

## THE EUROPEAN COMMISSION ANNOUNCES FURTHER COMPETITION ENFORCEMENT FOLLOWING ITS E-COMMERCE INQUIRY: CONSIDERATIONS FOR CONSUMER GOODS DISTRIBUTION

Date: 18 May 2017

### EU 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 (“**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 gives indications as to where such action may be targeted, possibly including the distribution of luxury goods.

### 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 announced that in-depth investigations will follow, apparently in addition to the holiday accommodation, PC video games distribution and consumer electronics probes which are already underway since February 2017 (see our previous alert).

Margrethe Vestager, the EU Commissioner for Competition, stated: “*Certain practices by companies in e-commerce markets may restrict competition by unduly limiting how products are distributed throughout the EU. Our report confirms that.*” In another statement, the Commission added: “*The insight gained from the sector inquiry will enable the Commission to target EU antitrust enforcement in European e-commerce markets, which will include opening further antitrust investigations.*”

### CONSUMER GOODS

The Commission's findings can be summarised as follows:

- A large proportion of manufacturers have begun selling their products directly to consumers through their own online retail shops, thereby competing increasingly with their distributors.
- Selective distribution systems, whereby products are only sold by approved resellers, allowing manufacturers to more closely control their distribution networks, are increasingly popular.
- Contractual restrictions relating to pricing, marketplace bans, restrictions on the use of price comparison tools and exclusion of pure online players have gained in popularity.

The Commission is concerned that some aspects of these trends may unduly limit consumers' product choice and raise prices in e-commerce and therefore warrant future action.

## **Selective Distribution**

The Commission has acknowledged the benefits of selective distribution systems and the legal rights of manufacturers to manage their sales. This is good news for branded producers which have voiced concerns with respect to the risk of altering the current EU rules applicable to selective distribution. The findings of the Final Report do not call for a change to the Commission's general approach to qualitative and quantitative selective distribution criteria.

However, it also noted that, amongst manufacturers operating a selective distribution system, a requirement to operate a brick and mortar shop by retailers, excluding pure online players, is widespread. The Commission is concerned that this requirement may not be linked to an improvement in distribution quality or other benefits for consumers. In these circumstances, the brick-and-mortar requirement may not be justified. This is an area for further scrutiny or, as a minimum, closer monitoring.

## **Pricing Restrictions**

The Commission stated that non-binding recommended maximum resale prices are considered to be useful in relation to developing a marketing strategy and supporting the brick and mortar channel. However, it is a well-established principle of EU competition law that resellers must be free to set their own resale prices.

Consistent with its Preliminary Report, the Commission remains concerned that manufacturers, who are now better placed than ever to monitor resellers' online prices thanks, for instance, to pricing software monitoring tools, are using this transparency to force resellers to adhere to recommended resale pricing - hence, amounting to an illegal minimum or fixed resale price.

The Commission also expressed concern at the use of dual pricing, whereby a reseller receives one wholesale price for goods to be sold in bricks and mortar shops and another for goods to be sold online. Justifications had been advanced that such a pricing policy was necessary to prevent free-riding and create a level playing field between online and offline sales. However, it seems that this pricing discrimination among the different channels of distribution that would unduly disincentivise the use of the online channel will be closely scrutinised by the Commission.

## RESTRICTIONS ON THE USE OF MARKETPLACES

Bans on online marketplaces which prevent authorised resellers from using them as a sales channel on the basis of quality criteria within a selective distribution system were considered not to amount to a *de facto* prohibition to sell online (which would be illegal under the consolidated jurisprudence of the Court of Justice of the EU in *Pierre Fabre*[1]). This is because such bans would just restrict one channel of online distribution but not prohibit all Internet sales. However, the Commission was careful in considering that they could result in possible violations of competition rules requiring in-depth analysis. The Commission also noted that the legality of such restrictions will shortly be considered by the Court of Justice of the EU in the *Coty* case.[2]

On a related point, the Final Report noted possible concerns relating to the exchange of commercially sensitive data on prices and sold quantities between online platforms and resellers operating on them when the platforms are in fact in direct competition with the resellers and selling the same products on their own account.

## 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.

Unusually, it is specifically noted that some fashion retailers have already reformed their practices during the course of (and presumably as a result of) the Inquiry. Further enforcement action against practices which are widespread and persisting seems to be inevitable.

The Vertical Block Exemption[3] and Vertical Guidelines[4], which set out the Commission's detailed views on distribution practices, will be revisited in 2022. This timeframe is apparently unaffected by the Inquiry. However, the Commission hopes in the meantime to start a dialogue amongst Member States to try to encourage more consistency across the EU in this area.

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[1] C-439/09 *Pierre Fabre Dermo-Cosmétique SAS*

[2] C-230/16 *Coty v Parfumerie Akzente*

[3] Commission Regulation (EU) No 330/2010

[4] Guidelines on Vertical Restraints 2010/C 130/01

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