

The Consumer Voice in Europe

E-COMMERCE SECTOR INQUIRY

BEUC comments on the preliminary report



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Why it matters to consumers

Consumer satisfaction depends on a high level of competition across sectors and well-functioning markets, which enable consumers to access a wide range of products at competitive prices. In the Single Market consumers should also be able to benefit from cross-border competition. This will bring wider choices to all consumers, as it will also stimulate the development of e-commerce in domestic markets. Competition law enforcement plays a very important role in achieving those objectives. The European Commission's competition sector inquiry sheds light on the functioning of e-commerce for goods and digital content in the Digital Single Market and on the challenges that need to be addressed from a competition policy perspective to ensure that online markets deliver to consumers.

Summary

BEUC welcomes the preliminary results of the E-commerce sector inquiry.

These results provide a very valuable overview of the state of play of e-commerce in the Single Market from a competition law perspective.

However, BEUC regrets that the inquiry did not incorporate consumer behavioural insights, particularly when it comes to assessing the relevance of "free riding" practices between off-line and online shops. Additionally, it is surprising that the inquiry is only limited to goods and digital content without looking at other services such as online booking and tourism, as these are two important sectors of e-commerce in the EU.

In relation to **e-commerce in goods**, the preliminary report shows the growing tendency among manufacturers to retain control over the distribution channels by means of qualitative criteria in selective distribution agreements. These restrictions can harm consumers by limiting the availability of products and leading to higher prices.

BEUC is particularly concerned about the use of bans on comparison websites since they are likely to limit transparency in e-commerce and impede consumers from comparing product features and prices.

In relation to **e-commerce in digital content**, the preliminary report confirms the widespread use of exclusive licensing agreements limiting the possibility for consumers to access content cross-borders through passive sales. Such practices risk hampering competition both at national and cross-border level.

Finally, the preliminary report provides useful findings about the potential negative impact of long-term licensing agreements on competition in the audiovisual sector, particularly in relation to sports broadcasting. BEUC considers this to be an area of growing concern and we encourage DG Competition to further investigate this sector.

1. General remarks

BEUC welcomes the European Commission's e-commerce sector inquiry.

E-commerce is rapidly growing in Europe bringing opportunities to consumers to access a wider range of goods, services and digital content; compare prices and look for better deals across the Digital Single Market.

As highlighted by Commissioner Vestager in her speech to BEUC's General Assembly in May 2016, "competition is a consumer issue"¹. Therefore, competition policy must guarantee that consumers have access to wide range of products at competitive prices by addressing market failures and tackling anti-competitive behaviours.

This principle is one of the pillars of EU Competition Law: Article 101 of the TFEU requires that consumers must have a fair share of the benefit stemming from agreements regulating the transactions between market players.

In this context, it is therefore important to assess the evolution of e-commerce in Europe and look at business practices that could eventually have a negative impact on the development of this sector to the detriment of consumers.

Comments on methodology

The preliminary report of the e-commerce sector inquiry (hereafter 'PR') provides useful insights about how manufacturers and retailers operate across the Single Market.

However, it is very unfortunate that the PR did not include consumer surveys to understand the drivers of e-commerce also from the demand side in order to explain some of the assumptions made in relation to "free riding". Why would consumers prefer to buy online rather than off-line (or the opposite)? What are the reasons for that choice? We believe that addressing these types of questions would allow for a fuller picture of the current functioning of e-commerce in the Single Market.

Additionally, the scope of the inquiry is somehow limited. Other online services such as online booking platforms, tourism and entertainment services could also have been considered as part of the inquiry. Furthermore, PR report does not sufficiently address competition law issues related to payments in e-commerce. This is particularly important if we take into account that 17 payment aggregators responded to the inquiry (§104), which indicates that the market is concentrated at EU level.

Consumer associations' experience

There are many different elements that consumers take into account when purchasing goods and services, including quality, price, after-sales services and brand reputation. The purchasing decision is therefore a complex one. At the same time, consumers generally buy online because of its convenience (online shops are open 24/7 and products can be delivered to the consumers' doorstep) and the possibility to compare prices and characteristics of products by means of comparison websites.

¹ "Competition is a consumer issue", BEUC General Assembly, 13 May 2016. Ref.: https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-consumer-issue_en

Online shopping is growing relentlessly. In May 2016, BEUC Italian member Altroconsumo published a large survey about e-commerce in Italy. The results showed an increment in business volume of 2,2 billion € (from 14,4 billion € in 2014 to 16,6 billion € in 2015). 11,1 million Italians regularly use online services to do shopping, 41% of them via their smartphone.

E-commerce offers new opportunities but it produces new pitfalls for consumers too. Consumers who buy online are faced with new purchasing methods and it is easy to create misleading information. A safer environment for digital market transactions can reinforce consumer confidence and thus foster the success of e-commerce. Effective consumer protection indirectly promotes competition.

In general terms, the level of satisfaction of consumers towards online shopping is relatively positive and this is reflected in different surveys that were carried out by our members. In March 2016, BEUC Spanish member OCU published the results of a large survey² of more than 4.600 consumers showing that 7,8 out of 10 consumers are satisfied with their online shopping experiences. In a similar exercise, BEUC Portuguese member DECO³ interviewed more than 5.000 consumers and also concluded that 7, 6 out of 10 consumers are satisfied with their online shopping experience.

Despite this, consumers do still indicate that they have problems related with online purchases. Additionally, research from BEUC UK member Which?⁴ has shown that nearly half of consumers who shopped online over the last two years had a problem with a purchase. The most recurrent problems pointed out by consumers are related with late deliveries, item arriving faulty or damaged and return of the product.

In this paper, we have tried to provide an assessment of the main findings of the PR, as well as a set of recommendations upon which we believe that DG Competition should take further action.

² Ref.: <https://www.ocu.org/tecnologia/internet-telefonía/noticias/satisfaccion-online>

³ Ref.: <https://www.deco.proteste.pt/familia-consumo/orcamento-familiar/noticias/compras-online-consumidores-rendidos-escolhem-as-melhores-lojas>

⁴ Ref.: <http://www.which.co.uk/news/2014/03/millions-experience-problems-with-online-purchases-357861/>

2. E-commerce in goods

2.1. Distribution strategies

The PR provides a useful overview of the distribution strategies of manufacturers in the Single Market. In this regard, we believe that there is a clear tendency among some manufacturers to move towards incorporating online distribution channels into their business models (§158). Given that we have already identified that consumers increasingly like to buy online this is a logical move in order to catch up with consumers' consumption behaviours.

From the PR, it is possible to identify three channels through which consumers purchase goods online:

- Retailers web-shops;
- Manufacturers web-shops (vertical integration) and,
- Online marketplaces.

Furthermore, consumer transactions take place domestically, at cross-border level (within the Single Market) or at global level⁵.

Concerning online channels, selective distribution seems to be a widespread practice in Member States with a developed e-commerce ecosystem (§202), a practice that has increased over the years (§223).

To remain in control all along the supply chain, manufacturers can apply different measures and criteria through their distribution agreements. Such measures are aimed for example at protecting the brand image and shaping the consumers' shopping experience (§209).

BEUC considers that such criteria are indeed important to ensure that consumers make the best out of their shopping experience, particularly in what concerns after-sales services (§209, point f).

However, excessive requirements imposed by manufactures on retailers (§216) could lead to products being less widely available with the risk of higher prices. As recognised by the CJEU in *Metro*, this could result in a restriction of competition⁶ and therefore harm consumers⁷.

Selective distribution agreements are allowed by Article 101(1) TFEU provided that certain conditions apply. However, due to the widespread use of these practices by manufacturers, it is necessary to look at the specific criteria included in the distribution agreements to assess whether some of the restrictions are excessive or not proportional. In this regard, BEUC agrees with DG Competition (§228) that it is necessary to look at specific contracts.

In addition to this, it is necessary to assess the need for more transparency for those retailers wishing to enter into a distribution agreement with a manufacturer (§231).

⁵ This last point not being covered by the inquiry due to the territorial scope of application of EU competition law;

⁶ C-26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1977] ECR 1875

⁷ EC Guidelines on Vertical Restraints, §101

Another potentially anti-competitive restriction relates to the exclusion of pure online players from manufacturers' selective distribution networks (§220). The given reasons to require retailers to operate at least one brick-and-mortar shop relate to customer advice by qualified staff, the possibility to demonstrate the operation of the product, the ability for consumers to visualise the product, the creation of a special shopping experience, etc. (§221).

Although many of these elements are important for consumers, BEUC considers that such requirements should bring positive effects on the consumer's shopping experience and not be applied as a means only to restrict the availability of products through online channels in order to allow greater control over retail prices. In this regard, it remains to be seen whether the obligation to operate at least one physical store is compatible with article 101(1) TFEU, bearing in mind that the requirement to have an off-line offer⁸ cannot amount to an absolute ban on internet sales⁹.

Further to this, it is not always clear what the relationship is between the requirement to have a brick-and-mortar shop vis-à-vis additional quality criteria. For example, is the obligation to have a physical shop a pre-condition to allow consumers receive face-to-face advice that cannot be replaced by an online service? Or is the requirement of the physical shop independent of the other quality criteria? This aspect would require further scrutiny from DG Competition.

BEUC recommendations to DG Competition

- *To assess to what extent the distribution criteria imposed by manufacturers on retailers could lead to a restriction of competition between the three online distribution channels (retailers' web shops, manufacturers' web shops and online marketplaces).*
- *To clarify the relationship between the requirements to have a brick-and-mortar shop with other quality criteria such as consumer advice or after sales.*

2.2. Restrictions to sell and advertise online

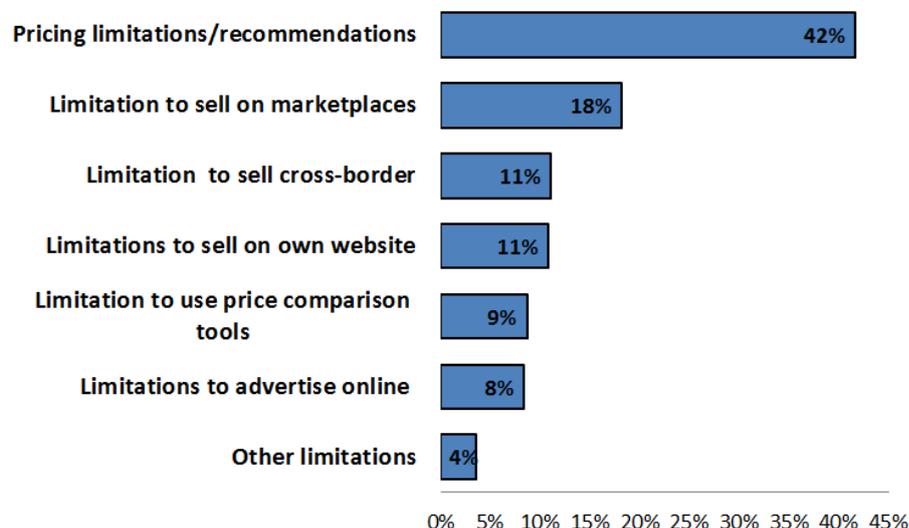
There are different reasons why manufacturers would include vertical restraints in their agreements with retailers. From the PR it seems that the main reasons given by manufacturers relate to the quality of the product and the protection of the brand's image (§247). However, it is surprising to see that only a low proportion of manufactures consider the price as primary factor to attract consumers, while this is an important element for retailers (§248).

To some extent, these results may go somewhat towards explaining why manufacturers want to limit the freedom for retailers to set prices, especially if many manufacturers directly compete with retailers through vertical integration (§166). These restrictions are often complemented by limitations imposed on retailers to sell on marketplaces (§307) and

⁸ EC Guidelines on Vertical Restraints, §54

⁹ Absolute restrictions on Internet sales has been considered by the CJEU in *Pierre Fabre* (C-439/09) as a violation by object

limitations to sell cross-border (§184), allowing manufacturers to have control over the whole distribution chain.



(Source: Preliminary Report, Figure B.36, p. 107)

Such control is often achieved through different types of restriction. Below we provide an overview of what we consider to be the main restrictions from a consumer perspective:

Price limitations / recommended prices: Article 4 of Regulation No 330/2010 allows the possibility to include recommended prices in distribution agreements, as long as they do not restrict the retailer's ability to determine the price. However, it is important to make clear that this could never lead to resale price maintenance as it is considered as hard-core restriction under point (a) of article 4 of Regulation No 330/2010.

As explained in the European Commission's Guidelines on Vertical Restraints resale price maintenance can be achieved through indirect means, including an *"agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level"* (§48, Guidelines on Vertical Restraints).

In order to address the risk of "free-riding" (see point 4 below), vertical integrated manufacturers apply price equivalence across their online and off-line shops (§298). Overall equivalence of online and off-line prices is also seen as a means to maintain a coherent brand image on both sales channels (§299). Normally, these practices are not considered as a restriction in the sense of article 4(a) of Regulation 330/2010. However, it is worth considering whether under some circumstances it could not lead to an indirect means of achieving resale price maintenance in view of sales growth via online distribution channels.

Limitation to sell on marketplaces: We believe that these types of restrictions risk limiting the availability of products through very popular online marketplaces such as eBay and Amazon, leading to less choice and higher prices for consumers. Although these restrictions are subject to the scrutiny of Article 101(1) TFEU, the CJEU needs to decide in

the case *Coty*¹⁰ whether limitations to sell on marketplaces could lead a restriction “by object”¹¹.

Irrespective of the outcome of the case, it is necessary to add a new layer of analysis regarding the risk of market consolidation. In this regard, many online marketplaces that act as sellers also compete with the retailers selling through their platform. This is not devoid of consequences because the marketplaces are often in a stronger position vis-à-vis the retailers and impose their own conditions.

There is no doubt regarding the benefits of online marketplaces for retailers and consumers. But, if platform bans are considered as hard-core restrictions, it is necessary to assess the impact on competition between different online distribution channels (retailers’ web shops, manufacturers’ web shops and online marketplaces) in the medium and long-term.

Limitation to sell cross-border: The PR provides an overview of the most common measures to restrict cross-border sales (§340). The most prominent and effective means to block cross-border access is the refusal to deliver (see Figure B. 47). Interestingly, the reason for applying geographical restrictions does not seem to be related (or significantly related) to different national pricing policies and most of respondents did not charge different prices (excluding delivery charges) when selling cross-border (see Figure B. 50).

Limitations to use price comparison tools: Price comparison websites are very useful and valuable for consumers. These tools give consumers the possibility to more easily find and compare products and offers. They play an important role in helping consumers to take informed purchasing decisions. This is because information on product characteristics and prices available on the manufacturers’ or retailers’ website are not always enough to take a transactional decision. Consumers need to be able to visually compare products and prices.

A recent report by the multi-stakeholder dialogue on comparison tools (DG JUSTICE) confirms these consumer benefits of comparison tools: *“Comparison tools have a clear potential for empowering consumers. They can help save time and money and find deals that are best suited to each consumer’s individual needs. They can also play a key role in enabling consumers to discover offers beyond their country of residence, facilitating cross-border purchases and allowing consumers to fully enjoy the benefits of the EU Single Market.”*¹²

We consider that imposing absolute bans on the usage of price comparison tools by retailers, not only restricts competition, but prevents consumers from enjoying the benefits that can derive from comparison tools.

For example, as the PR points out, bans on price comparison websites make it more difficult for (potential) customers to find the retailers’ website (§502), decrease price transparency and limit price competition among retailers, sometimes in order to protect the manufacturers’ own online offering (§499).

However, despite the fact of recognising the harmful effects of bans on price comparison websites, the PR takes a cautious approach towards these restrictions indicating that if the manufacturers wish to impose restrictions on the use of comparison tools, such restrictions should be directly linked to quality criteria (§502).

¹⁰ Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Germany) lodged on 25 April 2016 in *Coty Germany GmbH v Parfümerie Akzente GmbH* (C-230/16)

¹¹ This case relates to the restrictions imposed by a manufacturer of cosmetics to sell the products via third parties, such as Amazon

¹² Ref.: http://ec.europa.eu/consumers/documents/consumer-summit-2013-msdct-report_en.pdf page 6

This interpretation deviates from the recent *ASICS*¹³ decision of the *Bundeskartellamt*, which considered that the prohibition on distributions supporting price comparison websites to be a restriction of competition by object and therefore constitutes an infringement of Article 101 TFEU.

It is important to note that the *Bundeskartellamt* is of the opinion that “there were no qualitative considerations that could justify the prohibition of support for price comparison engines” and that “a per se prohibition of comparison engines is not a provision that generally serves to protect the manufacturer’s brand image”¹⁴.

BEUC agrees with the appreciation of the facts by the German competition authority and with the conclusion that restrictions on the usage of price comparison websites violates article 101 TFEU.

BEUC recommendations to DG Competition

- *To further assess the interplay of price equivalence limitations for online shops with article 4(a) of Regulation 330/2010.*
- *To assess the impact of restrictions to sell in online marketplaces in relation to the availability of products via online marketplaces and the impact on retail prices.*
- *To consider the potential effect of marketplace bans to prevent market consolidation restricting in the medium and long-term competition between the three online distribution channels (retailers’ web shops, manufacturers’ web shops and online marketplaces).*
- *To consider the imposition of absolute bans on the usage of comparison tools as a hard-core restriction in the context of article 4 of Regulation 330/2010, and assess whether further clarification is needed in the Guidance on Vertical Restraints.*

2.3. Price restrictions and ‘free riding’

The PR highlights concerns in relation to “free-riding”, explained as the situation in which consumers “benefit from services offered by bricks-and-mortar shops to make their choice, but then purchase the product online” (§286). This is perceived as a problem as it entails the risk that bricks-and-mortar shops will disappear over time (§292).

¹³ Case B2-98/11, decision of 26 August 2015

¹⁴ See page 8-9 of the English summary of the case available at :

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2

In recent speeches, Commissioner Vestager highlighted the concerns of the industry in relation to free-riding practices¹⁵ and suggested that pricing restrictions can help to stop physical shops from disappearing¹⁶.

Although such pricing restrictions are not prohibited under EU competition law, it is important to carefully assess the impact of such measures on competition across distribution channels (both online and offline).

BEUC is disappointed that the conclusions of the PR appear to be solely based on the information submitted by manufacturers and retailers without indicating that the supporting evidence has considered how consumers behave when making a transactional decision to buy online or offline. If consumers feel that it is necessary to check products in the shops before buying them online, it would make sense to consider the reasons why this is happening.

For example, consumers buying online enjoy a 14-day right of withdrawal which is free of charge and granted in all member states as a result of the transposition of the Consumer Rights Directive. Thus, if consumers go first to the physical shop to check the product before making an online purchase just because they want to be sure that the product meets their expectations, it should be rather a matter of ensuring that consumers are well-informed about the existence of their right of withdrawal rather than looking at price restrictions in online sales.

We therefore believe that the European Commission should incorporate consumer behavioural insights in its assessment in order to better understand the functioning of the e-commerce market at EU level. Companies, both manufacturers and retailers, will tend to adopt positions and provide input that favor their own business but such information cannot provide an objective picture of e-commerce without consumer insights.

BEUC recommendations to DG Competition

- *To incorporate consumer behavioral insights in the final report to assess whether free-riding is a problem at all since the assumptions of the PR are not credible from a consumer viewpoint.*

3. E-commerce in digital content

3.1. Contractual restrictions in licensing agreements

Online consumer behaviour is indicating a growing demand for digital content services across the EU. However consumers report experiencing a number of difficulties when

¹⁵ "E-commerce: a fair deal for consumers online", Stakeholder Conference on Preliminary Findings of the E-commerce Sector Inquiry, Brussels, 6 October 2016

¹⁶ "Competition and the Digital Single Market", Forum for EU-US Legal-Economic Affairs, Paris, 15 September 2016

accessing, or trying to access, those services. The PR provides a comprehensive analysis of where those difficulties are originating and how the established business practices are restricting consumer choice and competition.

BEUC supports the findings of the Commission preliminary report. We consider that the licensing practices and agreements among rights holders and service providers that are currently widely employed in the audiovisual sector limit competition in the Single Market, restrict consumer choice and hinder innovation¹⁷.

As the PR points out, online transmissions have changed the way content is accessed and consumed by consumers (§620). The importance of online transmissions as a means for consumers to access content is high and steadily growing. Netflix alone has over 86 million subscribers in over 190 countries worldwide and this number is expected to increase in the years to come¹⁸.

However, market practices have not evolved at the same rate as technology. Online rights are to a large extent licensed together with the rights for other transmission technologies (§689), even if the licensing party is not active in online distribution of content. This has indeed a negative effect on availability of content and competition, as pointed out in the PR (§694).

There are clear signs, such as the growth in the use of VPNs (§802-803) and recent consumer surveys¹⁹, showing that a growing number of consumers wishes to purchase content from outside their home Member State. Yet, they are very often prevented from doing so.

Availability of content (particularly via online distribution channels) varies across Member States²⁰. In eastern European countries lack of availability is an important reason why consumers cannot access the content of their choice.

¹⁷ This is being discussed in the context of the ongoing cross-border pay-TV case in which BEUC is an interested-third party. Our German member VZBV in a letter addressed to Commissioner Vestager in the context of the commitments offered by Paramount on the case of reference highlighted that *"the way these agreements are designed generates a situation of "absolute territorial exclusivity" which, coupled with geo-filtering practices, result in consumers being 'de facto' locked in to their domestic pay-tv providers. Consumer choice is restricted by the imposed geographical limitations to available pay-tv offers, and the lack of cross-border competition discourages the development of affordable quality legal offers across Member States"*

Ref.: http://www.vzbv.de/sites/default/files/offener_brief_vestager_paramount_2016-05-23.pdf

¹⁸ Ref: http://files.shareholder.com/downloads/NFLX/2992434071x0x912075/700E14FD-12BE-4C3A-9283-9A975C7FE549/FINAL_Q3_Letter.pdf

¹⁹ According to a 2015 Eurobarometer the younger the people are, the more they are attracted by cross-border opportunities. The figure goes up to 58 % amongst the 15-24 year olds and 46 % of those aged 25-39. However, data also shows that cross-border access to online content is still an uneasy experience: 56% of Europeans who have tried to access a service meant for users in another EU country met problems. While 8% of all European Internet users have tried to access such services, young people (15-24 years old) are the most likely to have tried – almost one in five

Ref.: <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059>

²⁰ The European Commission's Impact Assessment for the proposed regulation on online transmissions (SWD(2016) 301 final) provides data about the differences among member states availability of cross-border online transmissions by public and private broadcasters. For example, SVT (Sweden) geo-blocks its simulcasting TV services (they are available only in Sweden) while LTV (Lithuania) does not geo-block most of its simulcasting services, except for certain international entertainment. Mediathek, the livestream channel of ZDF (Germany), is geo-blocked and cross-border access is allowed only to selected programmes and the BBC (UK) channels BBC1, BBC2, BBC4 online services (BBC iPlayer) are available only in the United Kingdom while BBC World News online services are available in other MS. From the commercial broadcasters, TV4 Play (Sweden) geo-blocks online simulcasting TV services except live TV news; TV3 (Lithuania) news and own production is not

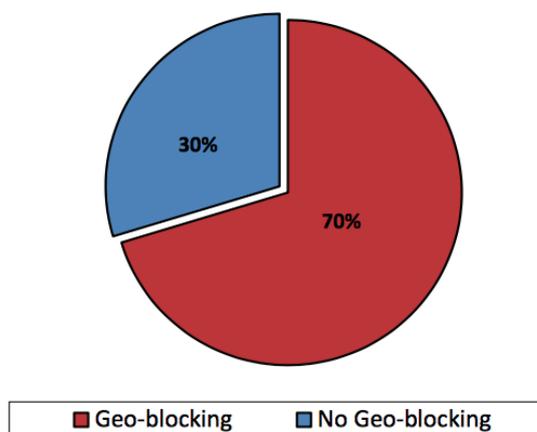
At the same time, even in bigger and competitive markets like Germany, research indicates that consumers are interested in accessing foreign offers. Our German member, The Federation of German Consumer Organisations (vzbv) carried out last year a survey²¹ which showed that over 70% of German consumers would like to be able to subscribe to foreign offers for sports, films and TV series.

The demand for foreign content is even higher among young consumers (15-24 years old). If we look at the recent data of the Observatory of the European Intellectual Property Office (EUIPO), a recent Youth IP Scoreboard²² showed that one of the main drivers for youngsters to turn to piracy is lack of availability.

The territorial scope of licensed rights is very limited and often the same for online and off-line transmissions (§695-696). Premium content is predominantly licensed on a national exclusive basis in each Member State (§720) under strict obligations for content providers to apply geo-blocking measures. The sole objective of this *modus operandi* is to maximise profits.

The PR confirms that restrictions to cross-border access is widespread in the EU. 70% of digital content respondents geographically restrict access to their online digital content services:

Figure C. 38: Proportion of respondents implementing at least one type of geo-blocking measure – EU 28



(Source: Preliminary Report, Table C.38, p. 233)

Such restrictions are imposed via the licensing agreements and are most prevalent in agreements for films, sports and TV series. 74% of all licensing agreements regarding television fiction require geo-blocking. Licensing agreements for TV drama and TV series,

geo-blocked but international entertainment programmes are geo-blocked; RTL TV Now (Germany) makes simulcasting services available only locally while live TV News are available internationally (paid services) and ITV (UK) free online services are only available for individuals located in the United Kingdom, Channel Islands or Isle of Man, however, ITV offers ITV Essentials, a paid service which provides a selection of programmes available only in 11 Member States (page 81, part 2/3 of the Impact Assessment)

²¹ Ref: http://www.vzbv.de/sites/default/files/digital_content_without_borders_factsheet_vzbv.pdf

²² Ref: https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IP_youth_scoreboard_study/executiveSummary/executive_summary_en.pdf

films and sports events include requirements to geo-block more often than licensing agreements for other digital content (§761).

The most common measure is to limit access/availability of the service outside of the territory covered by the license. But the PR also confirms that even basic cross-border portability of legally acquired content is often restricted (§770). This further demonstrates how “absolute” territoriality can undermine consumers’ welfare if consumers are not even able to access their own subscriptions when travelling abroad.

Release windows create an additional layer of “temporal” exclusivity, further complicating the situation (§805), once again in the interest of maximising profit (§806). Moreover, as the PR explains, the long duration of licensing agreements and contractual clauses facilitating the extension of existing agreements further create additional barriers for new comers to entry in the market (see point 3.2 below).

It is important to note that not all content produced across the EU can be licensed in all Member States simultaneously because – as often claimed by the industry - there may not be local distributors willing to purchase that content for the purpose of local adaptations through dubbing and subtitling. However, the PR indicates that the predominant reason for digital content providers not to make their services accessible in Member States other than those in which they currently operate is that content is not available at all to purchase in certain territories and that cost of purchasing content for certain territories is too high (Table C.6).

Absolute territorial exclusivity leads to a lack of access and availability of audio-visual content that increases the risk of consumers having to turn to unauthorised sources to view the desired content. It also has a negative impact on the development of national quality and affordable offers of digital content services. If consumers are not satisfied with domestic offers, they are prevented from voting with their feet and getting a subscription with a provider from another Member State.

BEUC acknowledges the possibility for content producers to sell their products on a territorial basis since this allows the development of legal offers that could be better tailored to the expectations of the majority of consumers in each domestic market. But the “freedom of contract” should not be used by rights holders and incumbent content providers to create territorial monopolies by means of exclusive licensing and geo-blocking technologies. These practices and restrictions create an environment where it can be difficult for new innovative services to flourish and for consumers to have access to a wide variety of competitive quality offers.

In the *Premier League*²³ ruling, the CJEU confirmed that contractual clauses restricting passive sales in satellite services by prohibiting broadcasters from effecting any cross-border provision of services (“*absolute territorial exclusivity*”) are against Article 101(1) TFEU.

The criteria used in this case should also apply by analogy to online distribution of content as the grounds for the decision can be transposed to these services. For the purpose of competition enforcement, the nature of the technological support used for the communication (satellite, Internet, etc.) is irrelevant.

Furthermore, the absolute territorial exclusivity that often stems from licensing agreements is not justified under copyright law either. Licensing agreements often impose obligations that go beyond the requirements of both the national and the EU copyright framework.

²³ Joined cases C-403/08 and C-429/08, *Football Association Premier League and Other* [2011] ECR I-09083, §§ 139-146

Restrictions on the possibility to serve unsolicited requests from consumers residing or located outside a certain Member State are not necessary for the purposes of granting territorial licenses.

Preventing cross-border access to consumers risks hindering competition and restricting consumer choice. By allowing cross-border access in the form of passive sales, consumers would enjoy the freedom to access the content and services in the EU that best match their preferences while respecting the current model based on territorial licensing. Additionally, it would be important to continue scrutinising cross-border restrictions to passive sales based on analysis of the relevant market. This should include the impact on pricing models between national markets.

BEUC recommendations to DG Competition

- *To further investigate licensing practices in line with the findings of the PR and the ongoing cross-border pay TV case.*

3.2. Duration of licensing agreements and contractual relationships

The PR provides useful information about the length of licensing agreements and renewal practices. It is not surprising that the sports sector includes the longest licensing agreements (§847) due to the high value of the content.

The combination of long-term licensing agreements and exclusivity has raised several concerns from a competition view point in the pay-TV market.

For example, in June the French competition authority (*Autorité de la concurrence*), voicing the concerns expressed by our French member *UFC-Que Choisir*²⁴, did not allow an exclusive licensing agreement between beIN Sports and Group Canal Plus (GCP)²⁵ for the broadcasting of premium sport. In this regard, the authority noted that the conditions to lift the ban on exclusive broadcasting were not met due to the market dominance of GCP with a market share between 70 and 80%²⁶.

In April 2016, the Italian Competition Authority (ICA) imposed fines totalling 66 million Euros on Sky and RTI/Mediaset Premium, the main television operators in the Italian pay-tv market, and on the Italian Football League (Lega Calcio) and its advisor Infront. The ICA found that the parties infringed Article 101 TFEU, as in June 2014 they entered a bid-rigging

²⁴ Ref.: <https://www.quechoisir.org/action-ufc-que-choisir-distribution-exclusive-de-bein-sports-sur-canal-plus-l-autorite-de-la-concurrence-doit-eviter-que-l-interet-consommateur-soit-mis-hors-jeu-n11583/>

²⁵ Ref.: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=630&id_article=2785;

²⁶ On this point the authority noted: "On the upstream market of sports rights acquisition, the *Autorité* notes that, as in 2012, GCP and beIN Sports hold the broadcasting rights of the quasi-entirety of the most appealing sports competitions, particularly football rights (League 1). The market structure, close to a duopoly between GCP and beIN Sports, is still characterized by GCP's dominance. The acquisition of English Premier League's rights by the Altice company remains to date an isolated experience, thus not proving the emergence of a sufficient and sustainable competition on the market."

agreement concerning the awarding of the Serie A broadcasting rights for the period 2015-2018²⁷.

The consolidation of the pay-TV market is a common feature across several member states, often characterised by lack of sufficient competition, which can lead to cases of consumer detriment. This is confirmed for example by our Danish member, Forbrugerrådet Tænk. Last year over 11.000 consumers in Denmark signed-up to a collective complaint about the quality of pay-TV services, being the main source of frustration the poor quality of grid of TV channels in basic subscription packages. At least three out of four consumers in Denmark pay for channels they do not watch and this is because the packages are designed so as to force consumers to pay more for additional expensive premium contents such as sport and films.²⁸

Additionally, a survey conducted by Altroconsumo last year revealed that in Italy what influences consumers the most when choosing a pay TV provider is the content they want to see rather than the price of the service. If a consumer is interested in certain content, and such content is only available exclusively via a certain TV provider (e.g. Sky or Mediaset Premium in Italy), the consumer has no real choice. The content offer is fragmented to avoid overlaps and minimise competition between providers.

These problems, often linked to lack of competition in the pay-TV market, might partly originate from the licensing agreements between rights holders and content distributors such as commercial broadcasters. On this point BEUC agrees with the preliminary assessment of DG Competition that such long-term agreements and renewal policies are likely to make it difficult for new players to enter the market.

BEUC recommendations to DG Competition

- *To investigate eventual anticompetitive effects of long-term licensing agreements in the audiovisual sector, in particular on sports broadcasting contracts.*

END

²⁷ Ref.: <http://www.agcm.it/en/newsroom/press-releases/2290-a-66-million-euro-fine-imposed-on-sky,-mediaset-premium,-lega-and-infront-by-the-italian-competition-authority.html>

²⁸ Ref.: <http://taenk.dk/tema/hvorfor-f-skal-vi-betale-for-noget-vi-ikke-ser>



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