On 6 May 2017, the EU Commission concluded its two-year inquiry into the e-commerce sector by releasing its Final Report, whose content – particularly relevant for understanding and anticipating the attitude of the Commission and national antitrust authorities towards competitive practices in the e-commerce industry – will be covered in this article.

The e-commerce sector inquiry

On 6 May 2015, the EU Commission launched an e-commerce sector inquiry which was completed on 10 May 2017 with the publication of its Final Report on the E-commerce Sector Inquiry1 (hereafter also “the Report”). The inquiry builds on the Digital Single Market strategy document of the European Union whose essential purpose is, according to the Commission, to “...make the EU’s single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one. This could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs”2.

In fact, e-commerce has increasingly spread throughout the EU, where the percentage of e-shoppers among consumers has grown from 30% in 2007 to 55% in 20163.

The inquiry focused its attention on the most sold online products, namely consumer electronics, home appliances, video games and software, media books, CDs, DVDs and blu-ray discs, clothing and footwear, cosmetics and health products, sports and leisure equipment, home and gardening articles.

The key critical aspects identified (1): selective distribution networks and obligation to have at least one brick and mortar shop

The first relevant conclusion of the e-commerce inquiry refers to selective distribution networks. In fact, as the Commission states, against new trends such as increased price transparency and price competition sparked by the evolution of online sales, manufacturers increasingly use selective distribution systems to better control their sales network and recommended prices. At this point, for the reader’s better understanding, it may be appropriate to spend few words on this type of distribution.

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2 See: https://ec.europa.eu/commission/priorities/digital-single-market_it
Pursuant to Commission Regulation (EU) 330/2010, in force from 1 June 2010 to 31 May 2022 (hereafter the “Regulation”), EU operators can establish selective distribution networks, which enjoy some exemptions as compared to the ordinary and tighter rules of EU competition law. Like all Regulations, it is directly addressed to citizens, individuals and legal persons resident in the different Member States of the EU, and has binding status on national governments and on all authorities of each Member State, thus including national courts which are required to interpret and apply national laws in compliance with current Regulations. The Regulation concerns, with a few exceptions, only the vertical agreements between non-competing undertakings (such as, for example, the agreements between Hewlett-Packard and its distributors and not the ‘horizontal’ agreements between Hewlett-Packard and Acer, Apple and/or other competitors). These agreements benefit from the exemption provided for by the Regulation, despite certain content that would normally be prohibited, if:

- they do not contain fundamental restrictions on competition (which will be examined later),
- the market share held by the seller does not exceed 30% of the relevant market on which he sells the contract goods or services and
- the market share held by the buyer does not exceed 30% of the relevant market on which he purchases the contract goods or services.

The implementation of a selective distribution system allows, under certain conditions, to derogate from the prohibition of exclusive rights and from a number of other restrictions otherwise provided for in EU competition law, as follows:

- **Examples of clauses generally prohibited but exempted under the Regulation:**
  - Obligation for the supplier to sell the contract products only to selected retailers.
  - Obligation for the retailer to purchase the contract goods only from the supplier.
  - Prohibition for the retailers to sell to other retailers NOT belonging to the national selective distribution network, or European (if any).
  - Prohibition for retailers to actively seek customers outside the contract territory.

- **Examples of clauses that are still prohibited under the Regulation:**
  - Prohibition to sell to end users (except in the case of wholesalers).
  - Prohibition to meet unsolicited orders from end-users outside the contract territory.
  - Failure to provide the legal guarantee, if applicable, to customers not reached by the selective distribution network.

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4. “a guarantee system under which a supplier of goods limits the guarantee to customers of his exclusive distributor places the latter and the retailers to whom he sells in a privileged position as against parallel importers and distributors and must therefore be regarded as having the object or the effect of restricting competition...” (ECJ 10 Dec 1985, Case 31/85)
It is important to underline that a selective distributor cannot be prohibited from:
- selling to end-users,
- selling and buying contract products from other authorized retailers, even if their contractual area is located in other EU countries which may be covered by the selective distribution network as a whole,
- meeting unsolicited orders from customers located outside his contract territory.

The Report firstly highlights that it is not appropriate at present to review the current Regulation, but it raises a critical issue in relation to the requirement for retailers part of a selective distribution network to operate at least one brick and mortar shop; in fact, according to the Commission, where such requirement is not intended to ensure the quality of the distribution and/or brand image, it could be prohibited since not justified by the exemption Regulation. We can therefore reasonably expect a particular attention on this point from EU and national antitrust authorities, who will evaluate on a case-by-case basis – depending on the situation, whether or not such requirement is justified consistently with the circumstances referred to above.

The key critical aspects identified:
- main ‘vertical’ restrictions contained in the agreements between supplier and retailer

Table 1 shows the main vertical restrictions set out in agreements and revealed by the sector inquiry, listed in descending order by percentage incidence, regardless of whether they are lawful or not, which will be assessed below.

The percentages refer to the answers received to the questionnaires sent by the Commission to sector operators. As can be seen, the main restrictions relate to pricing (42%) and to sales on marketplaces (18%), followed at some distance by others: cross-border sales (11%), online sales (11%), use of price comparison tools (9%), online advertising (8%), others (4%).

<table>
<thead>
<tr>
<th>Pricing restrictions/recommendations</th>
<th>42%</th>
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<tr>
<td>Restrictions on selling on marketplaces</td>
<td>18%</td>
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<td>4%</td>
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5 Paragraphs (26) and (27) of the Report state: “… more than half of the manufacturers require in their selective distribution agreements, for at least part of their products, the operation of a brick and mortar shop by retailers. Most of these brick and mortar requirements seek to promote competition on distribution quality. At the same time, certain brick and mortar requirements essentially aim at excluding pure online players from the selective distribution network, without enhancing competition on other parameters than price, such as the quality of distribution and/or brand image.”
Restrictions on cross-border sales

Restrictions on online selling

Restrictions on the use of price comparison tools

Restrictions on online advertising

Other restrictions

Pricing restrictions/recommendations: (i) online price monitoring software; (ii) dual pricing

Before turning to examine the first critical issue highlighted by the Report, it is appropriate to provide some preliminary information to the reader. The Italian antitrust law (Law 287/1990, Article 2), as well as EU law (TFEU, Article 101), prohibits, inter alia, any agreements or concerted practices which aim to or have the de facto effect of “directly or indirectly fixing purchase or selling prices or any other trading conditions”.

By contrast, it is not prohibited for the supplier, not even within a selective distribution network\(^6\), suggesting to his customers the retail selling prices, provided of course that they are free to comply with it or not. The question arising in the practical application of this provision is precisely this: when is a price an actual suggested retail price (thus reflecting the supplier’s unilateral and legitimate decision which can be accepted or not) and when is it instead an imposed price (corresponding therefore to a prohibited vertical agreement between supplier and retailer)?

To give some example, the supplier who threatens to interrupt the commercial relations with retailers who do not apply his ‘suggested’ retail prices (thus obtaining compliance through constraint) or offers discounts, bonuses, co-marketing, advantageous prices or other benefits only to those retailers who comply with his suggested prices and not to those that do not apply them, violates this provision as it dictates a form of agreement with which he imposes to the retailer (or ‘maintains’) the retail prices.

Now, the first critical issue identified in the Report refers to the frequent use by both manufacturers and retailers of **pricing software to monitor online retail prices**, which use,

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\(^6\) The exemption Regulation explicitly provides for the possibility of fixing a maximum selling price that retailers must apply, but expressly prohibits to set any minimum resale price.
according to the Commission, could, on the one hand, allow manufacturers to detect retailers who do not comply with their recommended prices in order to take retaliatory measures against them and, on the other hand, facilitate collusion between the same retailers in terms of pricing. In short, the use of such software is not in itself prohibited, but it may attract the attention of the supervisory authorities and require specific evidence from the operators concerned in order to prove that the use of such tools pursues a lawful aim and, above all, that it has no adverse effects on competition.

- The second specific issue highlighted by the Report refers to dual pricing, i.e. different pricing applied by the supplier to the same ‘hybrid’ retailer (i.e. a retailer who sells both online and offline): a price for products intended to be sold online and a different one for products sold through a brick and mortar shop. This commercial practice is prohibited under the aforementioned exemption Regulation 330/2010, but such prohibition is strongly criticised by manufacturers according to the replies to the questionnaires sent out by the Commission as part of its two-year inquiry. In particular, the manufacturers argue that dual pricing is an effective tool for dealing with free-riding, and also that it may help to create a playing level field between offline and online sales since it is geared to level out the difference in the costs of investments between the two channels. The Commission seems to regard such arguments as at least partially well-founded and concludes that, while dual pricing for the same (hybrid) retailer remains prohibited, dual pricing agreements can be exempted on an individual basis, depending on the circumstances of each case and in accordance with the provisions of Article 101(3) TFEU.

Restrictions on selling on marketplaces

On the basis of the results of the questionnaires sent out to sector operators, the Report shows the growing importance of sales on marketplaces with the following figures: 90% of responding retailers sell online only through their own online shop; 31% sell through their

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7 Paragraph 11 of the Report describes free-riding behaviour as follows: “...consumers can use pre-sales services of brick and mortar shops before purchasing the product online; alternatively, consumers can search and compare products online before purchasing in brick and mortar shops. Addressing free-riding and maintaining the incentives for retailers to invest in high quality services by creating a playing level field between offline and online are key considerations for both manufacturers and retailers.”

8 See paragraph 52(d) of the Vertical Guidelines. The Vertical Guidelines however allow for a fixed fee to support actual sales efforts in the offline (or online) channel.

9 Article 101(3) TFEU sets out as follows: “3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”
online shop as well as on marketplaces; 4% sell online only through marketplaces. As to the total percentage of retailers who sell wholly or partly on marketplaces, this reaches 62% in Germany, 43% in the UK and 36% in Poland, but it remains low in other countries such as Italy (13%) and Belgium (4%).

Agreements between manufacturers and retailers often contain (in 18% of cases according to replies to the questionnaires) restrictions on the use of marketplaces that may even include an absolute ban. Such restrictions (which in the case of Germany are encountered by 32% of responding retailers and by 21% in the case of France) are generally justified by manufacturers with (i) the need to protect the branded goods and/or (ii) the need to provide suitable pre- and after-sales services.

However, antitrust authorities and courts in some EU countries (especially Germany) regard with disfavour such restrictions as, in their opinion, they would have distortive effects on competition since they would: (i) tend to exclude or restrict access to the market for smaller retailers and, moreover, (ii) undermine the consumers’ ability to compare prices and accordingly make purchases. The European Court of Justice is currently dealing with this issue, following a request for preliminary ruling from a German court10. In its Final Report, the Commission concludes that absolute marketplace bans “...are generally compatible with the EU competition rules. The Commission or a national competition authority may decide to withdraw the protection of the exemption regulation in particular cases when justified by the market”. It goes without saying that the position of the Commission is not binding on the European Court of Justice and it will therefore be necessary to await the outcome of the proceedings mentioned above.

Restrictions on cross-border sales: (i) ‘geo-blocking’; (ii) various restrictions for authorized retailers (i) Geo-blocking

The Report refers to three different ‘geo-blocking’ measures with which operators prevent the completion of cross-border sales: (1) refusal to deliver goods across borders or to accept cross-border payments (which is the system most frequently used); (2) blockage of the access to the own website to ‘foreign’ consumers; (3) automatic re-routing of ‘foreign’ consumers to other websites dedicated to other Member States.

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10 Case C-230/16. Coty Germany GmbH v Parfümerie Akzente GmbH; it should be noted that, according to Advocate General huge Wahl, who delivered his opinion on this case on 26 July 2017, “…the prohibition on authorized retailers members of a selective distribution system from selling on online marketplaces does not constitute a restriction on active or passive sales prohibited under exemption Regulation 330/2010 …”. To date (October 2017) the decision of the European Court of Justice is still pending.
According to replies to the questionnaires, the Report states that 36% of responding retailers do not sell cross-border for at least one product category they offer and that 38% collect information on the location of the consumer in order to implement, where appropriate, geo-blocking measures. In particular, 11% of retailers report to have contractual cross-border sales restrictions; despite so, only 4% of retailers supply their products in only one Member State, while all others distribute them in at least 21 Member States.

According to the Commission, such practices are lawful solely and exclusively when they are the result of unilateral decisions by non-dominant undertakings, while they are unlawful pursuant to Article 101 TFEU when they involve a concerted practice between operators, as in the case of a contractual restriction between manufacturer and authorized retailers. In addition, in the case of a selective distribution network, geo-blocking agreements, already prohibited per se, are not covered by Regulation 330/2010 examined above, as, in this case, authorized retailers must still be free (i) to sell to end-users wherever they are located and (ii) meet unsolicited requests for goods from locations outside their contract territory (so-called ‘passive sales’).

(ii) Other vertical restrictions that may be prohibited

In its Working Document\(^{11}\), the Commission mentions five types of contractual territorial restrictions on retailers/distributors\(^{12}\), sometimes not written but only orally agreed upon, emerged from replies to the questionnaires and which “may raise concerns” as they are, or could be, incompatible with EU competition law and exemption Regulation 330/2010, and on which the antitrust authorities will presumably be especially vigilant:

(1) prohibition to actively or passively sell outside the home Member State or to customers located in certain Member States;

(2) prohibition for authorized retailers to make active sales in areas located outside the home Member State even if such areas have not been allocated to other retailers or reserved to the supplier;

(3) prohibition to passively sell into territories allocated to other distributors or reserved to the supplier;

(4) limitation to the ability of authorized retailers to actively or passively sell to customers located outside their contract territory and Member State in which they operate, but nevertheless part of a selective distribution network extending to several Member States


\(^{12}\) See paragraphs (435) to (439)
(also by imposing, for example, more burdensome requirements on websites targeting other Member States than on those intended for domestic sales);
(5) in the case of a selective distribution network operating in several Member States, the appointment in one or more Member States of an exclusive distributor/wholesaler for a certain territory and the imposition of limits on the ability of the distributor to actively sell to others exclusive distributors operating in other Member States.

Use of data in e-commerce

The Report highlights an intense exchange of varied commercial data, including sensitive data on customers’ choices (for example, on prices and sold quantities), that occurs (i) between companies operating marketplaces and third parties (i.e. independent sellers, manufacturers, retailers) or also (ii) between manufacturers and authorized retailers who are often burdened with complex reporting requirements, especially in the case of category management. According to the Commission, such an exchange of personal and/or anonymous data may be largely justified for a variety of reasons, such as marketing purposes, improving business performance and services to consumers, developing business efficiency. However, this considerable amount of data may raise competition concerns as both the companies operating marketplaces and the manufacturers sell at the retail level through their own platforms/websites. This leads to a competitive situation between the entities exchanging data and information, which could result in distortion of competition.

Conclusions and perspectives

The Report ends with the following two conclusions and recommendations of the Commission:
(1) apply EU competition rules to the commercial practices that have emerged or evolved as a consequence of the growth of e-commerce and highlighted in the Report and,
(2) liaise and coordinate with national antitrust authorities in order to achieve, with reference to e-commerce, a uniform and consistent application of EU competition law.

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13 The term Category Management refers to a manufacturer/distributor process of managing certain categories of products or services (perceived as related by consumers) as strategic business units in order to achieve consumer satisfaction and thus maximise sales and profits. One of the main strengths of Category Management lies precisely in the sharing of information and know-how between the manufacturer and distributor or retailer, through a significant flow of business information required from the latter.
As for exemption Regulation 330/2010, the Commission confirms that its review will not commence until after its expiry in May 2022, as this future review process will have to also take into account the results of the e-commerce sector inquiry.

This recommendation of the Commission is confirmed by Commissioner Margrethe Vestager, in charge of competition policy, who in the Report’s press release stated the intention to “... target the enforcement of EU competition rules in e-commerce markets”.

Even before the publication of the Report, the initiatives already taken by the Commission during 2017 confirm this intention:
- in February 2017, the Commission launched three separate investigations concerning price fixing and geo-blocking practices in the field of consumer electronics, video games and hotel industry\(^\text{14}\);
- in June 2017, an investigation was launched into the company Guess (clothing manufacturer and retailer) for allegedly restricting authorized retailers from selling online in other Member States\(^\text{15}\);
- always in June 2017, an investigation was launched into the companies Nike, Sanrio and Universal Studios, suspected of having prevented cross-border sales through licensing and commercial practices\(^\text{16}\).

As for the Italian antitrust authority (AGCM):
- in May 2017, AGCM launched an investigation into the company CADEL (stoves) for allegedly imposing minimum selling prices to online distributors;
- in July 2017, the investigation was extended to include Zanette Group and MCZ Group.

**CONCLUSIONS**

Both the Commission and national antitrust authorities seem determined to **strengthen and expand their surveillance activities** in accordance with the results of the recent e-commerce sector inquiry.


This will require businesses to re-assess and update their current sectoral practices with renewed and increased attention, focused also on the findings emerging from the Report, in organizing their sales networks, in structuring their online sales and in preparing and drafting all relevant contractual documents.

Maurizio Iorio, Attorney at Law
IL MERCATO UNICO DELL’UE ALL’ERA DIGITALE, ab-
dell’Unione Europea il cui scopo essenziale
il “Report”). L’inchiesta prende le mosse dal
settore del commercio elettronico, diffondendo una relazione finale il cui contenuto
sarà esaminato nel presente articolo.

MAURIZIO IORIO

La Commissione UE il 6 maggio 2017 ha concluso un’indagine di circa due anni sul settore del commercio elettronico, differenziando una relazione finale il cui contenuto sarà esaminato nel presente articolo.

E-COMMERCE E RETI DI DISTRIBUZIONE SELETTIVA: RECENTI ORIENTAMENTI DELLA COMMISSIONE UE

La Commissione UE il 6 maggio 2017 ha concluso un’indagine di circa due anni sul settore del commercio elettronico, differenziando una relazione finale il cui contenuto sarà esaminato nel presente articolo.

LE PRINCIPALI CRITICITÀ RILEVATE (1): RETI DI DISTRIBUZIONE SELETTIVA E OBIETTIVO DI AVERE ALMINO UN VENDITA NON VIRTUALE

La prima conclusione rilevante del “Report” si riferisce ai reti di distribuzione selettiva, infatti, come rilevata dalla Commissione, a fronte di fenomeni quali una crescente trasparenza dei prezzi e una maggiore competitività del prezzo generata dallo sviluppo della vendita on line, i produttori utilizzano sempre più la distribuzione selettiva per realizzare un maggiore controllo della propria rete di vendita e dei prezzi accomodanti. A questo punto, per maggiore comprensione del lettore è il caso di precisare, come definito dal Regolamento UE 330/2010, in vigore dall’1 giugno 2010 al 31 maggio 2022 il (“Regolamento”). Come tutti i Regolamenti, essi svolgono direttamente ai cittadini ed alle persone fisiche e giuridiche residenti nei vari Stati membri dell’Unione Europea, vincendo anche i governi nazionali e tutte quelle le autorità facenti capo ad ognuno Stato Membro, ivi compresi quelli giudiziari che sono tutelati ad interpretare e applicare i diritti dei soggetti, in conformità ai relativi Regolamenti di distribuzione. La possibilità per gli operatori di costituire reti di distribuzione selettiva, come esposto, è gestita per efferato ipotesi e non è soggetta a controllo dalle autorità. Stando all’osservazione di una successiva definizione del modo in cui l’indagine è stata condotta, vi è da rilevare che non si è considerato il problema del commercio elettronico e quindi non si sono considerate le questioni relative alla distribuzione, a condizione che le convenzioni riguardanti le vendite di prodotti in rete non superino un determinato limite.

Maurizio Iorio

di Maurizio Iorio

PARERE LEGALE

E-COMMERCE E RETI DI DISTRIBUZIONE SELETTIVA: RECENTI ORIENTAMENTI DELLA COMMISSIONE UE

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LE PRINCIPALI CRITICITÀ RILEVATE (2): PRINCIPALI RESTRIZIONI “VERTICALI” CONTENUTE NEI CONTRATTI TRA FORNITORE e RIVENDITORE

La tabella sotto riportata elenca esemplificativamente le criticità rilevate nel settore del largo mercato del commercio elettronico e dei prodotti che possono vantare una certa rappresentatività.

Le criticità sono risultate essere abbastanza diffuse, per cui l’obiettivo è quello di sinceramente informare e sensibilizzare il pubblico su una situazione che si è costituita, in ultima analisi, quasi come una realtà “invisibile” che si è potuta instaurare a causa di contratti che hanno comportato una perversione del mercato e di una distorsione del principio di concorrenza.

Potete trovare la tabella e il relativo commento a queste criticità nel documentario di Maurizio Iorio, che è stato presentato all’Empower Forum 2018.

MAURIZIO IORIO

Dalla partnership tra Marketplace e ANEDC prende vita questa rubrica, curata e promossa da Maurizio Iorio, nel suo duplice ruolo di Avvocato Professionista a Milano e di Presidente di ANEDC, e con il sostegno di di Maurizio Iorio, nel suo duplice ruolo di Avvocato Professionista a Milano e di Presidente di ANEDC.

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E-COMMERCE E RETI DI DISTRIBUZIONE SELETTIVA: RECENTI ORIENTAMENTI DELLA COMMISSIONE UE

Il 6 maggio 2017 la Commissione UE ha concluso un’indagine di circa due anni sul settore del commercio elettronico, diffondendo una relazione finale il cui contenuto sarà esaminato nel presente articolo.

RESTRIZIONI DELLE VENDITE TRANSFRONTALIERE:
(I) “GEOBLOCKING”; (II) RESTRIZIONI VARIE AI RIVENDITORI AUTORIZZATI

La relazione riporta tre diverse misure – definite di “geoblocking” o “geoblocco” con le quali gli operatori impediscono il perfezionarsi di vendite oltre confine: (1) il rifiuto di fornire la merce oltre frontiera o di accettare pagamenti transfrontalieri (tale sistema è largamente il più diffuso); (2) il vero e proprio “blocco” informatico al proprio sito web ai consumatori “esterni”; (3) il reindirizzamento automatico dei consumatori “esterni” verso altri siti dedicati ad altri Stati membri.

La Relazione riporta che, alla stregua delle risposte ai questionari, il 36% dei rivenditori non vende oltre confine almeno una delle categorie di prodotto in cui opera e che il 38% raccoglie informazioni sul luogo in cui risiede il consumatore onde ricorrere se del caso a misure di geoblocco; in particolare, l’11% dei rivenditori riferisce di sottostare a restrizioni contrattuali delle vendite transfrontaliere; malgrado ciò, solo il 4% fornisce i suoi prodotti in un solo Stato membro, mentre tutti gli altri li commercializzano in almeno 21 Stati membri. Orbene, secondo la Commissione tali pratiche sono lecite solo ed esclusivamente quando sono il frutto di decisioni unilaterali di imprese che non si trovino in posizione dominante, mentre sono illecite alla stregua dell’articolo 101 del TFUE là dove si tratti di pratica “concordata” tra operatori, come ad esempio nel caso di una restrizione contrattuale tra produtore e rivenditori autorizzati. Inoltre, in presenza di una rete di distribuzione selettiva, gli accordi di geoblocco, già di per sé vietati, fanno venire meno l’esenzione di categoria prevista dal Regolamento UE 330/2010 che abbiamo sopra esaminato, posto che in tal caso i rivenditori autorizzati devono essere comunque sempre liberi (i) di vendere ai consumatori finali ovunque questi siano allocati ed inoltre (ii) di soddisfare richieste non sollecitate di merce anche provenienti da località
allocate al di fuori dalla propria zona contrattuale (cosiddette “vendite passive”).

(ii) Altre restrizioni verticali possibilmente vietate
Nel suo Working Document 17, La Commissione cita cinque tipologie di restrizioni contrattuali territoriali dei rivenditori/ distributori 12, talvolta non scritte ma pattuite solo oralmente, emerse dalle risposte ai questionari e che “possono sollevare preoccupazioni” in quanto sono o potrebbero essere incompatibili con la normativa UE in materia di concorrenza oltre che col Regolamento UE 330/2010 di esenzione e sulle quali, presumibilmente, le autorità antitrust saranno particolarmente vigili: (1) il divieto di effettuare vendite attive o passive fuori dallo Stato membro a clienti allocati in certi Stati membri; (2) il divieto al rivenditore autorizzato di effettuare vendite attive in aree che si trovano al di fuori dello Stato membro ma che non sono stati assegnati ad altri rivenditori o riservati al fornitore; (3) il divieto di vendite passive in territori allocati ad altri distributori o riservati al fornitore; (4) la limitazione della possibilità per il rivenditore autorizzato di effettuare vendite passive o attive a clienti che si trovano al di fuori della propria zona di competenza nonché dello Stato membro in cui il rivenditore opera, ma comunque all’interno di una rete di distribuzione selettiva estesa a diversi Stati membri: ciò anche indirettamente, imponendo ad esempio requisiti particolarmente gravosi ai siti web utilizzati per vendere in altri Stati membri rispetto a quelli destinati alle vendite domestiche; (5) nel caso di rete di distribuzione selettiva operante in più Stati membri, la nomina in uno o più Stati membri di un distributore/grossista esclusivo per un certo territorio e l’imposizione di limiti alla facoltà di tale distributore di vendere attivamente ad altri distributori esclusivi operanti in altri Stati membri.

USO DEI DATI NEL COMMERCIO ELETTRONICO
La Relazione evidenzia un intenso scambio di dati commerciali assai vari tra cui quelli sensibili sulle scelte dei clienti (ad esempio prezzi e quantità vendute) che avviene (i) tra le società che gestiscono i marketplace e terzi (ossia: venditori indipendenti, produttori, rivenditori) o anche (ii) tra produttori e rivenditori autorizzati, che sono spesso gravati di oneri di reporting anche piuttosto complessi come nel caso del category management 13.
Secondo la Commissione, tale scambio di dati - di natura anonima o/ed personale - può esser largamente giustificato per questioni di marketing, per migliorare le prestazioni commerciali ed i servizi resi ai consumatori e per sviluppare l’efficienza delle imprese. Tuttavia, lo stesso può destare preoccupazioni sotto il profilo della concorrenza per il fatto che sia le società che gestiscono i marketplace che i produttori vendono anche al livello del dettaglio tramite le proprie piattaforme / i propri siti web.
Si creara quindi una situazione di concorrenza tra i soggetti che si scambiano i dati e le informazioni, competizione che potrebbe esser falsata in conseguenza di tale scambio.

CONCLUSIONI E PROSPETTIVE
La Relazione si conclude con il seguente duplice proposizio espresso dalla Commissione:
(1) applicare le norme UE in materia di concorrenza alle pratiche commerciali che sono emerse o si sono evolute con la crescita del commercio elettronico e che sono evidenziate nel Report e,
(2) coordinarsi con le autorità antitrust nazionali al fine di pervenire, con particolare riferimento al commercio on-line, ad un’applicazione uniforme e coerente della normativa UE in materia di concorrenza.
Quanto al Regolamento di esenzione 330/2010, esso non sarà anticipatamente rivisto ma, dopo la sua scadenza nel maggio del 2022, il suo futuro processo di revisione sarà alimentato anche dai risultati dell’indagine settoriale condotta. Il proposito espresso dalla Commissione è confermato dalla Commissionaria Margrethe Vestager, responsabile della politica della concorrenza, la quale alla pubblicazione del Report ha confermato l’intenzione di “...target the enforcement of EU competition rules in e-commerce markets”.
Le iniziative assunte dalla Commissione nel corso dell’anno 2017, ancor prima della pubblicazione della Relazione, confermano tale proposito:
- nel corso del febbraio 2017, sono state aperte tre separate istruttorie della Commissione relative alla fissazione dei prezzi ai dettaglianti in commercio trasfrontaliero e alla geoblocking, nel campo dell’eletronic di consumo, dei videogiochi e del settore alberghiero 14;

CONCLUSIONI
In conclusione, tanto la Commissione che le autorità di vigilanza antitrust nazionali sembrano fermamente intenzionate a rafforzare ed estendere le rispettive attività di sorveglianza con riferimento alle risultanze della recente indagine settoriale sul commercio elettronico. Si impone per le aziende una verifica e aggiornamento delle pratiche settoriali in uso e una rinnovata e maggiore attenzione, focalizzata anche sulle risultanze che emergono dal Report, nell’organizzazione delle reti di vendita, nella strutturazione delle proprie vendite on line, nella pattuizione e redazione di tutte le rilevanti scritture contrattuali.