

The EU Commission and national authorities' position on e-commerce

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Following the completion in 2017 of the two-year Commission's inquiry on electronic commerce (e-commerce), specific economic and legal issues have been highlighted which laid the basis for proceedings conducted by EU and national market surveillance authorities, whose outcomes – highly relevant to the economic operators concerned – are examined in this article.

The 2015/2017 inquiry on the e-commerce sector

On 6 May 2017, the EU Commission completed its inquiry on the e-commerce sector which lasted about two years, with a Final Report that focused **on the most sold online products** such as consumer electronics, home appliances, digital software and video games, mixed media items – i.e. books, CDs, DVDs and Blu-ray discs. The inquiry builds on the **Digital Single Market Strategy** document of the European Union aimed primarily, according to the Commission, at “...making the EU's single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one. This could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs”.

Main economic issues identified: influence on prices and growth of online marketplaces

The main economic developments highlighted by the inquiry as a result of online sales are:

(1) Increased price transparency: consumers can obtain and compare online product information and move from an online channel to a physical store. This might lead to *free-riding* practices, as defined in the Commission's final report of 10 May 2017: “... consumers can use pre-sales services of brick and mortar shops before purchasing the product online; alternatively, consumers can search and compare products online before purchasing them in brick and mortar shops...”.

- It follows, according to the Commission, that without a level playing field for online and offline sales, retailers cannot be encouraged to provide quality services.

(2) Increased price competition for online and offline sales:

- It follows, according to the Commission, that the lack of profitability has drawbacks for competition on other key parameters for the consumer: brand image, quality, innovation.

(3) A greater price transparency allows producers/suppliers to more easily monitor the prices applied by retailers by identifying within a very short time, by means of software designed for that purpose, deviations from their 'recommended' prices.

- According to the Commission, this allows producers to enforce automated price coordination, with possible effects in terms of competition.

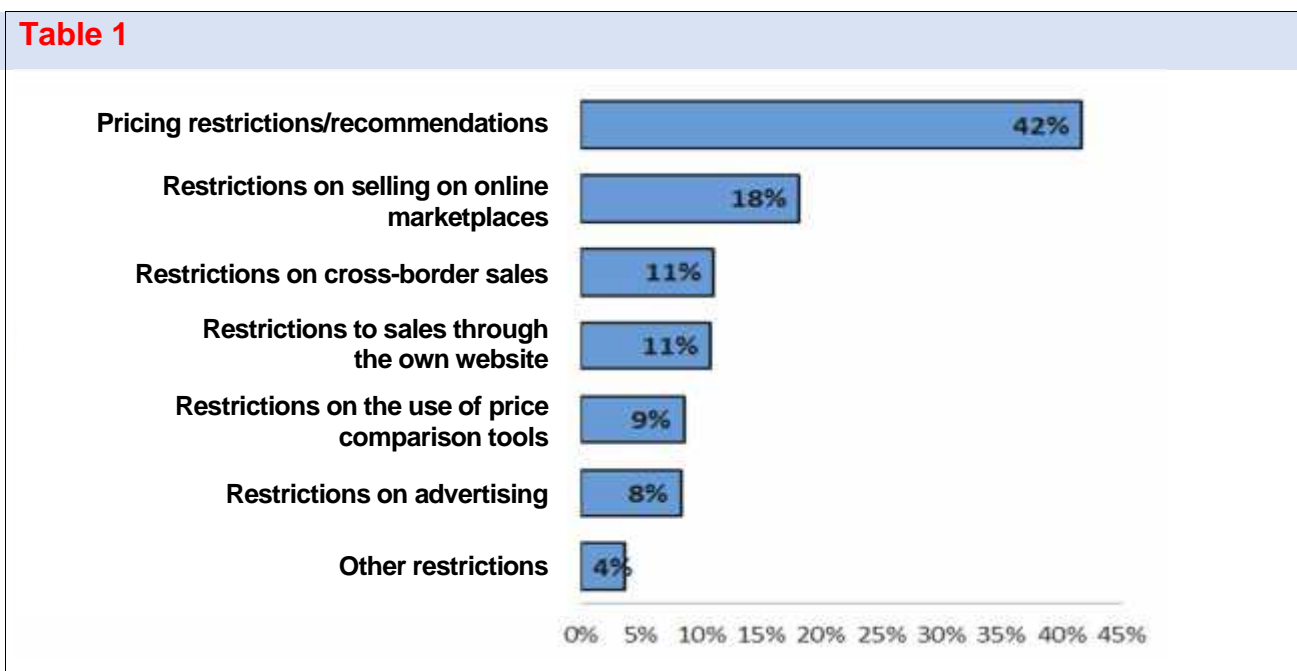
(4) Growth of online marketplaces, which by their nature allow small retailers to increase their visibility and customers base with limited investment.

- According to the Commission, the above would lead to a contrast with the producers' distribution and brand strategies.

Main issues identified from an antitrust perspective

Table 1 below shows the main vertical restrictions envisaged by agreements and revealed by the sector inquiry. In this Table, the restrictions are shown in descending order by percentage incidence, regardless of whether they are legitimate or not, which will be assessed below.

The percentages refer to the replies received to the questionnaires distributed by the Commission among Community operators. As can be seen, the main restrictions refer to **price maintenance** (42%) (to which is likely to be associated the abuse of tools for comparing prices: 9%), to **sales on online marketplaces** (18%), to **parallel imports**, in the form of obstacles to cross-border sales (11%) and to **sales through the own website** (11%).



The Commission's conclusions

The Report concludes with the following twofold proposal by the Commission:

- (1) enforce the EU competition rules at the business practices that have emerged or evolved as a consequence of the growth of e-commerce and highlighted in the Report, and
- (2) coordinate with national competition authorities to guarantee, with reference to e-commerce, uniform and consistent application of EU competition law.

Restrictions on selling on online marketplaces: it is legitimate, under certain circumstances, to prohibit a retailer from selling on marketplaces

Let us now examine the most recent competition authorities' guidelines and their development.

The competition authorities and courts of some Member States (especially in Germany) regard with disfavour the restrictions (including contractually imposed prohibitions) on operators from selling on online marketplaces as, in their opinion, they would have anti-competitive effects since:

- (i) they would tend to exclude or limit access to the market to small retailers and, in addition,
- (ii) they would limit the ability of consumers to easily compare prices.

However, according to the EU Commission, there is no absolute prohibition of these restrictions.

The issue was decided by the European Court of Justice (**Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH**), which was asked to give a preliminary ruling by a German court. The matter refers to a selective distribution agreement introduced in 2012 by the luxury cosmetics supplier Coty, which prohibits exclusive dealers from selling products on third-party online platforms (Amazon, E-bay, etc.).

One of the dealers (Akzente), who sold Coty products on Amazon.de, disputed the legitimacy of this prohibition. The German second instance judges before whom the dispute between Coty and Akzente was brought, called upon the European Court of Justice (ECJ) for a preliminary ruling to ask, in the light of EU competition law (Article 101.1 TFEU and Commission Regulation 330/2010, concerning the exemption in case of selective distribution networks):

- whether the protection of a fashion luxury brand justified the adoption of a selective distribution system by the principal/licensor and
- whether, in the case at issue, the prohibition to sell on Amazon was legitimate.

The ECJ, with its judgement of 06/12/2017¹, ruled that:

1) **It is legitimate a contractual clause that contains the prohibition to members of a selective distribution system of luxury products from making sales via the Internet through third-party platforms (Amazon and similar) “if that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court”.**

2) **The prohibition imposed on members of a selective distribution system of luxury products from using, in a recognizable way, third-party platforms for the internet sale of those goods “does not constitute a restriction of customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation”.** (i.e. Regulation 330/2010)

¹<http://curia.europa.eu/juris/document/document.jsf?text=&docid=197487&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=816146>

It should be noted that during the preliminary ruling proceedings – to which Member States may take part – only Germany and Luxembourg upheld the argument that the prohibition to sell on marketplaces is unlawful, whereas **Italy**, France, Holland, Austria and Sweden, in addition to the EU Commission, expressed the same view as that endorsed by the ECJ with its subsequent ruling.

Cases initiated by the EU Commission and decisions taken

In relation to online sales, in 2017 the EU Commission launched **three different groups** of investigations:

- 1- February 2017, the Commission opened three separate investigations into the consumer electronics, video games and hotel industry, concerning price fixing and geo-blocking practices;
- 2- June 2017, an antitrust investigation was opened into the clothing manufacturer and retailer Guess for allegedly restricting authorized retailers from selling online in other Member States;
- 3- June 2017, an investigation was opened into the companies Nike, Sanrio and Universal Studios, suspected of having prevented cross-border sales through licensing and commercial practices.

As to the first of these three ‘groups’, four cases were decided upon during 2018, concerning large multinational companies operating in the electronics sector. See in this regard Table 2.

Table 2

Company	Reduction for cooperation	Fine (EUR)
ASUS	40%	63,552,000.00
Denon & Marantz	40%	7,719,000.00
Philips	40%	29,828,000.00
Pioneer	50%	10,173,000.00

ASUS (Case AT.40465) Commission decision of 24/07/2018 (price maintenance)

According to the Commission, between 2011 and 2014, the company allegedly monitored its retailers’ resale prices (PCs, notebooks, displays) in Germany and France and intervened with retailers who sold these products below its ‘suggested’ resale prices requesting them to increase their prices.

ASUS agreed to cooperate with the Commission, acknowledging its antitrust violations and providing evidence of the infringements themselves. As a result, the Commission decided to reduce by 40% the fine otherwise imposed (reduced therefore to **EUR 63,522,000.00**).

The imposition of the administrative fine does not preclude claims for damages from all those parties (retailers, competitors) who can prove that they have been damaged by ASUS' conduct and the reparation of the harm caused by the same.

Denon & Marantz (D&M) (Case AT.40469) Commission decision of 24/07/2018 (price maintenance)

According to the Commission, between 2011 and 2015, the company actively pursued in Germany and Holland the strategy of achieving price maintenance of its retailers with respect to headphones and speakers of the Denon, Marantz and Boston Acoustics brands.

As said by the Commission, the employees and management of **D&M Germany** monitored resale prices and directly, or through sales agents, contacted online retailers to request them to bring their prices into line with those 'recommended', and in particular intervened on non-compliant retailers reported by other network retailers in order to get their prices increased.

Always according to the Commission, in **Holland** the company's anti-competitive conduct took various forms as follows:

- campaigns/initiatives aimed at 'cleaning up the prices' on the Internet by directly approaching several retailers on the same day and obtaining a more or less simultaneous price raise;
- sending emails with an invitation to a limited number of retailers to bring their resale prices within the suggested ranges, informing them that other retailers had already complied;
- sending a specific direct written request to certain particular retailers, asking them to align their prices to those recommended.

Also in this case Denon & Marantz acknowledged the infringements and agreed to cooperate with the Commission, obtaining a 40% reduction in the amount of the fine otherwise imposed (reduced therefore to **EUR 7,719,000.00**).

Obviously, also in this instance, the imposition of the aforesaid administrative fine **does not preclude the entitlement to seek compensation before the competent court** by the parties damaged by the company's conduct, as ascertained by the competition authority.

Philips (Case AT.40181) Commission decision of 24/07/2018 (price maintenance)

According to the Commission, between the end of 2011 and 2013, Philips France SAS (in agreement with its parent company Koninklijke Philips N.V.) systematically monitored the sales prices of retailers and requested and obtained their agreement to increase the resale prices of the products part of 'Philips Consumer Lifestyle' business. This conduct has been ascertained by the Commission through a series of announced inspections at Philips premises in Holland and in Italy and at the premises of an online retailer in France. In some cases they took place following complaints from

other retailers concerning the sales prices of their competitors. Philips cooperated with the authorities after submitting a formal request in this regard.

The Commission accordingly granted a 40% reduction in the amount of the fine otherwise imposed (reduced therefore to **EUR 29,828,000.00**).

Pioneer (Case AT.40182) Commission decision of 24/07/2018 (price maintenance and restriction of parallel trade)

According to the Commission, from the beginning of 2011 to the end of 2013, Pioneer Corporation (in agreement with Pioneer Europe and Pioneer GB) in addition to developing and implementing a strategy at European level designed to encourage, coordinate and facilitate the monitoring of resale prices of its Home Division products, also limited the retailers' ability to sell in other Member States in order to ensure compliance with local prices, taking measures to track the resale prices of its retailers in 12 EEA countries and to request and obtain their agreement to increase resale prices.

The evidence concerning Pioneer was collected by the Commission through a series of announced inspections at Pioneer's premises and at its retailers' premises. Also in this case the company agreed to cooperate and the Commission granted a 50% reduction in the amount of the fine otherwise imposed (reduced therefore to **EUR 10,173,000.00**).

Proceedings opened by the Italian Antitrust Authority and outcomes

CADEL-MCZ-Zanette (Case I813) order No. 27142 of 18/04/2018

As regards the Italian Antitrust Authority (AGCM), the investigation started in May 2017 against the company CADEL (stoves) concerning the imposition of minimum sale prices to its online distributors, was extended during July 2017 to Zanette Group and MCZ Group.

Cadel Srl, which produces pellet stoves, is a company controlled by MCZ Group SpA (that sells throughout Europe), which in turn is a subsidiary of Zanette Group SpA.

Following the complaint by an online distributor received in October 2016, in May 2017 AGCM opened a preliminary investigation into Cadel Srl, subsequently extended to MCZ Group and Zanette Group, for (i) imposing minimum selling prices (i.e. price lists with indicated the maximum discount) and (ii) prohibiting the delivery outside the Italian territory of products sold online.

The companies involved decided to cooperate with AGCM and on 25 October 2017 submitted the following commitments:

- a) not to set, either directly or indirectly, **the pricing policies operated by retailers (also online)**;
- b) refrain for two years from **recommending or suggesting resale prices**;
- c) **not to restrict the ways of promoting its own products** on the Internet, while ensuring the safety of consumers and/or the protection of the Group's brands;

- d) send to their retailers **notices containing the new policies on online sales** that also include a new provision on the validity of the conventional guarantee (i.e. entitlement to the guarantee only if the installation is made, in Italy or abroad, by qualified technicians in compliance with current legislation).

According to AGCM “... *The commitments submitted by MCZ Group appear suitable to resolve the issue of the anticompetitive practices forming the subject of the investigation. In particular, they are able to facilitate the competitive development of the online distribution channel and restore competition, especially on prices, among distributors of the products of MCZ Group, ultimately to the benefit of consumers*”.

Accordingly, AGCM decided to make the commitments binding and terminated the proceedings without ascertaining the alleged violations, as provided for by the law in these cases (Article 14-ter (1) Law 287/90).

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