

# Europe's digital single market and competition law

The European Commission ('EC') and the national competition authorities of the Member States ('NCAs') have identified 'digital markets' as a key area for policy development and enforcement. New Competition Commissioner Margrethe Vestager has, for instance, already emphasised her commitment to utilise available powers to foster a well-functioning digital single market. Becket McGrath, Partner at Cooley (UK) LLP discusses the EC's plans as well as the wider context and activity at NCA level in the UK.

While it may be increasingly hard to distinguish the digital economy from the economy as a whole, the EC and the NCAs have recently latched onto so-called 'digital markets' as a key focus for policy development and enforcement. There is nothing inherently suspect about the way in which digital markets operate, from a competition law perspective, and the differences between individual digital markets may be much greater than any similarities. That said, there are some common themes. For example, the disruptive nature of much digital innovation can stir up resistance from established players whose businesses were developed on the basis of a different historic model and this resistance may manifest itself in calls for regulatory or political intervention against technology companies. In addition, the virtually borderless nature of the internet has led to it being viewed by the EC as a key ally in breaking down national barriers to trade that have proved surprisingly persistent in the 'old economy'. The appointment of a new and more overtly political EC, keen to

respond to pressure from voters battered by the economic crisis to prove the value of the EU to them, has resulted in the emergence of the 'digital single market' as a key policy goal. As well as unleashing a wave of policy initiatives, this development is having a tangible impact on competition enforcement at the European level. At the same time, the penetration of digital delivery methods into ever more areas of the economy looks destined to lead to continued activity by NCAs at the Member State level.

When launching his candidacy for EC President last summer, Jean-Claude Juncker identified the creation of a connected digital single market as one of his key policy objectives. Once in office, President Juncker followed through on his vision, confirming an immediate objective of developing a digital single market strategy for the EC by May 2015. The President also demonstrated the importance attached to this objective by creating a new Vice President post with specific responsibility for the digital single market, to which he appointed former Estonian Prime Minister Andrus Ansip. As well as working closely with the Commissioner for Digital Economy and Society, Günther Oettinger, it appears from the EC's structure chart that Vice President Ansip will work on digital single market issues with a 'cluster' of as many as 12 fellow Commissioners to develop policy in this area.

The policy behind this objective is now starting to take shape. On 25 March 2015, the EC announced a wide-ranging list of initiatives that it proposes to address in more detail in May's main 'Digital Single Market Strategy' document. The proposed initiatives are grouped under three 'areas of action,' comprising: (1) providing 'better access for consumers and

businesses to digital goods and services,' for example through the facilitation of cross-border e-commerce, tackling 'geo-blocking' (the practice of redirecting visitors to a different website according to their location) and modernising copyright law to 'improve people's access to culture'; (2) 'shaping the environment for digital networks and services to flourish'; and (3) 'creating a European Digital Economy and Society with long-term growth potential.'

Given the powerful enforcement tools provided to her by EU competition law, it is no surprise that the new Competition Commissioner, Margrethe Vestager, was listed in the EC's press release announcing these areas of action as a 'main contributor' to the first two. Indeed, Commissioner Vestager lost little time in demonstrating how she intends to implement the Commission's strategy in her own area of competence. Just a day after the 'areas of action' announcement, Commissioner Vestager took the opportunity presented by a conference speech in Berlin to emphasise her commitment to use the EC's competition enforcement powers to help create a well-functioning digital single market, in particular through the promotion of cross-border e-commerce.

The Commissioner summarised her overall objective as being that "European consumers should be able to access goods, content, and other services no matter where they live and travel in Europe." Becoming more specific, she raised concerns over restrictions on cross-border sales of physical and digital products, highlighting practices that, for example, prevent a French consumer from purchasing shoes from an Italian website or that prevent a Danish consumer (i.e. the Commissioner herself) from

accessing Danish television programmes over the internet when in Belgium. While acknowledging that the Vertical Agreements Block Exemption Regulation ('VABER') and accompanying Guidelines already provide a legal framework for the analysis of distribution agreements, the Commissioner expressed dissatisfaction with the current state of affairs and promised to "put flesh on the bones" of this framework by taking forward enforcement cases and by increasing the EC's understanding of digital markets.

On the enforcement front, the Commissioner mentioned in her speech that her staff are currently investigating licensing contracts between US film studios and large European broadcasters; clauses in subscriber pay-TV contracts that limit access to programming outside the subscriber's home territory; pricing and trade restrictions affecting online sales of consumer electronics; and allegations of geo-blocking of online PC game sales. Despite the range covered by these cases, it appears that they will not lead to sufficiently 'systematic' knowledge to satisfy the Commissioner, however, she also announced in her speech that she is proposing that the EC launch a full sector inquiry into e-commerce.

Sector inquiries provide the EC with a means of undertaking a wide-ranging investigation of an entire sector of the economy 'where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted' within the internal market (Article 17 of Regulation 1/2003). While (unlike the UK's market investigation regime) the EC does not have the power to impose remedies on the basis of a sector inquiry, its

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conclusions can lead to enforcement action under Articles 101 or 102 of the Treaty on the Functioning of the European Union ('TFEU') or other measures such as legislative initiatives.

The EC has provided limited detail on the proposed scope of the inquiry, simply stating in a press release that it 'will focus on private - and in particular contractual - barriers to cross-border e-commerce in digital content and goods' and that 'knowledge gained through the sector inquiry will not only contribute to enforcing competition law in the e-commerce sector but also to various legislative initiatives which the Commission plans to launch to boost the Digital Single Market.' Given the broad scope of this sector inquiry, it is not surprising that, although the Commissioner plans to put the proposal to the College of Commissioners in May, she does not expect to publish the team's preliminary findings until mid-2016. It is interesting in this context to note that the organogram of the EC's Directorate General of Competition has already been updated to reflect the creation of a Digital Single Market 'Task Force,' which is presumably intended to ensure that the EC's work in this area is sufficiently coordinated and supported by adequate resources.

It is clear that the NCAs will not want to leave things entirely to the EC. For example, the UK Competition and Markets Authority ('CMA') has been pursuing a number of cases concerning online sales, including investigations into restrictions on the online sale and advertising of mobility scooters that led to two infringement decisions, and an investigation into pricing restrictions affecting online hotel booking sites, which led to a commitments decision that was

subsequently overturned on appeal. In its Annual Plan for 2015/16, which was published this March, the CMA listed 'online markets and the digital economy' and 'emerging sectors and business models' as two of its six 'strategic themes' in the year ahead. The accompanying Strategic Assessment document provides further detail, including an indication that 'restrictions in competition in online distribution of goods' and 'antitrust issues raised in internet ecosystems' are 'areas of interest.' In the same document, the CMA confirmed that it is working on a research project 'to identify sectors of the economy where online commerce is developing more slowly than might be expected.'

In January 2015, the CMA kicked off a project examining the use of vertical restraints by businesses with a roundtable meeting with stakeholders. While this project is not limited to online sales restrictions, these are likely to be a key focus (as they were when the Commission last reviewed the VABER and Guidelines in 2009-10). Later the same month, the CMA issued a 'call for information' about the commercial use of consumer data, with a view to assessing the extent to which companies' collection and use of such data may raise competition or consumer protection concerns. In February, the CMA issued a further call for information, this time relating to the use of online reviews and endorsements and, in particular, the risk that consumers may be misled by review sites and blogs.

It is too early to tell how much of this frenzy of activity will lead to concrete action, whether at the EU or Member State level. At the EU level, it does seem that the new EC is determined to break from the situation under its predecessor,

which saw grandly worded digital single market initiatives being frustrated by rivalry between different Commissioners with overlapping (and often conflicting) responsibilities and by a lack of political will on the part of Member State governments to grapple with the complex task of reforming copyright law. Indeed, it seems likely that the new structure of the EC, as well as its more overtly political mandate, are specifically designed to avoid such issues in the future. That said, challenges clearly remain once one looks beyond the EC's rhetoric.

The legal questions raised by the imposition of restrictions on the cross-border sale of physical products are relatively familiar. While it is clear that a supplier that seeks to impose an outright ban on resellers using the internet to sell its products is likely to infringe European competition law, suppliers are entitled to prohibit resellers from actively targeting consumers located in a territory that has been allocated to another reseller on an exclusive basis or to limit access to a selective distribution system by the application of objective criteria. There is also no law that requires a retailer to sell its products throughout the EU, if it would rather focus its sales efforts on its home territory.

Turning to restrictions on the sale of digital products, the picture becomes still more complex due to the key role of copyright law. The exclusive right of a copyright owner to authorise the distribution or sale of its protected works gives rightsholders a high degree of control over their commercial exploitation. This has, for example, enabled content creators (such as movie studios or sports leagues) to license the right to exploit their works on an exclusive basis to the highest bidder and to do so along

strictly national lines. While this exploitation model has arguably ensured maximum remuneration for content creators, it relies on the ability to limit access across territorial boundaries, which can conflict with the 'single-market imperative' of EU law.

This conflict has been largely resolved for the distribution of copyright material on physical products through the development of the exhaustion doctrine, which provides that a copyright holder may no longer restrict distribution of a physical product (such as a book or CD) once it has been placed on the European market with its consent. This doctrine does not apply for purely digital products, however, since consumers typically acquire either a right to make and access a copy of a work for their own use or to view a streamed copy. As a result, consumers may be prevented from accessing digital copies of copyright protected material, such as television programming, over the internet on a cross-border basis. The increasing migration from physical to digital distribution of copyright products (e.g. from DVDs to 'over the top' video streaming services) means that the disparity in usage rights is becoming more and more evident to consumers seeking to access familiar content when travelling (whether they are holidaymakers or European Commissioners) and hence a target for an EC keen to prove the value of the EU for consumers.

To date, a lack of concrete initiatives from the EC in this area has arguably contributed to *ad hoc* law making by the European courts, as seen for example in the *Karen Murphy* case<sup>1</sup>. In its judgment in that case, which condemned restrictions on the importation of pay-TV decoders between EU Member States as

contrary to EU competition law "by their very nature," the Court of Justice of the European Union ('CJEU') paid little attention to the question of whether the underlying territorial exploitation model for such broadcasts might be legitimate or efficient. Indeed, it saw this model as part of the problem. In making such a decisive move away from previous case law, which broadly recognised the ability of rightsholders to restrict cross-border exploitation to protect their commercial interests, the Court created significant legal uncertainty for rightsholders across a wide range of industries that rely on copyright.

As noted above, the EC has now promised to 'modernise' copyright law, as well as bringing a number of competition cases against rightsholders. While the EC has expressed a desire to 'ensure the right balance between the interests of creators and those of users or consumers' it is not yet clear how this will be achieved, given these groups' divergent interests. So far, the early comments of Commissioners suggest a degree of scepticism towards national rights exploitation models and a preference for consumers over creators. As a result, it is unsurprising that the representatives of significant rightsholders, such as publishers and television producers, are now mobilising to head off initiatives that threaten to overturn their established business models. How all these initiatives will play out remains to be seen but it should certainly make for interesting viewing.

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