Centre for Competition Law and Policy
Institute of European and Comparative Law

UNIVERSITY OF
OXFORD

Trends in Retail Competition:
Private labels, brands and competition policy

Report on the eighteenth annual symposium on competition amongst retailers and suppliers

Held on Friday 16th June 2023
at Mary Sunley Building, St Catherine's College Oxford

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OVERVIEW

This report provides an overview of the eighteenth annual symposium discussing Trends in Retail Competition. The symposium covered five themes relevant to competition involving branded producers and distributors: regulating horizontal agreements, innovation in grocery, information exchange and the new legislation on vertical agreements, online and offline consumer manipulation and ecosystem competition policy.

The symposium opened with a keynote presentation on evolving competition policy and the potential impact on fast moving consumer goods ("**FMCG**") which reflected on the rise of digitalisation, the effects of inflation on this sector and touched upon how the revised EU and UK guidelines on vertical and horizontal agreements generally address such issues.

This set the scene for the first panel discussion which focused on regulating horizontal agreements. The key changes in the draft horizontal guidelines were outlined and the importance of the new section on joint purchasing highlighted in light of the energy crisis. There featured a review of the sustainability section of the guidelines, highlighting the importance of the link between competition policy and sustainability and comparing how the EU guidelines addressed such issues against the equivalent draft UK guidelines. In the panel discussion, the implications of the new guidelines were explored for information exchange, joint purchasing and sustainability.

The morning programme concluded with a presentation from Europanel on an analysis of distinctive innovation in grocery, based on a market study and global database of SKUs in 36 countries. The study showed that distinctive innovations' performance proves hard to sustain over time, they usually come from brands rather than private labels and they have a higher capacity to attract buyers that have not bought the brand before.

The next session was a panel discussion with a focus on the new regulations on vertical agreements and whether they mitigate competition concerns over information exchange. The key changes in the new Vertical Agreements Block Exemption Order ("**VABEO**") were highlighted, particularly with regards to dual distribution and its differences from the European Commission's Vertical Block Exemption Regulation ("**VBER**"). This led into a panel discussion on whether the new VABEO and VBER guidelines adequately address the issues that arise from increased online shopping, its treatment of active and passive sales and information exchange.

The afternoon programme opened with a panel discussion exploring lookalike packaging and dark patterns in the context of online and offline consumer manipulation. The differences between online and offline consumer behaviour and harm were explored, followed by a discussion on the enforcement challenges and opportunities relating to lookalike products in the UK.

The final session of the programme focused on the emergence of ecosystems and the challenges they pose for competition authorities. Specific themes explored include the definition of ecosystems and how competition authorities have not been adequately reactive to the competition issues they raise. The panellists closed the programme with the conclusion that stakeholders, including regulators, academics and practitioners, need to work together to better understand and respond to the complexities of ecosystems and their impact on competition and consumers.

The event was hosted by the Centre for Competition Law and Policy in conjunction with the Oxford Institute of European and Comparative Law and was sponsored by Clifford Chance and Oxera. The event was held under the Chatham House Rule.

Acknowledgements:

In addition to the contributors and sponsors, the Centre for Competition Law and Policy wishes to thank the following for their help with the symposium:

Caroline Hobson, Cooley LLP
John Noble, British Brands Group
Kat Hayward, Oxford University
Mehjabin Ahmed, Clifford Chance
Michelle Gibbons and Laurent Cenatiempo, AIM

PROGRAMME

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Professor Ariel Ezrachi

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Sir Philip Lowe, *Oxera*

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Panellists Sophie Moonen, *European Commission, DG Competition*
Laurent Cenatiempo, *AIM*
Dr Ignacio Herrera-Anchustegui, *University of Bergen*
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Moderator Sir Philip Lowe, *Oxera*
Panellists Sharon Horwitz, *Competition and Markets Authority*
Christoph Leibenath, *AIM*
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Ciara Kalmus, *Compass Lexecon*

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Panellists Laura Smart, *Competition and Markets Authority*
Rocio Concha Galguera, *Which?*
Geoff Steward, *Stobbs IP*
David Jevons, *Oxera*

SESSION 5 – ECOSYSTEM COMPETITION

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Moderator Professor Bill Kovacic, *George Washington University Law School*
Panellists Dr Liza Lovedahl, *British Institute of International and Comparative Law*
Professor Barak Orbach, *University of Arizona*
Tom Smith, *Gerardin Partners*
Dr Cristina Caffarra*, Keystone Europe*

16.40 Closing remarks
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KEYNOTE PRESENTATION

EVOLVING COMPETITION POLICY AND THE POTENTIAL IMPACT ON FMCG MARKETS

Sir Philip Lowe, *Oxera*

Advocates of competition policy have successfully highlighted the importance of competition at the retail level, where consumers directly interact with suppliers. At this level, consumers can easily compare different offers in terms of price, quality, choice and innovation. In the past, consumers relied on surveys to make comparisons, but the emergence of price comparison websites has made it even easier to assess different options. This transparency has allowed consumers to identify situations where they may have been overcharged and competition authorities have been praised for intervening to prevent retailers from exploiting people and maintaining resale prices.

However, the grocery sector has experienced a shift towards large supermarket chains which has overshadowed local stores. While these chains have increased proximity to customers through numerous outlets, their size has granted them significant purchasing power over upstream manufacturers. In theory, lower wholesale input costs should benefit consumers if supermarkets pass on the savings and continue to provide quality products and a wide range of choices.

The rise of digitalisation and online shopping has further transformed the retail landscape. Consumer protection bodies and competition authorities play a crucial role in ensuring that consumers have access to accurate information to make informed decisions. However, search engines, algorithms and price comparison websites can be biased in favour of certain suppliers, distorting information and disadvantaging others. Digital companies monetise their services by charging suppliers for preferential treatment, similar to advertisers.

Digitalisation has also provided suppliers and digital platforms with valuable consumer data, enabling them to understand consumer behaviour and influence their choices. Analysing a consumer's online experience has become more commercially important than in-store experiences. Social media platforms play a significant role in providing personal information to commercial organizations, which exacerbates the trend of suppliers identifying individual preferences and choices. Competition authorities and consumer protection agencies need to be aware of these issues and take corrective action. New legislation, such as the Digital Markets Act, the Digital Services Act and the UK's Digital Markets, Competition and Consumers Bill, will complement traditional competition tools and consumer protection laws in the EU and the UK.

During times of inflation, competition policy plays a crucial role in protecting consumer interests. Authorities should investigate situations where firms justify price increases based on inflation rather than their own costs. Consumers have become more selective and cautious in their spending habits. Additionally, competition authorities need to be vigilant about potential collusion among upstream suppliers to maintain prices at the expense of retailers and consumers. Follow-on actions serve as disincentives for such agreements.

Retail suppliers and distributors themselves have faced pressure in recent times. While retail margins in grocery and non-food essentials have traditionally been small, major supermarket chains have been able to make profits due to high sales volumes, particularly during the pandemic. However, the economic recovery post-pandemic has caused material scarcity and supply chain bottlenecks. Some governments have called on supermarket chains to share their margins with affected suppliers, such as farmers, further exacerbating the challenges faced by retailers. In response, some retailers have passed on cost increases to consumers, while others have implemented restructuring measures, including store closures and staff reductions. Some chains have shifted toward franchising local stores, transferring downsizing responsibilities to franchisees. Competition authorities have prohibited further mergers in the grocery retail market to maintain competition, leading chains to focus on improving the efficiency of their central purchasing activities.

In the past decade or so, there has been organic growth in companies that compete at the retail level primarily based on efficient order taking and delivery of goods and services to consumers, including businesses. Companies like Amazon and Cool Blue have relied heavily on online sales while maintaining a presence in physical stores. Their success lies in their ability to excel in logistics, which has allowed them to establish a reputation among suppliers as the best route to reach customers. As a result, these companies have a degree of market power over suppliers in terms of price, quality, and range.

Revised EU and UK guidelines and block exemptions have provided a framework to regulate such agreements. There are underlying principles for these regulations which indicate that competition policy's direction of travel is the correct one:

1. If a vertical or horizontal agreement is aimed at improving the efficiency of supply chains and opens up the prospect for consumers of lower prices, better quality and better choice, then they should benefit from some neutral or positive presumption, either by being included under a block exemption or by being treated as potentially eligible for an exemption under article 101(3) of the TFEU.
2. Online sales and platforms are now well-established so do not need any special regulatory protection.
3. There is some objective justification for differentiating prices between online and offline sales.
4. 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.
5. 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.
6. 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.

Lastly, information exchange between suppliers and distributors about their direct relationship is considered normal and acceptable on efficiency grounds, regardless of any market share threshold.

SESSION 1
REGULATING HORIZONTAL AGREEMENTS

Implications of the New EU and UK Regulations and Guidance

Moderator: Professor Simon Holmes*, Oxford University*

Panellists: Sophie Moonen, *European Commission, DG Competition*
Laurent Cenatiempo, *AIM*
Dr Ignacio Herrera-Anchustegui, *University of Bergen*
Jay Modrall, *Norton Rose Fulbright*

Session Focus
The session reflects on the implications of the new 2023 guidelines regulating horizontal agreements. It focuses on three topics covered by the guidelines – joint purchasing, sustainability and information exchange.

Overview of the Changes
Changes introduced in 2004 made these documents (and their predecessors) even more important by providing guidance that allows companies to self-assess the compliance of their co-operation agreements with Article 101 of the Treaty and by ensuring a harmonised application of EU competition rules national competition authorities. The new block exemption regulations for research and development agreements and specialisation agreements and guidelines on horizontal agreements follow a four-year review. The last decade has seen two major developments – sustainability / climate change and digitalisation. These twin developments are reflected in the new regulations and guidelines. While the guidelines have been updated to reflect enforcement practice and case law, the EC has also considered input from stakeholders in several areas.

Some chapters have undergone little change, such as in R&D, specialisation and joint production. In contrast, the chapter on information exchange, which was new in 2011, has undergone a lot of changes. Businesses need a lot of guidance on information exchange because it is part of the context of corporate agreements. The chapter has been restructured to give useful guidance assessing different situations, covering both direct and indirect forms of exchange. The guidance includes measures that companies can take to limit competition risks or infringements.

Joint Purchasing
The revised guidelines include a new section with guidance on mobile infrastructure and network sharing, both linked to digitalisation. There is a lot of interest in the joint purchasing chapter, in some traditional areas such as supermarkets or newer such as energy. For example, there has been joint purchasing of gas and this will extend to hydrogen and even chips for computers. In some sectors, joint purchasing is now becoming popular with SMEs.

The new rules on joint purchasing have improved since 2011, but they are not revolutionary. Stakeholders have asked for more clarity on what is legitimate joint purchasing and what is a buyer cartel. The EC has tried to address this request by more clearly delineating the differences between them, including the upstream effects of agreements and their negotiation, and the potential harm to suppliers in terms of reduced investment and innovation. Further, the EC Guidelines bring useful guidance on how to form a lawful buying alliance. The guidance is much more detailed and clarifies how joint purchasing works. Specifically, it clarifies that a joint purchasing arrangement can be valid even if retail alliance members do not purchase in common but individually, based on the previous collective negotiations. The revised guidelines now provide a refined approach to assessing the impact of buyer power and acknowledge that buyer power can have a negative effect on suppliers and downstream markets alike and maintain the 15% aggregate market share threshold as a legality presumption of the joint purchasing scheme.

The revised guidelines now provide a refined approach to assessing the impact of buyer power. The guidelines recognise the need for a holistic approach, acknowledge that buyer power can have a negative effect on suppliers and maintain the 15% aggregate market share threshold.

Retail Alliances

The new chapter on joint purchasing provides a tighter framework for retail alliances' joint purchasing agreements. Such co-operation must "genuinely concern joint purchasing" and relate to "trading terms governing the supply of products" to the purchasers. The EC now clearly recognises that buyer co-operation can have adverse competitive effects both upstream and downstream in situations where the co-operating buyers account for a large share of the relevant purchases. Also, the EC clarified that collective threats such as purchase stops cannot be considered part of the normal bargaining process if they relate to products that were not the subject of the negotiations.

The Link between Sustainability and Competition Law

The biggest development is the new chapter 9 on sustainability. Sustainability has been the EC's main priority since the Green Deal was launched in 2019. State aid has a significant role to play in financing the transition to a net zero economy. Businesses conveyed that there is a risk that antitrust rules have a chilling effect on sustainability initiatives. The EC listened and decided that a new chapter was needed. There is no such thing as a 'sustainability agreement', but rather different forms of co-operation aimed at achieving sustainability.

Competition can drive innovation and encourage businesses to produce more sustainable products. However, businesses may also select less sustainable sourcing to sell cheaper products than their competitors. One survey suggests that 60% of businesses shy away from co-operating with competitors for fear of infringing competition law. The EC wanted to reassure businesses that competition law does not stand in the way of competitors reaching sustainability agreements. Although the new guidelines' definition of sustainability encompasses economic and social sustainability, the primary focus of the new guidelines is on environmental sustainability.

The guidelines provide a reminder that competition law only applies to an agreement if it affects a parameter of competition, such as price. The guidelines set out a safe harbour for agreements that set a minimum sustainability standard and comply with six cumulative conditions. They also provide guidance on how sustainability agreements should be assessed under the four conditions for exemption.

The EU guidelines take a less permissive approach to climate change agreements than the UK draft guidelines. Overall, however, the horizontal guidelines give the green light to many sustainability agreements and encourage businesses to enter into such agreements. The EC perceives the guidelines as a starting point, given the lack of enforcement experience concerning sustainable agreements. The EC believes that the open-door policy will help its learning process.

Information Exchange
The guidelines provide greater guidance on information exchange to a much greater extent than the 2011 guidance. Executive Vice President Vestager delivered a speech encouraging businesses to share data to promote competition. The EC has emphasised how information sharing can be beneficial. Indeed, information exchange is unlikely to raise competition issues to the extent that the information is aggregated or historical.

The guidelines deal with the interplay between regulatory encouragement and requirements to share information and competition law. Companies should exercise discretion in deciding whether to share information and take all possible precautions to minimise competitive risks.

Summary
The revised guidelines contain substantial updates on joint purchasing, sustainability and information exchange and should help businesses better self-assess their horizontal co-operation agreements.

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SESSION 2

INNOVATION IN GROCERY

An analysis of distinctive innovation in grocery

Filippos Kaliakatsos*, Europanel*

The session focused on distinctive innovation within the UK grocery sector. The ability to attract new brand buyers is crucial to success while other factors such as brand reputation and retailer relationships can enhance the value of distinctive innovations. These innovations often push the boundaries of a category and can even create entirely new product categories.

Europanel's BG20 is a market study and a global database covering 36 countries, designed to address specific questions. The significance of innovation is widely acknowledged, as 25% of all SKUs in the study were identified as new SKUs. The top 25% of successful brands prioritise innovation more than the lower-ranked brands. The main purpose of the study was to focus on distinctive innovations and to assess their performance in comparison to everyday product launches.

Regarding the methodology, the database encompasses all barcodes within a year, 2019 in the case of this study, with those barcodes not having been seen in previous years indicating a potential innovation. A distinctive innovation is defined as a new product that contains an element (e.g. an ingredient) that has not been seen in the category before. To do that, an algorithm looks at the product description of each new barcode and assigns a similarity or distinctiveness score, with higher scores indicating greater dissimilarity. Scores below a specified threshold are not considered distinctive innovations, unless they come from previously unseen brands, in which case all such barcodes within that brand are investigated. A filtering process is applied that considers factors such as flavours and ingredients to determine whether a classification of distinctive innovation is warranted.

Several examples of distinctive innovations were given, such as the Feta/Olive Tapenade Kettle chips. The study shows that there were 6,244 new launches in 2019, which is 30% fewer than in 2018. To understand which categories innovate more, two key aspects to check are (1) the category's reach (preferably wide) and (2) frequency of purchase (preferably frequent). Only 2% of all innovations were classified as distinctive, in other words not having been seen before.

The study found that the majority of innovations are flavour-related and most are brought to market by UK-based manufacturers. The top 10 manufacturers of distinctive innovations include well-known names like Coca-Cola, Mars and Kellogg's. Distinctive innovations initially perform well but tend to lose appeal relatively quickly. The size of the parent brand is an important factor in the success of the innovation and the study shows a survival rate of 61% based on the product's reach three months after its launch.

The study reveals that launches by large brands consistently outperform those by small brands, irrespective of whether they are distinctive or everyday innovations. This is attributed to the greater resources of larger brands, such as advertising and marketing spend. Tesco and

Sainsbury, followed by Aldi, were the most likely to list distinctive innovations. It is worth noting that discounters like Lidl, Aldi and Iceland have fewer listings of any type of branded innovation.

The study also investigated pricing, showing that distinctive innovations are launched at a higher premium and are predominantly introduced by premium brands. This premium pricing may explain the decline in performance over time, as it can be difficult for some households to sustain such buying behaviour. Premium brands contribute 60% of distinctive innovations but only 30% of everyday launches.

Distinctive innovations are found to have a greater capacity to attract incremental brand buyers, which is essential for a brand's growth. Attracting new brand buyers and increasing reach are the main drivers of brand growth. On average, 50% of a brand's buyers will not make a purchase in the next year, so innovation plays a crucial role in replenishing the customer base.

The key takeaways from this session focus on whether distinctive innovations are worth it. Their ability to attract new brand buyers is critical and under the right support from the parent brand they could outperform everyday launches. To summarise:

1. Performance: Distinctive Innovations start strong, but their performance fades away. That is likely due to reduced support from the parent brand, un-sustained levels of distribution and possibly due to the high premium;

2. Incrementality: Distinctive Innovations have a higher capacity to attract buyers that have not bought the brand before – this is imperative for the overall importance of a brand as brands grow by increasing their buyer base, according to the laws of brand growth;

3. Brands vs private label: Distinctive Innovations primarily come from brands rather than private label (84% of them come from brands).

Reach is determined by how many people buy the brand, while market share is based on the value of the brand compared to the category's value. Reach and market share are correlated and higher reach results in a higher value. Defining quality improvement cannot be tracked through this particular data, but methods like surveys could be employed for such purposes.

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SESSION 3

VERTICAL COMPETITION AND INFORMATION EXCHANGE IN DOUBLE-AGENT RELATIONSHIPS

Mitigating competition concerns over information exchange and balancing efficiency and competition outcomes

Moderator: Sir Philip Lowe, *Oxera*

Panellists: Sharon Horwitz, *Competition and Markets Authority*
Christoph Leibenath, *AIM*
Greg Olsen, *Clifford Chance*
Ciara Kalmus, *Compass Lexecon*

The session reflected on the implications of the new guidelines regulating vertical agreements in the EU (VBER) and the UK (VABEO) and how they address dual distribution, active and passive sales and the exchange of information between parties that are simultaneously in a vertical and horizontal market structure. This session also reflected on whether there is sufficient legal certainty.

Overview of the changes
The VABEO introduces an exemption which applies to vertical agreements between competing undertakings which are non-reciprocal and meet certain conditions. Dual distribution arises typically where a supplier is mainly active on the upstream market, but also has some activities at the retail level, while the buyer operates only at the retail level and doesn't compete with the supplier at the level of trade where it purchases contractual services. This exemption is applicable when the agreement meets the conditions of VABEO (including the market share threshold). Information exchange is covered by the exemption if it is necessary to implement the vertical agreement and it is evaluated on a case-by-case basis to determine if it is genuinely vertical.

There are white and black lists under the Dual Distribution exemption. The white list includes non-exhaustive information that, when exchanged by parties to a non-reciprocal vertical agreement that fall within the scope of the block exemption, can be considered unlikely to constitute a restriction by object and are likely to be truly vertical. The black list identifies information more likely to restrict competition by object and unlikely to be genuinely vertical. Precautions, such as firewalls, can be taken to minimize the risk of it being anti-competitive.

The UK and EU regimes differ in their approach to information exchange in dual distribution. The Commission uses the ancillary restraints doctrine, allowing information exchange where it is directly related to and necessary for the vertical agreement. UK legislation requires information exchange to be necessary for implementation. Hybrid platforms, such as price

comparison websites, are carved out from the exemption in the EU but not in the UK.

Regarding private labels, distributors that commission a manufacturer to produce goods under their brand are not considered competitors of the manufacturer for the purpose of applying VABEO's Article 3(5). However, distributors that manufacture goods in-house for sale under their own brand name are treated as manufacturers and do not benefit from the exemption in Article 3(1) VABEO. In discussion, the reasons behind this distinction and the practical implications that arise remain unclear.

Information exchange with retailers with private labels:
The guidelines on dual distribution relate to a manufacturer selling its own goods both direct and to retail customers. This differs from a retail customer purchasing a branded product while also selling its own competing private label version, a situation not addressed in the guidelines, whether vertical or horizontal. What should a brand manufacturer do, for example when introducing a new product, when it needs to provide sensitive information to the retailer to persuade it to list the product while knowing the retailer will likely be a competitor?

A second scenario arises where a brand manufacturer provides sensitive information to encourage a retail customer to accept a price increase. How far should the manufacturer go to justify its new prices when the retailer may be speaking to the same ingredient suppliers for its private label products?

Inflation
Inflation is posing challenges for both suppliers and retailers. Suppliers providing detailed cost information to retailers will benefit retailers, helping them make better cost and price decisions, while benefits to suppliers, while pushing through a price increase, may be short-lived if that information is used against them in future negotiations. Similar dynamics arise for private label suppliers, where short-term benefits may be offset by the greater negotiating leverage the retailer will be able to apply in the future.

Where the retail price of a branded product is well-known to shoppers and used to gauge the price competitiveness of retailers, misalignments in incentives may arise between retailers and suppliers. A retailer may drop the price below cost to attract shoppers, benefiting the supplier in the short term through increased sales in that retailer but deter other smaller retailers from stocking the product. While resale price maintenance may be a solution to align incentives, it may also give rise to a price cartel.

Dual distribution and the changes to treatment of active / passive sales
Changes in the VBER have shifted towards protecting brick-and-mortar stores, allowing greater tolerance for restrictions that limit intra-brand competition to enhance inter-brand competition. The initial reforms to the VBER caused uncertainties, but the Commission eventually made sensible changes that are easier to navigate.

Dual distribution has seen significant growth, especially with direct online sales by suppliers in competition with retailers. Concerns arose that the exemption led to a "false positive" impact on intra-brand competition and it was deemed anomalous that protection only covered agreements involving suppliers, excluding wholesalers and importers.

Initially, a market share cap of 10% was proposed for limiting the exemption's impact on information exchange, but it was not well-received. The Commission opted for a different

approach, outlining permissible information exchange in dual distribution. The focus is now on information related to agreement implementation and improving production or distribution of relevant goods, excluding other areas like future pricing or intended end-user identity.

There is an exemption carve-out for online intermediation services platforms acting as dual distributors. The Commission expanded the protection against active selling to cover up to 5 exclusive distributors supplying a territory or customer group. The rationale for this exemption lies in protecting the investment efforts of exclusive distributors to enhance inter-brand competition.

The VBER clarifies the notion of "active selling," particularly in the context of online sales. It now includes offering a website in a different language from the distributor's home country and setting up an online store with a country-specific top-level domain different from the seller's establishment territory. These changes provide more clarity and precision compared to the previous understanding of online sales as passive.

Do the guidelines, as currently drafted, provide sufficient legal certainty?
There are challenges for competition authorities in drafting guidance, needing to balance case law and practical examples to provide some certainty. The more complex the examples, the more cautious authorities are likely to be. Meanwhile industry dynamics may make legal cases unlikely, for example between retailers and their suppliers. In such instances uncertainty may result. The review of the VABEO in six years presents an opportunity to explore these.

Competition law may not always be the ideal solution for dealing with supplier-retailer relationships and other regulations might be considered such as those governing unfair trading practices, particularly where there are asymmetries in relative market power. The likely outcome for shoppers will also always be a consideration.

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SESSION 4

ONLINE AND OFFLINE CONSUMER MANIPULATION

Consumer Manipulation – Lookalikes and Dark Patterns

Moderator: Professor Ariel Ezrachi, *Oxford University*

Panellists: Laura Smart, *CMA Behavioural Hub*
Rocio Concha Galguera, *Which?*
Geoff Steward, *Stobbs IP*
David Jevons, *Oxera*

Session focus
The session reflected on the impact of consumer manipulation on individual choices and behaviour and how to distinguish between harmful and harmless practices. It focuses on how perception can shadow substance, both online and through real world packaging.

Lookalikes – Harmless fun or detrimental impact on consumer choice?
In the UK, there is a sophisticated lookalike market, driven by some discount retailers. Legally, the lookalike market is not harmless fun. The infringement of intellectual property is a serious matter. By adopting the look-and-feel of familiar branded products, lookalike products can gain an unfair advantage over the competing products they mimic. The intention is to transfer image, with consumers encouraged to buy the lookalike product because they recognise it and are reassured by its familiarity, without necessarily being confused. In such instances, the consumer is being manipulated.

It is difficult for brand owners to challenge lookalikes. When suppliers complain about mimicking packaging, the copier will state that their commercial partners should not sue them. There are commercial pressures in play, with brand owners having strong incentives to maintain a positive commercial relationship with the relevant supermarket customer or potential customer. However, were brand owners to dare challenge supermarkets, it may be possible to establish transfer of image and consumer harm in the High Court and for lookalike packaging to be held to be a trade mark infringement.

The difference between online and offline consumer manipulation
With offline choice architecture, the designer of the supermarket considers, for example, which products to position closest to the checkout. With online choice architecture, designers consider the ordering of products, the number of steps required to reach checkout and the presentation of discounts. The difference is that online behaviour is much quicker, relies on recommendations from strangers and information may be personalised. This makes consumers more susceptible to manipulation. There are different terminologies. Online choice architecture is the environment in which people make decisions online. This can include dark patterns like ‘confirm shaming’ (“no, I don’t want to be kept informed”), dark

nudges (it is made easy for consumers to do something they do not want to do) and sludge (something consumers want to do is made difficult).

Different choice architectures have different impacts on consumers. These can be tested and their impact evaluated. There is a spectrum of architecture impacts, ranging from beneficial to harmful for the consumer. The key questions to consider are whether a marketing technique is true to the average man on the street and, if it is true, whether it leads to fair outcomes for consumers.

Distinguishing between benign and harmful practices
There are several methods available to evaluate the impact of different choice architectures. Testing online can often be faster and easier.

1. Business model: is the business model reliant on the architecture to succeed? If a subscription service relies on consumers forgetting to cancel trial introductory offers, that would be problematic. The FCA puts the onus on the company to show that outcomes are fair for consumers.
2. Experiments: To test the effect of a choice architecture framework, participants can be split into two groups, one exposed to a certain choice architecture framework to be tested. The activity of the two groups is compared to determine the impact of the choice architecture framework on consumer behaviour.
3. Outcome Measures: To determine the harm caused by the choice architecture framework, the impact it has on complaints and reviews is measured.
4. Surveys on user experience: A website was set up with an algorithm that can perfect products. A group of consumers were asked to comment on the clarity of the website and given the opportunity to join.

Balancing responsibilities between consumers, suppliers and authorities
The CMA has provided consumers with good examples of how choice architecture can be misleading. However, consumer awareness is low and even when aware they may still be manipulated and vulnerable consumers may be less able to protect themselves. The quantity and quality of consumer information available online creates a power imbalance between the consumer and supplier. All stakeholders must bear a degree of responsibility for tackling this, though the consumer with least power bears the least responsibility.

Taking action
Cases are beginning to appear on choice architecture. In Norway, there is a case exploring whether Amazon deliberately dissuades people from leaving Amazon Prime. However, the challenge is undermined by video instructions on Amazon's website showing how to leave in less than a minute. There is a rule of thumb that it should be as easy to leave something as it is to enter it, without the presence of friction.

A combined behavioural and economic analysis is required to identify the friction being introduced or bias being manipulated. Countervailing benefits also need consideration. Cases are now being seen in the UK through the competition process and collective actions, though some may fit better under consumer protection law as in the cases involving online hotel bookings and secondary ticket sellers. There is a railway case involving 'boundary fares', a ticket that saved money but was not advertised or staff trained, prompting accusations of manipulation and abuse of dominance in not making it accessible to consumers.

There is growing concern over tech firms and the way in which they gain consent to gather data. Of particular significance is whether the gathering of data is an abuse of dominance or whether it is compliant with GDPR. The CMA Behavioural Unit focuses on key trends and how well consumers understand what they are doing.

In the UK, what tools are available to protect consumers?
Currently the CMA does not have the same powers to enforce consumer law as it does competition law. However, the Digital Markets, Competition and Consumers Bill will increase powers and give the Secretary of State power to include additional practices judged to be always unfair, such as drip pricing and fake reviews. The Bill will also introduce a pro-competitive regime covering digital companies with strategic market status, including the opportunity to address harmful choice architecture via the Digital Markets Unit. There were calls for more interventions from the regulators to punish harmful manipulative practices. Remedies must be carefully designed though to address the harm while not causing unintended, undesired consequences.

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SESSION 5

ECOSYSTEM COMPETITION – AMAZON INVESTIGATIONS AND BEYOND

Comparing and contrasting EU, UK and US investigations

Moderator: Professor Bill Kovacic, *George Washington University*

Panellists: Dr Liza Lovdahl Gormsen, *British Institute of International and Comparative Law*
Professor Barak Orbach, *University of Arizona*
Dr Cristina Caffarra, *Keystone Europe*
Tom Smith, *Geradin Partners*

The session looked at defining ecosystems and whether current competition policy adequately addresses the competition issues that such systems may raise.

What is an ecosystem?
While the word 'ecosystem' is regularly used, it is not a term of art and doesn't have a uniform definition, something that presents challenges for competition authorities. Ecosystems in the digital economy refer to business enterprises that integrate digital platforms and additional business actors to strengthen each other and create value. These ecosystems are characterized by interdependencies among multiple products, services and markets. A must-have product, like Google Search or Amazon Prime, may lie at the core of an ecosystem, surrounded by other linked products.

The concept of ecosystems is complex and distinct from conglomerates, as it involves a more intricate and complex network of efficiencies and synergies among various actors, such as suppliers and consumers, the hub firm and complementor firms. However, when looking at ecosystems it is necessary to consider conglomerate effects. Market power is created through the interplay and combination of assets (such as data and IP), capabilities and linkages which can be transferred and leveraged into other markets.

What are the implications of this phenomenon and are there examples of competition investigations where they have addressed such issues correctly?
Ecosystems like those of Amazon and Apple represent significant networks in the digital economy, with assets and capabilities that enhance market power. The ownership and use of these assets are crucial when evaluating the competition implications of mergers. What is it that makes a collection of assets more powerful, how does it fit into the network and what effects do they have?

Amazon and Apple are advanced ecoystems while Microsoft and Google are becoming more significant. It is also important to understand the role of intermediaries and the consumer advantage of offering "anything, anywhere, anytime". The ecosystem integrates several digital elements, with each arm strengthening the other to entrench the enterprise in the market and keep customers inside the system.

A good case that explored these issues involved Microsoft in the US, particularly in understanding the benefits of interoperability. Another is the CMA's judgment on Google's request to remove support for third party cookies on Chrome, a potential abuse of dominance that had yet to happen. The CMA opened the case and Google co-operated, coming to an arrangement with the CMA and Information Commission on how it will pursue privacy objectives without causing competition concerns.

An example of a poor decision related to a 2009 case involving Foundem, a price comparison tool, and Google. The company went bankrupt because of the practices they complained of and yet the case is still before the European Court.

Are current policy developments adequately addressing the phenomenon?
Competition authorities are grappling with the challenges of assessing and regulating ecosystems. It requires a willingness to experiment. Historically competition regulators have been hesitant to intervene, though policy developments such as the DMCC Bill[1] in the UK is adopting an *ex-ante* approach with the scope to experiment. Such legislation is still evolving and may require further refinement to address ecosystem-related issues adequately.

An example of a regulator taking an experimental approach is the CMA's open banking retail investigation in 2016 that forced incumbent banks to agree APIs[2] to allow consumers to move their data around. It wasn't clear at that point what the consumer results of the remedy would be. It has proved successful and has been replicated by other jurisdictions.

It is important to develop a framework to assess the impact of ecosystems in conglomerate and vertical contexts, looking at sources of market power and leveraging mechanisms to develop theories of harm. Traditional tools are not sufficient in assessing interlinkages, meaning that further conceptual work is required, and urgently, to formalise and articulate a regulatory approach. The transition to flexible models is something new and the notion of 'markets' is changing.

The regulation of ecosystems requires collaboration among regulators to enforce antitrust measures effectively, although anti-trust is not a solution to everything. The notion of breaking up such ecosystems is not necessarily a solution. There are many concerns which should be addressed by other regulators and other areas of policy.

What are the concepts and tools regulators need to tackle this?
Regulators are generally risk averse when it comes to the digital economy. Regulators are adopting a new *ex ante* regime and time will tell whether it will work. Better guidelines are needed along with new concepts. The process is starting.

A research agenda is needed to fill the gaps, involving academics, practitioners and regulators, while recognising that vested interests will be at play. Collaboration between regulators will also be important. Data scientists and other new skills and disciplines will also be required, especially with quantum computing on the horizon.

The UK's Digital Markets Unit is a good model and the DMCC Bill sets out how it will address

[1] Digital Markets, Competition and Consumers Bill
[2] Application Programme Interfaces

individual activities within specific digital firms with strategic market status. Some actions though are needed that are relatively simple. Clear anti-competitive practices still need to be addressed, such as Apple's restrictions on apps, lack of choice for payment systems, preferential treatment of the platform owner's products and Most Favoured Nation clauses. Such practices should be addressed to ensure fair competition.

Creating sandboxes where regulators and businesses can experiment with ideas and theories of harm is essential in understanding and addressing ecosystem-related issues. Experimentation though is counter cultural for public administrations due to the element of chance, the prospect of failure and the time involved. Small, non-threatening sandboxes for the testing and refining of concepts relating to ecosystems are nevertheless essential to accelerate theories. We need to look under the hood and observe outcomes.

Summary

In conclusion, the emergence of ecosystems in the digital economy poses new challenges for competition authorities. Effective regulation, collaboration and experimentation are essential to understand the complexities, theories of harm and potential anticompetitive practices within ecosystems. Stakeholders, including regulators, academics and practitioners, as well as third-party businesses that depend on ecosystems, need to work together to understand better and respond to the complexities of ecosystems and their impact on competition and consumers.

The views expressed in this panel discussion do not necessarily represent the official position of any panellist's organisation. The summary under each theme offers a synthesis of comments from various speakers and cannot be attributed to a single speaker.

BIOGRAPHIES

In programme order

MORNING PROGRAMME

Professor Ariel Ezrachi

Centre for Competition Law and Policy, Oxford University

Ariel is the Slaughter and May Professor of Competition Law at the University of Oxford and the Director of the University of Oxford Centre for Competition Law and Policy. He is the co-editor-in-chief of the Journal of Antitrust Enforcement (OUP) and the author, co-author and editor of numerous books, including, How Big Tech Barons Smash Innovation (2022 Harper Collins), Competition Overdose (2020 Harper Collins), Virtual Competition (2016 Harvard) and EU Competition Law, An Analytical Guide to the Leading Cases (7th ed, 2021, Hart). Ariel's research and commentary have been featured in The Economist, The New Yorker, Wall Street Journal, Financial Times, The Guardian, Nikkei, New Scientist, Politico, WIRED, BBC, and other international outlets.

Sir Philip Lowe

Oxera

Sir Philip has had a distinguished career in business and government, holding the senior positions of Director-General for Competition and for Energy at the European Commission.

Sir Philip began his career in manufacturing industry before moving to the Commission, where he was Chef de Cabinet and Director in the fields of regional development, agriculture, transport and administration, before becoming Director-General for Development in 1997. From September 2002 to February 2010, he was Director-General for Competition and from then Director-General for Energy. From 2013 to 2016, Sir Philip served as a non-executive Board Member of the UK Competition and Markets Authority. Since 2010, he is chair of the Florence EU Competition Law and Policy workshop at the European University Institute and since 2016 is also Executive Chair of the Trilemma Initiative at the World Energy Council.

Since joining Oxera in July 2018, Sir Philip has been working alongside the firm's Competition, Regulation, and Finance & Valuation practices to advise clients, lawyers, regulators and policymakers on matters relating to regulation, competition and finance.

Professor Simon Holmes

Oxford University and judge at the UK Competition Appeal Tribunal

Simon advised businesses on competition law for some 35 years before joining the UK Competition Appeal Tribunal as a judge. He was latterly head of competition law at SJ Berwin and then King & Wood Mallesons –first in the UK and Europe and then on a global basis.

He is a Visiting Professor at Oxford University where he teaches competition law. He is also an adviser to the NGO, ClientEarth; co - chair of the Sustainability and Competition Taskforce of the International Chamber of Commerce (ICC); a member of the international advisory board of the LDC (Insituto de

derecho de la competencia); an associate member of the UCL Centre for Law, Economics, and Society (CLES); and a strategic advisor to Sustainablepublicaffairs in Brussels.

He writes and speaks regularly on competition and regulatory issues and has a particular interest in the relationship between climate change, sustainability and competition law. He is co-editor of a new book on this published by Concurrence: "Competition Law, Climate Change and Environmental Sustainability".

Sophie Moonen

European Commission, DG Competition

Sophie is head of unit A1 – antitrust policy and case support, in the Directorate-General for Competition (DG COMP) of the European Commission. She joined DG COMP in 2002 where she has held various positions (head of unit F2 – State aid Transport and head of unit C5 – Mergers IT, telecoms and media). Prior to joining DG COMP, Sophie practiced law in Brussels (1996 – 2002) and Washington DC (1995-1996). She is a law graduate of the University of Liège (Belgium) and holds an LL.M. from the University of Michigan.

Laurent Cenatiempo

AIM

Laurent is Competition and Legal Affairs Manager at AIM, the European Brands Association, which represents manufacturers of branded consumer goods in the beverage, food, personal care, household care, toy, apparel and luxury sectors. In this role, he oversees all competition and distribution law work streams of interest to AIM's members, drawing on his legal, advocacy, management and communications skills. Prior to joining AIM, Laurent worked at Cleary Gottlieb Steen & Hamilton LLP (2007-2013), Arnold & Porter LLP (2013-2016), and Latham & Watkins LLP (2016-2021). Laurent holds an LL.M in European Law from the University of Pau (France).

Dr Ignacio Herrera-Anchustegui

University of Bergen

Ignacio is an Associate Professor at the University of Bergen specialized in EU/EEA competition law, public procurement. His research interests are also connected with the regulation of energy markets with a special emphasis on the regulation of offshore wind electricity and new energy technologies, like hydrogen. He is also a Member of the Bergen Offshore Wind Centre - BOW. He holds a PhD from the University of Bergen, "Buyer Power in EU Competition Law" which was awarded the 2017 Concurrences PhD award. He is also recipient of the Scholar-In-Residence Program award by the Antitrust Law Section of the American Bar Association in 2017, and the interdisciplinary Meltzer Prize 2018 for Young Researchers at the University of Bergen. He has published widely in competition law journals and his work has been referred to by the President of the UK Supreme Court and the European Commission.

Jay Modrall

Norton Rose Fulbright

Jay is an antitrust and competition lawyer based in Brussels. From 2013 to 2022, he was Partner/Head of Brussels for Norton Rose Fulbright LLP, having been a resident partner in a major US law firm since 1995. Since 2022, he is Senior Counsel at Norton Rose Fulbright's Brussels office. A US-qualified lawyer by background, he is a member of the bar in New York, Washington, D.C. and Belgium. With over 30

years of experience, he is a leading advisor for EU and international competition work, in particular the review and clearance of international mergers and acquisitions. Jay also has extensive experience with other EU regulatory regimes, including digital and financial services regulation.

Filippos Kaliakatsos

Europanel

Filippos is a consumer insights director in Europanel, and for the last 10 years he has been working with FMCG purchase panel data across many markets. Over the years he has worked extensively on generating insights on brand growth and innovation for most of the leading FMCG manufacturers, providing strategic advice on uplifting the performance of brands.

Sharon Horwitz

Competition and Markets Authority

Sharon is a senior lawyer with extensive experience in competition law and the promotion of competition in the regulated sectors. Currently a Director at the CMA working across the CMA's Legal Service and its Policy & International team, she joined the CMA in 2014 from the legal team at Ofcom. She joined Ofcom in 2011 from Postcomm following a brief period at the Office of Fair Trading (OFT) in the Cartels and Criminal Enforcement Group. Prior to that Sharon was a counsel in the Competition/ Antitrust group at Linklaters, where she worked for 14 years.

Christoph Leibenath

AIM

Christoph is Senior Antitrust Counsel of Nestlé SA, Vevey, Switzerland. He advises Nestlé divisions globally on all antitrust issues, including mergers and acquisitions, antitrust investigations / litigation, trade relations and distribution agreements, license agreements as well as general compliance work. Christoph chairs the Legal Committee of AIM. Before joining Nestlé, Christoph worked in an international law firm in antitrust law in Brussels, Cologne and London. He holds a postgraduate degree in European Law from the University of Aix-en-Provence (Diplôme d'Etudes Approfondies) and has received his doctorate in the field of EU merger control at the University of Göttingen. Christoph is a German Rechtsanwalt admitted to the Cologne Bar.

Greg Olsen

Clifford Chance

Greg is a partner at Clifford Chance London where he heads the London Antitrust Practice. He has over 25 years' experience in the application of EU and UK competition law to mergers, joint ventures and commercial arrangements as well as market investigations and alleged behavioural violations such as cartels, anticompetitive arrangements and abuse of market power. Greg advises major companies and institutions in a diverse range of industries including financial services, insurance, media and consumer goods. In 2018, Greg was named "Dealmaker of the Year" by Global Competition Review.

Ciara Kalmus

Compass Lexecon

Ciara is a Senior Vice President at Compass Lexecon with more than 20 years' experience as an applied economist working in competition policy and economic regulation. Ciara has worked on a variety of high profile competition cases including cartels, Article 102 investigations and mergers before the UK, Irish and European competition authorities. From 2011 to 2021 Ciara was an Economic Director at Ofcom, specialising in broadcasting and telecommunications. Ciara has an MA in PPE from Oxford University and an MSc from the London School of Economics.

AFTERNOON PROGRAMME

Laura Smart

CMA Behavioural Hub

Laura leads the CMA's Behavioural Hub. Prior to joining the CMA, she was Head of Investigations at Consumer Scotland and led the FCA's specialist Behavioural Economics and Design Unit where she established its applied Behavioural Insights in Practice internal consultancy programme. Research interests include group decision making, improving organisational culture and crime prevention.

Rocio Concha Galguera

Which?

Rocio is Director of Policy and Advocacy and Chief Economist at Which? where she leads the policy, external affairs, campaign and policy analytical teams. She has over 20 years' experience in public policy and strategic roles spanning the public, charity and private sectors. Before joining Which?, she was Royal Mail's Head of Regulatory Reform and Competition, previously, she was a UK Senior Civil Servant and member of the Government Economic Service. Earlier in her career she was a senior consultant working on regulation in European and Asian markets at NERA Economic Consulting. Rocio is a Board member of Consumer International, BEUC and the Ada Lovelace Institute.

Geoff Steward

Stobbs IP

Geoff is a trial lawyer with over twenty-five years' experience. He joined Stobbs in 2018 after being a partner and head of the IP group at leading London firm, Macfarlanes. He has handled IP disputes for brands including Budweiser, Nike, Pernod Ricard, Mars, Vagisil and various Formula One teams. His expertise includes disputes relating to trade marks, passing off, copyright, designs (registered and unregistered), database rights, data protection, breach of confidence and anti-trust. As well as undertaking pure IP claims, Geoff has acted on a broad range of contractual disputes relating to brand protection and brand monetisation such as licensing, franchising, manufacturing, supply and distribution. He has acted for clients in industries as diverse as retail, publishing, television, sports (soccer, cycling, golf and Formula One), food and drink; automotive and aviation. He does not like look-alikes.

David Jevons

Oxera

David is a technology economist advising firms, courts and regulators on the impact of technology on society. He has 19 years' experience across a wide range of sectors including energy, water, healthcare and financial services as well as digital markets.

He provides expert advice on privacy, liability, fairness and competition in digital markets. This includes product design, investments, mergers and public policy choices.

David delivers insights from data using econometrics and data science tools, and behavioural insights using experiments and simulation tools. He has advised companies such as Facebook, Amazon, Google, Liberty Global and ASML, as well as regulators and consumer bodies.

Professor Bill Kovacic

George Washington university Law School

Bill is Global Competition Professor of Law and Policy, and Director of the Competition Law Center, at George Washington University. He previously has served as a Non-Executive Director with the UK's Competition and Markets Authority and as the Chair of the US Federal Trade Commission. He has advised many countries and organisations on antitrust, consumer protection, and the design of regulatory institutions. He holds a J.D. from Columbia University.

Dr Liza Lovdahl Gormsen

British Institute of International and Comparative Law

Liza is an antitrust lawyer. She is currently a Senior Advisor to the UK Financial Conduct Authority and a Senior Research Fellow at the British Institute of International and Comparative Law. She chairs the Advisory Board of the Competition Law Forum. Liza has legal experience from both the private and public sector. She has served as a lawyer at the Office of Fair Trading and has worked as a consultant for the World Bank. Liza is currently a Board Member of the Open Markets Institute in Washington DC and is a non-governmental Advisor to the ICN, appointed by the Competition Markets Authority. She is currently the claimant in Dr. Liza Lovdahl Gormsen v Meta Platforms INC and others before the Competition Appeal Tribunal in London.

Professor Barak Orbach

University of Arizona

Barak is Robert H. Mundheim Professor of Law and Business at the University of Arizona James E. Rogers College of Law, where he serves as the founding director of the Business Law Program. His areas of expertise are antitrust, corporate governance, regulation and the digital economy. He is a fellow of the American College of Governance Counsel, Thurman Arnold Project at Yale, Salzburg Global Seminar and American Bar Foundation. He is also a member of the American Law Institute, and a member of the advisory board of the American Antitrust Institute. Barak currently serves as a Derek Brewer Visiting Fellow at the University of Cambridge's Emmanuel College.

Tom Smith

Geradin Partners

Tom is a partner at Geradin Partners, having previously been Legal Director at the UK's Competition and Markets Authority (CMA). Tom led the legal team on the Digital Markets Taskforce and also directed the CMA's digital advertising market study. Tom was previously Director of Mergers at the CMA, responsible for the delivery of the CMA's phase 1 mergers portfolio and liaising with the European Commission. He also has significant experience in the banking sector, leading the team that implemented the UK's Open Banking regulations following the CMA's retail banking market investigation. Before joining the CMA, Tom advised companies on UK and EU competition law at the law firm Hogan Lovells. He spent time on secondment to the broadcaster ITV plc and the UK's Office of Fair Trading. Outside of work, Tom is on the Board of Trustees of Citizens Advice Southwark.

Dr Cristina Caffarra

Keystone Europe

Cristina is an Expert with Keystone, a global advisory firm that offers advice at the intersection of antitrust economics, technology and strategy, and set up Keystone's European offices in July 2022. Prior to moving to Keystone, she headed for 15 years the Competition Team of Charles River Associates in Europe.

Cristina holds a Master and PhD in Economics from Oxford University and is an expert in the application of modern industrial economics to competition and regulation questions – with particular focus on digital industries. She appeared as expert witness in multiple high-profile cases before the courts in several jurisdictions and advised on the most high-profile landmark competition cases of the last 20 years before the EC and national agencies (across Europe as well as Australia, South Africa, the Middle East, South East Asia and the US) – on behalf of clients like Microsoft, Apple, Amazon, Uber, Liberty Global, Sky, Samsung, Visa and many others.

She is recognised as a thought leader in the regulation of the digital economy globally, advising companies but also agencies. She is sought after as a public speaker and regularly presents at top events on competition, regulation and digital policy. She is also a convener with the ability to gather senior agency, policy and academic speakers for the most high-profile events in Europe on competition, regulation, and digital policy. She has written multiple contributions to the field of competition and regulation of digital markets, lectures in competition economics as an Honorary Professor at UCL and is also Associate Fellow of the Centre for Economic and Policy Research (CEPR) in London and Deputy Director of the CEPR Competition Research Policy Network.

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