



AMWAY'S RESPONSE TO THE PUBLIC CONSULTATION ON THE EUROPEAN COMMISSION PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY

November 18, 2016

EXECUTIVE SUMMARY

Amway welcomes the European Commission's publication of the preliminary findings resulting from the e-commerce sector inquiry on September 15, 2016, as well as the opportunity to provide some comments.

Amway welcomes the efforts to promote electronic commerce or "e-commerce" in the European Union (**EU**) as part of the Digital Single Market (**DSM**) strategy. Therefore we support the present sector inquiry as a fact-finding mechanism to help understand the different business models and current market dynamics underpinning the EU e-commerce sector, as well as to identify any potential challenges arising from the growth of e-commerce throughout the EU. At the same time, the information obtained by way of the present sector inquiry should be used with caution in terms of potential future enforcement actions or regulatory initiatives.

Amway recognizes the importance of antitrust enforcement for the creation of a genuine DSM and supports the European Commission efforts of eliminating hardcore restrictions of competition. Amway strongly backs the Commission's position that online marketplaces bans are not 'by object' restrictions under EU competition law, as these can respond to legitimate ways to protect brands and consumer interests. With respect to territorial restrictions, the European Commission needs to assess in more detail the impact of national regulatory obligations in certain sectors such as in the case of cosmetics and food supplements.



A. INTRODUCTION

1. The present position paper has been prepared by Amway in response to the European Commission preliminary report on the e-commerce sector inquiry (the “*preliminary report*”) published on September 15, 2016.¹
2. The paper is structured as follows. Section B provides a brief description of Amway’s activities and business model. Section C contains Amway’s comments on the preliminary report and in particular on the issue of geo-blocking and selective distribution. Finally, Section D includes some suggestions on the approach that should be followed by the European Commission in terms of enforcement priorities.

B. BRIEF OVERVIEW OF AMWAY’S BUSINESS

3. Amway is a direct selling company currently active in more than 85 countries across the globe, including 25 EU Member States.² Founded in 1959 by entrepreneurs Rich DeVos and Jay Van Andel, and based in Ada, Michigan, U.S., Amway offers consumer products and business opportunities that are supported by a global agribusiness, manufacturing and logistics supply chain. More than 900 scientists, engineers and technical professionals work in 75 R&D and quality assurance labs worldwide to support product development and create a culture of scientific excellence.
4. Amway is a manufacturer of, most notably, high quality cosmetics and personal care products, food supplements and homecare, cleaning and cookware products. Top-selling brands include NUTRILITE® vitamin, mineral and dietary supplements, ARTISTRY® skincare and color cosmetics, and eSpring® water treatment systems.
5. Amway sells its products to end-consumers through a network of independent entrepreneurs (“Amway Business Owners” or “*ABOs*”), who sell their products face-to-face or through the Internet.

C. AMWAY’S COMMENTS ON THE COMMISSION PRELIMINARY REPORT

6. Amway generally welcomes the European Commission’s interest and support of the e-commerce as part of the Digital Single Market (DSM) strategy. From the EU competition law perspective, the present sector inquiry serves as a fact finding exercise that will allow the Commission to better

¹ For the purpose of the present submission, Amway refers to the group of companies operating under the Amway label in the EU.

² According to the European Direct Selling Association Seldia, “[i]n 2015, the direct selling sector enjoyed a growth over 7% in the EU, and accounted for sales € 28,2 billion”. For more details on direct selling, please see ‘*What is Direct Selling?*’, available at http://www.seldia.eu/index.php?option=com_content&view=article&id=5&Itemid=137.



understand e-commerce throughout the EU and any potential challenges to market operators. However, it is difficult for companies to evaluate these preliminary findings without having had access to the raw set of data. From that perspective, the Commission might consider providing access to data in an anonymized format.

7. Amway will therefore only provide some general comments to allow a more complete assessment of the e-commerce environment and the challenges faced by companies involved in the manufacturing and supply of branded goods, such as cosmetics, food supplements, and other lifestyle products.

(a) Branded goods, selective distribution and online marketplaces limitations

8. Amway welcomes the European Commission approach towards e-commerce of branded goods, selective distribution and the limitations on retailers' ability to sell on online marketplaces. In particular, the preliminary report recognizes the importance of non-price parameters of competition in sectors involving branded goods. Such non-price parameters of competition include, most notably, the quality, innovation, brand, and image of the products sold, as well as the service and other aspects relating to the customer experience.³
9. This is of particular importance to certain product sectors, such as cosmetics and food supplements, where selective distribution systems enable brand owners to establish a brand environment they can frame and that is supported by significant marketing investments to create a unique shopping experience. Customers obtain access to a selling environment that, also online, meets the customer expectations and offers an experience that is in accordance with the values and image of the respective brand. Products are accompanied by the high-quality visuals and presentation of the brand in line with its image. Professionally trained sales personnel can also focus on the consumer's specific needs and ensure that their advice will direct the consumers towards the most appropriate products. The website or the sales personnel can also make sure that consumers receive the necessary explanations on the correct use of the products and alert them about potential incompatibilities (such as allergies, etc.). All of this can be guaranteed by a selective distribution system that will support the brand image and the investments in new innovative products and in customer service.
10. Moreover, the preliminary report clarifies that online marketplace bans are not necessarily by-object restrictions under Article 101 TFEU. Amway hopes that the preliminary report's approach

³ The preliminary report correctly recognizes that *"the sector of cosmetics and healthcare is an exception as a higher number of both hybrid and pure online players attach the highest level of importance to quality rather than to price"* (Para. 118).



could represent the beginning of a less formalistic interpretation of the *Pierre Fabre*⁴ case-law and a more effect-based assessment of online marketplaces restrictions in selective distribution systems. This development would be particularly desirable in view of the increase in recent years of cases in which domestic courts or national competition authorities have interpreted restrictively bans of specific online marketplaces without taking due account of the possible efficiencies in certain cases. Such overly restrictive assessments, besides being legally questionable, have created significant uncertainty for businesses that use selective distribution systems to protect the customers of high quality products.

(b) National regulatory provisions and territorial limitations

11. The preliminary report assesses the possible commercial reasons behind unilateral geo-blocking and geo-filtering techniques. It also analyzes forms of geo-blocking that are contractually agreed among manufacturers/suppliers and retailers. Such contractual restrictions include, most notably, measures requiring a retailer to limit passive sales via the internet by blocking access to its website to customers located in other Member States, the re-routing customers to an alternative website or the refusal of payments. The preliminary report recognizes that these measures would amount to prohibited hardcore restrictions of competition under Article 4(b) to (d) of the Vertical Block Exemption Regulation.
12. While the characterization of these measures as ‘hardcore’ is correct from a rigorous competition law standpoint, it fails to take into account those restrictions on passive sales on the internet that might be inserted into distribution contracts for the purpose of complying with specific national rules and regulatory provisions. There are indeed certain products for which legislation is not entirely harmonized at EU level and for which national provisions are in place in each individual EU Member State. Such national rules might effectively prevent manufacturers and/or retailers from selling their products in other Member States.
13. The case of food supplements is an interesting example of different national regulatory standards having an impact on companies’ ability to sell cross-border. As it is well known, Directive 2002/46/EC⁵ (the “**EU food supplements directive**”) partially harmonizes the rules on the placing of food supplements on the market. It establishes, in particular, labeling information applying to all food supplements regardless of their composition. However, the EU food supplements directive does not fully harmonize other important aspects of food supplements such as maximum and minimum amounts of vitamins and minerals present in food supplements per daily portion

⁴ C-439/09 - *Pierre Fabre Dermo-Cosmétique*, [2011], ECR I-09419.

⁵ Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, OJ L 183 , 12.07.2002, p. 51.



consumed, as well as purity criteria and the list of other ingredients such as e.g. garlic or fatty acids. Against this background, and despite the fact that some national regulatory differences might be leveled out by the application of other EU rules,⁶ a food supplement manufacturer might be compelled to implement geo-blocking techniques for online sales.

14. In those cases involving different national product regulations, EU competition rules on vertical restraints find a limit in the so-called 'state compulsion doctrine'. According to the European Court of Justice in *Ladbroke Racing*:

"[a]rticles [101] and [102] of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative [...]. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles [101] and [102] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings".⁷

15. Interestingly, the proposed EU geo-blocking legislation currently under scrutiny in the European Parliament recognizes the impact of different national regulatory standards. In particular, a proposed EU regulation states that the prohibition to implement geo-blocking techniques "*shall not apply in so far as a specific provision laid down in Union law or in the laws of Member States in accordance with Union law prevents the trader from selling the goods or providing the services to certain customers or to customers in certain territories*".⁸

16. Amway would like to invite the European Commission to perform a more detailed review of the sectors in which non-harmonized rules and regulatory standards might influence companies' choice to recur to geo-blocking strategies.⁹

⁶ Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, OJ L 218, 13.8.2008, p. 21.

⁷ Joined Cases C-359/95 and C-379/95, *Commission and France v Ladbroke Racing*, [1997] ECR I-6265, para. 33. See also C-280/08 P, *Deutsche Telekom v Commission*, [2010] ECR 2010 I-09555, para. 80.

⁸ Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016) 289 final, 2016/0152 (COD), Article 3(3).

⁹ Indeed, the preliminary report touches only briefly upon the reasons leading manufacturers to supply product having different characteristics in different Member States. It states at paragraphs 352 and 353: "*Manufactures were also asked whether the products they supply differ in terms of characteristics depending on the intended Member State of sale. The majority of manufacturers report that their products would not differ while slightly less than a quarter of the respondents reported that there were differences but only in relation to some of the products. (353) That said there are appreciable differences reported between product categories. In the product categories clothing and shoes as well as sports and outdoor equipment over 85 % of the manufacturers report that there are*



D. CONCLUDING REMARKS

17. Amway welcomes the Commission's recognition of the importance of e-commerce for the development of the EU economy and within the particular context of the DSM strategy. Against this background, EU competition law can and shall play an important supporting role in the facilitation a free and open market across the EU. In particular, the action of the European Commission should focus on removing the major obstacles that still partition the internal market and prevent consumers from having access to a broader choice of goods. These obstacles are in the overwhelming part of the cases represented by hardcore restrictions – such as resale price maintenance, geo-blocking clauses not objectively justified, or complete bans on internet sales – which the e-commerce market inquiry has contributed to identify and track.
18. In tackling hardcore restrictions, the European Commission should use a holistic approach and focus both on the potential anti-competitive conducts of both manufacturer/suppliers as well as retailers. In this respect, the preliminary report correctly recalls cases in which restrictions might be promoted and favored by retailers.¹⁰
19. Outside the area of by-object restrictions, the European Commission should continue to promote a balanced, cautious and effect-based approach and recognize the efficiencies of restrictive distribution systems, such as the selective distribution, in which the efficiencies generated by non-price competition parameters are adequately taken into account and which ultimately serve the purpose of protecting consumer interests.

no differences between the products they supply depending on where the product is sold. In other categories, such as consumer electronics and household appliances, over 45 % of manufacturers report that their products differ depending on where they are meant to be sold. The main reasons reported to explain those differences are technical requirements, such as different plugs for products sold in certain Member States or local customer preferences”.

¹⁰ See preliminary report, para. 521 on retailer's strong negotiating power. More in general, the current practice – also at Commission level – shows the existence of hardcore restrictions implemented by retailers, including online platforms. One example at EU level is certainly the Amazon e-book case (AT.40153 – *E-book MFNs and related matters*).



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