

Comments on the preliminary findings of the eCommerce sector inquiry

Brussels, 24 November 2016

INTRODUCTION

DIGITALEUROPE welcomes the efforts that the EU Commission has undertaken through its sector enquiry to better understand e-commerce, and the dynamics around offline and online distribution in the technology industry. It is crucial to understand all relevant factors in order to determine whether any legislative or enforcement intervention is required.

DIGITALEUROPE however cautions the Commission not to draw conclusions, either from an enforcement or regulatory perspective, based on the factual background included in the preliminary report without conducting a thorough legal assessment as to whether there are grounds for concerns in terms of compliance with EU competition law.

On the legislative aspects, DIGITALEUROPE urges the Commission to preserve a legal framework that allows companies to choose the distribution model that best fits their business model. The existing legal rules provide an overall balanced framework for the assessment of vertical agreements. Promoting one distribution model over another, or favoring online over offline as a blanket policy principle, would be detrimental to the high standard of qualitative products and services that EU consumers can benefit from today. Furthermore, we encourage the Commission to provide guidance to ensure the consistent application of current law on a national level.

In the first section, we will elaborate on the dynamics of the market and our views on the general findings, while in the second section, we provide some comments on the more specific aspects covered in the preliminary report.

SPECIFIC REMARKS

1. E-commerce is of vital importance to the digital industry, and any regulatory overhaul or the prioritization of enforcement actions in the online distribution sector may potentially have a significant detrimental impact to one of the most innovative and competitive industries in Europe.

DIGITALEUROPE members and the brands they represent play a vital role in the EU economy in terms of employment, development of skills, intellectual property, and innovation. Companies significantly invest in R&D to provide the most innovative products and services to businesses and consumers in Europe and around the globe. This is not only a matter of ‘protecting the brand’; it is matter of building trust with customers in support of the EU economy, and allow consumers to benefit from the best products our DIGITALEUROPE members can offer.

Our industry represents the development and sale of high-tech products. Many of the products we sell involve ongoing product support to help customers get the full benefit of products they have purchased or licensed.

Because of the speed at which new innovations come to market, success in our sector requires continuous R&D intensive innovation.

Furthermore, our sector is highly competitive. New competitors appear every day, challenging existing players, and disrupting entire business models. It is therefore not only the dynamics of e-commerce, but also the nature of the industry in which the various distribution models operate that must be carefully considered.

The internet and e-commerce is of vital importance to our sector. We have seen a tremendous evolution of consumers' purchasing behavior over the last decade. Our members have played a pivotal role in this evolution, and embraced online distribution very early on in this process.¹ In the end, businesses seek to reach out to as many customers as possible to offer their innovative products and services at the best price and highest quality, based on each company's own business strategy.

It is against this background of a highly competitive, innovative and dynamic tech industry that the compliance of any distribution arrangements with EU competition rules should be assessed. We understand that it was not the purpose of the sector enquiry to conduct such legal assessment. However, it is important that no conclusions in terms of the potential anti-competitive nature of a given behavior should be drawn, without a thorough legal assessment against the rigid legal framework that is currently in place, and without taking into account all the factual circumstances and specificities of a given case. It is only in exceptional circumstances, based on a case-by-case assessment and the application of the legal framework, that competition authorities should intervene in the distribution aspects of our highly dynamic sector – where competition is fiercer than ever before.

Furthermore, while DIGITALEUROPE welcomes the efforts undertaken by the Commission to better understand the background against which a certain conduct in the e-commerce sector should be assessed, none of the findings in the preliminary report suggest there is a systemic concern in terms of compliance with EU competition rules, and/or the need to overhaul the existing legal framework as provided for in the Vertical Block Exemption Regulation and its Guidelines.² The current legal rules provide for an overall balanced framework within which any assessment should be conducted, and – importantly – allows our members to maintain the freedom to establish the distribution model that they believe fits best to the nature of their business, and the freedom to have those models evolve over time depending on changing consumer behavior and market conditions.

A blanket policy objective of favoring online over offline distribution will not benefit companies or consumers, as it will not allow our industry to guarantee the highly innovative nature and qualitative standards of the products and services that it is able to offer EU consumers today.

1 Our members have done so in many ways, for example through relying exclusively on e-commerce; multichannel distribution (launch of e-commerce websites by traditional retailers); cross-channel distribution (development of interconnections between in-person and online channels such as: buy online/pick up offline; buy online/return offline; or, online scheduling an in-person store demonstration); m-commerce (development of shopping functionalities on smartphones); community shopping (use of social networks to promote and sell products); as well as digital stores (complete integration of all retail channels to deliver rich and seamless shopping experience).

2 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 ("Vertical Block Exemption Regulation", or "VBER"); and European Commission Guidelines on Vertical Restraints, [2010] C130/01 (Guidelines).

2. While the preliminary report touches upon a number of relevant findings, we urge the Commission to be careful not to make conclusions in terms of what constitutes a potentially anti-competitive behavior without having conducted a proper assessment of the relevant circumstances within the boundaries of the applicable legal framework.

As recognized by the Commission, there is no unique channel partner for customers and consumers to gather pre-purchasing information and make purchasing decisions – this is done online or offline or as a combination of both. For this reason, manufactures have had to evaluate their distribution strategies, and adapt to the reality of the 21st century. At the same time, consumers also want a consistent experience across all channels, including a best-in-class online as well as in-person buying experience. Brand owners have responded to these consumers’ demands by investing in R&D and innovation as well as in the continued improvement of the retail environment which is in the trust of not only brand owners but also retailers and consumers.

In describing the parameters for competition amongst manufacturers, the Commission’s preliminary report rightly recognizes that that price is not the only aspect (see para 114). The growth in e-commerce has indeed increased price transparency. Therefore, price competition in the high-tech industry is fierce. However, while price remains an important factor, the quality and innovative nature of a product or service in combination with a brand are indeed crucial factors based on which manufacturers compete. As mentioned above, this allows them to bring the best products to market, to the ultimate benefit of consumers.

In order to maintain such highly qualitative products, for many companies, bricks-and-mortar distribution will continue to play an important role in the EU retail landscape, and stores need to be able to continue to differentiate themselves via enhanced displays, shop-in-shop, a trained sales force to improve consumer experience in stores, or multichannel initiatives for their consumers. Some bricks-and-mortar players are under pressure in their traditional format both in terms of volume and cost structure, forcing them to rethink this traditional format, customer service, and online offerings. As they expand their online offerings, they should be allowed to maintain the value they obtain from the shop-in-shop services they offer to consumers.

As far as selective distribution is concerned, the observed increased recourse to this distribution method as well as the use of new selection criteria over the last 10 years should not be a cause of concern or a reason for increased scrutiny by the Commission. As mentioned above, our members have had to, and will need to be able to continue to adapt to the fast evolving consumer needs and purchasing patterns in our sector. Over the past 10 years, manufacturers necessarily had to adapt their contracts and distribution methods, to ensure that the qualitative purchasing experiences in the offline environments were replicated in the online world. However, as recognized in the Commission’s Guidelines,³ offline and online sales environments are not the same. There are objective factors that differentiate both, and requiring all companies to promote one distribution channel over another without taking into account their specific strategic business strategy and concerns may damage competition and limit consumer choice.

³ See in particular §56 of the Guidelines.

As mentioned above, the current rules on selective distribution provide a balanced legal framework, enabling manufacturers of high-tech products to work with those resellers (offline, hybrid and online) that are able to provide an adequate level of consumer experience, while addressing possible free riding situations and without compromising on quality and innovation in the distribution of products either online and offline.

The current legal framework set out by the Vertical Block Exemption Regulation, and clarified by its Guidelines, offers a thorough analysis of selective distribution when it comes to assessing its compliance under EU competition law that can be summarized in the two steps below:

1. Purely qualitative selective distribution falls outside Article 101(1) TFEU for lack of anti-competitive effects, provided that three conditions are satisfied, i.e.:
 - a. The nature of the product in question must necessitate a selective distribution system;
 - b. Resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner; and
 - c. The criteria laid down must not go beyond what is necessary (§175 of the Guidelines).

2. Selective distribution systems based on quantitative criteria, or those that do not meet the three conditions described above, may fall within the application of Article 101 (1) TFEU. But provided that the 30% market share threshold is not overpassed, and in the absence of hardcore restrictions, *“The Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria”* (§176 of the Guidelines).

Therefore, the benefit of the Vertical Block Exemption Regulation (and hence the choice of a manufacturer to operate under selective distribution and to impose a number of selection criteria) cannot be withdrawn, unless it is proven that:

- (i) Either one of the conditions of application of the Vertical Block Exemption Regulation (maximum market share; absence of hardcore restriction) is failing; or
- (ii) Such selective distribution system and/or selection criteria may have appreciable anticompetitive effects on the relevant market (§176 of the Guidelines).

We invite the Commission to remind this effect based approach that is key to the EU rules on vertical agreements and offer the company security and steadiness to operate on the market, and request the Commission to ensure a consistent application at national level based on the above-mentioned principles.

In addition, we are also concerned by the increasing divergence in the interpretation and application of the Vertical Block Exemption Regulation’s provisions on selective distribution by national competition authorities and national courts. We therefore would urge the Commission to intervene to provide guidance to ensure a coherent application of the VBER, specifically in relation to the issue of marketplace bans for example. On this point, we agree with the Commission’s conclusion that marketplace bans do not amount to a de facto prohibition to sell online and do not constitute a hardcore restriction within the meaning of the VBER. As the Commission highlights in its preliminary report (§472), such clauses concern the question of how the reseller can sell the products over the internet, and do not restrict where or to whom resellers can sell the products.

Consequently, any marketplace bans or qualitative criteria will fall under the Vertical Block Exemption Regulation safe harbor and under the effect based approach described in the Guidelines and summarized above – in other words, such clause can only be invalidated should there be an appreciable adverse effect on competition.

Regarding dual pricing, we caution not to create confusion between, on the one hand, dual pricing which is defined in the §52 of the Guidelines as *“agreeing that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line”*, and, on the other hand, price differentiation that a manufacturer can make towards its different distributors, which is a way to create a level-playing field for different conditions and is not problematic under EU law in absence of market power. We would welcome the Commission encouraging in this regard the application of a consistent interpretation at EU and national level.

We also welcome the confirmation that in the absence of a dominant position, unilateral geo-blocking decisions are not caught by the EU competition rules. We understand that geo-blocking decisions are often taken unilaterally by retailers as part of their own strategy and do not depend on manufacturer’s policy. In any event, as mentioned above, should any concerns in terms of competition law compliance arise, any behavior should be assessed against the correct background of the case and be based on a thorough legal assessment in line with the applicable rules outlined in the VBER and its Guidelines.

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 62 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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