

Opportunities in Online Goods and Services: Issues paper

The European Union aims to create a competitive single market, where consumers throughout the Union can choose freely among products and services, regardless of national borders. The internet has tremendous potential to help to achieve that aim and it has already helped in many ways. But some Commission competition cases – such as the recent iTunes case - have cast doubt on whether the opportunities provided by the internet are being fulfilled or are hindered by barriers created in the off-line world without consideration of their on-line effects.

Consumers and businesses are also publicly questioning developments in these markets, and, where they believe the opportunities of the internet are not being fulfilled, they are calling on the European Commission to act.

European Competition Commissioner Neelie Kroes decided to establish a group of advisers from a range of business and consumer interests to collaborate on a report providing information on these and other online market issues. On the basis of this report, Commissioner Kroes will decide whether to support further regulation, deregulation or competition law enforcement.

This group therefore gathers world leaders from business and consumer organisations to analyse whether opportunities exist for greater online provision of goods and services to consumers in the European Union.

Organisation of the Group and Final Report

The group will be chaired by Mr Ben Verwaayen.

The group will meet in Brussels on September 17 2008, when each member of the group will have an opportunity to respond to the issues raised. Mr Verwaayen will circulate an agenda in advance of the meeting and will chair the meeting. Following the meeting the chairman will summarise the consensus view of the group and any other points of relevance, and draw up a final report. That report will be submitted to Commissioner Kroes within one month of the meeting.

Each group member may supplement their comments during the meeting with an additional paper on behalf of themselves or their organisation; this paper must be submitted no more than one week following the meeting. These papers will be included as annexes to the final report.

The final report and annexes will be published on the European Commission website by the end of October 2008.

Commissioner Kroes will participate in the Brussels meeting, and if participants have additional points to make which for commercial reasons they would prefer to make confidentially they will have an opportunity to do so on the day of the meeting or shortly afterwards.

I. Overall Remit

For each of copyrighted¹ and non-copyrighted products,² the group is asked to consider:

- the opportunities for further growth in these markets in countries where online provision is or is not already available, together with the opportunities for new products, services and distribution methods;
- what barriers exist or are likely to exist that would stop consumers from benefitting from these opportunities.
- the solutions to overcome such barriers.

Opportunities may include increasing sales of existing products or services, expanding products or services into countries not currently served, bringing new products and services to market, or introducing new distribution methods.

Barriers may take a variety of forms, including, but not limited to: regulatory provisions permitting or requiring geographic market partitioning , regulatory provisions preventing or impeding the online provision of goods or services, contractual restrictions on distributors, legal uncertainty, lack of consumer trust in the security of payment systems, high internet access charges, and any limits on the availability of delivery options.

Solutions may take the form of a simple continuation of the competitive process between firms, changes to the regulatory environment, or refinements to the interpretation of the competition rules.

II. Specific issues in relation to the provision of copyrighted products online

One issue of concern to Commissioner Kroes is that the online provision of copyrighted content as digital data files is often limited to the territory in which the consumer requesting the service is located. The provision of the same content in a physical format is usually not subject to the same territorial limitation. In addition, the provision of copyrighted content in a physical format is clearly subject to EU competition rules on Vertical Restraints (see II. below), but the position for digital data files is less clear.

Put another way, we appear to have a more fragmented European market for the online sale of copyrighted products available in electronic format, than we do for the same content in physical format.

In any market for copyrighted works, it is also vital that consumer freedom and choice supports a robust system for the payment of rightholders and the protection of the rights granted to them.

The group is invited to consider this issue, and any others that they wish. In particular, the group could consider the impact of the following:

¹ The term copyrighted products covers the full range of copyrighted products, including books, music, television series and films, distributed through the Internet both in physical and electronic format.

² The term non-copyrighted goods and services includes any product made available over the internet for sale, rental or other commercial arrangement.

- The role of collecting societies, and of direct licensing, and whether the absence of a multi-repertoire pan-European licensing system is impeding the development of online markets;
- The need for territorial licensing of copyrighted content, and whether that need varies depending on the type of content and / or the revenue model being used;
 - Do you believe that the need for territorial restrictions varies depending on whether a copyrighted product is provided in physical format, as an electronic download, as a streaming service, or as a broadcast?
 - Do you believe that the same regulatory environment should apply to copyrighted content distributed in a physical format, as that distributed via electronic download?
 - Do you think that the 2001 Copyright Directive should be interpreted as applying a different regulatory environment to copyrighted content distributed in a physical format as compared to content distributed via electronic download?
 - Is there a justification for licensing for certain countries and not for others, even where rights-holders hold the rights for the entire European Economic Area (EEA)?
 - What, if anything, should be done to overcome or facilitate the need for commercial users to clear the rights with collecting societies in each country in which they operate?
 - What, if anything, should be done in respect of unilateral decisions not to offer services to all consumers in the EU, even where rights are available?
- The availability of new distribution models for copyrighted products.

III. Opportunities and barriers in the provision of non-copyrighted goods and services online

Absolute territorial restrictions in relation to non-copyrighted goods and services are subject to the competition rules on Vertical Restraints. The Guidelines on Vertical Restraints make it clear that "every distributor must be free to use the internet to advertise or to sell products". A restriction upon a distributor preventing passive selling of online goods/services to a final consumer located in another territory will clearly infringe the competition rules (for example restrictions on having a website and responding to spontaneous requests from customers).

The group is invited to consider these issues, and any others that they wish. In particular, the group could consider the impact of the following:

- For exclusive distribution systems (territorial exclusivity) EU competition policy distinguishes between active and passive sales. In particular, restrictions on active sales, such as restrictions on sending e-mails directly addressed to customers in the exclusive territory of another distributor, are permitted under certain circumstances.
 - Do you agree that this distinction between active and passive sales is useful in an internet context? Could you elaborate further on the criteria used for this distinction in addition to those foreseen in the Guidelines?
 - What other clarifications or changes of policy would you consider necessary or useful?
- For selective distribution systems, EU competition policy requires that selected dealers also be allowed to fully use the internet for active and passive sales, but otherwise does not generally interfere with the selection criteria the producer applies to select its dealers.
 - Do you think it is in the interest of consumers that a producer can use as one of its selection criteria that its dealers have a brick and mortar shop or showroom to taste/feel/experience the product and thus exclude internet-only-shops from its distribution network?
 - How would you ensure that the criteria used to select dealers do not bias against their use of the internet by imposing criteria for internet selling which are comparatively more severe than the criteria for sales from the brick and mortar shop?
 - How would you ensure that selective distribution systems and consequent limitations on internet sales are not used for products the nature of which does not require selective distribution?
 - How would you ensure that selective distribution systems do not hinder the development of new methods of distribution?
- The rules on Vertical Restraints are applicable to agreements between firms but are not applicable to unilateral conduct (i.e. behaviour which is decided on by an individual company and does not derive from any agreement that company has with a

third party). For example, these rules do not apply if a company directs its local subsidiary in a particular territory not to sell goods/services online to customers located in other territories in which the distribution is carried out by other subsidiaries. However, such practices can also restrict online sales and may support price discrimination between final consumers located in different territories (i.e. by re-routing the consumer to the company's website of the country where he/she is located and where prices for the same products are higher).

- Should competition law or regulation prevent such unilateral conduct, where the company has market power? What, if any, circumstances could justify such unilateral conduct?
- Should competition law or regulation prevent such unilateral conduct, where the company does not have market power? What, if any, circumstances could justify such unilateral conduct?