

‘Evolving Competition policy and the potential impact on FMCG markets’

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Whether they believe they are defending the competitive process or protecting consumer welfare, advocates of competition policy have rarely been so persuasive vis-à-vis the general public as when they talk about competition at the retail level. After all this is the level where there is a direct interface between consumers and suppliers, the level at which it is relatively easy to compare different offers in terms of price, quality, choice and innovation.

Forty years ago, there were some consumer surveys but no price comparison websites. Yet consumers could compare what was on offer in different local grocery stores, high street jewellery or toy shops or car showrooms. There were frequent promotions and discounts. And it was relatively easy to recognize situations where you think you had been ripped off. It was also fairly obvious if a manufacturer had organised things so that all downstream suppliers had to sell his products at the same price. Competition authorities were generally applauded when they stopped retailers from exploiting people and prevented upstream suppliers from maintaining resale prices.

Do competition authorities enjoy the same popularity when they intervene in the retail sector today?

It is not so clear. After all many things have changed.

In the grocery sector, the emergence of large supermarket chains has eclipsed local stores, even if they have created a large number of local outlets to ensure proximity to the customer at that level. Given their size, these chains have acquired significant purchasing power vis-à-vis upstream manufacturers of consumer goods, food and non-food. This obviously has consequences for the sharing of rents in supply chains. But reducing wholesale input costs should be good for competition policy and consumers as long as supermarkets pass on

the lower cost of their supplies to consumers and continue to guarantee quality and a wide choice of products to their clients. And this should happen provided there is sufficient competition between supermarket chains. This often depends on the choice which consumers have in their locality. So competition authorities have been anxious to ensure that big mergers between chains don't lead to local monopolies.

Secondly, in retail more generally, digitalisation and the internet have led to the growth of online shopping. Again, consumers can benefit from this as long as they have sufficient information about the products they are buying. Consumer protection bodies and competition authorities have an important role here in ensuring that consumers do have the correct information about offers in order to make correct decisions. This is not always easy. Search engines, algorithms and even price comparison websites may be biased towards selecting certain suppliers and downgrading the information about others. The reason for this is obvious: digitally based companies, just like advertisers, monetise the services they offer by charging suppliers for preferencing their products. It is on the other hand the task of competition authorities to ensure that the competition between suppliers is on the merits. As a consequence, they have had to intervene, with varying success, to police the action of big tech and of the variety of websites now available which entice consumers to purchase the goods or services which they promote.

Thirdly, through digitalisation, through the availability of big data and the application of behavioural economics, both suppliers and digital platforms know more and more about how consumers make decisions and how they can be influenced to choose one option rather than another. The analysis of a consumer's online screen experience has now arguably much more commercial importance than his or her in-store experience. Social media and the flow of personal information they open up to commercial organisations have exacerbated the trend towards identification by suppliers of the personal preferences and choices of individual people. How often now do we find that a search, or even a mention in a conversation of an individual product, service or geographical location leads curiously to directly relevant information and advertising on our digital devices?

One can of course argue that consumers obtain significant benefits from these trends. They have immediate access to at least some of the information which will allow them to take informed decisions. On the other hand they may not be told the whole story. They can be misled and manipulated. Competition

authorities and consumer protection agencies need to be aware of this danger and take corrective action. In the EU and the UK, new legislation, such as the Digital Markets Act, the Digital Services Act and the UK CMA's planned Digital Markets Unit will complement traditional competition tools and legislation on consumer protection and unfair trading practices.

During a period of inflation, there is naturally an even more important role for competition policy in protecting the interests of consumers. They should at least pay attention to situations where firms are justifying price increases in relation to inflation in a general sense rather than in respect of any increase in their own costs. Consumers have in any event been increasingly selective and cautious in their spending. Competition authorities must also be mindful of the potential for upstream suppliers to enter into a cartel to maintain their own price levels at the expense of the retail level and of final consumers. Follow-on action acts as an additional disincentive to this kind of agreement.

However retail suppliers and distributors themselves have also recently come under pressure, including those who compete mainly on price. Retail margins in grocery and non-food essentials have traditionally been small but most major supermarket chains were able to make money given the volume of sales involved, in particular during the pandemic. The economic recovery post-pandemic nevertheless provoked scarcity of some materials and created bottlenecks in supply chains. Upstream suppliers have consequently been anxious to pass on the increased costs of their purchases to the retail level. Some governments have compounded the problems at the retail level by calling on supermarket chains to share their margins with categories of suppliers, such as farmers, who are perceived to be the most hard-hit by the latest trends.

The reaction of the retail grocery sector to these developments has sometimes been simply to pass on cost increases. But they appear now to be reviewing their business models more in-depth. In some cases they have embarked on radical restructuring, including closure of stores and significant staff reductions. Others have moved towards more franchising of local stores, leaving the responsibility for downsizing to the new franchisees. As grocery retail markets in Europe are already dominated by a few large supermarket chains, competition authorities have prohibited further mergers and are likely to continue to do so. This has led some chains to concentrate their efforts on ensuring that their central purchasing activities are as efficient as possible. The new EU and UK Guidelines Block Exemptions on Horizontal and Vertical

Agreements explicitly mention this trend and seem to indicate that it would be generally regarded as pro-competitive, provided the efficiency benefits are passed on to consumers. I will comment later on some of the underlying assumptions in these revised guidelines.

In parallel, there has been increasing scepticism among competition authorities about vertical and conglomerate mergers between parties who are not in principle competitors but whose relationships could harm the competitive process .

In the last ten to fifteen years, we have seen some organic growth in firms who have chosen to compete at the retail level primarily on the basis of their ability to take orders and deliver goods and services efficiently and rapidly to final consumers, including businesses. This is not just an Amazon phenomenon. Other companies such as the Dutch 'Cool Blue', which specialises in domestic appliances and digital, has expanded in Germany and the Benelux countries on this basis. Their business models rely heavily on online sales, although they have been careful to maintain or create some high street presence.

The ability to excel in logistics enables firms of this kind to establish a reputation among suppliers as firms which offer the best route to final customers. In turn, the firms offering this route can exert a degree of market power vis-à-vis suppliers on price, quality and range. In some cases this may allow them to use their power and data access to give preference to their own products or those of commercial partners which they have a closer relationship with. Amazon's Buy Box was investigated by the European Commission due to concerns about self-preferencing. The Commission investigation ended in a settlement with remedies while the UK CMA's investigation is still ongoing. Amazon also faces a private litigation case in the UK under collective action.

Finally I should like to come back to the treatment of horizontal and vertical agreements under EU and UK competition law. As I indicated earlier, we now have the benefit of recently revised EU and UK guidelines and block exemptions in respect of these types of agreements.

I have to confess to a degree of admiration for the authors, but also dismay, when I read through these documents. They represent a morass of regulation in which only the most fervent aficionados of competition law on agreements could ever master all the details.

Nevertheless there are several underlying principles to this set of regulations which give me comfort that the direction of travel of competition policy is the correct one.

The first is that if an agreement, vertical or horizontal, is aimed at improving the efficiency of the supply chains concerned and opens up the prospect for consumers of lower prices, better quality and better choice, then they should benefit from some neutral or even positive presumption, whether by being included under a block exemption or by being treated as potentially eligible for an exemption under article 101(3) of the TFEU or its UK equivalent.

The second is that online sales and online platforms are now significantly well-established that they do not merit any special regulatory protection.

The third is that there is some objective justification (usually investment needs) for differentiating prices between online and offline sales.

Fourth, online intermediation services (OIS) – e-commerce entities, marketplace, app stores, PCW's and social media- should be recognized as having a supplier as well as an intermediary role.

Fifth, wide MFN clauses can have anticompetitive effects, but both in the UK and the EU, they can still benefit from exemptions based on an assessment of their effects, even though they do not benefit from any block exemption.

Sixth, a comprehensive analysis of the potential anticompetitive effects of agreements should distinguish between effects on intrabrand and on interbrand competition and reach an overall conclusion on the harm to competition and consumers.

Finally, information exchange between a supplier and a distributor about their direct relationship is normal and acceptable, on efficiency grounds, irrespective of any market share threshold.

I know that I have not been comprehensive here in summarising the important messages which we can extract from these new guidelines and block exemptions. For example, sustainability is a new and important dimension in the examination of agreements and it is now taken into account in the EU's new Horizontal Guidelines. However I hope the messages from the whole package which I have put emphasis on reflect the reality of retail distribution

today, which relies on a network of horizontal and vertical relationships, in the online and offline world.

Ladies and Gentlemen,

I have contrasted the challenges of competition policy in the retail sector forty years ago with those which it faces today. Despite the complexities of the challenges today, I am optimistic that competition policy can meet them, whether through application of the competition rules or through complementary legislation which makes markets work for consumers and for business.

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