

AmCham EU comments on the European Commission's Preliminary Report on the E-Commerce Sector Inquiry

Promoting e-commerce across the EU - fostering free and open competition while protecting innovation and consumer choice

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) supports the European Commission (Commission)'s efforts to promote e-commerce in the European Union (EU) as part of the Digital Single Market (DSM) strategy. Our members see the present sector inquiry as a fact-finding mechanism leading to better understanding of the different business models and market dynamics underpinning the EU's e-commerce sector, as well as identifying potential anti-competitive barriers.

While we commend the Commission's efforts to better understand the e-commerce market, the findings contained in the Preliminary Report (also referred to as Report) should be used with caution. Any future enforcement action or regulatory initiative needs to take into account the increasing competitiveness of EU markets, due not only to e-commerce and the ongoing digital transformation, but also to more general competitive factors.

These developments suggest there is no need to single out alleged restrictions in e-commerce as distinct from those encountered in the broader economy. Intervention in this sector may be premature and result in stifling growth and innovation rather than stimulating it. Should the Commission decide to take action, further analysis is needed on the potential negative impact on the development of e-commerce and the DSM. A case-by-case approach is recommended. A finding of an anti-competitive concern can only be warranted after careful consideration of the relevant facts, and a thorough assessment in terms of the application of those facts to the applicable legal framework.

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American Chamber of Commerce to the European Union (AmCham EU)
Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium
Register ID: 5265780509-97
Tel: +32 (0)2 513 68 92 | www.amchameu.eu

Secretariat Point of Contact: Ava Lloyd ava@amchameu.eu +32 (0)2 289 10 29

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totaled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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2 December 2016

Introduction

AmCham EU welcomes the European Commission's publication of the Preliminary Report on its e-commerce sector inquiry on September 15, 2016, as well as the opportunity to provide comments.

The Report confirms the significant growth of e-commerce and its increasing significance for the European economy. It also provides an overview of the main competition-related market trends and identifies a number of business practices it believes may restrict competition in online trade for consumer goods and digital content. The Commission is also warning of follow-up investigations and potential enforcement action.

General remarks

The Commission's efforts to promote electronic commerce, or 'e-commerce', understood as the buying and selling of goods and services over the Internet, are appreciated. Our members agree on the importance of e-commerce for the European economy, for the Commission's DSM strategy, and as a motor for increased competition and continued innovation.

AmCham EU is a strong and vocal advocate of free and open competition in all markets, whether online or offline, and commends the Commission's objective to remove barriers to trade in the EU. However, the Commission should be wary of the stifling effect of regulatory intervention when setting its enforcement priorities and intervening in the rapidly growing and changing e-commerce markets.

Sector inquiries pursuant to Article 17 of Regulation 1/2003 can serve as a valuable fact-finding exercise, but the use of their results depends among other things on the scope and design of the inquiry. For the Commission's e-commerce sector inquiry, the relevance and representativeness of the findings are affected both by the limited scope of the inquiry (consumer goods and digital content), and the characteristics of the participating companies (with SMEs unlikely to have been able to provide input).

It is difficult to evaluate and comment on the Report without having reviewed the complete set of underlying data. The results should be placed in the context of the competitive developments in the broader economy. In the absence of that, drawing legal conclusions about potential violations of Article 101 or Article 102 TFEU, or the need for regulatory intervention in relation to e-commerce, would be premature.

The Report does not point to any evidence that the development of the e-commerce sector is being hindered by anti-competitive practices, further suggesting that e-commerce should not be a priority for any enforcement intervention. We therefore urge the Commission to continue its market analysis and carefully assess the different distribution strategies used by market players in a particularly competitive landscape, before drawing any conclusions in terms of enforcement priorities. Furthermore, any enforcement action will require pertinent investigation and in-depth legal assessment on a case-by-case basis.

The findings of the sector inquiry do not justify regulatory action. If anything, some indicate that competition has increased rather than decreased, possibly offsetting any alleged anti-competitive effects. Any potential plan by the Commission to amend or produce new guidance or reform any rules

on vertical restriction should take into account the role of e-commerce in increasing competition and innovation in the economy as a whole. The risk of limiting this should be part of any impact assessment.

Parameters of competition

AmCham EU supports the Commission's balanced approach to the parameters of competition in online markets, and the aim to better understand some of the relevant market dynamics. However, our members also consider that the Commission does not sufficiently place its findings in the broader context of increased competition as a result of e-commerce more generally.

The Report shows that manufacturers and retailers have different priorities when it comes to parameters of competition. We recognise that '[w]hile price is a key parameter of competition for retailers, product quality and brand image are key for manufacturers'. Both manufacturers and retailers play important roles in ensuring that EU markets remain competitive and beneficial to consumer choice.

We are concerned that the Report does not place its findings on the business practices it examines in the wider context of the Internet's role in increasing competition. For example, it focuses on the conclusion that manufacturers increasingly exercise tighter control of their distribution systems in response to increased online price transparency. However it does not take into account how increased competition in recent years has forced businesses to become more and more sophisticated in how they position and market their products. In fact, when it comes to inter-brand competition, quality, innovation, creativity and brand image constitute very important criteria.

While the Report does not provide evidence supporting enforcement or regulatory intervention targeting the e-commerce sector in particular, the Commission should, in any further work, take account of the importance of quality and brand competition in parallel with price competition.

Distribution models

The Report observes that increased price competition at the retail level has led to 'manufacturers adopting a variety of business strategies in order to better control the distribution quality and the image and positioning of their brands'. These strategies include the choice of a distribution model allowing competition on product quality and brand, as well as price. This has an impact on their incentives to invest and innovate.

Increased control of distribution is not just a response to more online price transparency but a reflection of the sophistication of manufacturers offering high-quality products as well as positive and increasingly customised consumer experiences.

The Commission validates selective distribution as a legitimate and necessary means of selling certain products, including in the online sector, and covered by the rules applicable to vertical agreements (notably, the Vertical Block Exemption Regulation (VBER), guidelines and case law). It enables brand owners to establish a brand environment they can frame and control, supported by significant marketing investments to create a unique shopping experience. We encourage the Commission to consider how tighter control and selective distribution actually increases choice for consumers in terms of quality and experience.

Online marketplace restrictions

Our members welcome the Commission’s clarification regarding third-party platform restrictions. Platforms are not separate distribution channels but rather part of the overall online environment, where they constitute one of several means to sell online.

We would, however, like to draw the Commission’s attention to some important findings concerning marketplace restrictions. 88% of respondent retailers that did not sell on marketplaces said that they were not restricted from doing so. Only 4% of retailers sell online only via marketplaces, while 61% sell via their own online shop as the sole online selling channel. Marketplaces form part of certain distribution models and are a key channel to selling online, especially for small and medium enterprises.

The Report notes that marketplace restrictions do not amount to a *de facto* prohibition to sell online under the *Pierre Fabre* case law.^[1] It concludes that marketplace bans do not constitute hardcore restrictions within the meaning of Article 4(b) and/or Article 4(c) of VBER, as they do not have as their object ‘a restriction of the territory or the customers to whom the retailer in question may sell, or the restriction of active or passive sales to end users’.

The Report also justifies the use of marketplace restrictions in the framework of selective distribution systems. In this sense, the Commission acknowledges the importance of brand protection and quality considerations.

We invite the Commission to provide, in the final version of the Report, additional guidance on the efficiencies or other elements that should be taken into account in the case-by-case assessment of online marketplace bans and restrictions. These should be in line with the existing frameworks and practices to further enhance legal certainty and a consistent enforcement approach across the EU/EEA.

The Commission should consider online marketplace restrictions in the broader context of the ongoing digital transformation. As more and more people turn to their smart devices to shop for goods, new marketplaces will develop that cater for manufacturers’ individual needs (i.e. in terms of maintaining brand image). In these fast developing markets, it is important to give competitive forces the chance to play out without regulatory intervention, as such intervention may have the effect of stifling innovation rather than stimulating it.

Territorial restrictions

The Report claims that ‘nearly 12% of retailers indicate that they have contractual cross-border sales restrictions in at least one product category’. However, it does not explore the significance of such restrictions compared to other constraints on cross-border trade activities, such as regulation, tax law, language barriers and customer preferences. It also does not analyse how e-commerce-specific these issues are or whether these are just general problems of the not yet completed (not necessarily Digital) Single Market. The figure quoted in the Report does not in and of itself justify any

^[1] Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi*. Judgment of the Court (Third Chamber) of 13 October 2011.

conclusions regarding whether these restrictions represent a problem requiring any competition policy intervention.

The Report mentions that ‘only 15% shopped online from a seller established in another Member State’ without a proper assessment explaining why this is not enough or too ‘modest’. Eurostat statistics suggest (Figure A.3) that growth rates of domestic online shopping and online shopping cross-border from other EU sellers or non-EU sellers are by and large aligned.

The Report does not fully assess the impact of regulation on the territorial restrictions or geo-blocking measures implemented by manufacturers and retailers. There are sectors – such as food, alcoholic beverages or medicines – where no fully harmonised EU rules exist and where individual Member States still retain significant regulatory powers. More specifically, when different product standards and regulations exist across Member States, manufacturers and retailers might be left with little or no choice but to ‘geo-block’. A product initially designed to be marketed in one Member State might not be perfectly compliant with the laws and regulations of another Member State. In all these cases, EU competition rules on vertical restraints would cease to apply under the so-called ‘state compulsion doctrine’, as developed by the European Court of Justice in *Ladbroke Racing*.¹

The EU proposed geo-blocking legislation acknowledges this issue. According to the draft regulation, the prohibition to geo-block ‘shall not apply in so far as a specific provision laid down in Union law or in the laws of Member States in accordance with Union law prevents the trader from selling the goods or providing the services to certain customers or to customers in certain territories’.²

AmCham EU thus calls upon the Commission to conduct a more thorough assessment of the impact of government regulation on the geo-blocking strategies in order to obtain a better understanding of the situation.

Conclusion

Overall, AmCham EU welcomes the European Commission’s attempt to better understand and support the EU e-commerce sector.

EU competition law can and shall play an important role in the facilitation of a free and open market across the EU. But the action of the European competition authority should focus on removing those obstacles that have a clear anti-competitive effect, resulting for example in partitioning the internal market or harming consumer choice. These obstacles are mostly represented by hardcore restrictions – such as resale price maintenance, geo-blocking clauses not objectively justified, or complete bans on internet sales – which are prohibited under Article 101(1) TFEU. Any of these agreements or practices needs to be analysed on a case-by-case basis, based on the specific circumstances of the case and a thorough legal assessment.

¹ Joined Cases C-359/95 and C-379/95, *Commission and France v Ladbroke Racing*, [1997] ECR I-6265, para. 33.

² Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016) 289 final 2016/0152 (COD), Article 3(3).

The results of the inquiry should equally not be used by the European Commission as a pretext for modifying the rules or imposing further regulation on a sector that can bring a decisive contribution to the growth of the EU economy.

Businesses should continue to have the flexibility to determine the distribution model that best fits their strategy, and favouring one model over another as a general policy principle may have significant detrimental consequences for businesses and EU consumers as a whole.