Reports on the e-commerce sector inquiry and modern forms of distribution in the internet age

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1. Introduction

In this second issue of CLPD in 2017 we take a closer look at the long-awaited Preliminary Report on the European Commission’s E-commerce Sector Inquiry (“Preliminary Report”). We also take into account the findings of the Final Report on the European Commission’s E-commerce Sector Inquiry (“Final Report”), which was published on 10 May 2017, i.e. only a few days before the publication on this issue. The Final Report to a large extent repeats and confirms the findings of the Preliminary Report. The goal of the e-Commerce Sector Inquiry, as the Commission explains in the Preliminary Report, was to obtain an overview of the prevailing market trends and gather evidence on potential barriers to competition linked to the growth of e-commerce. In addition, through the Sector Inquiry, the Commission was seeking to understand to what extent the growth of e-commerce has led to an increase in contractual restrictions that could raise antitrust concern.

The articles in this issue discuss how the Preliminary Report has been received by stakeholders, national competition authorities and the academic community and what the main areas of concern are with regard to the Commission’s preliminary findings. While our authors look at the Preliminary Report from various angles, they all in a way address the same question, i.e. whether the Commission has managed to give additional useful guidance in the Preliminary and the Final Reports (“Reports”), which can be applied in the new market context created by the digital economy. Both Reports find that online price transparency is the market feature that most affects the behaviour of market players and consumers. Many of our authors therefore focus on tools designed to increase such transparency, including pricing algorithms, online marketplaces and price comparison tools.

In their economic analysis titled “Does economic theory justify a difference in treatment of restrictions of competition on PCT’s verses Marketplaces” Hugh Mullan and Natalie Timan from the UK’s Competition and Markets Authority (“CMA”) explore whether there are any economic justifications for the Commission adopting a stricter approach to restrictions on price comparison tools than to restrictions on marketplaces. As the authors rightly note, the Commission takes a clear position in the Reports that absolute bans on marketplaces cannot be considered as hardcore restrictions under the existing Commission Vertical Block Exemption Regulation of 2010 (“VBER”), while...
In the Final Report.

Concerns receive a significant amount of attention flagged in the Preliminary Report foster tacit collusion. These concerns have been of the strategic use of algorithms to stabilize and “discuss a very hot topic monitoring and collusion – the Tale of online price transparency, advanced algorithms’ antitrust impact” MLex, 16 March 2017; full speech available on the European Commission website: http://ec.europa.eu/competition/index_en.html

Ariel Ezrachi (University of Oxford) and Maurice Stucke (University of Tennessee College of Law) in their article titled “Tacit Collusion on Steroids – the Tale of online price transparency, advanced monitoring and collusion” discuss a very hot topic of the strategic use of algorithms to stabilize and foster tacit collusion. These concerns have been flagged in the Preliminary Report and were also recently mentioned by Commissioner Vestager in her speech at the Bundeskartellamt. Finally, these concerns receive a significant amount of attention in the Final Report. As Ezrachi and Stucke observe, competition authorities currently might not be well prepared to tackle such tacit collusion scenarios.

In an article titled “The EU Vertical Restraints Rules and E-Commerce – A Case for Continuity, Modification or Disruption?” Birgit Krueger and Jan Muhle from the Bundeskartellamt take a broad look at the Bundeskartellamt’s experience with the e-commerce sector and strategies employed by manufacturers to reduce price transparency on the internet. In conclusion they suggest that while the existing VBER might be sufficient to address strategies employed by manufacturers to suppress web-based price competition between retailers, the VBER might not be suitable to address restrictions originating from internet intermediaries.

Lindsay Lutz and Nikolaus Lindner from eBay in their piece titled “European Competition Law – Leaving MSMEs Behind” take a critical look at the Commission’s analysis of restrictions imposed on marketplaces. Lutz and Lindner observe that the Preliminary Report fails to take into account the impact of marketplace bans on micro, small and medium enterprises (MSMEs) and does not adequately explore the substantial barriers for MSMEs to participate in the internet economy.

Finally, Lars Wiethaus and Simon Chisholm in their article titled “The Commission’s e-Commerce Sector Inquiry – Time to change presumptions on vertical restraints?” look at the Reports for hints as to the possible motivations to employ vertical restraints to reduce intra-brand competition. Wiethaus and Chisholm conclude that the results of the sector inquiry do not offer many answers in that regard and there seem to be no questions aimed at exploring the suppliers’ reasons for employing such restraints. The Commission, in the authors view, has missed an opportunity to better understand and document motivations that might lack pro-competitive justification.

In this editorial, we embark on a similar task to that of our authors and offer our high-level thoughts on whether the Reports provide any useful guidance with regard to arguably the most controversial restriction addressed in the Sector Inquiry – marketplace bans. As the Commission notes in both Reports, there is currently a debate in some Member States whether marketplace restrictions which are not linked to qualitative criteria (absolute or per se marketplace bans) amount to hardcore restrictions in the form of restrictions of “passive sales” within the meaning of the VBER. On 25 April 2016, a German court referred a case before it to the European Court of Justice (“ECJ”) in order to seek guidance on this specific issue. The case is currently pending.

Since the approach to marketplace bans has created divergence between the European national competition authorities, the Commission decided to address the issue by weaving into the Reports a full legal analysis of marketplace bans. Below we go over this analysis with a fine-tooth comb in an
attempt to understand whether the Reports have brought any clarity to this controversial area.

2. Guidance without certainty

Overall, the e-commerce Sector Inquiry should provide useful background facts, stimulate the discussion on how to approach restrictions of competition in e-commerce in the EU, and allow for informed policy-making in the future. Given the fact-finding purpose of any sector inquiry, the Commission was expected to flag in the Reports any potential competition concerns in e-commerce markets without, however, going into an elaborate legal analysis of these concerns. This approach prevails in the Reports but in one notable case the Commission diverted from it significantly: the dispute around marketplace bans is addressed in great detail and the Commission clearly endorses the view that such restrictions do not qualify as hardcore restrictions of competition neither under the VBER nor under Pierre Fabre7.

According to the Commission, the findings of the Sector Inquiry indicate that marketplace bans are not hardcore restrictions within the meaning of Article 4(b) or Article 4(c) of the VBER. The Commission considers that such clauses do not have as their object (i) a restriction of the territory or the customers to whom the retailer in question may sell or (ii) the restriction of active or passive sales to end users. In other words, marketplace bans are not aimed at segmenting the internal market based on territory or customers. In addition, in the Commission’s view, marketplace bans do not amount to a total ban of the use of the internet or restrict the effective use of the internet as a sales channel and therefore they do not fall within the scope of the ECJ’s judgment in Pierre Fabre.

However, the debate on this issue will remain unresolved until the ECJ judgment in the Coty8 case. Given this, it is not clear why the Commission decided to present a legal analysis of the issue pre-empting the ECJ’s judgment. In these circumstances, it would perhaps have been more appropriate to limit the discussion in the Reports to the fact-finding exercise.

3. Does Pierre Fabre apply only to a complete ban on the use of the internet?

In the ECJ’s judgement in Pierre Fabre a de facto prohibition of sales over the internet (inserted in a selective distribution agreement) was held by the Court to be a restriction of competition “by object”.9 The findings of the Reports, however, do not show that marketplace bans necessarily amount to a prohibition on sales via the internet. In the Commission’s view, therefore, marketplace bans do not have as their object the restriction of passive sales and therefore cannot be considered as hardcore restrictions under Pierre Fabre.10 The Commission’s narrow reading of Pierre Fabre is somewhat unexpected. While it is true that in Pierre Fabre the Court dealt with outright online sales bans, nothing in the wording of the judgment suggests that restrictions short of a total internet ban could not qualify as a restriction “by object”. Given this, it is surprising that the Commission did not inquire in the Preliminary Report whether a restriction by object could arise when only a certain percentage of internet sales is restricted.11

“A restriction by object could arise when only a certain percentage of internet sales is restricted”

With regard to marketplace bans there are good reasons to (re)consider such a scenario. While online distribution methods are still developing and morphing, it is apparent that

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8 Case C-230/16 Coty Germany, pending before the ECJ.
9 Ibid.
10 We note that in the Preliminary Report the Commission conflates hardcore restrictions with restrictions “by object” in the context of the Pierre Fabre judgment even though the judgement clearly refers to a restriction “by object”. 11 For example, in its recent judgement in the Asics case, which was delivered on 5 April 2017, the Düsseldorf Higher Regional Court confirmed that the general prohibition of the use of price comparison engines is a restriction of competition by object because it deprived retailers of a advertising and sales possibility. The Court also stated that the case law of the ECJ (Pierre Fabre) was clear in this regard. The case summary is available on the Bundeskartellamt’s website: http://www.bundeskartellamt.de/SharedDocs/Meldungen/EN/Pressemitteilungen/2017/06_04_2017_Asics.html?sessionid=610A8758E9E11E5C8806ED893AF971_cid371
Online marketplaces are not just a larger version of specialized online stores but rather a separate distribution channel on the internet. The number of products and competing manufacturers on a marketplace is significantly higher than on the website of any distributor. Online marketplaces offer their customers a different shopping experience. Factors such as access to products, convenience, ambience, the level of customer service (fast and efficient check-out, available payment methods) and delivery are of great importance. Conversely, the shopping experience within online shops is very different. Online shops offer a smaller range of products (typically from one brand or category), the level of customer service varies greatly and so do delivery methods and payment and return policies.

In their article titled "European Competition Law—Leaving MSMEs Behind" Lindsay Lutz and Nikolaus Lindner invite us to imagine a marketplace as an online equivalent of a vast supermarket filled with endless shelves. This comparison accurately reflects the role of online marketplaces as aggregators of products sold on the internet. Online marketplaces offer a wide array of products in one, albeit virtual, space. Just like customers of a supermarket, customers of an online marketplace can easily compare prices across a number of products and purchase them at the lowest price. Finally, online marketplaces benefit from similar economies of scale, which allow them to offer prices that are more attractive.

The Commission recognizes the Reports some of these characteristics of online marketplaces. In particular, the Commission notes that marketplaces allow buyers to easily compare prices across a number of sellers on the marketplace and purchase products at the lowest price. In addition, the Commission observes that marketplace bans may allow manufacturers to stabilize retail prices and reduce competitive pressure on prices and may therefore not only be in the interest of traditional brick and mortar retailers, but also of manufacturers that operate their own online shop or sell directly via marketplaces to customers. Unfortunately, these considerations do not lead the Commission to a rather obvious conclusion that online marketplaces constitute a separate distribution channel on the internet and offer benefits different from simple online shops.

Given the role of marketplaces as a distinct distribution channel online, there are strong arguments to defend the position that blanket marketplace bans should in general be treated as “by object” restrictions. Blanket marketplace bans target marketplaces as a channel without advancing any individual justification - based for example on a lack of objective quality criteria - and prevent distributors from using a modern form of online distribution.

In this context it is worth recalling that a similar dispute about modern channels of distribution and their impact on brand image took place in the past two decades when multi-products retailers such as hypermarkets and supermarkets entered the market and disrupted the previously existing model of retail sales. At that time the EU Courts recognized that access to these new forms of distribution benefitted consumers and that the selective distribution system should not a priori exclude any category of retailers, including hypermarkets. Likewise, at the wholesale level, criteria of admission to the selective distribution network should not in principle exclude self-service and cash-and-carry wholesalers. In Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission the Court explicitly held that an operation of a selective distribution system must be considered unlawful where the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refuses to approve distributors who satisfy the qualitative criteria of the system.

Similarly, in Villeroy and Boch the Commission considered that a selective distribution system, which excludes department stores even when they have suitable premises and staff, would

13 Ibid.
not normally be exempted. In the Commission's view, the selective distribution system should not exclude “certain modern forms of distribution” and should accept not only specialized retailers but also retail outlets having specialized departments. By this, the Commission meant department stores or other large outlets whose scale of operation permits them to charge lower prices than are charged by small, specialist shops selling the same goods. If a specialized department is available and meets the selection criteria, admission cannot be denied only because the shop deals in many other kinds of goods as well.

In the cited cases the Courts (and the Commission) correctly recognized that manufacturers’ attempts to limit offline distribution to small and medium specialist retailers go against the interest of consumers. In the online world, however, similar attempts to restrict modern online forms of distribution to the benefit of specialist retailers and direct sales fly under the Commission's radar. It is true, as the Commission argues in the Reports, that distributors prevented from selling on online marketplaces can still sell their products in online stores. However, services offered by online stores are not the same as those offered by online marketplaces: not the same delivery, not the same prices, not the same geographical reach.

Today we would not accept blanket sales bans on multi-product retailers such as hypermarkets and department stores. The Commission should adopt the same approach to online marketplaces as it does offline—in line with the provisions of the VBER that say online and offline should be treated in a similar manner. Otherwise, the acceptance of blanket marketplace bans will result in undue discrimination against modern forms of distribution online to the benefit of specialist retailers and direct sales but to the detriment of consumer choice.

4. Artificial distinction between “how” and “where or to whom”

In the Reports the Commission considers that marketplace bans are not hardcore restrictions within the meaning of Article 4(b) or Article 4(c) of the VBER. In the Commission’s view, the purpose of marketplace bans is not to restrict “where or to whom” distributors can sell the products but rather to regulate “how” the distributors can sell their products over the internet.

The Commission’s distinction between “how” and “where or to whom” appears artificial at best and runs counter to other Commission pronouncements that they are concerned with effects rather than form. This statement is also in conflict with the Commission’s own conclusions in the Preliminary Report that online marketplaces facilitate cross-border sales and that retailers that sell (also) via marketplaces are much more likely to sell cross-border compared to those which only sell via their own website.

“By reducing visibility, marketplace bans necessarily reduce the territory and the number of customers to whom the retailer may sell”

In reality, manufacturers use marketplace bans as “multi-purpose tools” which help them to exert stricter control over prices of their products and to reduce the visibility of products online. Online marketplaces are used by very large numbers of customers and have a very wide reach. By preventing their own distributors (who satisfy...

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18 As it was held in Goupment d’achat Edouard Leclerc, a selective distribution system can fall outside of Article 101 (1) TFEU only if it is objectively justified and account is being taken of the interests of consumers. See Judgement of the Court of First Instance of 12 December 1996, Goupment d’achat Edouard Leclerc v. Commission, Case T-88/92, paragraph 112.


20 Ibid, paragraph 322. In the Final Report on the E-commerce Sector Inquiry the Commission notes that “alternative online distribution models such as online marketplaces have made it easier for retailers to access customers. Small retailers may, with limited investments and effort, become visible and sell products through third party platforms to a large customer base and in multiple Member States”, Final Report on the E-commerce Sector Inquiry, paragraph 14.
the selection criteria) from selling via these marketplaces, manufacturers significantly restrict their ability to make online sales to end customers and to reach a large part of the market.\textsuperscript{21} By reducing visibility of products, marketplace bans necessarily reduce the territory and the number of customers to whom the retailer in question may sell and thereby restrict active or passive sales to end users.

We note in this context that Birgit Krueger and Jan Muhle from the Bundeskartellamt argue in their article that Article 4(c) of the VBER is, on its face, sufficiently broad to ensure that clauses which restrict distributors’ use of significant internet distribution channels do not come under the exemption provided by the VBER.\textsuperscript{22}

Finally, the link between online visibility and the retailer’s freedom to promote its own offer becomes apparent in the Commission’s analysis of restrictions on price comparison tools. In the Reports the Commission argues that bans on using price comparison tools may make it more difficult for customers to find the retailer’s website thereby potentially limiting the (authorized) retailer’s freedom to promote its own online offer.\textsuperscript{23} Such bans, as the Commission argues, may also make it more difficult to attract customers outside the physical trading area of the retailer via online promotion.\textsuperscript{24}

The very same reasoning directly applies to marketplace bans, which also make it more difficult for customers to find the retailer’s product and to attract customers outside the physical trading area of the retailer. The Commission, however, dismisses this similarity by introducing another artificial distinction, this time between restriction on online marketplaces and restriction on price comparison tools.

In their excellent analysis, Hugh Mullan and Natalie Timan explore whether there are any economic justifications for the Commission adopting a stricter approach to restrictions on price comparison tools than to restrictions on marketplaces.\textsuperscript{25} Their conclusion is clear that the main benefit of both marketplaces and price comparison tools is their ability to reduce search costs for consumers and help them compare brands. Therefore, these authors suggest that the Commission should take a similar approach to restrictions on marketplaces and price comparison tools.\textsuperscript{26}

As a final important point, we note that the Commission does not actually have the authority to exempt a practice under the VBER unless it is clear that it will always satisfy the criteria for exemption. The Reports do not justify such conclusion with regard to blanket (or absolute) marketplace bans. To the contrary, the Commission clearly states that marketplace bans cannot in all circumstances be considered compatible with competition law.\textsuperscript{27} By effectively exempting blanket marketplace bans under the VBER, the Commission exposes itself to criticism and potential liability. It also remains open to national authorities to withdraw the benefit of the VBER. However, as Birgit Krueger and Jan Muhle from the Bundeskartellamt note, the national authorities’ power in that respect is limited by the requirement that the geographical scope of the market, to which the withdrawal relates, must not be larger than national.\textsuperscript{28}

5 Conclusion

The Commission’s legal analysis of marketplace bans contained in the Reports seems somewhat inappropriate and premature and does not adequately explore the role of marketplaces as a modern form of distribution. Given the role of marketplaces as a distinct distribution channel online, there are strong arguments to defend the position that blanket marketplace bans should

\textsuperscript{21} This was also the view of the Bundeskartellamt in the Asics case (decision in re. ASICS of 26 August 2015, B2-98/11 (“Asics”) – see also the case summary on “Unlawful restrictions of online sales of ASICS running shoes” published by the Bundeskartellamt on 25 January 2016 (page 10)). See also point 52 of the Vertical Guidelines.

\textsuperscript{22} Birgit Krueger and Jan Muhle, The EU Vertical Restraints Rules and E-Commerce – A Case for Continuity, Modification or Disruption?


\textsuperscript{24} Ibid.

\textsuperscript{25} Hugh Mullan and Natalie Timan, Does economic theory justify a difference in treatment of restrictions of competition on PCT’s verses Marketplaces.

\textsuperscript{26} For the sake of clarity we note, however, that Hugh Mullan and Natalie Timan argue for a case by case examination of these restrictions.


\textsuperscript{28} Birgit Krueger and Jan Muhle, The EU Vertical Restraints Rules and E-Commerce – A Case for Continuity, Modification or Disruption?
in general be treated as hardcore restrictions and restrictions “by object”.

Finally, the Commission’s inconsistent conclusion that blanket marketplace bans are neither hardcore restrictions nor always compatible with competition law can only be read as a compromise between those who want to encourage the development of digital markets and those determined to defend the current wording of the Guidelines on Vertical Restraints (despite their obvious deficiencies). In its legal analysis in the Reports the Commission refers to the ambiguous paragraph 54 of the Guidelines on Vertical Restraints29 (often referred to as the “logo clause”), on which manufacturers have relied to restrict their distributors from selling on any online marketplace, simply because marketplaces display their logo on the website. The Commission’s reasoning in the Preliminary Report appears to be that since the logo clause may be read as allowing suppliers to use marketplace bans, in no circumstances could such bans fall into the category of hardcore restriction.30 However, given the unclear wording of the “logo clause” and its obvious conflict with other provisions such as the obligation to treat offline and online in a similar way, it would perhaps have been more appropriate for the Commission to simply admit that the “logo clause” is an unfortunate example of less-than-perfect last minute legal drafting and focus instead on the current reality of online commerce and the role of marketplaces as a distinct distribution channel.

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29 Point 54 of the Guidelines on Vertical Restraints states: “[f]or instance, where the distributor’s website is hosted by a third party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform.”

30 In the Final Report, the Commission takes an even stronger stance and argues that paragraph 54 of the Guidelines on Vertical Restraints demonstrates that, at the time when the VBER was adopted, the Commission did not consider marketplace bans to amount to hardcore restrictions, which are incapable of qualifying for a block exemption. Final Report, Commission’s Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, paragraph 501.