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The European Commission's Preliminary Report into the e-Commerce Sector

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

On 15 September 2016, the European Commission (the “**Commission**”) published its Preliminary Report arising from its e-commerce sector inquiry (the “**Report**”). In essence, the Report highlighted two key points.

- » First, e-commerce is rapidly and continuously increasing in the EU, with more than half of EU adults having ordered online in 2015.
- » Second, the Commission will closely monitor certain business practices it has identified as potentially anti-competitive relating to both the online sale of consumer goods and supply of digital content.

The Report cautions that the Commission is likely to undertake case-by-case investigations into these practices.

ONLINE SALE OF CONSUMER GOODS – HOT TOPICS

Contractual sales restrictions in distribution agreements: The Report finds that manufacturers have responded to the rapid rise of e-commerce in certain cases by imposing price limitations, by restricting retailers from selling cross-border or on online marketplaces and by banning retailers from submitting offers to price comparison websites. The Commission stressed that while such restrictions are not automatically anti-

competitive, each arrangement will need to be examined on its individual facts and blanket bans in particular will be scrutinised closely.

Selective distribution systems: These involve suppliers agreeing to supply products for resale to only those distributors which meet certain minimum criteria. The Report notes that the use of these systems is on the rise, with increasingly detailed and complex minimum criteria being applied. The Commission has emphasised that use of such systems must be justified by legitimate commercial aims, such as the need to maintain high-quality distribution facilities and a coherent brand image, and that the restrictions arising from selective distribution must not go further than is necessary to achieve these aims.

ONLINE SALE OF DIGITAL CONTENT – HOT TOPICS

Geo-blocking: EU Competition Commissioner Margrethe Vestager has prioritised tackling the practice of geo-blocking (i.e. creating technical barriers impeding consumers from buying and selling across the borders of EU Member States). In its press release announcing the Report, the Commission notes that “if geo-blocking is the result of agreements between suppliers and distributors it may restrict competition ... in breach of

antitrust rules". The Report suggests that understanding the commercial justifications for such restrictions will be central to the Commission's analysis of geo-blocking measures in the future.

Restrictions on competitors accessing digital content: Digital content providers surveyed as part of the inquiry emphasised the importance of access to quality digital content on fair terms as being key to building and sustaining a competitive digital platform. Commissioner Vestager has stated that what most digital content providers *"have in common is that they need to show the top football games, or the most popular TV shows"*. The Commission is concerned that clauses in content licensing agreements which tie up key content on a long-term basis (e.g. via long contractual terms, automatic renewal rights and first refusal rights for incumbent licensees) will prevent new platform providers from entering the market.

Vestager commented that *"[m]any companies have already taken this opportunity to check that they're complying with the rules [and] the information gathered will obviously guide [the Commission's] enforcement activities"*.

For further information and guidance on these matters, please contact a member of the Competition and Regulated Markets Group.

NEXT STEPS

The Report is subject to public consultation for a period of two months. The Commission's Final Report is expected to follow in the first quarter of 2017.

In the meantime, the Commission has stated that the Report *"should be a reason for companies to review their current distribution contracts and bring them in line with EU competition rules."* The Commission has also stressed that case-by-case investigations are very likely to follow in the near future. Businesses whose distribution practices include some or all of the areas highlighted above should carefully review their existing arrangements and ensure that any restrictions are linked to a clear and objectively justifiable commercial aim. On 6 October 2016, Commissioner

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