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Interventi

Assonime contribution to the Commission Consultation on the Preliminary Report on the E-Commerce Sector Inquiry

1. Importance of the Sector Inquiry

We commend the Commission for the decision to include into the Digital Single Market Strategy a fact-finding Sector Inquiry, pursuant to Article 17 of Regulation 1/2003, into the e-commerce of consumer goods and digital content in the EU.

For undertakings at the different levels of the value chain (from manufacturers to retailers, from right holders to digital content providers) the development of e-commerce represents a great opportunity and at the same time a challenge. The strategies adopted to face the evolving commercial environment include an increasing use of vertical integration and updating vertical agreements with third parties.

Improving the knowledge and understanding of these developments, of their reasons and their impact on the market is a precondition for a proper application of EU competition rules in this area.

E-commerce is a powerful instrument which can contribute to broadening markets and enhancing consumer welfare, but it would be misleading to consider it an objective in itself. Consumer welfare in the EU also depends on whether suppliers maintain adequate incentives to produce high quality products and content and on the availability of both online and offline retail channels.

2. The analytical framework for the application of Article 101 TFEU

The Sector Inquiry aims at ensuring a proper application of Article 101 TFEU to vertical agreements attaining to online sales.

The reform of the treatment of vertical restraints in the application of EU competition rules undertaken at the end of the 1990s had as its main aim the shift from a form based approach to a more impact based assessment of agreements on the market, so as to ensure a better focus on those business practices which are harmful to the competitive process.

The resulting general analytical framework, outlined by Regulation 330/2010 (Vertical Block Exemption Regulation –VBER) and the Commission's Guidelines on Vertical Restraints, updated in 2010, indicates that:

- vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies;
- to determine whether an agreement is restrictive of competition, either by object or by effect, it is necessary to look beyond the formal content of its clauses and consider the economic and legal context of which it is part as well as the lessons which can be drawn from experience and economic analysis;
- the assessment of the actual or potential impact of an agreement on competition has to consider whether it has appreciable negative effects on the main market variables, i.e. price, output, innovation, quality and variety of goods and services, looking not only at the short term but also at the medium term;
- in the application of Article 101 TFEU the case-law has acknowledged a distinct relevance of the wider objective of achieving an integrated internal market within the EU;
- both the impact on competition and the impact on market integration cannot be ascertained without considering the counterfactual, i.e. the market conditions which would have prevailed in the absence of the agreement or business practice;
- only for agreements which, either by means of a 'by object' or 'by effect' analysis, have an adverse impact on competition pursuant to Article 101(1), it should be necessary to assess whether the conditions of Article 101(3) are met;
- agreements where the market shares of the parties do not exceed 30% and which do not contain specific hardcore restrictions are block exempted, according to the conditions set forth in the VBER.

In 2014, in *Cartes Bancaires,* the Court of Justice has clarified that also the notion of restriction by object should not be interpreted in a formalistic way but on the basis of economic analysis and experience showing that a certain type of agreement reveals a sufficient degree of harm for competition.

The Sector Inquiry provides the opportunity to develop the implications of this analytical framework in the area of e-commerce of consumer goods and digital content.

3. The role of the Commission in promoting a consistent application of Art. 101

Since the adoption of Regulation 1/2003, the application of Article 101 to vertical agreements has mostly been undertaken by national competition authorities, sometimes with differences in approach (an example is provided by the assessment of parity clauses in the national cases on hotel booking).

In some of these national cases, national courts have requested preliminary rulings pursuant to Article 267 TFEU, thus giving the Court of Justice the opportunity to provide guidance for the future application of Article 101 throughout the EU.

The Sector Inquiry may provide a significant contribution to a consistent application of Article 101 and therefore a level playing field across the different Member States, by ensuring a fact-based improved understanding of market practices.

Moreover, we respectfully submit that the Commission should be ready to play an active role, fully using its enforcement powers under Regulation 1/2003, including the power to adopt positive decisions pursuant to article 101(3), when this would be useful to promote, within the ECN, a consistent approach to emerging issues.

4. E-commerce in goods

4.1 Relevance of the data gathered in the sector inquiry

Responses from retailers selling online

The Commission sent questionnaires to a large number of companies active in e-commerce (retailers selling online, manufacturers, marketplaces, price comparison tools, payment system providers). As to retailers, the selection of addressees was carried out by the Commission with the aim to ensure that companies of different sizes and covering a large part of the market in terms of sales were included. The Commission also sought to achieve a broad geographic coverage with a minimum of 20 addressees per Member States. The Preliminary Report stresses that the number of

responses received per Member State was then affected by different response rates and spontaneous requests for participation. The final result is that the number of responses from retailers varies significantly across Member States (for instance with 338 respondents in Germany, 132 in the UK, 82 in Italy, 48 in France, 38 in Spain), in a way which clearly does not correspond to the actual and potential economic relevance of e-commerce in the different countries. In particular, the features of the German distribution sector are clearly over-represented.

The Preliminary Report acknowledges that the data do not have a statistical relevance and should be read as mere summaries of the qualitative information obtained from respondents. Nevertheless, there may be an element of bias in the analysis since the restrictions most frequently reported are not necessarily the most widespread in all Member States and may be related to the peculiar characteristics of certain national markets.

Broad product categories

Consumer goods covered by the Sector Inquiry are classified into categories (e.g. clothing and shoes, house and garden, consumer electronics, cosmetic and healthcare). Some of these categories are far less homogeneous than it would seem at a first look. In particular, the category "clothing and shoes" includes luxury goods – even hard luxury goods such as jewels costing several thousands euros) which, compared with other products in the same category, raise completely different issues in terms of competitive dynamics, need for brand protection and protection against counterfeiting. Inclusion of highly heterogeneous products into a same category, if not properly managed, may conceal some of the reasons which, for a subset of products, may strongly justify vertical restraints aimed at preserving investments in the brand image/reputation.

Due to these features of the data, special care has to be taken in the interpretation of the results of the Sector Inquiry. In this regard, the fact-based exchange of views triggered by this public consultation can be helpful to point out elements that, otherwise, might be neglected.

4.2 *Main features of competition in e-commerce in consumer goods*

Low concentration

The Preliminary Report shows that none of the sectors covered by the Sector Inquiry is highly concentrated: both for manufacturers and for retailers, the number of undertakings perceived as main competitors is significant throughout the different regions of the EU. As a consequence, in most cases the supplier's and the distributor's market shares do not exceed the thresholds set by the VBER. Therefore, most distribution agreements, provided that they do not contain hardcore restrictions, are covered by the VBER.

In some sections of the Preliminary Report the Commission recalls the possibility for the Commission and for NCAs to withdraw the benefit of the block exemption for an individual agreement or a set of agreements if there is evidence that such agreement(s) may nonetheless have a significant anticompetitive impact on the market. Although the withdrawal of the benefit of the block exemption would have effect only ex nunc, with no risk of sanctions for agreements which were previously block exempted, it must be kept in mind that changing the distribution strategy may entail huge costs for undertakings. Therefore, losses of the benefit of the block exemption should be limited to cases in which the change in legal status is strictly justified, i.e. when there is evidence of a significant actual or potential harm with reference to the main competitive variables.

Main parameters of competition and manufacturers'reaction to the growth of e-commerce

For manufacturers, hybrid retailers, pure online retailers and marketplaces profitability depends on different variables; it is therefore not surprising that, when asked to rank the parameters of competition according to their perceived importance, these undertakings indicate different rankings, with manufacturers considering product quality and brand image to be the most important parameters.

The Preliminary Report usefully points out that the price transparency resulting from e-commerce is the feature that most affects the behaviour of customers and retailers, leading to increased price competition affecting both offline and online sales.

Retailers were asked to compare the prices they set online and offline and the margins they achieve on the two channels. It is not clear whether the information on margins is

homogeneous and reliable, since it strongly depends on how costs are allocated between online and offline sales.

As to the different strategies in terms of set of products offered by retailers online and offline, it is difficult to understand them without looking at the products concerned in more detail.

The Preliminary Report points out the main aspects of the growth of e-commerce which affect the distribution strategy of manufacturers. These aspects include, in particular, online price transparency, quick online price erosion and the growing difficulties of maintaining a coherent brand image across the offline and online sales. For branded goods, the impact in terms of investment needed to fight online sale of counterfeit products is often mentioned by companies as an additional factor.

Although the strategies adopted to face the new competitive challenges differ significantly depending on the type of products concerned, the Preliminary Report indicates that 64% of manufacturers launched their own websites within the last ten years. More generally, an increased proportion of sales of manufacturers is generated via the manufacturers own retail activities, both online and offline, i.e. by means of vertical integration of manufacturing and distribution activities.

The Preliminary Report acknowledges that, while reducing intrabrand competition, vertical integration can also bring efficiencies by streamlining the incentives of the manufacturing and retail level, with a positive impact on customers.

The general trend towards vertical integration should be carefully taken into account when establishing how to apply article 101 to vertical agreements in this area, since a too strict approach may increase the incentive of manufacturers to disintermediate, leading to a smaller number of independent distributors.

4.3 Selective distribution

The Preliminary Report shows that increased recourse to selective distribution in terms of number and variety of products, as well as the use of new selection criteria represent frequent reactions to the growth of e-commerce.

In general terms, the current use of selective distribution is closely related to the challenges raised for manufacturers by online sales, including the difficulty of

maintaining a coherent brand image across the offline and online sales, the need to avoid free riding between the two channels and the need for protection against the sale of counterfeit products.

Moreover, as pointed out in section 3.2 of the Preliminary Report, despite the growing importance of e-commerce, many manufacturers stress the importance of traditional brick and mortar shops. In particular, manufacturers of luxury branded goods "consider the traditional shopping experience in a specific luxury environment to be a central element of their distribution strategy". Thus, one third of the manufacturers interviewed in the Sector Inquiry indicate that they do not sell to pure online retailers, and require their distributors to operate at least one brick and mortar shop (looking at subset of manufacturers using selective distribution the percentage is 47%).

In the assessment of these developments it is important to acknowledge that horizontal and vertical product differentiation are key dimensions of the competitive process, which contribute to the variety and quality of products available to consumers. The reputation of a brand is usually built by means of huge investments in research, development and marketing, aimed at sustaining the real value of branded products which is normally accompanied by a price positioning on the market. Preserving the possibility of manufacturers to profitably differentiate their products is an essential requirement for the competitiveness of European companies on the global markets.

For these reasons, it is important that, when applying Article 101, EU competition authorities do not unduly discourage the adoption of selective distribution systems aimed at preserving the image and value of brands.

In this perspective, the Report should not convey the idea that the approach to selective distribution agreements is becoming stricter than the one resulting from the current VBER and Guidelines on vertical restraints.

The Preliminary Report recalls that, under the case-law, selective distribution agreements fall outside the scope of Art. 101(1) when the three requirements set out in *Metro* are met (i.e. objective qualitative criteria are applied uniformly and with no discrimination and, moreover, are necessary and proportionate in relation to the characteristics of the product in question) (§224). Moreover, the Preliminary Report recalls that both qualitative and quantitative selective distribution agreements are exempted by the VBER as long as the market shares of the parties do not exceed 30% and none of the hardcore restrictions listed in Article 4 of the VBER are present (§225).

It would be useful to specify that, as indicated in section of the Guidelines on vertical restraints dedicated to selective distribution, “the market position of the supplier and of its competitors is of central importance in assessing possible anticompetitive effects”, as the loss of intrabrand competition can only be problematic if interbrand competition is limited or when cumulative effects entail the risk of a significant impact on the parameters of competition.

On the contrary, making the legitimacy of selective distribution arrangements pursuant to competition rules depend only on the assessment (by competition authorities or courts) of whether the selection criteria are justified by the nature of the product, independently of an analysis of the economic and legal context and of the counterfactual, would unduly increase legal uncertainty in this area.

In the same perspective, as already pointed out, the scenario of a withdrawal of the benefit of the Block Exemption should be considered only when there is clear evidence of an appreciable adverse impact not only on intrabrand competition but more broadly on the market.

4.4 Territorial restrictions

The Preliminary Report indicates that the majority of manufacturers sell their products in all Member States. On the other hand, 36% of retailers are not selling cross-border and 38% of retailers collect information on the location of the customer in order to implement geo-blocking measures. Although in the majority of cases geo-blocking measures are the result of unilateral business decisions by retailers, 12% of the retailers who responded to the questionnaire report the existence of contractual cross-border sales restrictions.

As a complement to the application of competition rules, in order to ensure better access for consumers to goods across the EU, within the DSM Strategy the Commission has also presented the proposal of a regulation on geo-blocking and other forms of geo-discrimination. This proposal directly aims at preventing geo-blocking, understood as limiting cross-border access to online interfaces, independently of whether geoblocking is the result of a unilateral measure or of an agreement. Moreover, the proposed regulation sets a prohibition on geo-discrimination, preventing undertakings from applying different general conditions of access to goods related to

the customers' nationality, place of residence or place of establishment whenever the customer arranges for cross-border transport of the good. Indeed, for goods not delivered cross-border by the trader or on his behalf, two of the main reasons for geo-discrimination are not at stake, i.e. there is no need to register for value added tax in the Member State of the customer and to arrange for the delivery of the product. The regulation on geo-blocking, in combination with the legislative proposal for more efficient parcel delivery services, will entail for both online and offline traders stronger competition from online sales, although traders remain free to direct their activities at different Member States with targeted offers and differing terms and conditions, including through the setting up of country specific online interfaces.

When restrictions result from vertical agreements, Article 101 and the VBER remain applicable. Restrictions of active sales are therefore admissible when the conditions set forth in the VBER are met; on the other hand, undertakings should avoid including in their agreements restrictions which are considered hardcore pursuant to Article 4 of the VBER.

Importantly, the Preliminary Report indicates that the reasons for charging different prices when selling cross-border include different tax regimes, costs and product demand, as well as different competitive pressure in other markets (§350).

Moreover, the Report acknowledges not only that cross-border sales restrictions may be motivated by the suppliers' interests to ensure price discrimination in different Member States, but also that the impact of price discrimination on consumer welfare is not necessarily negative. In particular, when price discrimination allows a company to serve a market which would otherwise not be served, the impact on consumer welfare is normally positive.

In view of these considerations, it remains of the utmost importance to ensure that the application of Article 101 to agreements entailing territorial restrictions does not unduly impede price discrimination and the related constraints on arbitrage between Member States when, in the economic and legal context, price discrimination has not a negative effect on overall consumer welfare.

4.5 Restrictions to sell on online marketplaces and on the use of price comparison tools

The Preliminary Report acknowledges the importance of online marketplaces and of price comparison tools as powerful instruments to reach a large number of customers.

For marketplaces, it would be useful to more clearly distinguish between pure marketplaces (i.e. sites hosting retailers) and marketplaces acting directly as retailers (which, therefore, cannot be involved in a selective distribution system if they do not fulfil the selection criteria for retailers).

As to the reasons why some manufacturers may want to restrict the ability of their retailers to sell through marketplaces, undertakings, in particular luxury brands, underline that, although some marketplaces have made efforts to improve protection against counterfeiting, in practice for manufacturers the activity aimed at detecting and taking down counterfeit products on marketplaces still entails huge costs and dedicated resources. Moreover, the procedure to take down the counterfeit products is complex and does not adequately protect the reputation of the branded products. Therefore, in assessing whether contractual restrictions on the use of marketplaces are justified in a specific case, competition authorities should take into account that, so far, concerns relating to the costs of fighting against counterfeiting are still relevant.

One of the most important conclusions drawn by the Preliminary Report is that restrictions on the use of marketplaces cannot be equated to a prohibition to sell via the internet and therefore cannot be considered hardcore restrictions pursuant to Article 4 of the VBER (§472), although they may be found in breach of competition rules in specific cases (when the market shares exceed the thresholds of the VBER or in case of withdrawal of the benefit of the block exemption). Implicitly, this is also the case for restrictions on the use of price comparison tools, which do not represent a distinct online sales channel.

4.6 Price setting at retail level

The Preliminary Report points out that the consequences of the growth in e-commerce include increased price transparency and competitive pressure on prices.

As to the legal framework, fixed and minimum resale prices are hardcore restrictions, not covered by the VBER; moreover, an individual exemption, pursuant to Article 101(3), is more a theoretical than an actual possibility. On the other hand, in the current environment recommended prices are considered an essential instrument in the distribution strategy of most branded products, with the aim to ensure that the prices established by retailers are consistent with the image and value of the brands.

The proper treatment of RPM under competition rules has been hotly debated in the subsequent revisions of the vertical block exemption regulation, since competition concerns related to RPM, in particular the risk of collusion between manufacturers and/or retailers, vary depending on the features of the market and may not be significant in presence of strong interbrand competition.

We suggest to discuss again, in the next revision of the VBER, whether the current approach to vertical price restrictions in the EU is adequate or should be reconsidered. An alternative which might be contemplated is the shift to a structured approach, aimed at ensuring a better focus on resale price agreements with an appreciable impact on competition.

4.7 Parity agreements

The results of the Sector Inquiry indicate that, depending on the circumstances, parity agreements may have anticompetitive effects, but also efficiency justifications (for instance with reference to the need to recoup investments by the marketplace and to avoid free-riding). Therefore, the Preliminary Report properly suggests that parity clauses have to be analysed and assessed on a case-by-case basis.

5. E-commerce in digital content

For digital content, the Sector Inquiry makes a comprehensive analysis of the features of current licensing practices, aimed to understand both the reasons of contractual arrangements between right holders and providers of online digital content services and to identify potential competitive concerns.

The analysis points out that licensing contracts often include exclusivity clauses and have a limited scope in terms of territory, release windows and technologies. The

Preliminary Report focuses in particular on geographic restrictions which may make it more difficult to obtain access to digital content across the EU and on features, such as the duration of exclusive relationships, the bundling of rights and payment structures, which may represent potential barriers to entry.

The Sector Inquiry must be viewed within the broader context of the DSM Strategy which has, among its aims, the objective to facilitate access by citizens to digital content across the EU.

A crucial issue in this area is whether the ability of stakeholders to exploit online copyright protected content on a territory by territory basis should be eliminated, restricted or instead preserved because it may have efficiency enhancing effects with a positive impact on consumers.

Economic studies indicate that territorial licenses may allow the parties in vertical agreements to control for harmful externalities. Moreover, due to the importance of sunk costs and the short life of products in both the music and the audiovisual industries, the possibility to price discriminate between Member States can be essential to ensure the viability of business models and preserve the dynamic incentives to invest in the production of creative content.[1]

For these reasons, the ongoing legislative initiatives by the European Commission in the area of copyright only include narrowly circumscribed limitations to the ability of undertakings to use territorial restrictions (see the proposal of regulation on the cross-border portability of online content services; the clearly limited scope of the draft regulation on online transmissions and retransmissions; the choice not to include- at least for now- copyright protected content in the scope of the proposal of regulation on geoblocking). The European Parliament, in its resolution of 19 January 2016 “Towards a Digital Single Market Act”, has acknowledged that indiscriminately promoting the issuing of mandatory pan-European licenses should be avoided since it could lead to a decrease in the content made available to users.

For the same reasons, competition authorities should follow a cautious approach in the application of Article 101 to territorial restrictions in this area, always considering the

[1] See in particular the CRA Study on Economic Analysis of the Territoriality of the Making Available Right in the EU, prepared for DG Markt, 2014.

concrete impact of removing existing restrictions to cross border online access to digital content on the viability of business models. The ultimate aim should be to ensure that consumers have better access to digital content across the EU and to foster innovation, while preserving rightholders incentives to invest in the production of new content and thus the availability of contents for consumers.

The Sector Inquiry can provide an important contribution to a better understanding of the extent to which the existing features of licensing contracts cannot be overturned without jeopardizing the viability of business models.