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DG Competition
Building MADO – 1049
Bruxelles / Brussel
Belgique
23rd November 2016*

Re: preliminary findings of the ecommerce sectoral inquiry

Dear Sir,

Thank you for the opportunity to provide comments regarding this report.

We have read with great interest your preliminary report on the e-commerce sector inquiry. We agree with your objectives to promote e-commerce and to do so in a manner that ensures the same levels of competition and price transparency as that of physical commerce in Europe. We are, however, concerned that you confuse achieving that equal outcome with the means by which it can be achieved in a different trading environment.

Differences in Technical and Legal Architecture

We are very concerned that the report does not analyse the technical and legal architecture of the online environment and so does not consider the differences with the offline environment that are critical in considering how to achieve an equivalence of outcomes with other forms of commerce.

The safe harbours from liability in the ecommerce directive have no equivalent for offline intermediaries. The elements of the internet as a platform itself, whether visible, like the search function and browser, or in the background such as the DNS, IP address allocation and hosting, have a material impact on the nature of the market and what security and consumer safety measures are necessary to protect a functioning market both for consumers and legitimate businesses.

Similarly, the preliminary report looks a great deal at undertakings along the value chain in ecommerce, without considering the role and behaviour of platforms for digital content or the online markets through which goods are sold. The behaviour of consumers, sellers and producers in these environments cannot be adequately assessed without considering the specifics of the platforms that shape the markets in which these actors participate.

Differences in the Security Environment

Alongside the cybercrime risks of identity theft, financial fraud and malware, there is no more flagrant risk to online shoppers than the pervasive presence of fakes and illegal content. The Commission itself recognises this in its communications regarding the digital single market and the work of DG Grow, DG Connect, the JRC and EUIPO.

Given that the ultimate objective of your work is to ensure that e-commerce evolves in a manner that affords a safe, secure and competitive shopping experience for the consumers of Europe, governed by at least the same parameters as those the Commission has continuously implemented for decades, we are surprised that this 290 page report is so limited in addressing the impact of the risks of trademark counterfeiting and copyright piracy in its assessment of the market in which competition occurs.

While the report does specifically note the actions of brands to prevent counterfeiting at paragraphs 447 & 448, the narrative in paragraphs 459 to 464 merely sets out the actions platforms claim to take. There is no assessment or commentary on your part about the effectiveness or adequacy of these measures, or a separation between measures taken for prohibited items such as narcotics and those taken with regard to fakes.

The high volume of illegal websites that sell only counterfeits, and may be entirely dedicated to mimicking single brand sites needs proper consideration in the final report. Their distorting effect on consumer discovery of genuine sites and genuine products is currently missing from the analysis of the market trends that the report identifies, or the justifications for them.

Similarly, the section on digital content fails to look at the area of the “value gap” that has been the subject of significant work by the Commission as part of the Digital Single Market. The pervasive presence of illegal sources of content and the ineffective enforcement measures available to tackle them is clearly relevant to the technological controls referenced in the report. The final report needs to give serious consideration of the scale of counterfeiting and piracy and the appropriateness of the responses required to provide a safe and secure environment where legitimate competition can flourish.

Public Enforcement

There is no consideration in the report of the differences in public enforcement by police, customs and market inspectors in the online environment despite the obvious differences in markets that this creates. Capacity and capability of such agencies are entirely different. The expectation and reality of enforcement online is of self-help by rightsholders. Your recognition of these differences is critical to analysing the behaviour of market participants.

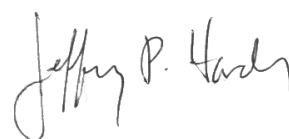
Conclusion

Ecommerce is rapidly restructuring the global economy and you have an important role to understand and reflect all of the drivers of the market and distortions within it to ensure that the opportunities for increased competition through transparency and reduced barriers to entry are secured for the benefit of European consumers. Delivering this requires a market that protects the underpinning businesses from IP theft rampant in e-commerce along with associated platforms that must be proactively responsible for a modern supply chain which defends against exploitation and fraud.

It is imperative that the anti-competitive effects of piracy and counterfeiting, along with the ultimate risks to consumers are addressed rigorously in the final report. We request therefore that your final report reflects qualitative and quantitative consideration of the factors that we set out above.

ICC BASCAP has worked with the OECD, EUIPO and economic consultants such as Frontier Economics to look at the econometric impacts of counterfeiting and piracy. We would be very happy to meet and discuss the issues that we raise further.

Yours sincerely,



Jeffery P Hardy
BASCAP Director