

THE EUROPEAN COMMISSION ANNOUNCES FURTHER COMPETITION ENFORCEMENT FOLLOWING ITS E-COMMERCE INQUIRY: CONSIDERATIONS FOR DIGITAL CONTENT PROVIDERS

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Antitrust, Competition & Trade Regulation Alert

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On 10 May 2017, the European Commission (the “**Commission**”) published its final [report](#) (“**Final Report**”) concluding its wide-ranging, two-year long inquiry into e-commerce including media rights distribution (“**Inquiry**”). The Final Report offers key insights into areas that the Commission considers to be problematic. It signals that further enforcement action is imminent and where such action may be targeted, such as the bundling of different rights and exclusive licenses with long durations. On the other hand, it seems that the Commission is more likely to await new legislation rather than taking immediate enforcement action in relation to geo-blocking of digital content.

COMMISSION CONCLUDES SECTOR INQUIRY

During the Inquiry, the Commission gathered evidence from nearly 1,900 companies operating in e-commerce of consumer goods and digital content in Europe and reviewed around 8,000 distribution and license contracts in order to assess the scope of potential contractual barriers erected by companies to trade across Member States in the EU.

The Final Report largely confirms the Commission's findings in its preliminary report published last September (see our previous [alert](#)) in relation to which the Commission invited all stakeholders to provide their views through a public consultation ended last November.

The Commission has clearly stated that further action in this sector “*will include opening further antitrust investigations.*”

DIGITAL CONTENT

The Commission structures its analysis around three elements: the territorial restrictions and geo-blocking; the scope of licensed rights, as determined by the license agreement; and the duration of such licenses.

With regard to territorial restrictions to online distribution of digital content, the Final Report adopts a prudent position, and does not call the practice of territorial licensing into question. It clarifies that there are potential

justifications for geo-blocking (such as to deal with VAT issues or certain public interest legal provisions) and that any enforcement action would need to be based on a “*case specific assessment*”. The Commission also notes that there is an ongoing legislative debate about the scope of a new Regulation restricting geo-blocking.^{0F[1]} Consequently, even though the practice of geo-blocking was found to be widespread, it seems unlikely that enforcement action against such practice will be brought before the new legislative proposals are implemented unless aggravating factors are present.

However, with regard to the two other elements the Commission identifies current practices that may lead to further policy developments or competition enforcement. On the scope of licensed rights, and in particular on the practice of bundling (e.g. rights for mobile, terrestrial and satellite transmission), the Commission identifies concerns when online rights have been acquired but are not, or are only partly, exploited by the licensee. On the matter of duration of licensing agreements, the Commission considers that the practice of having longer terms is likely to make it more difficult for new players to enter the market and is a potential concern.

NEXT STEPS

The Inquiry was conceived as part of the Commission's Digital Single Market Strategy and the Commission notes that a number of the practices identified are at odds with the strategy's aims. Further enforcement action against practices which are widespread and persisting seems to be inevitable.

As regards geo-blocking specifically, EU legislation has been proposed to place restrictions on the practice, including where companies unilaterally implement geo-blocking measures without being required to do so by the right holder (see our previous [alert](#)). Based on the Commission's comments in relation to the Inquiry, it seems unlikely that the Commission will weigh in on this area and take enforcement action before the outcome of that proposal is clear. However, the Commission hopes in the meantime to start a dialogue amongst Member States to try to encourage more consistency across the EU in the areas covered by the Inquiry.

WHAT K&L GATES CAN DO FOR YOUR BUSINESS

Our Antitrust, Competition and Trade Regulation team has extensive experience advising right holders in Europe on a number of antitrust compliance activities, including in particular on licensing models, such as exclusive licensing and contractual restrictions such as those relating to territorial scope and bundling practices. We regularly assist clients in the media and broadcast space to best achieve their commercial objectives whilst minimising their legal risk, including evaluating, designing or refining licensing models and updating agreements.

Our Policy and Regulatory team closely monitors the EU legislative, regulatory and policy developments going on in these matters: it stands ready to provide clients with a detailed analysis in anticipation of future regulatory obligations, and it can provide solid advocacy support to assist them in the defence of their interests towards decision makers in the EU.

NOTES:

^[1] COM(2016) 289 final

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