Energising ecommerce

The European Commission is looking at the barriers to online trade

*by **Elisabetta Rotondo** and **Sophie Lawrance****

For those who follow competition policy and enforcement, it will have come as no surprise that ecommerce is the focus of the European Commission's latest sector inquiry, announced on 26 March 2015. This follows a line of previous inquiries into sectors as diverse as energy, pharmaceuticals and financial services.

The ecommerce inquiry is an offshoot of the Commission's 10-year development plan, Europe 2020, which sets out a "jobs and growth strategy" for Europe aimed at creating "smart, sustainable and inclusive" economic growth. It identified three flagship initiatives, one of which was the Digital Agenda for Europe whose aim is to complete the "digital single market for Europe" by enabling better access to goods and services online. The ecommerce sector inquiry has been launched with that aim in mind. While the Digital Agenda initiative will focus on eliminating regulatory barriers to cross-border trade, the sector inquiry will concentrate on contractual barriers between companies. It is complemented by other initiatives, such as DG Growth's recently announced consultation into cross-border parcel delivery.

Why ecommerce?

Ecommerce is an obvious choice as a strategy for growth, given the huge potential of the internet to transcend national boundaries, reduce transaction costs, bring down prices and be a catalyst for completion of the single market. The Commission recognised the importance of ecommerce back in 2009:

> "Consumers have everything to gain from the internet. It expands the size of the market they operate in and gives them access to more providers and more choice. It makes it possible to compare products, suppliers and prices on an unprecedented scale. Internet use for retail shopping is destined to become pervasive...We must see to it that adoption of the internet platform will not be unnecessarily slowed down by a failure to remove important regulatory barriers or to address important trust issues for consumers." (Consumer protection commissioner, report on barriers to ecommerce, 5 March 2009.)

Why is this inquiry not a surprise?

The European Commission has already been chipping away at barriers to ecommerce for some time. An early area tackled more than 10 years ago by the Commission was the issue of barriers to cross-border payments, notably with investigations into Visa and MasterCard multilateral interchange fees (MIFs) – without the ability to pay online, the development of ecommerce would be a pipedream (see speech by Joaquin Almunia, "A new approach to integrating payments in the EU" 4/05/2012). These investigations lasted over a decade, culminating only last year in an offer of commitments by Visa and a ruling against MasterCard by the CJEU (Case 382/12P).

Not only were potential barriers removed through antitrust enforcement but, in 2015, the European parliament and Council adopted a regulation capping interchange fees for card-based payments and removing technical barriers to innovative payment methods (Regulation 2015/751). The Commission has also supported the creation of a single integrated payments area for bank transfers.

Many would agree that it is high time that the Commission took an in-depth look at developments in the online world: regulatory activity has until now focused on adapting existing competition rules (notably the Vertical Agreements Block Exemption Regulation (VBER) and associated guidelines) to the online world. However, technological developments in ecommerce have thrown up new types of possible competition law concerns – for example, the Commission's current investigation into Google's online search engine – and new business models, which may not fit neatly within the current regulatory framework. Perhaps the ecommerce sector inquiry is a response to a growing recognition that the old rules (in particular, the VBER) are inadequate to cope with new business models arising from the internet and the new competition issues that these may bring to the fore.

What will the sector inquiry focus on?

Indications from the Commission suggest that the sector inquiry will focus on commercial barriers to online trade, particularly in sectors where ecommerce is most widespread, such as electronics, clothing and shoes. While a degree of crystal-ball gazing is necessary to identify which particular restrictions will be the centre of any subsequent competition probe, recent enforcement activity may provide some clues.

Supplier restrictions affecting sales on online platforms are mentioned as one focus area (see the sector inquiry fact sheet: MEMO-15-4922). This may reflect the significant time that several national antitrust authorities have spent in recent years investigating most favoured nation clauses (MFNs) between hotels and online travel agents (notably Booking.com). Such clauses have been found to dampen price competition not only between the supplier (via direct bookings) and the platform but also between different platforms. The ultimate decision by some authorities to permit MFNs, which prevent the supplier charging a lower price on its own website than via the platform, gives an implicit nod to the free-riding defence in the VBER, suggesting that such clauses may be necessary to prevent suppliers using online platforms as a marketing tool and then undercutting the platform price to secure a sale on its own website.

The German Federal Cartel Office was the only authority to issue an infringement decision against an online travel agent, Hotel Reservation Service, for use of the same clauses in its contracts with hotels. In its decision, the FCO mooted the idea that MFNs should be classified as hardcore restrictions of competition which would only exceptionally satisfy the

** Elisabetta Rotondo is an associate – and Sophie Lawrance is a senior associate – at Bristows LLP*

article 101(3) exemption criteria. Over recent years, the FCO has also taken a stricter approach to restrictions of online sales than the vertical guidelines do. This kind of situation can leave companies operating across the EU in the unsatisfactory position of having to navigate differing national regimes.

In addition to the contractual agreements between suppliers and online platforms, a further angle which may be explored in the Commission's inquiry is the regulatory status of new online business models. In a speech in April 2012, Neelie Kroes recognised the potential of the internet to rewrite the competition rules: "We must also be open to different online business models. The internet potentially offers not just new forms of content, but new ways to distribute it, new ways to make it accessible, and new ways to be rewarded for it. If we are to benefit from the internet's enormous innovation, we must be open to new ideas here."

Online platforms are such an example. Agreements between suppliers and platforms for the distribution of products do not appear to fit within the strict criteria that apply to agency agreements, and yet they are not traditional resale agreements either: only rarely do the platforms take possession of or title to the suppliers' goods. At present, the Commission's guidance is structured as if it has identified every type of vertical agreement that might exist. But this form of hybrid arrangement, whereby platforms provide a marketing service to the supplier in exchange for a commission, is not countenanced. In this context, is it acceptable for the supplier to keep control of the prices at which it sells its goods? Or are these in fact to be classified as reseller agreements, in which case the platforms should be in charge of setting the prices at which the supplier's products are sold? The penalties for identifying the agreement wrongly are heavy.

The VBER states that it generally identifies sales over the internet as a form of passive selling and classifies some of the restrictions on the internet as (re)sales restrictions, but does that mean that selling over the internet via a platform is a resale agreement? These are the kinds of questions that the Commission is likely to need to tackle and for which guidance would increase legal certainty for business.

Vertical distribution agreements: RPM?

The Commission's 2011 ebooks investigation gives another pointer as to the types of restriction that may interest the authorities. The ebooks case raised concerns among some in the competition community that the agency model would be left in tatters. Using agency is the only legal way of allowing suppliers to set the resale price at which downstream sellers place products on the market. In the end, it was not the agency models themselves nor resale price maintenance which was an issue, but their collective use by each of the five major publishing houses on the market, coupled with MFNs, which, taken together, resulted in the price of ebooks being fixed at an artificially high level for online sellers.

It is clear from the above cases that MFNs are high on the agenda, particularly where they have a significant impact on an online market, either by virtue of industry-wide agreements or because the parties have market power.

Barriers to cross-border trade

Removal of absolute territorial protection has been a key focus of EU competition law since its inception and features highly on the ecommerce inquiry's "hit list". The inquiry is expected to focus on the practice of geoblocking - ie where technical measures are used to prevent customers located in one territory from accessing or buying from websites in another territory. This was the subject of a 2007 investigation into Apple's distribution agreements with major record companies, which included an obligation on customers of iTunes musical downloads to purchase from a website in their country of residence, leading to price differences (see MEMO/07/126). Similar territorial restraints have been found anticompetitive by the CJEU in *FAPL v Karen Murphy* (Joined cases C403/08 and C429/08), where FAPL's licences of rights to view football matches included absolute territorial protection obligations on each satellite broadcaster. This meant that customers were not permitted to view transmissions from broadcasters outside their country of residence. An infringement finding was reached despite the existence of territorial copyright protection over such rights.

It is therefore unsurprising that part of the intended completion of the digital single market is a proposed "modernisation" of copyright to give people "better access to culture". It is unclear exactly what the Commission means by increasing access, or how such a proposal will be received, given recent copyright reforms. However, given the context of the announcement, it appears that copyright laws may be curbed to prevent undue restrictions on trade between member states.

Other issues that are likely to arise include contractual restrictions which impose obstacles on online sales compared to bricks and mortar sales – whether it is an outright ban on online sales (like those at issue in the *Pierre Fabre* case) or dual pricing (where products to be sold online are more expensive than those sold offline). One of the bones of contention prior to adoption of the current VBER was the issue of selective distribution and how to protect genuinely complex, experience goods where brand value is high when these are sold via the internet. Now, five years on, it will be interesting to see whether the Commission's approach will change.

Conclusion

Recent antitrust enforcement belies a general uncertainty in the legal community as to how to categorise certain types of business model and contractual agreement in the online context. While business is keen to obtain legal certainty at EU level, the European Commission's initiatives should not neglect the problem of free-riding, which is a particular issue for online platforms as well as suppliers selling complex or high-end goods who wish to retain certain control over sales to the end-consumer.

Next steps

The Commission is currently sending information requests to stakeholders including suppliers, wholesalers and online retailers. It expects to publish a preliminary report for consultation in mid-2016 with a final report following early in 2017.

The inquiry is likely not only to lead to antitrust investigations being launched, but may also yield further legislation in this sector. No doubt the Commission's findings will also feed into the review of the current VBER, which expires in 2022.