



**Computer & Communications  
Industry Association**

**Tech Advocacy Since 1972**

# **CCIA<sup>1</sup> Response to the Public Consultation on the Preliminary Report on the E-Commerce Sector Inquiry**

**18 November 2016**

## **Introduction**

CCIA has welcomed the sector inquiry and the Commission's aim to get more information on how e-commerce markets work and evolve. We were particularly delighted to see that the sector inquiry is not an exercise conducted in a policy vacuum, but that its aim is also to inform and support the policy objectives of the Digital Single Market (DSM) strategy -- one of the flagship initiatives under the current Commission.

We appreciate the opportunity to comment on the preliminary report. While the report rightly sheds light on a variety of restrictions found in e-commerce, we will limit our comments to the report's findings, and to a certain extent conclusions, as regards restrictions to sell on online marketplaces (Chapter B, Heading 4.4). These restrictions, particularly blanket prohibitions of sales via online marketplaces, are hotly debated across Europe and will also be subject to legal scrutiny in front of the Court of Justice of the EU (CJEU) in the currently pending *Coty Germany*<sup>2</sup> case.

In light of the growing trend among manufacturers and brands to put in place contractual restrictions to online commerce, these 'online marketplace bans' (OMBs) are of critical relevance to online sellers as they heavily rely on marketplaces to sell products in their home market as well as beyond. Given the growing importance of marketplaces for e-commerce, we think it is more appropriate to characterize online marketplace bans as a 'hardcore restriction' under EU competition rules.

Our comments will first discuss the economic impact of OMBs. This will be followed by a legal analysis of blanket or *per se* OMBs under current competition rules. That analysis will

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<sup>1</sup> The Computer & Communications Industry Association (CCIA) is a non-profit membership organisation that represents the interests of a wide range of companies in the Internet, technology and telecoms industries. We advocate for open markets, open networks and full, fair, and open competition. Our full membership can be viewed here: <http://www.ccianet.org/about/members/>

<sup>2</sup> Case C-230/16 [pending].

naturally be made against the background of the pending *Coty Germany* case since the CJEU is asked to give guidance on questions that are very close to the discussion of OMBs in the preliminary report. In the conclusion we will highlight that the discussion around OMBs goes far beyond the correct legal approach -- it is ultimately about deciding on the openness and inclusiveness of competition among online sellers.

## **Economic Impact of Online Marketplace Bans**

Online marketplaces have become an important distribution channel, particularly for SME distributors. The preliminary findings of the sector inquiry confirm this point. It is estimated that by 2018 up to 40% of all online commerce will take place over online marketplaces.<sup>3</sup> Online marketplaces offer up-to-date technological expertise, help thousands of merchants better market their inventory, efficiently manage customer support and offer a trusted consumer shopping experience. OMBs have multiple detrimental effects:

### **1. Micro- and Small- and Medium-Sized Enterprises Suffer the Most**

As also shown in the preliminary report, particularly SME sellers rely on open marketplaces because as platforms they effectively aggregate consumer demand. While sellers are not prevented from selling through their own websites, they can only drive traffic through investing into advertisement or search engine optimization (SEO). Both options are often too costly and do not provide an adequate substitute for an online shop on a marketplace. For some sellers, OMBs effectively amount to a general online sales ban.<sup>4</sup> This is particularly true for sellers from remote areas who cannot offset their online income loss with sales from their physical establishment as well as for sellers who simply do not have their own website.

### **2. Cross-border Trade is Strongly Impeded**

Online marketplaces make the Digital Single Market a reality today: they drive cross-border trade. For example, 93% of small businesses using the eBay marketplace in the EU export reaching on average 18 countries annually.<sup>5</sup> In contrast, on average 26% of 'traditional' firms export. OMBs therefore significantly impede sellers' ability to find customers beyond their home market.

### **3. Price Competition is Harmed to the Detriment of Consumers**

Online marketplaces are typically vibrant and highly competitive selling platforms. That is because consumers are easily able to compare offers and prices. This price transparency fosters strong inter- and intra-band competition which exerts downward pressure on prices. Prohibiting the sale of products through marketplaces reduces price transparency which reduces price competition. This ultimately results in consumer loss.

### **4. European Sellers Can't Access the 'Mobile Consumer'**

Together with the wider trend in the digital economy e-commerce moved mobile. Convenience-oriented customers increasingly shop through mobile devices. It is difficult for

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<sup>3</sup> eCommerce Foundation (2016). The Rise of Global Marketplaces. Available at: [https://www.ecommercewiki.org/Prot:The\\_Rise\\_of\\_the\\_Global\\_Market\\_Places\\_Online\\_Version.pdf](https://www.ecommercewiki.org/Prot:The_Rise_of_the_Global_Market_Places_Online_Version.pdf)

<sup>4</sup> BKartA decision in AS/CS of 26.08.2015, B2-98/11, para. 559. Available at: [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.pdf?__blob=publicationFile&v=3)

<sup>5</sup> eBay (2015). Empowering People and Creating Opportunity in the Digital Single Market. Available at: [http://www.ebaymainstreet.com/sites/default/files/ebay\\_europe\\_dsm\\_report\\_10-13-15\\_1.pdf](http://www.ebaymainstreet.com/sites/default/files/ebay_europe_dsm_report_10-13-15_1.pdf)

SME sellers to reach the 'mobile customer' other than through online marketplaces that run successful and trusted apps. OMBs effectively prevent sellers from benefiting from the latest technology shift: the move to mobile.

### **5. Cumulative Effects Magnify the Negative Impact**

The effect of OMBs is often intensified by the simultaneous imposition of such practices by several producers in a respective market. The purpose is to move online sales to independent websites and offline channels where pricing is less transparent and less competitive. The cumulative effect of OMBs significantly reduces inter-brand competition which ultimately harms consumers.

To a certain extent these points were also reflected in the preliminary report. As competition enforcement action as well as competition policy must necessarily be based on solid economic fundamentals, these points remind us that OMBs are about the chances of smaller resellers to effectively compete. Unjustified marketplace restrictions have the most detrimental effect on SME sellers, reduce price transparency and competition, and deprive consumers of greater choice.

### **The Need For A Different Legal Approach**

It goes without saying that it is impossible to discuss the Chapter on marketplace sales restrictions in the preliminary report without regard to the questions put in front of the CJEU in *Coty Germany*. The German referring court has in essence asked the CJEU to provide clarity on the proper legal characterization of blanket OMBs under EU competition rules which has, admittedly, remained disputed to date. Against the background of the questions raised in *Coty Germany*, we would like to contribute to the Commission's legal analysis (Chapter B 4.4.8) of marketplace restrictions. We hope our contribution will lead to a more nuanced discussion in the final report.

### **The Incompatibility of Absolute OMBs with Art. 101(1) TFEU**

As the law currently stands, we do not see how *per se* OMBs are compatible with EU competition rules. Provided that the characteristics of the product in question necessitate a selective distribution network in order to preserve its quality and ensure its proper use in the first place, **established case law states that manufacturers' distribution criteria must not go beyond what is necessary -- i.e. they must be proportionate.**<sup>6</sup>

While we do not object to legitimate distribution criteria, settled competition law requires every qualitative criterion to be necessary and proportionate to preserve the quality of the product in question and to ensure its proper use. It is difficult to see how a general and absolute OMB would fulfil these legal requirements. The legitimate aims of a manufacturer may be satisfied by laying down conditions for the sale via third-party marketplaces that are more proportionate than a blanket OMB. First and foremost, the manufacturer can still require the reseller to fulfil the *proportionate* qualitative criteria when using third-party platforms. Online marketplaces have significantly evolved in recent years to meet justified quality requirements.

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<sup>6</sup> Case C-439/09 *Pierre Fabre*. Judgment of 13.10.2011, para. 41.

Likewise, the aim to avoid an alleged risk of consumer confusion about his contractual partner's identity (i.e. the authorized reseller or the platform operator) may not serve as a justification for an absolute ban because such intention would neither aim at *preserving the quality* of the contract goods nor at *ensuring their proper use*. In addition, it is in no platform's interest to confuse their customers. Various transparency measures are standard practice among at least the industry leaders. In any case, a blanket OMB is excessive and can consequently not be justified.

### **Absolute OMBs as a Hardcore Restriction under the VBER<sup>7</sup>**

The preliminary report states that the Commission does not consider absolute OMBs as a hardcore restriction under the VBER. Even though the pending *Coty Germany* case will inevitably provide more clarification on that issue, we submit that there are strong legal reasons to consider these kind of blanket restrictions as 'hardcore' under both, Art. 4(b) and 4(c) VBER. This view is also found in academic writing.<sup>8</sup>

The general prohibition on involving visible third-party platforms catches in particular online marketplaces with a wide consumer reach. Such a prohibition constitutes a significant restriction of resellers in their opportunities to reach a greater number and variety of customers. The Commission Guidelines on Vertical Restraints make clear that the use of the Internet, going beyond a mere right to set up an independent website, is a powerful tool to create these opportunities.<sup>9</sup> At the same time resellers' opportunities to passively sell to end users who are looking for products on online marketplaces on their own initiative are restricted. Both restrictions are classified as 'hardcore' under Articles 4(b) & (c) VBER and hence fall foul of competition rules. Because online marketplaces are a key distribution channel for a great number of resellers, manufacturer-imposed OMBs are a *significant* restriction of internet sales. Importantly, Article 4(c) VBER does not require a restriction of *all* sales via a certain distribution channel like the internet -- it is sufficient that the restriction constitutes a significant limitation of sales over the internet.<sup>10</sup>

As discussed above, blanket OMBs cannot be regarded as a quality requirement either.<sup>11</sup> They lack a link to concrete qualitative requirements for the manner of online distribution and are therefore excessive.

Importantly, **manufacturers should not be able to rely on the 'logo clause' in the last sentence of paragraph 54 of the Commission Guidelines on Vertical Restraints to change this finding.** The logo clause needs to be read in conjunction with the preceding sentence of paragraph 54 according to which suppliers may require its distributors to "use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributor's use of the internet." In other words, it is legitimate for a supplier to require that its authorized resellers

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<sup>7</sup> Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (VBER).

<sup>8</sup> See e.g. Ezrachi, A. (2016). The Ripple Effects of Online Marketplace Bans. Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2868347](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868347)

<sup>9</sup> European Commission Guidelines on Vertical Restraints (2010/ C 130/01), para. 52.

<sup>10</sup> See BKartA decision in AS/CS of 26.08.2015, B2-98/11, para. 534.

<sup>11</sup> See BKartA decision in AS/CS of 26.08.2015, B2-98/11, paras. 46 & 577 et seq.

maintain a consistent quality of online presentation of the products concerned, irrespective of whether a reseller uses his own website or a third-party marketplace.

If the logo clause were to be interpreted as allowing the imposition of a blanket OMB, it would clearly go beyond the proposition in the preceding sentence unless it can always be assumed that *any* sale on *any* third-party marketplace will always and necessarily fail to meet *any* supplier's conditions for online sales. This interpretation would not only be illogical, but also contrary to the overall approach of the VBER and the Guidelines on Vertical Restraints which view undue discrimination against online retail as a hardcore restriction of competition.

In our experience manufacturers excessively rely on the 'logo clause' to justify the imposition of blanket OMBs on authorized sellers using any online marketplace to reach customers, irrespective of the substance of their criteria for online sales or the quality of the sales experience provided. **The anti-competitive intent of some manufacturers becomes most clearly visible when OMBs are maintained where a marketplace offers a high quality retail environment that has been approved for sales of the same product on a linked retail site that shares its essential characteristics.** The 'logo clause' does not justify *per se* OMBs affecting *all* online marketplaces -- it should rather be understood to apply to *specific* marketplaces that have a clear detrimental effect on brands.

Furthermore, we would also like to point out that a general and absolute OMB together with a broad interpretation of the 'logo clause' is contrary to the principle of equivalence that online and offline sales channels must be treated equally. No requirement for stationary trade amounts equivalently to the intervention in online distribution stemming from absolute OMBs.

In conclusion, blanket OMBs are a hardcore restriction of competition by restricting the customers to whom a reseller may sell the contract goods and by restricting passive sales to end users. **Distribution restrictions in selective distribution systems must be based on criteria that are qualitative, objective, non-discriminatory, reasonable and necessary. The benefits of these systems must also outweigh the restriction of intra-brand competition.** Blanket OMBs affecting all marketplaces are incompatible with these principles.

### **Selective Distribution Aimed to Maintain a Luxury Image**

Finally, we would also like to submit our observations as regards manufacturers' aim of maintaining a luxury image for their products. As mentioned in the preliminary report, selective distribution systems and absolute OMBs are often imposed to achieve that aim. We would like to emphasize that the aim of maintaining luxury image does not justify anti-competitive conduct. In the *Pierre Fabre* ruling, the CJEU held that the "aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU".<sup>12</sup>

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<sup>12</sup> Case C-439/09 *Pierre Fabre*. Judgment of 13.10.2011, para. 46.

Importantly, in *Pierre Fabre* the CJEU did not merely address the proportionality of the *specific* contractual clause in question. The Court rather addressed the general permissibility of protecting a luxurious and prestigious image as a legitimate aim to restrict competition. First, the Court solely refers to the question of *legitimate aim* which it generally negates with regard to protecting a luxurious and prestigious image without making any reference to the proportionality of the contractual clause in question. Second, the task of assessing the specific contractual clause was left to the national referring court. The CJEU accordingly ruled on the *general* legality of protecting a luxurious image as a legitimate aim to restriction of competition under Art. 101(1) TFEU.

We would also like to highlight that selective distribution systems are increasingly used by manufacturers and brands for everyday products, clearly with a view to avoid price competition rather than to protect a 'luxury image'.

## **Conclusion**

So far the debate on absolute OMBs has primarily been about the correct legal approach. It is an important debate and we remain convinced that these restrictions should be subject to greater competition law scrutiny. We consider them as anti-competitive and as a hardcore restriction under the VBER.

However, OMBs must also be seen in the proper economic context. The preliminary report clearly established that marketplaces are particularly important for smaller sellers. Very often marketplaces enable SME sellers to effectively compete with their larger competitors. Against that background, dealing with blanket OMBs is very much about more openness and inclusiveness in our online retail economy.

It is also about making sure we will have vibrant competition in e-commerce in the future. The shift to mobile devices has made marketplaces even more important for sellers. Marketplaces' successful and popular apps ensure that sellers reach the mobile customer. Absolute OMBs *de facto* exclude sellers from this technological wave as they will more than struggle to develop a successful app for mobile devices.

It is in tune with the Commission's DSM goals to support a thriving SME landscape and to make sure small businesses have easy access to retail markets. Online marketplaces play a key role in that they make Europe's single market a reality today. OMBs impede these policy goals and hinder greater price competition to the detriment of consumers. They also make it more difficult for European innovators to develop home-grown marketplace businesses.

We appreciate the opportunity to provide our comments on this important matter and are happy to answer any further questions.

Respectfully submitted,

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