This research surveyed 2600 respondents across the UK, France, Spain, Italy and Germany. All respondents earn over \$10,000 per year though selling via online marketplaces.

<sup>32</sup> ASICS, para. 558.

<sup>33</sup> ASICS, para. 558.

<sup>34</sup> ASICS, para. 559.

<sup>35</sup> ASICS, para. 559.

<sup>36</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 25.

<sup>37</sup> In ASICS, the German FCO comes to the same result and gives some narrow examples where marketplaces could harm a brand image, e.g. with "Discount" in the name or in the logo of the marketplace, para. 610.

<sup>38</sup> On eBay the most frequently searched key words are brand names (e.g. currently on eBay.de: Nike (rank 14) or Adidas (rank 21)).

irritated if a brand can't be found on well-known open online marketplaces like eBay or Amazon. In a survey conducted by IPSOS in 2015 the vast majority of online shoppers interviewed believes that products sold on online marketplaces are either of the same quality (61-64%) or even of higher quality (19-23%) than those sold in alternative sales channels. Moreover, the clear majority (79%) considers that if a brand is not available on online marketplaces the reputation of that brand is worsened (32%) or unaffected (47%).<sup>39</sup> A recent consumer survey has shown an even clearer picture: Once consumers have understood what a platform ban is (usually consumers are unaware of such practices), 22% said that they would lose trust in a brand implementing bans and 75% of the consumers said that they would urge brands to sell via marketplaces.<sup>40</sup>

One must bear in mind, that the large marketplaces, like eBay, have significantly changed in recent years – often without the critical manufacturers noticing. eBay is not the same as it was in 2009/2010 when the revision of the vertical restraints regulation took place, but has evolved substantially, made great efforts to support brand images and offers more options than ever for exclusive brand presentation.

According to most recent figures, 81% of all offers on eBay concern new goods and 87% are fixed price offers (i.e. for goods that are not put out for auction). This is not a coincidental occurrence but the result of a clear shift in eBay's strategy to evolve away from an auction platform towards a trade platform for professional sellers. The times that eBay could be perceived as a mere auction platform for used goods are long past. While this is certainly not an abrupt development, the results are far more visible today than they were in 2010.

eBay makes great efforts in close cooperation with brand manufacturers to offer them a high-grade branded shopping environment. eBay operates so-called branded showrooms that allow for an exclusive brand presentation. Moreover, through its authorized sellers program, eBay enables brand manufacturers to expressly highlight their authorized sellers on eBay. As a result, the number of brand manufacturers that cooperate with eBay (e.g. Samsung, Sony or Bosch) is constantly growing.

A close cooperation with brand manufacturers and professional sellers is also key for eBay when it comes to the next dimension of developments in trade, namely multichannel strategies, mobile commerce and cross-border e-commerce. It is in these areas where brand manufacturers and commercial sellers need to innovate in order to preserve or expand their market position. Open online marketplaces like eBay serve as an important facilitator that help brand manufacturers and commercial sellers to implement such innovative trade developments. In 2010, these trade developments were mostly still in their infancy. Today, they are key for both brand manufacturers and commercial sellers.

## **b. Combating the sale of counterfeit products**

There has also been a development of marketplaces when it comes to concerns that these would facilitate the sale of counterfeit products. It seems that these are arguments that were mainly used in the past and do not have any substance in today's market reality. The opposite is true: eBay works with rights holders

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<sup>39</sup> Coppi, Trento: "The competitive effects of marketplace bans for electronic products, 4.8 and 4.11.

<sup>40</sup> Toluna research of 2000 German consumers, 2016.



and the relevant authorities to fight trade in illicit products. The sale of counterfeit products is prohibited on eBay. Any right-infringing items harm the eBay marketplace and lead to negative buying experiences. By means of technical filters eBay actively searches the marketplace for counterfeit items. When eBay discovers counterfeit items or is informed of them, eBay takes them down and sanctions the sellers.

eBay has put in place the so-called “Verified Rights Owners” (VeRO) program with participation of 30,000 rights owners. Within this program rights owners can fast and easily report us items that infringe their rights which are then being taken down swiftly by eBay. This form of cooperation has paid off in recent years.

eBay employs a team of experts who by means of highly-developed software and risk management systems can, in most cases, identify fraud attempts and take counter measures before any harm was done. At the same time, we react to all reports that we receive from outside, e.g. our customers, regarding any cases of a problem. Moreover, the retail standards we set for our sellers support us in identifying and sanctioning those sellers with whom rights owners and/or buyers are dissatisfied.

#### **c. Ensuring sufficient pre- and post-sale services**

Brands often justify imposing these restrictions saying they offer a superior customer experience and better customer service than online marketplaces, who they believe lack experience in the sale of their goods. Yet, eBay’s research shows that just 14 per cent of e.g. UK shoppers rate customer experience as one of their top three shopping priorities, and only 6 per cent rank customer service as important.<sup>41</sup> Price remains the number one priority – 80 per cent of shoppers placed it in their top three priorities – choice (59 per cent) and convenience (46 per cent) were also key considerations.

Moreover, merchants, who (also) sell online, usually offer a high service level (e.g. they have the legal obligation to take back goods for 14 days) and tend to be available 24/7, otherwise they won’t be able to survive in a highly transparent environment. This is even more true on marketplaces, like eBay, where the service level is constantly monitored and measured by the consumer.

More importantly, there is no difference between sellers’ own websites and their shops on eBay (see an example in the Annex). As a manufacturer must not prohibit the use of an online shop but can only impose qualitative criteria that ensure a specific service level, these criteria can also easily be met on eBay. We can therefore not see how this argument prevails in a world where online distribution of an authorised seller can’t and (rightly so) should not be prevented by a manufacturer.

#### **d. Protection of existing distribution channels and brick and mortar shops/free riding**

For many years, brands have also tried to justify bans by saying that online merchants would “free ride” off of the service levels provided by brick and mortar merchants. There were similar discussions when

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<sup>41</sup> Toluna, 2016; The research was conducted by digital insights and research company, Toluna, and surveyed 2,000 UK consumers who shop online at least once a month.

large malls outside the cities opened and city centers seemed to be at risk. But free riding concerns for marketplaces are outdated; the commerce landscape is significantly changing and offline and online are merging.

Shopping is no longer a choice between offline or online: The consumer decides what he or she wants and uses all available channels (multi-channeling) to find it. With mobile devices, people have a mall in their pocket and can buy wherever they want. And increasingly consumers take advantage of all possibilities: for example, they can buy something online and pick it up in a store – something that eBay enables – and often they will then buy additional goods when picking up the item. It is therefore not surprising that the so-called “free riding” more often happens the other way around: Consumers seek information via the Internet and then shop in a brick and mortar shop, so called “Webrooming”.<sup>42</sup>

It’s important to note that even pure online players have significant costs, esp. staff and rent for warehouses, as well as additional costs, like shipping costs, Internet marketing etc. More importantly, they have to offer a high service level (see above).

#### **e. Concerns about competition and the lack of relationship with customers**

Moreover, there are some brands who wish to have a direct relationship with their customers and fear to lose this to marketplaces. However, there are different types of online marketplaces. The type of online marketplace eBay offers is that of a platform which enables independent businesses to engage in commerce. eBay does not sell merchandise itself and therefore does not compete with the sellers who use the platform. This eliminates competition concerns that sellers might otherwise have.

As said, eBay only acts as a platform. A seller, who uses eBay, has a direct relationship with the consumer and ships the good directly to him or her. The seller can send messages directly to the consumer and receives all necessary data. Moreover, the global reach of eBay allows a seller to expand the footprint and thus to widen the customer base significantly.

Some manufacturers have also tried to argue that marketplace bans are needed to prevent confusion for consumers.<sup>43</sup> They argue that whenever it is not clear to consumers who buy on an online marketplace from whom they actually purchase the goods, a brand manufacturer should be allowed to prohibit its authorized sellers from offering goods via that marketplace. eBay doubts that, with the exception of some individual cases, such a “confusion effect” could actually be demonstrated in reality. In any event, because eBay acts as a marketplace for others and does not act as a seller itself, such confusion can’t be assumed for consumers buying on the eBay marketplace.<sup>44</sup>

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<sup>42</sup> 38,5% of German online users first consult the Internet before buying offline and only 10,3% do it the other way round. For “Smart Natives” the difference is even higher: 54,7% vs. 14,1%; ECC Köln, Cross-Channel im Umbruch, 2015.

<sup>43</sup> Cf. Higher Regional Court of Frankfurt, 22 December 2015, 11 U 84/14 (Kart) – Deuter, that has justified an “Amazon ban” with the argument of consumer confusion because, unlike eBay, Amazon both sells items itself and allows third-party sellers.

<sup>44</sup> See also footnote 108, Advocate General in L’Oreal v eBay case:

In my opinion ‘normally informed and reasonably attentive internet users’ are capable of understanding the

#### **(4) The underlying data available to the Commission is too weak to support some of its findings**

We fear that the data based upon which the Commission developed its findings is insufficient and does not provide a sound basis for the platform related findings and conclusions contained in the preliminary report.<sup>45</sup>

The report is based on input provided by companies from all member states. Companies with cross border activities and thus several homepages with different domains had to answer the questionnaire twice or more.<sup>46</sup> While the attempt to get a detailed response is admirable, the setup chosen by the Commission clearly favors bigger companies. Equally, by not differentiating between retailers with an annual turnover below €500.000,<sup>47</sup> the Commission ignores micro-sized retailers for which marketplaces constitute an essential gateway to online distribution.

By contrast, the background information provided in the report with respect to the questionnaire's analytical framework, the selection of retailers and the structure of the questionnaire indicates that small retailers are not adequately represented in the results published by the Commission. The time and resources needed to respond to the questionnaire favors bigger retailers, let alone the fact that most of the smallest retailers probably were not even questioned whatsoever. It can reasonably be assumed that the answers provided in the context of the E-commerce Sector Inquiry do thus not correlate with the actual market structure and are therefore not representative:

- First, the selection of retailers was carried out based on unsuitable resources. As there is no central register for retailers selling online, the Commission relied "on a number of databases, such as Amadeus, Euromonitor and Veraart Research, as well as information received from professional associations."<sup>48</sup> While larger retailers might be adequately covered that way, relatively few small and smallest retailers (e.g. many eBay sellers) are not listed in such databases. This leads to a serious lack of data in relation to this segment.
- Second, even if contacted, it can be reasonably assumed that many small retailers lacked sufficient resources required to be able to provide in-depth answers to the questionnaire, as they

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difference between an electronic marketplace, a direct seller of goods or services and the commercial source from which the goods or services originate. And this because the existence of various intermediary economic activities such as distributors, brokers, auction houses, flea markets and real estate agents is known to every adult living in a market economy. Hence, a mistake concerning the origin of goods or services cannot be presumed only because a link leads to the ad of an electronic marketplace operator if the ad itself is not misleading as to the nature of the operator. <http://curia.europa.eu/juris/celex.jsf?celex=62009CC0324&lang1=de&type=TXT&ancre=>

<sup>45</sup> In the Preliminary Report the Commission states that Marketplace restrictions are not uncommon and 18 % of retailers report to have agreements with their suppliers containing marketplace restrictions. The Member States with the highest proportion of retailers experiencing marketplace restrictions are Germany (32 %) and France (21 %). Preliminary Report, p. 155

<sup>46</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, Fn. 56.

<sup>47</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, Figure B.59.

<sup>48</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, recital 39.

generally have less time and human capacity at their disposal that can be made available for the purposes of the questionnaire. By contrast, larger retailers with substantial resources were in all likelihood able to answer the extensive questionnaire in great detail rather easily.

As a consequence, the companies that are harmed the most by platform bans are significantly underrepresented in the report's database and thus also the findings derived from it.

Also, the overall number of respondents seems to be too low to draw reliable conclusions with respect to the relevance of distribution via marketplaces: according to the Commission, only 1.453 companies responded in total, 1.051 of which were retailers.<sup>49</sup> Even rather large economies like France or Italy account for only 48 and 82 respondents, respectively, in relation to goods. The highest number of responses came from Germany, adding up to 338 in total.<sup>50</sup> While this is, in absolute figures, by far the highest number compared to other member states, it is still surprisingly small, considering that even six years ago more than 117.000 enterprises engaged in the e-commerce sector in Germany alone.<sup>51</sup> It can be assumed that those numbers have since then continued to increase, which is by no means mirrored in the number of responses taken into account for the purposes of the report. In order to reach an adequate confidence interval and provide a basis for reliable factual and (indirectly) also legal conclusions, the number of responses would have to be larger by far.

Moreover, the conclusions drawn in the report fail to adequately take into account that marketplaces do not have the same significance in every member state. However, answers from some member states where marketplaces (e.g. Belgium) do not play a significant role in e-commerce distort the average results the Commission relies upon.

Furthermore, the Commission's data shows that 18% of all retailers across the EU are subject to platform bans. However, the sample reported by the Commission understates the share of affected retailers by design: only around one third of all respondents to the Commission survey sell on online marketplaces. The remaining respondents are therefore logically not affected. Adjusting for this feature of the sample the relevant statistics inferable from the Commission figure is that 60% of relevant retailers (those selling on marketplaces) are affected by online marketplace bans.<sup>52</sup>

All this clearly demonstrates that the report's database is rather flawed and therefore not sufficient to make any general observations about the harm to competition caused by (absolute) platform bans, especially as it is highly discriminative against small retailers who are affected by such bans the most.

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<sup>49</sup> Those figures do not even take into account the multi-counts of companies with cross-border activities; see European Commission, Preliminary Report on the E-commerce Sector Inquiry, Fn. 56.

<sup>50</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, Figure A.1, p. 26.

<sup>51</sup> See i.e.: <https://de.statista.com/statistik/daten/studie/157505/umfrage/anzahl-der-anbieter-am-deutschen-e-commerce-markt/>

<sup>52</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 32



According to the recent seller survey conducted by eBay, the number of retailers affected by marketplace bans is significantly higher than what is stated in the Preliminary Report. In fact, more than half of online sellers (53%) have been affected by platform bans. In addition, out of this 53% sellers:

- More than a third (36%) have suffered reduced revenues because of platform bans
- More than a third (36%) say platform bans have left them with unsold stock, as they've been restricted from selling it through marketplaces
- Almost a quarter (23%) have been forced to make redundancies because of revenue losses from platform bans

Despite the aforementioned shortcomings, it is evident even from the report that marketplaces are essential for small retailers – much more so than for medium and large ones.<sup>53</sup> The report shows that amongst small and smallest businesses, up to 54% of respondents sell via marketplaces, as compared to 28% of the biggest retailers with more than 100 million Euro in revenues.<sup>54</sup> Accordingly, the Commission came to the conclusion that "the proportion of retailers that sell via marketplaces only and do not have their own websites tends to be higher within the smaller turnover bands", whereas larger retailers can increasingly afford to sell exclusively via individual online shops and not use marketplaces.<sup>55</sup>

It is thus in particular the small and medium-sized retailers and market entrants for whom marketplaces are an important or in some cases even essential gateway to online sales. Given this, it draws even more criticism that smaller retailers are not sufficiently represented in the results of the Sector Inquiry.

#### **(5) The Commission fails to address the consumer perspective on marketplace bans**

The preliminary report deals with a number of aspects on marketplace bans that have a direct or indirect consumer impact. The report, for example, rightly notes that marketplace bans allow manufacturers to stabilize retail prices and reduce competitive pressure on prices (paragraph 455), thereby leading to direct consumer harm through higher prices. However, the Commission did not address the consumer perspective on the actual restrictions and the justifications provided by manufacturers. The primary justification for putting in place marketplace bans put forward by manufacturers relates to protecting the brand image and positioning online (paragraphs 444-446). However, recent consumer research<sup>56</sup> in this area shows that 88% of shoppers expect their favorite brands to be available through online marketplaces such as eBay and Amazon. In fact, the impact on brand image seems to be the opposite. Over a quarter

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<sup>53</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, Figure B.58, p. 156.

<sup>54</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, Figure B.56, p. 138.

<sup>55</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, Figures B.58, B.59, p. 139.

<sup>56</sup> The research was conducted by digital insights and research company, Toluna, and surveyed 2,000 UK consumers who shop online at least once a month.

of shoppers (26%) would lose trust in a brand if it was secretly using platform bans, with the majority of shoppers (83%) urging brands to be open about their use of these shopping restrictions.

Consumers also acknowledge that marketplaces allow buyers to easily compare prices across a number of sellers on the marketplace and purchase the products at the lowest price. Almost two thirds (65%) expect to find the best prices on marketplaces and only 6% said they would go directly to the manufacturer for best price.

Indeed, for consumers, online marketplaces provide a transparent and easily accessible comparison of offers of many distributors for a product they are looking for, reduce search costs and provide additional consumer protection features as well as transaction security. Brands' purported justifications simply do not hold up. As a consequence of marketplace bans, consumers are effectively prevented from buying their favourite products at competitive prices via their preferred and trusted online and mobile commerce channels and may pay higher prices because they cannot use marketplaces to efficiently compare prices. The benefit for consumers of "platformisation" has been estimated alone for the EU at 1 billion Euro annually.<sup>57</sup> A recent Compass Lexecon survey found that 80% of consumers consider that online marketplaces provide more choices than physical stores while 69% consider that online marketplaces provide more choices than specialist retailers online.<sup>58</sup>

We also regret that the Commission has not taken into account consumer-side figures when assessing the importance of online marketplaces as a distribution channel. The Commission's figures (page 141) on the relevance of online marketplaces is limited to how many merchants use online marketplaces as distribution channels, but does not cover how many consumers use online marketplaces as a preferred shopping destination. Indeed, over 90% of European online shoppers shop on online marketplaces.<sup>59</sup>

#### **(6) The implications of mobile commerce and new technologies have not been addressed**

While the Commission acknowledges marketplaces as a very important sales channel for smaller and medium-sized retailers (e.g. page 156), the Commission does not assess the underlying reasons and how those framework conditions might change in the coming years. As noted above, the online marketplace model supports small retailers in getting access to the kind of support with marketing, traffic, delivery, translation, technology development, and payments that had previously been out of reach for firms of their size. As has been shown above, that combination is proving a powerful model for connecting businesses with consumers across national and cultural borders, and helping them to punch above their weight with larger competitors.

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<sup>57</sup> Tagesspiegel, 17.10.2016.

<sup>58</sup> Referenced in Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 24.

<sup>59</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 22.



The online marketplace model thus allows small merchants to stay relevant in the continuously changing online commerce landscape. For example, mobile commerce – and in particular app-driven commerce – already plays an important role and is expected to further grow in the coming years.

In Q2, 2016, the value of goods traded over eBay worldwide was 19.8 billion US-Dollars. 9.5 billion of that was generated on mobile devices. In other words, almost 50% of all goods on eBay were purchased on a mobile device. eBay's mobile applications allow consumers and merchants to easily and conveniently use eBay marketplaces on smartphones and tablets and are available in 190 countries and were so far downloaded 337 million times. Every week, 10 million new offers are listed via a mobile device.<sup>60</sup> In the broader European online commerce market, mobile accounted for 20% of e-Commerce spending in 2015.<sup>61</sup>

The growth rate of "mobile commerce" is astonishing. The iPhone was introduced in 2007 and in 2011, only five years ago, the percentage of mobile commerce on eBay was just below 8%. And this enormous growth is happening across the market – not only on eBay. A study prepared by Criteo entitled "State of Mobile Commerce – Growing like a weed", found that in the beginning of 2015, US mobile transactions had grown 10% in the last three months, that 34% of eCommerce transactions were mobile globally and that countries like Japan and South Korea had already exceeded the 50% mark of all transactions.<sup>62</sup>

One main reason for the rise of mobile commerce, which is primarily consumer driven, is convenience, the ability to shop anytime and anywhere. That is the reason for the success of mobile apps.

There is strong evidence that this is particularly true for e-commerce. In 2014, sessions on shopping apps on iOS and Android devices increased by 174% year-over-year, including 220% on Android, while overall app use was up 76%.<sup>63</sup>

The increasing importance of mobile commerce is evident also from the Toluna consumer survey, which found that over three quarters (77%) of younger shoppers use apps for online marketplaces, compared to just over a quarter (28%) of silver surfer shoppers.<sup>64</sup>

Yet hand in hand with the emphasis on convenience comes a lack of willingness to use or even consult a variety of shopping apps when shopping mobile. In 2014, of the top 25 smartphone apps only two were shopping apps (Amazon and eBay).<sup>65</sup> It is thus unlikely that a merchant would be able to replace loss of revenue from a marketplace app through sales on its own shopping app – consumers are just unlikely to download hundreds of different shopping apps.

And the technical development doesn't stop with mobile commerce. We have already seen the rise of further channels powered by new sorts of devices, like smart watches or other wearables. The future of

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<sup>60</sup> [https://presse-de.backends.ebay.eu/sites/default/files/eBay\\_Factsheet\\_112016.pdf](https://presse-de.backends.ebay.eu/sites/default/files/eBay_Factsheet_112016.pdf).

<sup>61</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 15.

<sup>62</sup> <http://www.criteo.com/media/1894/criteo-state-of-mobile-commerce-q1-2015-ppt.pdf>.

<sup>63</sup> <http://www.forbes.com/sites/briansolomon/2015/01/06/shopping-apps-are-now-the-fastest-growing-thing-in-mobile/#a34eb7877d51>

<sup>64</sup> The research was conducted by digital insights and research company (<https://uk.toluna.com/>) and surveyed 2,000 UK consumers who shop online at least once a month.

<sup>65</sup> <http://www.techlicious.com/blog/top-25-mobile-apps-for-ios-and-android/>



commerce in this world of connected screens and sensors will be a more contextual, conversational, and accessible experience for consumers. Deep learning through Artificial Intelligence advances are about to revolutionize commerce through an unprecedented convergence of technology and consumer expectations.

At eBay we already use machine learning algorithms to recognize objects in listings, find similar products, and rank recommendations. We deploy artificial Intelligence in various areas, from structured data to machine translation to risk and fraud management. Recently, eBay also launched a product called eBay ShopBot, an artificial intelligence shopping assistant that is integrated with Facebook Messenger.

We believe that open marketplaces play an important role in spreading the benefits of technological innovation to in particular small merchants who are not able to invest in this type of commerce development.

These rapid changes in the underlying technology and processes connecting buyers and sellers online also show that the market is evolving quickly and it is difficult to forecast how current business models – such as marketplaces, comparison shopping sites, search engines, social media sites, and even retailers – evolve and possibly merge.

Thus, we encourage the European Commission to focus on these very relevant developments in the final report and to refrain from statements that categorize certain distribution restrictions as not hardcore restrictions. The Commission should, at least, note that the market is evolving quickly and certain practices may amount to hardcore restrictions in the future.

#### **(7) The report does not take into account market trends and future developments**

The Commission's figures (page 141) indicate that the importance of marketplaces for overall online commerce varies among Member States. While 62% of German online merchants use online marketplaces as a distribution channel, only 4% of merchants in Belgium do so.

These figures seem to suggest that the relevance of marketplaces for overall online commerce is higher in countries that have a more mature and developed online commerce market (such as Germany and the UK). In other words, the more developed the online commerce market, the more important is the role of online marketplaces. The Commission should view this trend as an indication to which direction the market will evolve in less developed online commerce markets – in other words, it is likely that the importance of online marketplaces increases. Recent research also suggests that not only the importance of marketplaces will increase, but also the use of restrictions will. In fact, 90% of affected online retailers have noticed an increase in online marketplace bans in the last three years.<sup>66</sup>

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<sup>66</sup> Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 33.

#### **(8) The Commission should differentiate between blanket platform bans and qualitative criteria**

The Preliminary Report recognizes that restrictions regarding sales via marketplaces differ to a large extent. They range from absolute bans to restrictions of selling on marketplaces that do not fulfil certain quality criteria.<sup>67</sup>

Despite this recognition, however, the Preliminary Report applies the same legal approach to all marketplace bans concluding that these bans do not amount to a hardcore restriction of competition.<sup>68</sup> The Commission appears to conflate absolute bans and qualitative marketplace bans in this regard, presuming that absolute bans are a type of or akin to qualitative restrictions.<sup>69</sup> In eBay's view, however, a different legal approach to absolute and qualitative marketplace bans is necessary given that these two types of bans have a very different impact on competition and have very different rationales. The Commission's analysis fails to take into account the differences between the numerous available marketplaces.

Absolute marketplace bans should be treated as hardcore (and by object) restrictions. As set forth above, brands' pretextual justifications for such restrictions are not supported by the evidence. Absolute bans ignore the diverse nature of marketplaces offerings, targeting an entire sales channel as a class without advancing any individual justifications. Marketplaces not only follow various business models, but also significantly differ in quality and service. As confirmed by the findings in the Preliminary Report, many marketplaces invest substantial financial and non-financial resources in order to ensure a high-quality shopping environment and quality of content presentation.<sup>70</sup>

Online marketplaces such as eBay are used by very large numbers of customers and have a very wide reach – absolute marketplace bans thus necessarily leads to a major restriction on sellers' ability to make online sales to end customers and to reach a large part of the market. Such bans are likely to reduce competition, limit access to the Internet as a sales channel, and limit small sellers' opportunities to increase their sales volume and expand their customer base outside of their local community. The Commission highlights in its report a number of efficiencies and benefits which are facilitated through platform selling – both economically and politically, for instance with a view to trade between member states. It is therefore natural that *restricting* this form of distribution will nearly always restrict competition. However, these findings appear to have been completely ignored in the legal assessment.

In the Preliminary Report, the Commission concludes that bans are not a restriction by object because they do not have as their object a restriction on territory or the restriction of active or passive sales to end users (Par. 472). eBay submits that such bans do constitute hardcore restrictions of passive sales. Recent

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<sup>67</sup> Preliminary Report, p.145, paragraph 431.

<sup>68</sup> See paragraph 472 of the IR: "The preliminary findings of the sector inquiry do not indicate that **marketplace bans** should be considered hardcore restrictions within the meaning of Article 4(b) and/or Article 4(c) of the Vertical Block Exemption Regulation"(emphasis added).

<sup>69</sup> See paragraph 472 of the IR: "Such an approach is in line with the Vertical Guidelines which specify that marketplace restrictions requiring the retailer to use third party platforms (e.g. marketplaces) only in accordance with the quality criteria agreed between the manufacturer and its retailers for the retailer's use of the internet are not considered a hardcore restriction."

<sup>70</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, recital 456-458.

research based on eBay export data indicates that fixed costs to export are low on eBay, and for those sellers that do export, there appears to be an almost complete absence of destination-specific fixed costs. Sellers on eBay thus export in a demand-driven way without specifically targeting certain customer groups or markets, supporting the argument that sales on marketplaces should be seen as passive sales in the context of competition law.<sup>71</sup>

Absolute marketplace bans should be, therefore, deemed anticompetitive and should not benefit from the safe haven provided by the Vertical Block Exemption. Absolute bans reduce sellers' visibility on the Internet and cannot be deemed proportionate and assumed 'with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.'<sup>72</sup>

In contrast to absolute marketplace bans, qualitative criteria which are introduced by the producer to ensure, among other things, the brand image, quality of distribution, customer services, promotion, and nature of display, should not be treated as a hardcore restriction. As noted in the Vertical Guidelines, a 'supplier may require quality standards for the use of the Internet site to resell his goods, just as the supplier may require quality standards for a shop, or for selling by catalogue, or for advertising and promotion in general.'<sup>73</sup> However, when the criteria required by the producer are impossible to comply with, and cannot be addressed through existing technology, this should be seen as equivalent to absolute marketplace bans and constitute a hardcore restriction.

The Commission fails to demonstrate why brands should be allowed to prohibit sales through these marketplaces even if they meet the (legitimate) qualitative standards the brand owner has set for online shops. Instead, the Commission does not distinguish at all between marketplaces that do meet the quality standards and marketplaces that don't. The Commission only mentions "qualitative criteria" in relation to certain contractual clauses that imply conditions in relation to online distribution potentially having the same impact as an absolute marketplace ban.<sup>74</sup> The Commission is right in assuming that such clauses have to be treated like forthright marketplace bans. However, those criteria are not the only means to safeguard the quality of a distribution network. Apart from them, it would be easy and appropriate to define "real" qualitative criteria, taking into account individual product characteristics as well as marketplace specifics. Such qualitative criteria could be a mechanism through which the interests of the manufacturer were acknowledged without unreasonably limiting the retailers' options to the overall benefit of effective competition.

Also the German cartel office (BKA) addressed blanket marketplace bans in the context of its Adidas investigation. The BKA stated that "in the present case there were no indications that the general

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<sup>71</sup> An Anatomy of Online Trade: Evidence from eBay Exporters, Andreas Lendle, August 2013, available: <http://www.etsg.org/ETSG2013/Papers/206.pdf>

<sup>72</sup> Recital 5, Commission Regulation (EU) No 330/2010 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.

<sup>73</sup> Guidelines on Vertical Restraints (2010/C 130/01), [54].

<sup>74</sup> European Commission, Preliminary Report on the E-commerce Sector Inquiry, recital 433.

functionality of open marketplaces, irrespective of their specific design, would necessitate a general ban on sales in order to safeguard the quality or distribution of the sports articles concerned.”<sup>75</sup>

### **(9) The Commission applies different standards to related / similar restrictions**

In the Preliminary Report the Commission applies a different theory of harm to marketplace bans than that applied to dual pricing (charging different prices online and offline) and to price comparison tools. With respect to dual pricing the Commission notes that “dual pricing may lead to limiting the retailer's online sales and hinder access to more and different customers online”.<sup>76</sup> Indeed, such agreements are considered a hardcore restriction that may, on a case-by-case basis, fulfil the conditions of Article 101(3) TFEU and benefit from an individual exemption.<sup>77</sup> It is not clear why the Commission adopts a different approach when considering online marketplace bans. After all, absolute bans also, in the majority of cases, lead to “limiting the retailer's online sales and hindering access to more and different customers online”.<sup>78</sup> Both restrictions concern how retailers can sell on the Internet, without concerning where and to whom they may sell.

For price comparison tools, which according to the definition encompass shopping comparison sites, the Commission distinguishes between absolute bans and bans that are linked to quality criteria. The Commission states, “[a]bsolute price comparison tool restrictions, i.e. restrictions which are not linked to quality criteria may exclude an effective method for retailers to generate traffic to their website.”<sup>79</sup> The Commission also observes that absolute price comparison tool bans may also make it “more difficult to attract customers outside the physical trading area of the retailer via online promotion.”<sup>80</sup> There is no reason not to apply this same reasoning to online marketplaces, as shopping comparison sites and marketplaces fulfill a very similar function. Without marketplaces, many MSMEs lack an effective method to generate online traffic.

As noted above (section 7), the market is evolving quickly and it is difficult to forecast how current business models – such as marketplaces and comparison shopping sites – will evolve. Already today, online marketplaces and shopping comparison sites offer similar services by aggregating the inventory of different merchants and allowing consumers to compare products and offerings. Some price comparison sites have also introduced a “buy button”, facilitating on-site transactions. Differing analyses of the harm caused by the absolute ban of marketplaces and shopping aggregators are therefore misinformed.

### **(10) The wrong application of the EU Court of Justice’s ruling in the Pierre Fabre Case**

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<sup>75</sup> Referenced in Copenhagen Economics Report on the Economic Effects of Online Marketplace Bans (2016), page 46.

<sup>76</sup> Preliminary Report, paragraph 542.

<sup>77</sup> Paras 52, 64, Guidelines on Vertical Restraints, SEC(2010) 411.

<sup>78</sup> A similar effect to that noted by the Commission with respect to Dual Pricing ( Preliminary Report, paragraph 542).

<sup>79</sup> Preliminary Report, paragraph 918.

<sup>80</sup> Preliminary Report, Summary Box, p. 166.



In *Pierre Fabre v Président de l'Autorité de la concurrence*<sup>81</sup> the CJEU held that an absolute ban on Internet sales amounted to violation by object. The case concerned restrictions on online sales in the distribution of cosmetics products which were not classified as medicines. The Court noted that for such products (non-prescription medicines), the need to maintain a prestigious image is not a legitimate aim for restricting competition.

The Preliminary Report concludes that the *Pierre Fabre* ruling is not on point with regard to marketplace bans because it applies only to situations where there is an absolute ban on Internet sales. According to the Commission, since the impact of online marketplaces varies between Member States and product categories, marketplace bans do not entirely prevent retailers from accessing the Internet because they do not preclude the use of the retailers' own websites.

eBay disagrees with the Preliminary Report's conclusion that the treatment of online marketplace bans call for a different approach than that taken by the CJEU in *Pierre Fabre*. While this judgment was confined to the specific facts of the case involving an absolute ban on Internet sales, its rationale should be extended to online marketplace bans. Many times marketplaces are the starting point of consumers accessing the Internet<sup>82</sup> – especially in the mobile world (see above). Further, for many smaller sellers a marketplace ban is tantamount to a complete restriction on Internet sales, as these businesses do not have the financial and technical resources to set up a meaningful alternative to an online marketplace.

In its reasoning in *Pierre Fabre*, the CJEU referred to *Ker-Optika* (which involved a state measure allegedly infringing the Treaty provisions on the free movement of goods) in which the ECJ noted that preventing sales of contact lenses by mail order deprived dealers of “*a particularly effective means of selling those products and thus significantly impede[d] access of those traders to the market of the Member State concerned*”.<sup>83</sup> Marketplaces are a particularly effective means of selling products, particularly for small and medium-sized businesses. Absolute restrictions on marketplaces sales significantly limit sellers' Internet distribution possibilities and adversely affect competitiveness of the market as a whole.

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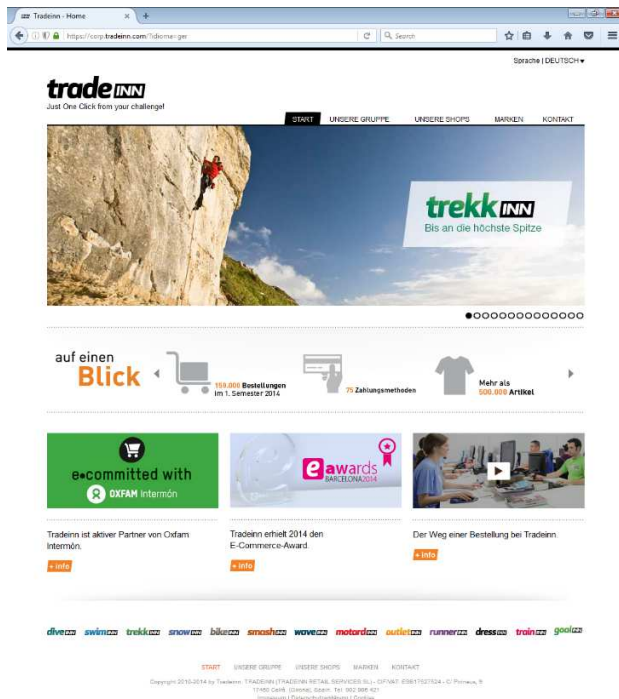
<sup>81</sup> Case C 439/09, [2011] 5 CMLR 31. For earlier case law, note Case COMP/37.975, PO/Yamaha in which the Commission condemned obligations whereby Yamaha's distributors had to contact Yamaha before exporting goods via the Internet, viewing such obligations as 'excessive', stating that, if the attempted justification was genuine, then there would be 'no reason' why the limitations should be limited only to online sales.

<sup>82</sup> In Germany, a third of all online purchases start at Amazon; ECC Köln, Cross-Channel im Umbruch, 2015.

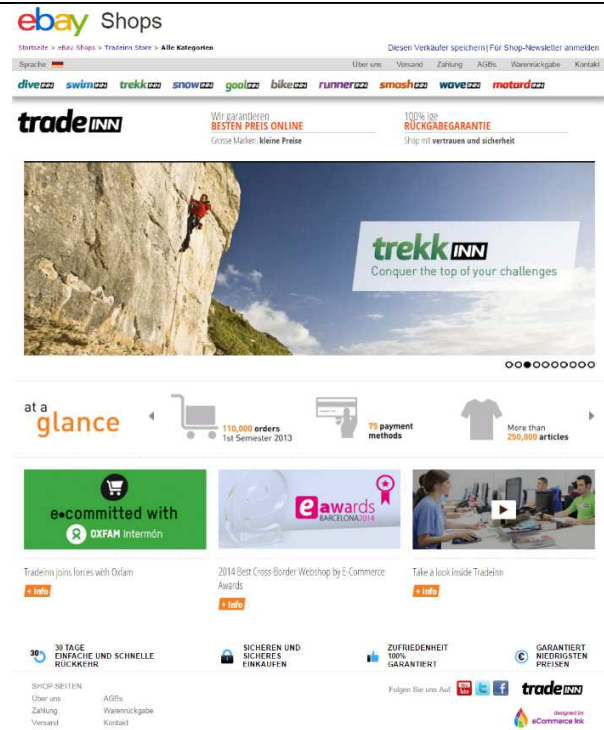
<sup>83</sup> Case C-108/09, *Ker-Optika* EU:C:2010:725, para. 54.

## ANNEX

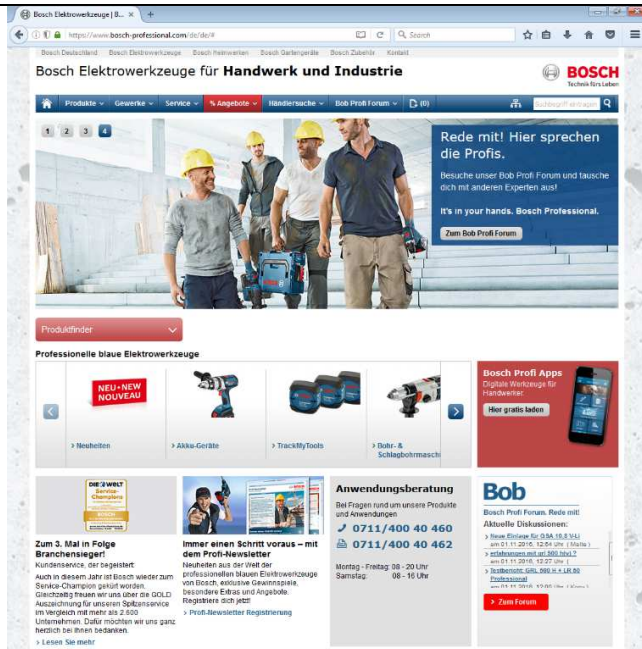
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### Bosch on eBay

