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REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Final report on the E-commerce Sector Inquiry

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I. INTRODUCTION

(1) On 6 May 2015, the Commission launched a sector inquiry into the electronic commerce ('e-commerce') of consumer goods and digital content in the EU ('e-commerce sector inquiry').[1] The e-commerce sector inquiry forms part of the Digital Single Market strategy adopted on the same day.[2]

(2) The Digital Single Market strategy outlines several key actions under three pillars through which the Commission plans to create a 'Digital Single Market'. One of these pillars relates to ensuring better access for consumers and businesses to goods and services via e-commerce across the EU.

(3) E-commerce in the EU has grown steadily in recent years. Today the EU is one of the largest e-commerce markets in the world. The percentage of people aged between 16 and 74 that have ordered goods or services over the internet has grown year-on-year from 30 % in 2007 to 55 % in 2016.[3]

(4) The rapid development of e-commerce affects consumers and businesses alike. The e-commerce sector inquiry allowed the Commission to obtain an overview of the prevailing market trends and gather evidence on competition barriers linked to the growth of e-commerce. It also allowed the Commission to understand the prevalence of certain business practices and their underlying rationale, and ultimately to identify priorities for enforcing the EU competition rules.

(5) For the purposes of the e-commerce sector inquiry, requests for information ('questionnaires') were addressed to stakeholders between June 2015 and March 2016. 1 051 retailers ('retailers'); 37 marketplaces; 89 price comparison tool providers; 17 payment system providers; 259 manufacturers; 248 digital content providers; 9 companies offering virtual private networks[4] and IP routing services; and 30 large groups and hosting operators,[5] from 28 Member States, provided responses to the questionnaires. Respondents submitted in total 2 605 agreements related to the distribution of consumer goods and 6 426 licensing agreements related to the distribution of digital content.

[1] The sector inquiry was launched pursuant to Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Digital Single Market Strategy for Europe', COM(2015) 192 final. For further details on the Digital Single Market Strategy, see https://ec.europa.eu/priorities/digital-single-market_en.

[3] See 2016 Eurostat Community Survey on ICT usage in households and by individuals, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals.

[4] A virtual private network is an encrypted communication channel that can be established between two computers or IP-based devices.

[5] Operators which offer online content through agreements whereby such operators host service providers within a hosting environment with a specific set of characteristics, either via software ('hosting online operator') or via hardware ('hosting device').

(6) On 15 September 2016, the Commission published a Preliminary Report[6] on the initial findings of the e-commerce sector inquiry. The publication of the Preliminary Report was followed by a public consultation open to all interested stakeholders. The public consultation ended on 18 November 2016. Altogether 66 submissions were made in relation to consumer goods and digital content.[7]

(7) Interested stakeholders also expressed their views at a stakeholder conference in Brussels on 6 October 2016. The event provided representatives of different stakeholders with an opportunity to put forward their views on the Preliminary Report.

(8) This Report is accompanied by a Staff Working Document, the **Final Report on the e-commerce sector inquiry** ('the Final Report') which summarises the main findings of the e-commerce sector inquiry and incorporates comments submitted by stakeholders during the public consultation. The Final Report is divided into two separate sections: the first section covers e-commerce of consumer goods, while the second focuses on e-commerce of digital content.

II. MAIN FINDINGS OF THE E-COMMERCE SECTOR INQUIRY

2.1 CONSUMER GOODS

(9) The e-commerce sector inquiry covered the product categories most sold online: clothing and shoes; consumer electronics; electrical household appliances; computer games and software; toys and childcare articles; media (books, CDs, DVDs and Blu-ray discs); cosmetics and healthcare products; sports and outdoor equipment, and house and garden products. Respondents to the questionnaires could also comment on any 'other' product categories.

(10) The results of the e-commerce sector inquiry confirm that the growth of e-commerce over the last decade had a significant impact on companies' distribution strategies and customer behaviour.

(11) First, *price transparency* has increased with online trade. Consumers are now able to instantaneously obtain and compare product and price information online, and switch swiftly from one channel (online/offline) to another. While this allows consumers to find the best deal online, it may also result in *free-riding* behaviour: consumers can use pre-sale services of brick and mortar shops before purchasing the product online; alternatively, consumers can search and compare products online before purchasing in brick and mortar shops.[8] Addressing free-riding and maintaining the incentives for

[6] See SWD(2016) 312 final, available at http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf.

[7] The list of the participants and the non-confidential versions of their submissions are available at http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

[8] 72 % of the manufacturers responding to the questionnaires explicitly acknowledge the existence of free-riding by online sales on offline services. 62 % acknowledge the existence of free-riding by offline retail on services (information) offered online. Approximately 40 % of retailers also acknowledge the existence of free-riding behaviour both ways. Approximately 50 % of retailers declare they do not know whether such behaviour exists

retailers to invest in high quality services by creating a level playing field between offline and online are key considerations for both manufacturers and retailers.

(12) Second, the ability to compare prices of products across several online retailers leads to increased *price competition* affecting both online and offline sales. While such increased price competition has beneficial effects for consumers, it may affect competition on parameters other than price, such as quality, brand and innovation. While price is a key parameter of competition between retailers, quality, brand image and innovation are important in the competition between brands. Incentivising innovation and quality, and keeping control over the image and positioning of their brand are of major importance for most manufacturers to help them ensure the viability of their business in the mid to long term.[9]

(13) Third, increased price transparency allows companies to monitor more easily their prices. A majority of retailers track the online prices of competitors. Two thirds of them use automatic software programmes that adjust their own prices based on the observed prices of competitors. With pricing software, detecting deviations from 'recommended' retail prices takes a matter of seconds and manufacturers are increasingly able to monitor and influence retailers' price setting. The availability of real-time pricing information may also trigger automatised price coordination. The wide-scale use of such software may in some situations, depending on the market conditions, raise competition concerns.

(14) Fourth, 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. This may however clash with the distribution and brand strategies of manufacturers.

(15) These market trends significantly affect the distribution and pricing strategies of both manufacturers and retailers. As a reaction to increased price transparency and price competition, manufacturers have sought greater control over distribution networks, with a view to better controlling price and quality. This translates into an increased presence of manufacturers at the retail level and increased recourse to agreements or concerted practices between manufacturers and retailers ('vertical restraints'), affecting competition among retailers selling the same brand ('intra-brand competition'). The Final Report provides indications of the following most typical market trends:

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and less than 10 % claim that such customer behaviour does not exist. The claimed significantly higher costs of offline services lead, however, to much stronger concerns regarding free-riding by online retailers on offline services (see Section 4.1 of the Final Report).

[9] Both manufacturers and retailers were asked to rate the most important parameters of competition in terms of their importance. Manufacturers consider product quality, brand image and the novelty of the product the most important, with price being ranked between the fourth and sixth most important factors. Retailers, however, rank price as either the most or the second most important parameter of competition throughout all the sectors. The range of brands, availability and quality are listed as the next three most important parameters of competition (with variations amongst different sectors) (see Section 2 of the Final Report).

(i) A large proportion of manufacturers decided in the course of the last ten years and in reaction to the growth of e-commerce, to sell their products directly to customers through online retail shops, thereby competing increasingly with their own independent distributors.[10]

(ii) An increased recourse to 'selective distribution systems',[11] where manufacturers set the criteria that retailers must meet to become part of the distribution network and where all sales to unauthorised retailers are prohibited. Manufacturers explicitly acknowledge that they use selective distribution as a reaction to the growth of e-commerce as it allows them to better control their distribution networks, in particular in terms of the quality of distribution but also price. The results of the e-commerce sector inquiry indicate that both the number of selective distribution agreements and the use of selection criteria have increased significantly over the last ten years.[12]

(iii) An increased recourse to vertical restraints that allow for a greater control over the distribution of products. Depending on the business model and strategy, restraints may take various forms, such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks.

2.2 DIGITAL CONTENT

(16) The e-commerce sector inquiry focused on the online provision of audio-visual and music products. It involved both digital content providers, which offer digital content to consumers or provide services for third parties to offer content to consumers, and right holders.

(17) The information gathered during the e-commerce sector inquiry indicates that online transmission (i.e. the possibility for consumers to access digital content online) has changed the way digital content is accessed and consumed, providing new business opportunities both to established operators and new entrants. Online transmission is

[10] Manufacturers were asked what concrete measures they had taken to react to the growth of e-commerce in the last 10 years. 64 % of the manufacturers reported that they opened own online retail shops. 3 % reported that they took the decision to fully integrate distribution activities (see Section 3.1 of the Final Report).

[11] Article 1(e) of the Vertical Block Exemption Regulation ('VBER'; Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.) defines 'selective distribution system' as 'a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system'.

[12] Manufacturers were asked what concrete measures they had taken in response to the growth of e-commerce in the last 10 years. Nearly 20 % reported they had introduced selective distribution systems (where they did not have one before), 2 % extended the existing systems to new types of products, and nearly 40 % introduced new criteria in their distribution agreements on how to sell or advertise their products online (see Section 3.1 of the Final Report).

encouraging innovation and experimentation in digital content markets, resulting in a variety of new service offerings and business models.

(18) Online transmission allows for lower transmission costs per user compared to other transmission technologies, such as terrestrial transmission. It also provides more flexibility and scalability than other transmission technologies, such as satellite transmission. Online transmission further allows digital content providers to create user interfaces that can be accessed on multiple devices in a seamless way and are easily adaptable.

(19) The results of the e-commerce sector inquiry indicate that the key determinant for competition in digital content markets is the availability of the relevant rights. The online transmission of copyright-protected digital content requires the acquisition of rights in order to lawfully market the content — typically including the right to transmit via internet, broadband or cable technologies, and to allow users to stream or download the content via a receiving device. Over time, complex licensing practices have developed. They reflect the desire of right holders to exploit fully the rights they hold, and the need for digital content providers to remain competitive by offering attractive content that meets consumer demand and reflects cultural diversity within the European Union.

(20) When analysing the competitive landscape in digital content markets, it is important to understand how rights are commonly licensed. Rights can be split up in different ways and can be licensed, either on an exclusive or a non-exclusive basis, for a certain territory and/or for certain transmission, reception and usage technologies.

(21) The results of the e-commerce sector inquiry indicate that there are three main elements as regards the scope of the rights that are commonly used in licensing agreements:

(i) technology and usage rights: these include 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;

(ii) release and duration rights: these refer to the ‘release window or windows’, meaning the period during which the digital content provider is lawfully entitled to offer the product; and

(iii) geographic rights: these relate to the geographic area or areas in which the digital content provider may lawfully offer the product.

(22) Rights may be licensed using any combination of these elements, either on an exclusive or non-exclusive basis. Licensing agreements typically do not allow for the unrestricted use of the licensed rights but come with explicit terms and conditions. Contractual restrictions in licensing agreements are therefore not the exception but the norm in digital content markets.

III. MAIN COMPETITION CONCERNS

3.1 CONSUMER GOODS

(23) The main competition concerns highlighted by the e-commerce sector inquiry can be summarised as follows.

3.1.1 Selective distribution

(24) The current Vertical Block Exemption Regulation ('VBER') exempts qualitative and quantitative selective distribution agreements from the prohibition under Article 101(1) TFEU, provided that the market share of both the supplier and the buyer each do not exceed 30 %. This exemption applies regardless of the nature of the product concerned and regardless of the nature of the selection criteria, provided they do not contain hardcore restrictions[13] (as listed in Article 4 of that Regulation).

(25) The results of the e-commerce sector inquiry do not call for a change to the Commission's general approach to qualitative and quantitative selective distribution as reflected in the VBER. Selective distribution may, however, facilitate the implementation and monitoring of certain vertical restraints that may raise competition concerns and require scrutiny.

(26) For example, more than half of the manufacturers require in their selective distribution agreements, for at least part of their products, the operation of a brick and mortar shop by retailers, thereby excluding pure online players from the distribution of the concerned products.

(27) Most of these brick and mortar requirements seek to promote competition on distribution quality. At the same time, certain brick and mortar requirements essentially aim at excluding pure online players from the selective distribution network, without enhancing competition on other parameters than price, such as the quality of distribution and/or brand image. As a result, while acknowledging that brick and mortar requirements are generally covered by the VBER,[14] certain requirements to operate at least one brick and mortar shop without any apparent link to distribution quality and/or other potential efficiencies may require further scrutiny in individual cases.

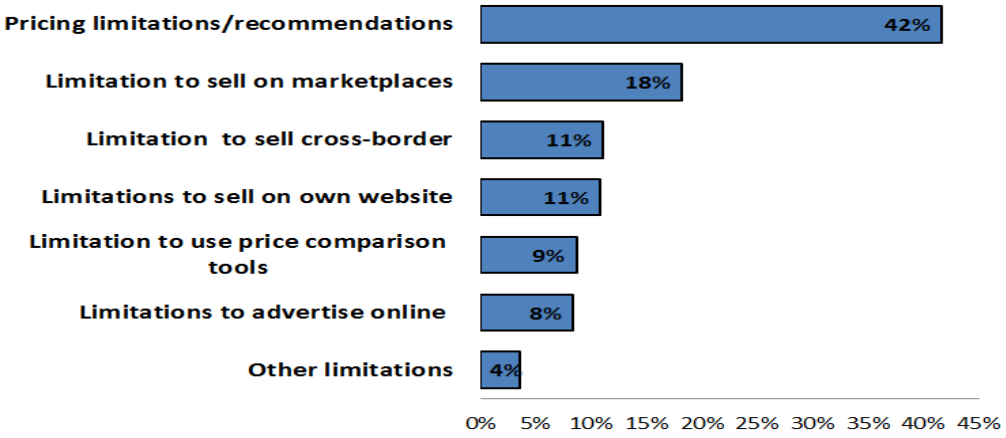
3.1.2 Restrictions on selling and advertising online

(28) The results of the e-commerce sector inquiry provide an overview of the prevalence of certain vertical restraints faced by online retailers.

[13] Where such hardcore restrictions are present in vertical agreements, the agreements are presumed to fall within Article 101(1) TFEU and are unlikely to fulfil the conditions of Article 101(3) TFEU. However, companies are not prevented from claiming efficiencies and demonstrating that the conditions of Article 101(3) TFEU are fulfilled (see paragraph 47 of the Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1,'Vertical Guidelines').

[14] As set out in paragraph 176 of the Vertical Guidelines, the benefit of the VBER can be withdrawn where the characteristics of the product are such that the requirement to operate a brick and mortar shop does not bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the VBER is likely to be withdrawn.

Proportion of retailers with contractual restrictions, per type of restriction



(i) Pricing restrictions/recommendations

(29) Pricing restrictions/recommendations are by far the most widespread restrictions reported by retailers.

(30) Under the EU competition rules, manufacturers should not take any actions that interfere with the freedom of retailers to set their final prices to customers by making a recommended retail price or a maximum retail price equivalent to a *minimum or fixed price*. Agreements that establish a minimum or fixed resale price or price range ('resale price maintenance') are a restriction of competition by object under Article 101(1) TFEU[15] and a hardcore restriction within the meaning of Article 4(a) of the VBER.

(31) At the same time, the practice of *recommending* a resale price or requiring a retailer to respect a maximum resale price is exempted by the VBER provided that the market share thresholds set out in that Regulation are not exceeded and that the recommendation does not amount to a minimum or fixed resale price as a result of threats, pressure or incentives.[16] Price recommendations are considered important to communicate quality and brand position.

(32) Various comments from retailers point to recourse to resale price maintenance by manufacturers.

(33) Both manufacturers and retailers frequently monitor online retail prices, often by means of pricing software. As a result, it is now easier to detect deviations from manufacturers' pricing recommendations. This could allow manufacturers to retaliate against retailers that deviate from the desired price level. It may even limit the incentives for retailers to deviate from such pricing recommendations in the first place. Increased online price transparency may also facilitate or strengthen *collusion* between retailers by making it

[15] See for example judgment in SPRL Louis Erauw-Jacquery v La Hesbignonne SC, 27/87, EU:C:1988:183, paragraph 15.
[16] See paragraph 226 of the Vertical Guidelines.

easier to detect deviations from the collusive agreement. This, in turn, could reduce the incentives for retailers to deviate from the collusive price by limiting the expected gains from such deviation.

(34) Several respondents to the e-commerce sector inquiry, including in the public consultation, criticised the current EU rules on *dual pricing*. Manufacturers are generally prohibited from charging different wholesale prices for the same products to the same retailer (hybrid retailer) depending on whether the products are intended to be sold online or offline.[17]

(35) Dual pricing is often viewed by stakeholders as a potentially efficient tool to address free-riding. They argue that dual pricing may help to create a level playing field between online and offline sales, taking into consideration differences in the costs of investments. Comments in relation to dual pricing point to the need for a more flexible approach to performance-related wholesale pricing. A more flexible approach would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline), value added services.

(36) At the same time, some comments also reveal a potential misunderstanding of the rules on pricing practices where the manufacturer sets a different (wholesale) price for the same product to the same (hybrid) retailer, depending on the resale channel through which the product is to be sold (offline or online) and practices where the manufacturer sets a different (wholesale) price for the same product to different retailers.

(37) The Final Report clarifies that charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process.[18] Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER. Moreover, the Final Report points to the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis,[19] for example where a dual pricing arrangement would be indispensable to address free-riding.

(ii) Restrictions on selling on online marketplaces

(38) The question on the extent to which restrictions limiting the ability of retailers to sell via online marketplaces ('marketplace restrictions' or 'platform bans') may raise concerns under the EU competition rules has attracted significant attention in recent years in some Member States. A reference for a preliminary ruling on this question is currently pending before the Court of Justice.[20] One of the aims of the e-commerce sector inquiry was to

[17] See paragraph 52(d) of the Vertical Guidelines. The Vertical Guidelines however allow for a fixed fee to support actual sales efforts in the offline (or online) channel.
[18] Unless different wholesale prices to (online) retailers have the object of restricting exports or partitioning markets.
[19] See paragraph 64 of the Vertical Guidelines.
[20] In Case C-230/16 *Coty Germany GmbH* v *Parfümerie Akzente GmbH* ('Coty Germany'), the Higher Regional Court of Frankfurt am Main has essentially asked the Court of Justice whether a ban on using third party platforms

better understand the prevalence and characteristics of marketplace restrictions and the importance of marketplaces as a sales channel for retailers and manufacturers.

(39) The results of the e-commerce sector inquiry show a rather scattered picture:

(i) More than 90 % of respondent retailers use their own online shop when selling online. 31 % of respondent retailers sell via their online shops as well as on marketplaces, while only 4 % of the respondent retailers sell online only via marketplaces. While own online shops therefore remain the most important online sales channel for retailers, the use of marketplaces has increased over time.

(ii) Marketplaces play a more important role in some Member States such as Germany (62 % of the respondent retailers use marketplaces), the United Kingdom (43 %) and Poland (36 %) compared to other Member States such as (Italy 13 %) and Belgium (4%).

(iii) Marketplaces are more important as a sales channel for smaller and medium-sized retailers while they are of lesser importance for larger retailers. The results show that smaller retailers tend to realise a larger proportion of their sales via marketplaces than the larger retailers.

(40) 18 % of retailers report having agreements with their suppliers that contain marketplace restrictions. The Member States with the highest proportion of retailers experiencing marketplace restrictions are Germany (32 %) and France (21 %). Marketplace restrictions encountered in the e-commerce sector inquiry range from absolute bans to restrictions on selling on marketplaces that do not fulfil certain quality criteria. Restrictions on the use of marketplaces are mostly found in selective distribution agreements. They typically concern branded goods, but are not limited to luxury, complex or technical goods.

(41) The information obtained in the e-commerce sector inquiry indicates that the importance of marketplaces as a sales channel varies significantly depending on the size of the retailers, the Member States concerned, and the product categories concerned. As a result, the findings indicate that marketplace bans do not generally amount to a *de facto* prohibition on selling online or restrict the effective use of the internet as a sales channel irrespective of the markets concerned. The findings of the sector inquiry also indicate that the potential justification and efficiencies reported by manufacturers differ from one product to another.

(42) As a result, without prejudice to the pending preliminary reference, the findings of the sector inquiry indicate that (absolute) marketplace bans should not be considered as hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the VBER.

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in a selective distribution agreement may be compatible with Article 101(1) TFEU and whether such a restriction constitutes a hardcore restriction within the meaning of Article 4(b) and/or Article 4(c) of the VBER.

(43) This does not mean that absolute marketplace bans are generally compatible with the EU competition rules. The Commission or a national competition authority may decide to withdraw the protection of the VBER in particular cases when justified by the market situation.[21]

(iii) Geographic restrictions to sell and advertise online

(44) Cross-border e-commerce has the potential of contributing to the integration of the EU's internal market, as consumers may find it easier to purchase products from another Member State online, rather than cross the border and buy products in brick and mortar shops.

(45) However, it is frequently not possible for consumers to make cross-border online purchases because retailers refuse to sell to customers abroad, for example by blocking access to websites, re-routing customers to websites targeting other Member States or by simply refusing to deliver cross-border or to accept cross-border payments. These measures are known as 'geo-blocking'. Geo-blocking can be distinguished from 'geo-filtering' measures, i.e. commercial practices whereby online retailers allow consumers to access and purchase goods or services cross-border, but offer different terms and/or conditions if the customer is in a different Member State.

(46) The results of the e-commerce sector inquiry indicate that most manufacturers distribute their products in at least 21 Member States, while only a limited proportion (4 %) supply them in only one Member State.

(47) While products are typically sold throughout the EU, 36 % of respondent retailers reported that they do not sell cross-border for at least one of the relevant product categories in which they are active. 38 % of retailers collect information on the location of the customer in order to implement geo-blocking measures. Geo-blocking most commonly takes the form of refusal to deliver goods to customers in other Member States, followed by refusals to accept payments from such customers.

(48) Geo-blocking measures based on unilateral decisions by non-dominant companies fall outside the scope of Article 101 TFEU, whereas geo-blocking measures based on agreements or concerted practices between distinct undertakings may be caught under Article 101 TFEU. The European Courts have on several occasions held that agreements or concerted practices which are aimed at partitioning markets according to national borders or which make the interpenetration of national markets more difficult, in particular those which are aimed at preventing or restricting parallel exports, have as their object the restriction of competition pursuant to Article 101(1) TFEU.[22]

[21] See Article 29 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

[22] See, for example, judgment in *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH* v *Commission of the European Economic Community*, 56/64 and 58/64 and judgment in Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139.

(49) The majority of geo-blocking measures in relation to consumer goods result from unilateral business decisions of retailers not to sell cross-border. However, more than 11 % of retailers indicated that they have contractual cross-border sales restrictions in at least one product category in which they are active.

(50) Certain of these territorial restrictions may raise competition concerns.

(51) First, contractual restrictions of the territory into which a distributor may sell the relevant goods are generally considered a hardcore restriction of competition under the VBER, with only a limited number of exceptions.[23]

(52) The VBER distinguishes in this context between active and passive sales restrictions.[24] Active sales restrictions are allowed insofar as they concern sales into an exclusive territory reserved for the supplier or allocated by the supplier to another distributor, whereas passive sales restrictions provide absolute territorial protection and are normally unlawful.[25] Within a selective distribution system, neither active nor passive sales to end-users may be restricted.

(53) Second, territorial restrictions limiting retailers' ability to actively and passively sell to customers outside their Member State may also raise concerns. For example, certain of the reported active sales restrictions are not limited to territories that have been exclusively allocated to other distributors or reserved for the supplier. Moreover, certain suppliers operating a selective distribution system across several Member States are reported to have limited the ability of authorised retailers to sell to all customers within the territory where the selective distribution system is applied.

3.1.3 The use of data in e-commerce

(54) The e-commerce sector inquiry did not focus in particular on data-related competition concerns. However, its findings confirm that the collection, processing and use of large amounts of data (often referred to as 'big data'[26]) is becoming increasingly important for e-commerce.

(55) On the one hand, data can be a valuable asset and analysing large volumes of data can bring substantial benefits in the form of better products and services, and can allow companies to become more efficient.

[23] See Article 4(b) VBER.

[24] 'Active sales' means actively approaching individual customers by, for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Conversely, 'passive sales' generally mean sales in response to unsolicited requests from individual customers including delivery of goods to such customers.

[25] They may only in exceptional circumstances be compatible with Article 101 TFEU; see for example paragraph 61 of the Vertical Guidelines.

[26] Such 'big data' may depending on the circumstances be subject to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('General Data Protection Regulation'), OJ L 119, 4.5.2016, p. 1–88.

(56) On the other hand, the results of the e-commerce sector inquiry confirm the increased relevance of data and point to possible competition concerns relating to data-collection and usage. For example, the exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services.

3.2 DIGITAL CONTENT

(57) The results of the e-commerce sector inquiry confirm that one of the key determinants of competition in digital content markets is access to licensing rights to content, and in particular to attractive content. The availability of online rights is largely determined by the decision of a given right holder on whether to license them and, if relevant, on their scope, as defined in the licensing agreements.

(58) Licensing agreements between right holders and digital content providers use complex definitions to precisely define the scope of rights. It is also common for rights to be split up in the same or in different licensing agreements, particularly in terms of their technological, temporal and territorial scope.

(59) Exclusivity is widely used in relation to the licensed rights since access to exclusive content increases the attractiveness of the offer of digital content providers. The Commission considers that the use of exclusivity is not problematic in and of itself.

(60) The main competition concerns identified in the e-commerce sector inquiry relate to certain contractual restrictions in licensing agreements.

(i) Scope of licensed rights

(61) Right holders tend to split up the rights into several components, and license part or all of them to different content providers in different Member States. The scope of the licensed rights, as determined by the licensing agreement, might vary as regards: (i) the technology used to distribute and access content, in terms of transmission, reception and usage technologies; (ii) the product release and/or the duration of the licensed rights; and (iii) the territorial scope.

(62) Bundling technology rights is also common. Rights for online transmission of digital content are to a large extent licensed together with the rights for other transmission technologies. Agreements submitted by digital content providers indicate that online rights in particular are most often licensed together with rights for mobile transmission, terrestrial transmission and satellite transmission.

(63) Bundling rights for online transmission with rights in other transmission technologies protects exclusive rights to a digital content product and thus confers to a single content provider the possibility to use them in relation to the same product. Any alternative allocation of rights would imply that different content providers can offer the same product.

(64) However, bundling online rights may hinder existing operators and new entrants from competing and developing new innovative services, which in turn may reduce consumer choice. Bundling may be of particular concern when 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.

(ii) Territorial restrictions and geo-blocking

(65) Online rights are to a large extent licensed on a national basis or for the territory of a limited number of Member States which share a common language. This is particularly prevalent in relation to content types that may contain premium products, such as sport (60 %), films (60 %) and fiction TV (56 %).

(66) Digital content providers often use geo-blocking measures.[27] The vast majority of digital content providers (68 %) restrict access to their online digital content services from other Member States, and 59 % of them do so because of contractual restrictions in the agreements with right holders. Geo-blocking is most prevalent in agreements for TV series (74 %), films (66 %) and sport events (63 %). It is less prevalent in agreements for other digital content categories such as music (57 %), children's TV (55 %), non-fiction TV (51 %) and news (24 %).

(67) There are, however, differences across Member States and content sectors when it comes to the prevalence of geo-blocking. In some Member States only a minority of respondents use geo-blocking, while in others the vast majority of respondents do so. Certain operators appear to use geo-blocking more than others. This leads to differences in the extent to which geo-blocking is implemented in the EU.

(iii) Duration of licensing agreements

(68) The duration of licensing agreements is, together with the technological and territorial scope of the agreement, a key component of rights licensing. Relatively long contract durations are common, with more than 50 % of agreements lasting more than 3 years and 23 % of them more than 5 years. Contractual relationships tend to last even longer, with average durations of more than 10 or even 20 years, possibly as a result of clauses favouring their extension.

(69) The fact that contracting parties often decide to contract again or renew or extend existing licensing agreements instead of concluding contracts with new parties is likely to make it more difficult for new players to enter the market. It may also make it harder for existing operators to expand their current commercial activities, for example into other transmission means such as online, or into other geographical markets. Certain contractual clauses may facilitate the extension of an existing exclusive licensing agreement such as automatic renewal, first negotiation, first refusal, price matching or similar clauses.

[27] See paragraph 49 above.

(iv) Payment structures and metrics

(70) While the payment structures for non-premium content (such as news and non-fiction TV) vary greatly, right holders licensing attractive content tend to make use of payment structures such as advance payments, minimum guarantees and fixed fees per product irrespective of the number of users. These practices implicitly privilege more established content providers, which are typically able to commit to greater levels of investments upfront.

(71) The results of the e-commerce sector inquiry raise the question of whether certain licensing practices may make it more difficult for new online business models and services to emerge. It also raises the issue of whether these practices make it harder for new or smaller players to enter existing markets or to grow and expand their activities into other markets, and whether these licensing practices are justified.

(72) Any assessment of certain licensing practices under the EU competition rules has to consider the characteristics of the content industry, the legal and economic context of the licensing practice and/or the characteristics of the relevant product and geographic markets.

IV. POLICY CONCLUSIONS OF THE E-COMMERCE SECTOR INQUIRY

(73) With the growth of e-commerce, certain business practices that raise competition concerns have emerged and others have evolved. It is important to avoid diverging interpretations of the EU competition rules with regard to business practices in e-commerce markets which may, in turn, create serious obstacles for companies to being active, in a compliant manner, in multiple Member States, to the detriment of a Digital Single Market.

(74) The VBER expires in May 2022, and the results of the e-commerce sector inquiry confirm that there is no need to anticipate its review. The large amount of data and related information gathered in the course of the e-commerce sector inquiry and any guidance that results from follow-up enforcement action will however serve as an input for that future review process.

(75) In the light of the results of the e-commerce sector inquiry, the Commission will therefore:

(i) **target enforcement of the EU competition rules** at the most widespread business practices that have emerged or evolved as a result of the growth of e-commerce and that may negatively impact competition and cross-border trade and hence the functioning of a Digital Single Market;

(ii) broaden the dialogue with national competition authorities within the European competition network on e-commerce-related enforcement to contribute to a **consistent application of the EU competition rules** as regards e-commerce-related business practices.