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What are the major competition/anti-trust issues generated by the growth of online sales platforms, and how should they be resolved?

1. Background

Internet is at the centre of our daily life and according to some recent surveys 95% of Italians between the age of 25 and 44 use smart phones to surf online; even more interesting is that in recent years in Italy there has been a steady growth in the use of e-commerce¹. In particular in 2016 this growth regarded the sector of luxury goods and finance investment where more and more consumers use Apps to conclude their transactions².

However, Italy still lags behind the main western markets (United Kingdom, France, Germany, and USA) where the use of e-commerce has almost quadrupled.³ Moreover, data shows that only a small percentage of Italian enterprises trade online⁴.

In 2016 in Italy online sales B2C (Business to Consumers) increased by 16-17% compared to the previous year, achieving a turnover of EUR 16 Billion, while the online sales B2B (Business to Business) the annual growth is more or less of 20%, with a turnover of EUR 28,8 Billion⁵.

From a legal view point, specifically regarding antitrust law and the definition of relevant market we should address the question whether online distribution and e-commerce is a separate market from the traditional one.

Furthermore, we should consider if the antitrust and competition law in force and in particular the EU Reg, 330/2010 on vertical agreements are adequate to solve all problems raised by e-commerce.

One of the main novelties of the Regulation has concerned the discipline of on-line sales. The need to protect sales online derives from the advantages that this form of sale brings to the consumers at least under two profiles. The first concerns the prices. Not only are online prices lower, but they also constitute a competitive pressure on the prices practised by the physical shops. In addition, the possibility to shop on-line, enabling cross-border commerce, widens the range of the products from which consumers can choose from.

However, online sales may have a potential negative impact for example on luxury brands, due to the fact that an indiscriminate access to the sales network of virtual operators can unhinge the orders and the traditional dynamics, with undue forms of unfair competition against the traditional physical distributors.

A further cause for concern for producers and chains of traditional distribution drift from the necessity to limit the so-called phenomenon of free riding. A typical example of free riding is when a buyer of a technological product that goes

¹ Google Consumer Barometer 2015- Insight of Italy. https://storage.googleapis.com/think-v2-emea/docs/infographic/CB_wave_2_Italy_infographic_translated_FINAL_4.pdf. Accessed 13 June 2017.

² Think with Google, Ricerca di Mercato. Shopping, Finanza e Viaggi: il Ruolo dei Siti e delle App per Dispositivi Mobili nel Percorso verso l'Acquisto. <https://www.thinkwithgoogle.com/intl/it-it/research-study/shopping-finanza-e-viaggi-il-ruolo-dei-siti-e-delle-app-per-dispositivi-mobili-nel-percorso-verso-lacquisto/>. Accessed 13 June 2017.

³ Eurostat, Digital Economy and Society Statistics – Households and Individuals. http://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-_households_and_individuals. Accessed 13 June 2017.

⁴ Eurostat, Digital Economy and Society statistics – Enterprises. http://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-_enterprises. Accessed 13 June 2017.

⁵ Casaleggio Associati, E- Commerce in Italy 2016, 3 May 2017. <https://www.casaleggio.it/focus/rapporto-e-commerce-in-italia-2017/>. Accessed 10 June 2017

to the shop to benefit from the pre-sale services to acquire all the functional information to decide whether to buy and after purchases online.

Lastly, geo-blocking, the practice by which e-commerce sites filter out users based on location is relatively wide spread in the EU⁶ and in Italy, which gives rise to problems that the current law is unable to solve.

2. Positive Law

Under Italian Law the relevant competition rule is art. 101 Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU) on restrictive agreements which states that agreements for the purchase or sale of goods or services concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods are generally considered unlawful, unless the four conditions stated by paragraph 3 are met. Therefore, a restrictive agreement is allowed which contributes to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings restrictions which are not indispensable to the attainment of these objectives and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

More specifically, art. 101 TFEU corresponds to the Italian provision art. 2 of Law 287/1990 on antitrust, but considering that usually the restriction on online sales have an impact on intracommunity commerce, direct referral is made to the EU rule.

This, also because art. 1, paragraph 4, Law 287/1990, imposes an interpretation of the Italian antitrust norms that conform to the principles of the European antitrust and competition legislation, therefore application of art. 2 of Law 287/1990, would hardly bring to different conclusions in comparison to the application of the art. 101 TFEU.

The prohibition of the restrictive agreements of the competition concerns both horizontal agreements, the concluded agreements among two or more competing enterprises that operate to the same level of the market, and the vertical agreements. These last intervene among two or more working enterprises always to the goals of the agreement or the arranged practice, to a different level of the chain of production or distribution. It deals with the contracts of distribution and the problem of online sales concerns this typology of agreements.

The European Commission has adopted the regulation n. 330/2010 of 20 April 2010, related to the application of the art 101 paragraph 3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (hereinafter referred to as the “Block Exemption Regulation”) and the relative “Orientations on the vertical restrictions” (hereinafter referred to as the Guidelines)⁷.

The Regulation is binding for the Italian Competition Authority and for the Italian Judges⁸, while the guidelines are not mandatory for the national authorities.

The Block Exemption Regulation establishes the conditions and indicia in presence of which some categories of vertical agreements can be considered compatible with the requisite required by the art. 101 TFEU and, therefore, automatically exempted by the application of the antitrust normative and prohibitions (so called block exemption).

According to art. 4, let. B) of the Block Exemption Regulation, the restriction of “passive sales” into an exclusive territory is considered a hardcore restriction and therefore is forbidden, while the restriction of territory regarding “active sales”, when it is limited to the clients or to the territories reserved to the supplier or attributed to another distributor, is allowed.

⁶ Commission Staff Working Document 18 March 2016, SWD (2016). https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/third_progress_report_on_turkey_visa_liberalisation_roadmap_swd_en.pdf. Accessed 25 May 2017.

⁷ The Commission Regulation n. 330/2010 of 20 April 2010 has substituted the previous Commission Regulation 2790/99, of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

⁸ Only specialized courts have judicial competence on antitrust matters.

In any case, a vertical agreement to be able to benefit from the automatic exemption of the Block Exemption Regulation, it will be necessary that the market share of both the parts of the agreement, supplier and buyer, don't exceed the threshold of 30%. The market share of the supplier is calculated on the basis of the data related to the value of the sales on the market where it sells the contract products to the buyer, while the one of the buyer is based on the data related to the market where it purchases the contract products. For agreements between small and medium-sized undertakings it is generally not necessary to calculate market shares. Before, the Regulation 2790/99, limited the evaluation only to the market share of the supplier.

Online sales are considered to be passive sales, because it is a reasonable way to allow consumers to reach the distributor. Therefore every distributor should be able to sell the products online.⁹ Consequently, from the moment that the restriction of the passive sales constitutes a hardcore restriction, any attempt to limit the use of internet by the producer does not enjoy any benefit of the exemption stated by the Regulation and it is very unlikely that it can satisfy the conditions of exemption under art. 101.3 TFUE, however not all sales made on the internet should be qualified as a passive sale.

The Guidelines recognize that there are some restrictions to the use of internet which are compatible with the Regulation because they are directed to prevent ways of promotion or sale that can qualify as active sales. The Guidelines give a series of examples of on-line active and passive sales. They are useful examples, but they don't succeed in eliminating all the uncertainties regarding the application of the rules.

Indeed, the definition of "passive sale" given by the Guidelines is not entirely clear. It defines one determined advertising action as "passive sale" because the underlying investment is interesting for the distributor if doesn't reach territories or groups of clients assigned to other distributors.¹⁰ The distinctive criterion is based therefore on an element of subjectivity, which can lead to conflicting conclusions. In practice the uncertainty is not of little account: it deals with establishing if a restriction is qualifiable as hardcore or not, and the conclusion may also have an impact on the validity of the whole contract, make the party of the contract eligible to administrative pecuniary sanctions by the Italian Competition Authority, and damages action brought by third parties.

Only a few cases have been decided by the Italian Competition Authority and Judges.

3. Restriction of Online sales

3.1 Restrictions which are considered passive sales

The Guidelines give some examples of passive sale, that if limited constitute a hardcore restriction, contrary to antitrust law.¹¹

It is clarified that if a customer opts to be kept automatically informed by the distributor and this leads to a sale then that is considered a passive selling. Therefore, information diffusion through a newsletter to customers situated anywhere cannot be forbidden.

It is established, also, that the choice of languages used on the website or for communications are considered a passive form of marketing. According to this, a distributor to which the producer has assigned the Italian territory will be able to insert special options on its own website that allow the consumer to enter the same contents in different languages.

These provisions raised some perplexities also in light of the definition of passive sale. Indeed, it is not clear why an Italian distributor could consider interesting translating its site in a language, for example in Swedish, if not to sell in such country. Furthermore, it has been argued that the use of domain names and currencies different from the one used on the territory assigned to the distributor (for example the "xxx.se" domain name or the Swedish crown currency) shall be considered an active sale.¹²

⁹ Paragraph 52 of the Guidelines.

¹⁰ Paragraph 52 of the Guidelines.

¹¹ Paragraphs 51 and 52 of the Guidelines.

¹² E. De Giorgi, *Le Vendite On-line e la Normativa Antitrust*. In: G. Cassano, G. Scorza and G. Vaciago (eds), *Diritto dell'Internet*, CEDAM 2013, p.368.

Furthermore, it should be considered a hardcore restriction, and hence illegal, a clause which prohibits the distributor to allow consumers of another country to visit its website or impose to the distributor to automatic redirecting of the consumers towards the site of the producer or other exclusive distributor.¹³ However this does not exclude the possibility that the distributor's website may offer links to websites of other distributors or supplier.

An agreement with which the exclusive distributor is obliged to terminate transactions over the internet, once the consumer's credit card data reveals an address that is not within the distributor's exclusive territory, is also consider a hardcore restriction.¹⁴

Another restriction of passive selling consists in an agreement with which the distributor shall limit its proportion of sales made over the internet.¹⁵ On the other hand it is possible for the supplier to impose that a certain percentage of sales is made off-line: but it cannot be established a maximum threshold, in value or volume, of sales that can be made through the channel internet.

Lastly, it is considered a hardcore restriction an agreement that the distributor shall pay a higher price for products intended to be resold online than a products intended to be resold offline.¹⁶ However, It is specified that it is allowed the possibility that the supplier agrees with the buyer a fixed fee (not a variable fee where the sum increases with the realised offline turnover, as this amount indirectly to dual pricing) to sustain the efforts of sale offline or online of the buyer. The formalities of application of this precise statement are not entirely clear. In effect, in the case the producer establishes a fixed remuneration for the sales online combined with a fixed quantity of products to sell, this would correspond to a system of dual pricing that is exactly what the rule wants to avoid.

The Guidelines states that an agreement which provides a dual pricing may profit of an individual exemption if the sales online substantially leads to higher costs for the manufacturer than offline sales. This may happen when online selling provokes more complaints and warranty claims for manufacturer.¹⁷ This specific provision is inspired by a Dutch case in which the distributor sold online kitchens without providing instructions or an installation service, and the manufacturer had to supply this information and assistance.¹⁸

In Italy in 2013 the Italian Competition Authority started an inquiry¹⁹ (which ended with the acceptance of the appointments) on the conditions of on-line sale imposed by Enervit (company that manufactures and markets integrators and alimentary products intended to satisfy demands connected to specific nutritional for sports activities) to its to own distributor which foresaw the formulation of a minimum price of resale, in the form of the indication of a maximum percentage of discount applicable to the consumer, and the imposition of an obligation of sale of the product exclusively on the territory and through channels attributed in exclusivity to the distributor.

3.2 Objective justification that can legitimate the prohibition of sales online

Exceptionally, some hardcore restrictions stated in a vertical agreement may be objectively necessary and therefore they do not fall within the prohibition laid down by art. 101 TFUE.

Even if no specific rule is provided regarding online sales, it can be maintained that a limitation of online selling of goods due to public prohibition of sale of dangerous substances to determined clients for health and security reasons is allowed. However, to invoke the security norms and the clause on dangerous products there should be a specific law imposing those norms for the goods object of the agreement, while when the commercialisation of the goods is not regulated, the objective justification of a hardcore restriction is not allowed.²⁰

¹³ Paragraph 52, lett. a) of the Guidelines.

¹⁴ Paragraph 52, lett. b) of the Guidelines.

¹⁵ Paragraph 52, lett. c) of the Guidelines.

¹⁶ Paragraph 52, lett. d) of the Guidelines.

¹⁷ Paragraph 64 of the Guidelines.

¹⁸ District Court Zutphen, 8 August 2007, n. 79005/HA ZA 06-716.

¹⁹ Italian Competition Authority, 20 November 2013, n. 24619.

²⁰ Opinion of Mr Advocate General Mazák delivered on 3 March 2011, in CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECR [2011], I-9419 .

3.3 Restrictions allowed to protect the quality of the distribution and to prevent free-riding

The Guidelines admit the possibility to impose a series of direct obligations to the distributor to safeguard the quality of the distribution (for instance in terms of services pre and post sale) and to prevent the possibility that online distributors take advantage of investments made by the subject that uses physical stores.

Firstly, the supplier may require to its distributors, as a condition for becoming a member of its distribution system, to have at least one brick and mortar shop.²¹

More specifically, the producer may exclude from its own net of sale purely virtual distributors. The fact then, that it can be able also to require to the distributor more brick and mortar shops, allows the producer to avoid that a distributor with a solo physical shop with a limited proportion of sales (thus de facto an online distributor), may compete with distributors that have invested in physical shops. It is also possible for the producer to require that the distributor limits its store and deposit to an allocated territory area.²²

On the other hand, it is questionable if the producer may require to the distributor that the products sold online have to be collected in a brick and mortar shop. Probably the answer will vary according to the type of product.

Furthermore, the manufacturer may require, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of products offline to ensure an efficient operation of its brick and mortar shop.²³ It is also specified that the absolute amount of required offline sales can be the same for all buyers or determined individually for each buyer on the basis of objective criteria, such as buyer's size in the network or its geographic location.

It is not clear which kind of remedies the manufacturer may adopt if the distributor does not reach the requested threshold of offline sales. A possible remedy could be the interruption of online sales by the distributor until it reaches the requested and agreed threshold; the provision of a remedy which forbids the online sale for the whole residual duration of the contract as a consequence of the non-compliance with the threshold, would probably be considered as hardcore restriction.

Another possibility for the manufacturer is to impose that the distributor's website shall also offer a number of links to websites of other distributors or suppliers.²⁴ In this way, the consumer will be able to visit the website in its own language and the quality of the distribution system is maximised.

Lastly, the manufacturer may require quality standards for the usage of the internet website to resell its goods. Just as the supplier may require for a shop, or for selling by catalogue or for advertising activities.²⁵

The standards that the manufacturer may require to be met may regard the quality and the characteristics of the website or the modalities of selling by internet.

For the time being, no decision has been made by the Italian Competition Authority or Judges that clarify what kind of quality standards may be considered lawful.

However, the request made by the manufacturer to the distributor to dedicate a special space to the products on the website and not to associate the product with others that could diminish the image or the value, to give information and specific suggestions on the products, with the possibility for consumers to ask questions regarding the products, to ensure specific terms of delivery, may all be considered compatible with the Regulation.²⁶

²¹ Paragraph 54, of the Guidelines

²² Paragraph 50, of the Guidelines.

²³ Paragraph 52, of the Guidelines.

²⁴ Paragraph 52, of the Guidelines .

²⁵ Paragraph 54, of the Guidelines.

²⁶ A.Frignani, A. Sonnati, *La Distribuzione via Internet nell'Unione Europea prima e dopo il Regolamento 330/2010: I Giudici Hanno Compreso l'Economia di Internet?*, *Diritto del commercio Internazionale*, 2016, p. 627.

The guidelines, also admit that a manufacturer may require that its distributors use third party online platforms (such as marketplaces) to distribute its products only in accordance with the standards and conditions agreed between the manufacturer and its distributors. However, the quality standard should not discriminate the sales online to advantage the sales offline.²⁷

There is no specific rule that states if a prohibition to use a specific form of online sales (such as auctions) or use of online marketplaces (such as Amazon or EBay), because held by the supplier harmful for the image of its product, should be considered a hardcore restriction or not. Nevertheless, it may be claimed that absolute marketplace bans do not generally amount to a de facto prohibition to sell online, but they concern the way the distributor sells its products online and do not have the object to restrict where and to whom distributors can sell.²⁸ This solution would be consistent with the case-law of the European Court of Justice.²⁹

4. Online sales and selective distribution

The notion of selective distribution is contained in art. 1, let. 3) of the Block Exemption Regulation, according to which a system of selective distribution is when the supplier undertakes to sell the goods or services object of the contract, directly or indirectly to selected distributors on the basis of specific criteria and in which these distributors undertake not to sell such goods or services to unauthorized retailers in the territory that the supplier has reserved to such system.³⁰ Therefore, only designated retailers and the end consumers can become buyers.

Selective distribution systems are an important distribution model for luxury and premium branded goods. The use of quality criteria that retailers need to meet in order to become part of the distribution network allows manufacturers to have a better control of the distribution quality and to alleviate free riding by retailers that do not make adequate investments in providing a quality consumer experience.

Within the systems of selective distribution two types are distinguished. The first one is constituted by the systems of purely qualitative selective distribution, in which the retailers are entirely selected on the base of objective criteria connected to the nature of the product, the level of professional qualification of the personnel employed to the sales, the service provided by every authorized points of sale, the sale of one determined range of products. The selective distribution purely qualitative does not fall within the prohibition of art. 101 provided that three conditions are met: the nature of the product in matter must make a system of selective distribution necessary, in the sense that such system is necessary to preserve the qualities and to ensure a correct use of the product; the choice of the distributors must indiscriminately occur according to objective criteria of qualitative nature; the criteria set must not go beyond what is necessary³¹.

On the other hand, the quantitative distribution limits in a more direct way the potential number of distributors, for example imposing a minimum or maximum level of purchases and fixing the number of distributors.

According to paragraph 56 of the Guidelines dealers in a selective distribution system should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore is a hardcore restriction any obligation that prevents the designated retailers the use of the internet to reach a greater number and variety of customers, by imposing criteria for online sales which are not overall equivalent to those imposed for brick and mortar stores.

²⁷ Such principle had been stated by the European Court of Justice in two cases: ECJ, C-26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, ECR 1977 -01875; ECJ, C-31/80, *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK*, ECR 1980 03775.

²⁸ Preliminary report of E-commerce Sector Inquiry. http://europa.eu/rapid/press-release_IP-16-3017_en.htm, para. 469. Accessed 20 May 2017.

²⁹ CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECR [2011], I-9419 .

³⁰ Differently from exclusive distribution agreements in distribution agreements the restriction of the number of dealers depend on selection criteria linked to the nature of the product and not on the number of territories. Another difference is that restriction on resale is a restriction on any sales to non-authorised distributors and not a restriction on active selling to a territory.

³¹ CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECR [2011], I-9419, par. 41.

However, this does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same goals and achieve similar results and any difference should be justified by the different nature of these two distribution modes. Indeed, the main point is to prevent measures that limit sales on the internet.

Anyway, the producer may impose quality standards also regarding the website and require that the distributor has at least one brick and mortar shop and where it should be located.

In such regard, the Italian Chamber of Fashion held that the distribution via brick and mortar shops to be of great importance for the fashion industry. Indeed, according to the Italian Chamber of Fashion this requirement contributes towards enhancing consumers' experience, in particular given that fashion articles are designed to be tried on and worn by consumers and their quality to be judged in person. In addition, it stated that this approach minimizes free-riding by pure online sales players on the significant investments made by high-quality physical points of sale.³²

Lastly, according to the Guidelines a supplier, in order to prevent sales to non-authorized dealers, can restrict its selected dealers from selling more than a given quantity of contract products to an individual end user.

5. Most Favoured Nation condition and the definition of Relevant Market in context of online sale platform

In 2014 the Italian Competition Authority took action against the online travel agencies named Booking and Expedia in order to examine whether the "Most Favoured Nation" (MFN) clauses of the contracts concluded by the two Online Travel Agencies (OTA) and their hotel partners in Italy may integrate a vertical restriction in violation of art. 101 TFUE.

In its contracts with hotels, Booking.com obliged them to always offer their best prices, maximum room capacity, and best cancellation and booking conditions in comparison to what they offered on other platforms, and through their online and offline direct booking channels. Similar clauses exist with regards to other significant platforms, such as Expedia.

The Italian Competition Authority held that such conditions could infringe art. 101 TFUE because they could result in a restriction of competition between platforms, since the level of commissions applied to hotels by platforms does not affect room rates applied to end users, which boost platforms to raise commission rates. Furthermore, an "MFN" clause creates entrance barriers for new platforms and creates eviction risks.

During the legal proceedings Booking and Expedia spontaneously undertook to modify the contracts by removing 'wide MFN clauses' and equivalent measures, consisting in price and non-price (e.g., availability) parity clauses, with respect to other OTAs and to the hotel's offline channels, which is expected to stimulate competition between platforms and restore hotels' abilities to differentiate prices between platforms. However, Booking.com would be allowed to continue using 'narrow MFN clauses' preventing hotels from offering lower prices through their own website. Hotels remain free to advertise discounts online without publishing the amount of such discounts and to grant the OTA different availability conditions than through their own sales channels. Therefore the Authority dismissed the cases because the grounds for actions no longer prevailed.

The Italian Competition Authority admitted that allowing narrow MFN clauses may be necessary to prevent hotels from free-riding on the important investments made by platforms, such as the cost of marketing and maximum visibility through search engines allowing the hotel partner to offer better prices and conditions on its offline channels.

These decisions are also interesting because the Authority has expressly stated the "relevant market" to be considered in those cases was the Italian online market, distinguished from the one of distribution through traditional physical stores. This in consideration of the fact that every day consumers prefer to book their hotels online, the agency taxes and the services offered by the online agency are different than the ones offline; thanks to online travel agencies hotels can reach a higher number of potential consumers .

³² Camera Nazionale della Moda Italian, Contribution to the Public Consultation on the European Commission's Preliminary Report on the E-commerce Sector Inquiry, http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html. Accessed 20 May 2017.

However this difference is not so explicit in all the markets.

In the market of consumer goods, for example, the buyer can have advantages thanks to the complementarity of both channels. Indeed, the online experience provides important information on the characteristics and availability of the products and read reviews on them, but only offline can the consumer understand the quality of the goods and take better advantage of the pre-sale and post-sale services.

6. European Commission's e-commerce sector inquiry

On 6 May 2015 the European Commission launched the sector inquiry into e-commerce, as part of the Digital Single Market strategy, on the basis of European Union (hereinafter referred as "EU") competition rules.

On 15 September 2016 the Commission published a Preliminary Report on the e-commerce sector inquiry setting out its initial findings.³³

On 10 May 2017, the Commission adopted the Final Report on the e-commerce sector inquiry and published the accompanying Staff Working Document which sets out the main findings of the e-commerce sector inquiry taking into account the views and comments submitted by stakeholders during the public consultation. The 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.³⁴

The report confirms that the growth of e-commerce over the last decade and, in particular, increased online price transparency and price competition, had a significant impact on companies' distribution strategies and consumer behaviour.

In particular, a large proportion of manufacturers have decided over the last ten years to sell their products directly to consumers through their own online retail shops, thereby competing increasingly with their distributors;

Furthermore, the report shows that the use of selective distribution systems has increased, where products can only be sold by pre-selected authorised sellers, allowing manufacturers to better control their distribution networks, in particular in terms of the quality of distribution as well as prices.

Consequently, the use of contractual restrictions to better control product distribution has also increased. Depending on the business model and strategy, such restrictions may take various forms, such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks.

Some of these practices may be justified, for example in order to improve the quality of product distribution, others may unduly prevent consumers from benefiting from greater product choice and lower prices in e-commerce and therefore warrant Commission action to ensure compliance with EU competition rules.

With respect to digital content, the results of the sector inquiry confirm that the availability of licences from content copyright holders is essential for digital content providers and a key factor that determines the level of competition in the market.

The report points to certain licensing practices which may make it more difficult for new online business models and services to emerge. Any assessment of such licensing practices under the EU competition rules has however to consider the characteristics of the content industry.

One of the key findings of the sector inquiry is that almost 60% of digital content providers who participated in the inquiry have contractually agreed with right holders to "geo-block".

³³ Preliminary report of E-commerce Sector Inquiry. http://europa.eu/rapid/press-release_IP-16-3017_en.htm. Accessed 30 May 2017.

³⁴ Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry. http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Accessed 29 May 2017.

7. Geo-blocking

Geo-blocking is a practice used by online sellers where access to internet content is restricted based upon the user's geographical location.

There might be justified reasons for traders not to sell cross-border, such as the need to register at the tax authority in the country of destination, higher shipping costs or costs arising from the application of foreign consumer law. While outside barriers create additional complications and extra costs for the trader, differences in the treatment of customers are based on objective criteria.

However, discrimination between EU customers based on the desire to segment markets along national borders, in order to increase profits to the detriment of foreign customers, is considered as unjustified geoblocking.

Geo-blocking and other geographically-based restrictions undermine online shopping and cross-border sales by limiting the possibility for consumers and businesses to benefit from the advantages of online commerce.

In 2015, a Commission survey found that only 37% of websites actually allowed cross-border customers to reach the final step before completing the purchase by entering payment details. While 38% of the respondent consumer goods retailers and 68 % of respondent digital content providers geo-block consumers located in other EU Member States.

In May 2016 the Commission made a legislative proposal after assessing the responses from a public consultation held in 2015. This proposal prohibits the blocking of access to websites and other online interfaces and the rerouting of customers from one country to another. It furthermore prohibits discrimination against customers in specific cases of the sale of goods and services and does not allow the circumventing of such a ban on discrimination in passive sales agreements. Therefore, online sellers will not be able to discriminate against consumers elsewhere in the EU in their general terms and conditions (including those relating to pricing) on the basis of their nationality, place of residence or even their temporary location. Both consumers and businesses as end users of goods or services are affected by such practices and should therefore benefit from the rules set out in this proposal. Transactions where goods or services are purchased by a business for resale should, however, be excluded in order to allow traders to set up their distribution systems in compliance with European competition law.

Some sectors remain, for the time being, outside the scope of the draft Regulation. These include audiovisual services (such as the broadcasting of sports events that are provided pursuant to exclusive territorial licences) and financial, transport, electronic communication or healthcare services.

On 25 April 2017 the European Parliament's Committee on Internal Market and Consumer Protection voted to approve amended draft legislation to ban unjustified geo-blocking in business-to-consumer relationships and now begin the negotiations with the Council and the Commission with the aim of reaching an agreement on the final legislation.

8. Conclusions

Over the past decade, the web has quickly become a powerful channel for the distribution of goods. Its development has brought about significant changes in distributors' strategies. The expansion of the Internet has also created new economic players, including online-only sellers, such as eBay and Amazon.

More and more goods and services are traded over the internet worldwide. However the Commission's Digital Single Market Strategy has underlined that cross-border online sales within the EU are only growing slowly and have identified a number of regulatory barriers that hinder cross-border e-commerce and proposes different initiatives to address these.

There are also indications that businesses may themselves establish barriers to cross-border online trade, with a view to fragmenting the market along national borders and preventing competition. The Commission has therefore launched an inquiry to gather market information in order to better understand the nature, prevalence and effects of these barriers and to assess them in light of EU antitrust rules.

The preliminary results of the Commission's competition sector inquiry on e-commerce show that the use of these restrictions is widespread throughout the EU.

Under certain circumstances, these practices may make cross-border shopping or online shopping in general more difficult and ultimately harm consumers by preventing them from benefiting from greater choice and lower prices in e-commerce. Such behaviour may breach competition rules that prohibit anti-competitive agreements between undertakings.

In order to overcome this anti-competitive practice it is important to harmonize the laws at least between EU countries given that internet allows commerce worldwide. However, not everything can be predicted and disciplined by the law therefore National Competition Authorities and judges will have to assess on a case by case basis, having regard to the characteristics of specific product and geographic market, whether certain agreements may restrict competition and whether enforcement is necessary in order to ensure effective competition.