

Warning: competition authorities may keep tabs on your distribution contracts

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The European Commission recently published its preliminary report on the E-commerce Sector Inquiry, identifying potential competition concerns in cross-border e-commerce of digital content and consumer goods. Competition Commissioner [Vestager](#) has advised companies to use the preliminary report's findings to review their current distribution contracts and bring them in line with EU competition rules. Companies should keep this advice in mind, particularly as the preliminary report itself warns that further investigations into restrictions on pricing, online sales and territorial scope may be launched soon. A few companies have already received formal information requests since the announcement.

The [preliminary report](#) indicates that the growth of e-commerce in Europe has resulted in manufacturers wanting to keep better tabs on price and quality of distribution. Given this wish for more price and quality control, the preliminary report flags the following provisional competition concerns.

1. Non-exempted contractual territorial restrictions

The preliminary report reconfirms that a number of restrictions go against the block exemption framework laid down in the [Vertical Block Exemption Regulation](#):

- restriction of active sales by retailers outside a designated territory, when these other territories have not been exclusively allocated to other retailers or reserved for the supplier;
- restriction of passive sales into territories that have been exclusively allocated to other distributors or reserved for the supplier;
- restriction by suppliers with a selective distribution network to limit authorised retailers from actively selling to certain customers within the EU by, for instance, limiting the retailers in their ability to launch websites targeting other member states than their own.

But the preliminary report notes – in line with the initial findings on [geo-blocking practices](#) in e-commerce – that geo-blocking measures often result from unilateral decisions by retailers not to sell cross border and are therefore not caught by Article 101 TFEU. Only when geo-blocking results from an agreement or concerted practice between two companies, this causes competition concerns.

2. Warning for brick and mortar obligation

The preliminary report expresses concern that certain clauses in selective distribution agreements may go beyond what is necessary for the products for which they are used. In fact, the requirement for retailers to operate at least one brick and mortar shop, which is generally block-exempted, may in some cases be unnecessary to safeguard high quality distribution.

3. Restrictions to sell on online marketplaces

The preliminary report notes that the extent to which retailers may be restricted from selling through online marketplaces under the EU competition rules is a hot topic in some member states. A reference for a preliminary ruling is currently pending before the Court of Justice in [Coty](#) (see our case tracker below).

The Commission seems to pre-empt this discussion by stating that it does not consider absolute marketplace bans to constitute hard-core restrictions within the meaning of the Vertical Block Exemption Regulation. Marketplace bans generally do not amount to an actual prohibition to sell online and are not aimed at segmenting markets based on territory or customer. In contrast, absolute internet bans do constitute a hard-core restriction which cannot benefit from the Vertical Block Exemption Regulation.

4. Restriction on price comparison tools

The preliminary report finds that absolute price comparison tool bans which are not linked to quality criteria may prevent distributors from using this promotion method to generate traffic to their own website and are therefore considered hard-core. Restrictions on the use of price comparison tools based on objective qualitative criteria may be used by manufacturers operating selective distribution systems.

Interestingly, the UK competition Authority CMA recently [launched](#) a market study into digital comparison tools. This study will consider how to maximise the potential benefits of digital comparison tools for consumers, and reduce any barriers to how they work.

5. Parity clauses

According to the preliminary report, parity clauses in vertical agreements are covered by the Vertical Block Exemption Regulation, provided the parties' market shares do not exceed 30%.

Where market shares exceed 30%, parity clauses must be individually assessed. In product markets where marketplaces play an important role, parity clauses can provide disincentives for retailers to compete on those parameters that fall within the scope of the parity clause and can ultimately lead to reduced intra-brand competition. In addition, parity clauses could reduce competition between online retailers and marketplaces and make market entry or expansion for competing marketplaces more difficult. However, parity clauses may also lead to efficiencies, as their use may for instance be necessary to recoup investments by marketplaces and to avoid free-riding. The preliminary report therefore notes that parity clauses will need to be analysed on a case-by-case basis.