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# **E-Commerce Sector Inquiry**

## **Final Report**

May 2017

# The Final Report

On 10 May 2017 the European Commission finalised its two-year antitrust inquiry into the e-commerce sector. The final report largely confirms the findings in the Preliminary Report of 15 September 2016 but also reflects the comments received in the subsequent public consultation.

In a nutshell, the Commission found that the growth of e-commerce over the last decade has had a significant impact on companies' distribution strategies and customer behaviour. Business reaction to the resulting challenges was not always found to be in line with competition laws. Since the Commission considers that the existing competition rules remain adequate, it will principally provide guidance through enforcement action.

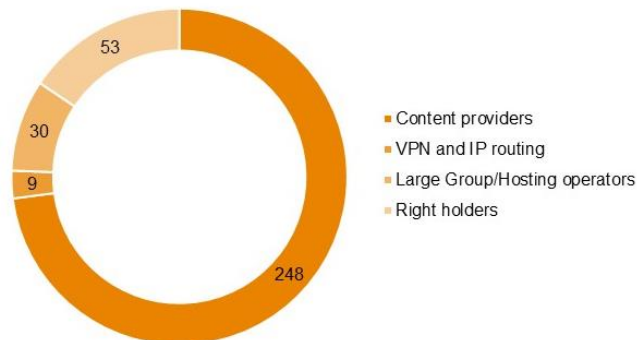
**1800** market players responded to the Commission's questionnaire.

**9000** distribution agreements were analysed, making this the most extensive sector inquiry so far.

1453 respondents in relation to goods



287 respondents in relation to digital content



The goods investigation included the following product categories:

- clothing, shoes & accessories
- house and garden
- consumer electronics
- electrical household appliances
- computer games and software
- toys and childcare articles
- media
- cosmetic and healthcare products
- sports and outdoor equipment

The digital content investigation looked into films, music, sports and news.



Our findings help us to target the enforcement of EU competition rules in e-commerce markets.

*Competition Commissioner Margrethe Vestager*

## What did the Commission find?

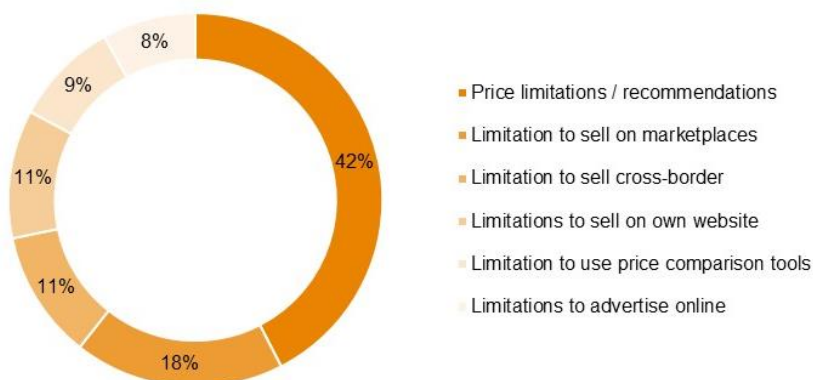
The final report confirms that a number of practices carried out by businesses in light of the increase in e-commerce may unduly restrict competition. The Commission strongly encourages companies to review their commercial practices if they have not done so already, with a clear signal that it intends to broaden its enforcement activities in this sector.

In relation to consumer goods, the following key points can be drawn from the final report:

- Retailers active in a number of product categories reported undue restrictions on cross-border sales and illegitimate influence on their pricing by manufacturers – a fact which is likely to prompt the initiation of further enforcement cases.
- While online price transparency has encouraged price competition, the Commission is concerned that ever-increasing tracking and monitoring activities facilitate anti-competitive behaviour.
- Dual pricing to hybrid retailers generally remains a “hardcore” restriction, but, in response to calls for greater flexibility the Commission emphasises that it is open to consider efficiency justifications.
- Restrictions on the use of brand names for online advertisement purposes may raise concerns insofar as such usage would normally be allowed under trademark rules.
- The Commission recognises that free-riding is a major concern for businesses. However, free-riding is not a blanket justification for restrictions, in particular because it affects online and offline stores equally. Each arrangement will need to be assessed individually.

According to the Commission, concerns are most apparent in the clothing, shoes, consumer electronics, sports as well as house and garden sectors. Companies in these sectors should therefore review their arrangements carefully.

Limitations found in relation to e-commerce in goods



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## A focus on hot topics in consumer goods

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The Commission indicates its position on several important (and highly controversial) distribution issues in the report:



### Selective distribution

- The Commission is not going to change its general approach to selective distribution which will continue to benefit from the Vertical Block Exemption where the terms are met.
- However, selective distribution can also facilitate restraints on retailers which may raise competition concerns – e.g. bricks and mortar shop requirements not linked to justified brand image or distribution quality continue to benefit from the Vertical Block Exemption but the Commission will consider withdrawing this benefit in individual cases.



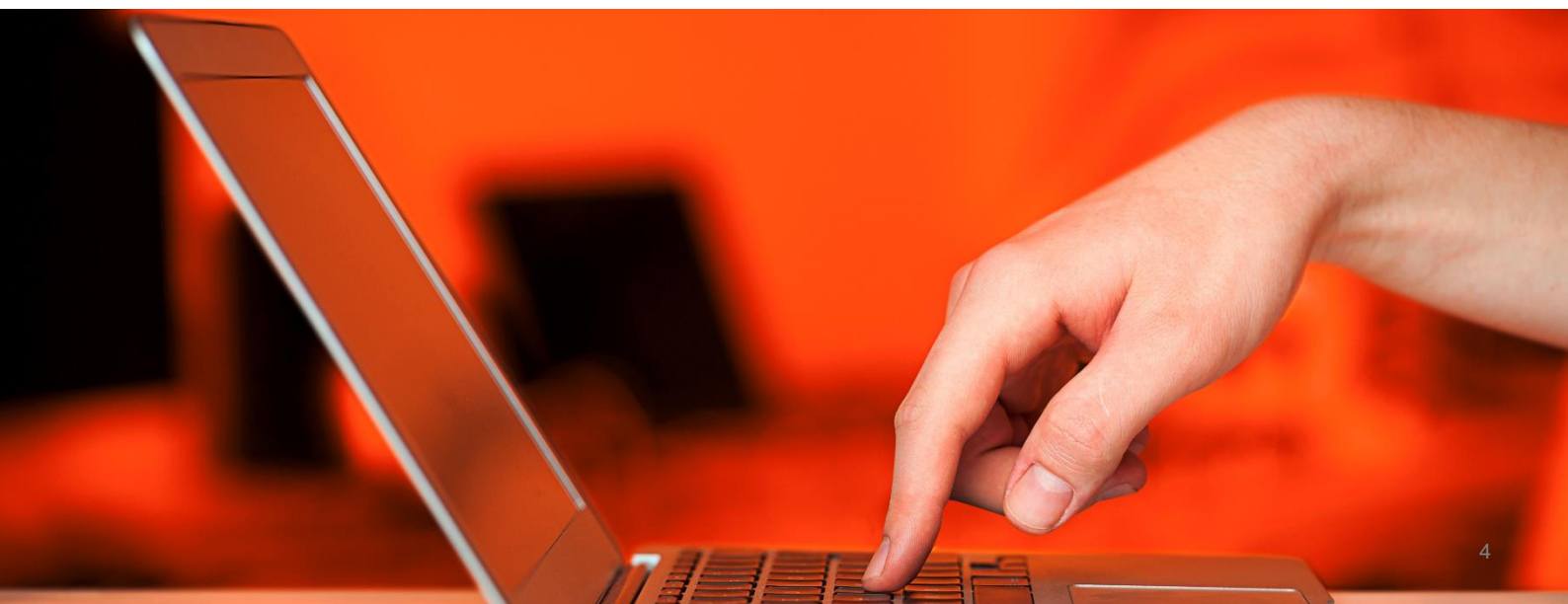
### Marketplace restrictions

- “Absolute” marketplace bans should not be considered “hardcore” restrictions of competition - subject to the pending *Coty* ruling before the CJEU.
- But whether an individual ban actually restricts competition will require a full assessment of all the circumstances, including e.g. importance of the channel and credibility of justifications.
- Parity or “MFN” clauses in marketplaces may have both pro- and anti-competitive effects and the Commission will assess these on a case-by-case basis.



### Price comparison tool restrictions

- Price comparison tools are not viewed as a distinct sales channel but instead offer retailers the ability to advertise their own online offering to a wider audience and increase its findability.
- The Commission has not taken a position, but a higher hurdle is indicated – e.g. an “absolute” ban on retailers using such tools, which is not linked to credible quality criteria, may amount to a “hardcore” restriction of competition.



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# The Commission's findings in digital content

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The Commission looked at the online provision of audio-visual and music products, namely digital content providers that offer digital content to consumers or provide services for third parties to offer content to consumers and right holders.

## The Commission found that:

- Online transmission (access digital content online): provides new opportunities to both established players and new entrants; encourages innovation; allows for lower transmission costs per user; provides more flexibility than other transmission technologies; and allows digital content providers to create user interfaces that can be accessed on multiple devices seamlessly and easily.
- The key determinant for competition in digital content markets is the availability of the relevant rights. However, the granting of these rights has developed into a “complex” license model for content online.
- There are three notable ways in which rights are granted in licensing agreements: (1) usage rights, which set out the technologies that the digital content providers may lawfully use to transmit the content and allow the user to receive it, including the modalities of access; (2) release and duration rights, which refer to windows during which the digital content provider is lawfully entitled to offer the product; and (3) geographic rights, which relate to the geographic area or areas in which the digital content provider may lawfully offer the product.
- Whilst exclusivity is widely used, its use, of itself, is not problematic.
- However, the main competition concerns identified in licensing agreements were:
  - **Bundling** online rights (e.g. technology rights – mobile, terrestrial or satellite): “may hinder existing operators and new entrants from competing and developing new innovative services, which in turn may reduce consumer choice”. Bundling is a particular issue where “it leads to a restriction of output, in situations where online rights have been acquired but are not, or are only partly, exploited by the licensee”.
  - **Territorial restrictions and geo-blocking**: generally these restrictions may give rise to competition issues, but there are differences across Member States. Specific regulation is pending in this area.
  - **Duration**: the Commission found “relatively long contract durations are common”; the Commission saw this as meaning 3-5 years, with some lasting even longer, with average durations of more than 10 or even 20 years, due to extensions. It is in the latter space that the Commission focussed, as these durations tend to make entry more difficult.
- **As a result**: digital content is flagged as needing to be under scrutiny; there are already several open antitrust investigations, for example studio and online gaming, **and** “certain business practices that raise competition concerns have emerged and others have evolved”. The Commission is now looking ahead to the review of the Vertical Block Exemption in 2022, but in the meantime prioritising **enforcement of EU competition rules** through more investigations.

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## What now?

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The Commission's report is the final stage in the e-commerce inquiry and a key building block in the overall Digital Single Market agenda. All eyes will now be on implementation and how far the Commission will go using these findings.

### We expect the following developments:

#### Increased enforcement action



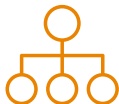
The Commission has said it will open further antitrust cases as a result of the findings of the sector inquiry – and it has already opened investigations into holiday accommodation, PC video games distribution and consumer electronics.

#### No major legislative changes



The Commission considers that the current legal framework adequately addresses the challenges brought about by e-commerce. There are no imminent plans to amend block exemption regulations or guidelines.

#### More consistent application of vertical rules within the EU



In the past, the Commission focused on cartel enforcement, leaving vertical cases mostly to the national authorities. The result is a patchwork of different approaches to vertical agreements throughout the EU. Companies will therefore welcome the Commission's intent to broaden the dialogue with the national authorities within the ECN in order to create a more consistent application of EU competition rules in the Union.

The Digital Single Market strategy continues with its work on, among other things, the data economy, cybersecurity and online platforms.



### Big data

The final report contains a new distinct section on the increasing use of data in e-commerce. It notes potential competition concerns e.g. regarding exchange of competitively-sensitive data – the Commission's approach to big data in competition law may have a far-reaching impacts and is keenly awaited.

# How we can help you?

The Commission has now set out its strategy on e-commerce and companies should consider closely the implications of the findings on their business, contracts and business models.

Companies are “on notice” that the **Commission will take action** in this space and in particular that it is prepared to launch individual antitrust investigations to deal with any perceived issues.

This is particularly important in the context of multi-channel distribution and selective distribution systems and **companies should review whether pre-emptive changes are required**, including whether agreements currently being negotiated require “change of law” protection in light of future developments in the scope of the Digital Agenda.

**It is not just an EU wide issue:** The Commission continues to emphasise that national market structures vary and one-size-fits-all may not be appropriate in all cases – this may well be a call to Member State regulators to step in and enforce in this area. The CMS Competition Group, with over 170 specialist competition lawyers in total and present in each major EU Member State (and beyond), is uniquely placed to assist you in a broad “house-keeping” exercise, to horizon-spot potential risk areas and provide future-proofed solutions.



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