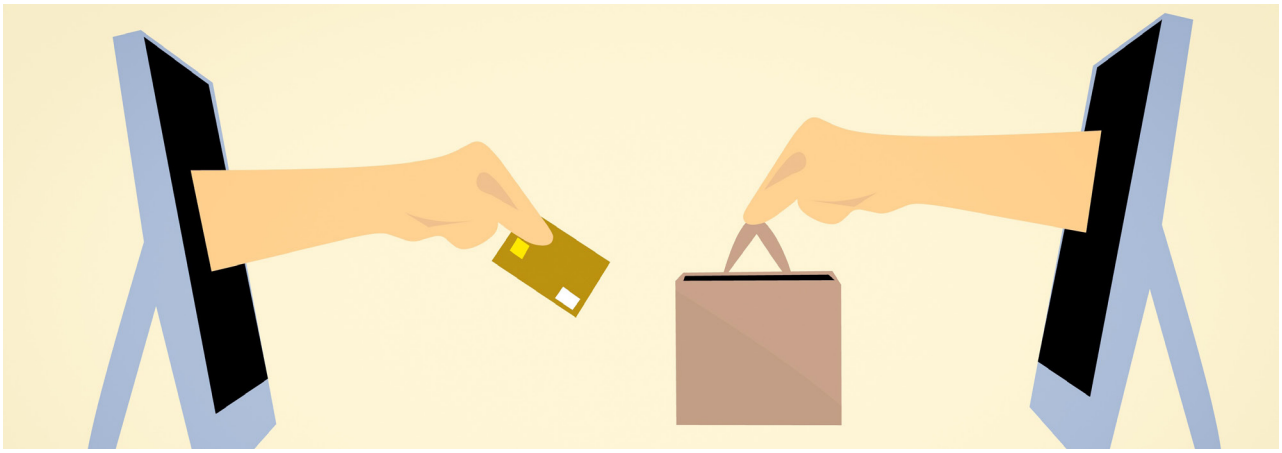
Antitrust Enforcement Post E-Commerce Sector Inquiry: Where Do We Stand Now?

December 2018

On May 10, 2017, the European Commission (EC) unveiled the long-awaited results of its e-commerce sector inquiry. Among other findings, the inquiry revealed an increased use by suppliers of contractual restrictions to assert control of their product distribution and protect their brands in the online space.

Fast-forward eighteen months later, enforcement is booming in this area, affecting virtually all businesses operating online. Feel like you need a refresher on the topic? We have you covered: below we provide a recap of key developments that are relevant to your business.

Fifty Shades of Non-Price Restraints: Platform Ban vs. Internet Ban & Co.



Platform bans. 2017 finished with a blast: on December 6, the European Court of Justice (CoJ) opened the door to restriction of sales on third party marketplaces (also known as platform bans), in the context of luxury goods (see our article here). This ruling came as a surprise to a number of commentators and put a hard stop to a line of national cases, including those of the French and the German competition authorities, which had taken strong positions against platform bans. But Coty also left a number of open questions, in particular concerning the scope of the judgment: was it limited to luxury goods, or could it be extended to other types of products?

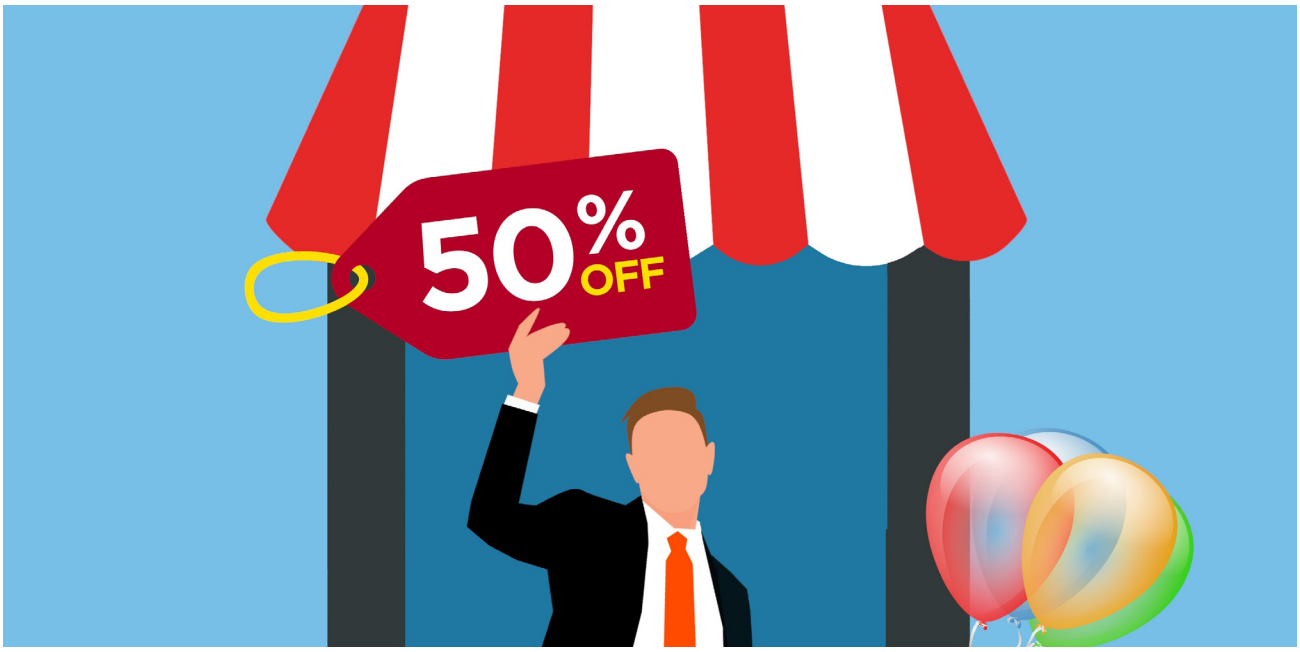
One year on, the fog appears to be slowly lifting:

- DG Comp recently issued a competition policy brief that expressed the view that a prohibition on sales of non-luxury goods through online marketplaces would also not infringe Article 101(1), provided that the Metro criteria are satisfied;
- In the same line, the French Competition Authority (FCA) recently validated a platform ban imposed in the chainsaw sector, due to safety concerns (see our briefing here);
- Even in Germany – where we expected more resistance, due to initial comments of the head of the Federal Cartel Office (FCO),– a recent judgment allowed for a small opening of platform bans beyond luxury goods (Aloe2Go case, validating a platform ban in the sector of food supplements, cosmetics and fitness drinks, on the basis of safeguarding proper customer advisory services).

Internet sales ban. Importantly, this new found lenient approach towards platform bans does not extend to wider internet sales bans, à la Pierre Fabre. In the French chainsaw decision, the FCA imposed a 7 million euros fine to Stihl for imposing a de facto ban on online sales to its distributors, in the form of a requirement to hand-deliver the products. Similarly, the UK Competition and Market Authority (CMA) found that Ping, a golf clubs manufacturer imposed an outright ban on online sales to its distributors. As a result, Ping received a fine of £1.45 million in August 2017 (confirmed by the Competition Appeal Tribunal in September 2018).

Price comparison website ban. A few days after the Coty judgment, the Germany Federal Court of Justice (Bundesgerichtshof or BGH) confirmed a decision of the FCO stating that Asics could not prevent its authorized dealers from using price comparison websites (due to the novelty of the issue, the FCO did not impose a fine). The BGH reached this conclusion on the grounds that the ban was not linked to specific quality requirements. This may suggest that suppliers can impose bans on certain price comparison websites for qualitative criteria, e.g. because of the low quality of their service. However, such a ban would have to be calibrated to allow for the use of other price comparison websites that meet the quality criteria imposed by the brand suppliers (see our briefing here).

Resale Price Maintenance Enters the Digital Age



The e-commerce sector inquiry flagged a tendency for manufacturers to seek greater control over their online distribution networks, which in turn raises a number of antitrust issues in the online space, including the widespread use of pricing restrictions.

Recently, enforcement against vertical price restraints has come back to the fore at the EU level (after fifteen years without enforcing any case!). On July 24, 2018, the EC fined consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer €111 million for imposing fixed or minimum resale prices on their online retailers, as well as limiting the ability of retailers to sell cross-border (see our briefing here). The resale price maintenance (RPM) took a fairly traditional form. However, the effect of these RPM practices was amplified and maximized by the use of online tools:

- Sophisticated monitoring tools allowed manufacturers to track deviations from the imposed price and to intervene swiftly in case of price decrease;
- Since most online retailers use pricing algorithms that automatically adjust retail prices to those of competitors, the RPM practices impacted not only the distributors of the infringing parties, but the overall industry, thus leading to higher prices for consumers.

Most Favored Nation Clauses: Old Hat, New Style?

Most-Favored Nation (MFN) clauses are back on the radar of competition authorities: on November 2, 2018, the CMA announced that it had provisionally found that ComparetheMarket, a home insurance price comparison site, may have infringed both UK and EU competition law by inserting wide MFN in its contracts with home insurers (see our briefing here).

Hopefully, this investigation and the final CMA decision will contribute to further the debate on the competitive assessment of MFNs. This would be welcome given the current lack of legal certainty on the topic, which is the result of at least three factors:

- The competitive effects of MFNs are often ambivalent and require a careful balancing exercise, between pro- and anticompetitive effects;
- Second, national competition authorities (NCAs) across the EU appear to disagree on how certain MFNs should be analyzed under EU competition law (see Booking.com saga) with some treating them as 'by object' violations of competition law and others, such as the UK's CMA subjecting them to an effects-based analysis;
- Thirdly, to date, most investigations have resulted in the adoption of commitment decisions. These decisions are typically very short and therefore provide very little guidance.

For a more detailed overview of the competitive assessment of MFNs, check out the practice note that we published on Lexis Nexis.

Geoblocking - Empty Promises?

The e-commerce sector inquiry, initially largely focused on geoblocking practices, concluded that these were indeed pervasive across the e-commerce industry, both for goods and content. The final report also emphasized that only those geoblocking practices imposed by means of a contractual arrangement may fall within the scope of Article 101 TFEU.

One year on, enforcement against geoblocking clauses remains pending:

- With regard to goods, a number of investigations are ongoing in the video games, hotel accommodation, clothing and accessories sectors. In addition, in the above mentioned Pioneer case, the EC found that Pioneer reinforced its RPM practices through the implementation of restrictions on parallel trade;

- On the content side, things are moving slowly. In the Pay-TV case, the EC had sent a Statement of Objections (SO) to UK broadcaster Sky and six studios (Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros) back in July 2015. According to the SO, Sky was contractually bound to geo-block its platform to prevent consumers from accessing Sky from outside the contractual territory(ies), which may amount to a hardcore restriction within the meaning of the Vertical Block Exemption Regulation (VBER). To date, only Paramount has settled the case and deleted the geoblocking provision. Earlier this month, Disney offered similar commitments, a few days after the EC cleared its acquisition of rival studio Fox; the EC is currently seeking market feedback on these commitments. The investigation continues with regard to the other studios.

In parallel, legislative efforts against geo-blocking are continuing. The geoblocking regulation (for now focused on goods) will enter into force on December 3, 2018; the EC will review the impact of the regulation within two years after its entry into force, with a view to possibly extend the rules to content, e.g. audiovisual production. Other proposed legislations impacting online content (e.g. review of the SatCab directive) are currently under discussion. However, due to copyright considerations, the issue appears to be particularly thorny and it is unclear whether such proposals will effectively tackle geoblocking in the online space.

What's Around The Corner for 2019?

- **Platforms are likely to be under the spotlight in 2019**. Last September, Commissioner Vestager announced that the EC was conducting an investigation into Amazon's dual role as a retailer and a platform for other sellers. More specifically, the regulator is looking into how Amazon amasses large chunks of sensitive information on sales made by retailers on Amazon Marketplace and whether that gives it an edge when it sells competing goods or services to consumers. This investigation appears to be connected to a wider discussion about the role of platforms in the e-commerce world (see, in particular, the upcoming regulation on Platform to business trading practices).

- **The review of the VBER is also around the corner** and may have significant implications for businesses. According to an evaluation roadmap published earlier this month, the EC will be seeking feedback until December 6. A public consultation of 12 weeks will be launched in the first quarter of 2019 and should be followed by a stakeholder workshop in Q4. The purpose of this consultation is to allow the EC to decide whether to revise – or not – the VBER, notably in light of 'the increased importance of online sales and the emergence of new market players such as online platforms.'

- **Enforcement will continue in 2019**, with pending investigations into geoblocking clauses (video games, hotel accommodation, clothing and accessories sectors) and into MFNs (ComparetheMarket case).

» **2018 has brought more nuances in the competitive assessment of online restraints**. Going forward, online businesses ought to integrate these nuances in their commercial and distribution strategies. Admittedly, some restraints, e.g. a ban on internet sales, will still be deemed inexcusable. For these restraints, businesses should brace themselves for vigorous enforcement and higher fines: clearly, the early days where enforcers would take action against egregious online restraints without imposing a significant fine are over. But other restraints, and in particular platform bans, may increasingly be regarded as legitimate tools under EU competition law, at least under certain circumstances. Accordingly, suppliers seeking to protect their brands and assert control over their distribution networks in the online space will need to select and calibrate online restraints whilst keeping an eye on an evolving enforcement environment in Europe.

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