



UNIVERSITY OF
OXFORD

Institute of European and Comparative Law, University of Oxford

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

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

Held on Friday 24th May 2019
at Mary Sunley Building, St Catherine's College Oxford

Sponsored by

Bristows

Contents

OVERVIEW	2
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PROGRAMME	3
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MERGER ANALYSIS, BUYING ALLIANCES AND BUYER POWER	
The assessment by authorities of retail mergers	5
A former regulator’s perspective on the Asda/J Sainsbury decision	7
Assessing the competition effects of European retail alliances	9

ADDRESSING UNFAIR TRADING PRACTICES (UTPs)	
Micro-foundations, market power and unfair trading practices – how our assumptions determine what we see	12
What have we learned from the regulation of unfair trading practices?	15

VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES	
Vertical restraints and e-commerce – recent enforcement	18
Panel discussion: Where should the VBER review focus and why?	21

TERRITORIAL SUPPLY CONSTRAINTS	
The AB InBev case and its implications	24

COMPETITION POLICY IN THE DIGITAL WORLD	
Competition law and its effectiveness in a digital world	26
Market power, platform power and exclusionary practices	29
Potential regulatory approaches to competition concerns in digital markets	32
Panel discussion: Keeping digital markets competitive	34

SPEAKER BIOGRAPHIES	37
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OVERVIEW

This report provides an overview of the fifteenth annual symposium discussing Trends in Retail Competition. The symposium covered five themes relevant to competition involving branded producers and distributors: buyer power, unfair trading practices, the Vertical Block Exemption Regulation, territorial supply constraints and competition policy.

The symposium opened with three presentations covering the assessment of retail mergers by competition authorities (including the CMA's three-step approach and the GUPPI formula), a perspective of the recent Asda/J Sainsbury merger decision and an assessment of the competition effects of European buying alliances and where the borderlines are likely to lie.

The session on unfair trading practices (UTPs) comprised two presentations. In the first, a Norwegian academic looked at how market power and UTPs tend to be assessed and what can be learned from taking a consumer behavioural perspective. In the second, a legal practitioner evaluated the regulation of UTPs, the barriers to enforcement from both the supplier and buyer sides, and the considerations required for an effective enforcement regime.

A speaker from the European Commission highlighted the increased focus on vertical restraints in competition enforcement, outlined the key findings from the e-commerce sector inquiry and described the enforcement activity that had taken place over the last two years, including the Guess decision. His overview of the consultation on the Vertical Block Exemption Regulation (VBER) led into a panel discussion on where the VBER review should focus.

The afternoon programme opened with a presentation from InBev on territorial supply constraints, focusing on the European Commission's investigation and InBev's strengthening of its internal compliance regime, combining teams, technology and targets.

The final session of the programme focused on competition law and its effectiveness in the digital world. The European consumer body, BEUC, outlined some of the challenges and how these demanded a holistic approach to digital markets while an academic from Oxford University looked at the characteristics that make digital markets different from others and explored the welfare concerns that may arise. A US perspective on potential regulatory approaches was then explored by an economist, who outlined the evidentiary factors, the protection of edge innovation and how non-discrimination might work in digital markets. The session closed with a panel discussion on the harms that may arise from online platforms, the effectiveness of remedies and what evidence would be required for any intervention.

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

PROGRAMME

09.30 **Introduction**

Professor Ulf Bernitz

MERGER ANALYSIS, BUYING ALLIANCES AND BUYER POWER

09.40 **The assessment of retail mergers**

Mat Hughes, *AlixPartners*

10.00 **A former regulator's perspective on the Asda/J Sainsbury decision**

Andrew Taylor, *Aldwych Partners*

10.20 **Assessing the competition effects of European retail alliances**

Michael Bauer, *CMS*

ADDRESSING UNFAIR TRADING PRACTICES (UTPS)

11.00 **Micro foundations, market power and unfair trading practices – how our assumptions determine what we see**

Bent Sofus Tranoy, *Inland Norway University of Applied Sciences and Kristiania University College*

11.20 **What have we learned from the regulation of unfair trading practices?**

Rona Bar-Isaac, *Addleshaw Goddard*

VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES

11.40 **Vertical restraints and e-commerce – recent enforcement**

Fabian Kaiser, *DG Competition, European Commission*

Panel discussion: Where should the VBER review focus and why?

Chair
Panellists
Simon Holmes, *Competition Appeal Tribunal*
Alessandro Tajana, *Johnson & Johnson*
Thomas Graf, *Cleary Gottlieb Steen & Hamilton*
Emma Trogen, *Cosmetics Europe*
Jan Werner, *Metro AG*

TERRITORIAL SUPPLY CONSTRAINTS

14.00 **The InBev case and its implications**

Matthias Eisenbarth, *AB InBev*

COMPETITION POLICY IN THE DIGITAL WORLD

14.20 **Competition law and its effectiveness in a digital world**

Augustin Reyna, *BEUC*

14.40 **Market power, platform power and exclusionary practices**

Ariel Ezrachi, *Oxford University*

Continued overleaf

PROGRAMME *continued*

15.00 **Potential regulatory approaches to competition concerns in digital markets**

Hal Singer, *Econ One Research*

Panel discussion: Keeping digital markets competitive

Chair Ariel Ezrachi, *Oxford University*
Panellists Stefan Hunt, *Competition and Markets Authority*
Alec Burnside, *Dechert LLP*
Hal Singer, *Econ One Research*
Oliver Bethell, *Google*

MERGER ANALYSIS, BUYING ALLIANCES AND BUYER POWER

The assessment of retail mergers

Mat Hughes, *AlixPartners*

Mergers between retailers, wholesalers and service providers (such as gyms, cinemas and health care service providers) are a core focus of UK merger control. Indeed, such mergers account for 37% of mergers that are either referred to Phase 2 in the UK or are only cleared subject to undertakings in lieu of reference, typically to divest outlets in areas where local competition concerns arise. The reason for this is that local mergers tend to be more complex, often with many local areas needing to be considered, and these mergers may also raise national competition concerns if some dimensions of competition are determined nationally (for example, large supermarkets setting prices nationwide).

The CMA takes a 3-step approach to assessing retail mergers:

i. Identify the geographical area across which the firms operate

The CMA will typically define an 80% catchment area, which may be expressed in terms of drive-time or walking-distance data. Once this is done, they will also analyse how many of the parties' stores overlap. If there are many overlaps (there can be hundreds with large mergers), the CMA may engage in some filtering to focus on those areas where competition concerns may arise.

ii. Identify the 'effective competitor set'

The CMA will then seek to identify the effective competitor set. To inform this they consider market research (such as surveys), the parties' store characteristics to ascertain which rivals have similar offerings or prices and the views of rivals. At Phase 2, the CMA may also conduct econometric analysis on potential entry and exit of stores in the catchment area to identify important rivals and store catchment areas.

iii. Define the measure of concentration

This could involve counting the number of relevant stores or fascia and calculating revenue-based market shares. In a number of recent Phase 2 cases, the CMA has used a weighted share of shops methodology, with rivals that are physically closer or having a more comparable offering having a higher weight. The CMA's objective at this stage is to use a measure of concentration to identify those areas where local competition concerns may arise as diversion between the parties' stores is high, in the sense that a high proportion of the customers they win or lose is between their outlets.

GUPPI pricing formula

In a number of retailer mergers, the CMA has then considered whether the loss of rivalry between the parties would lead to them having incentives to worsen some element of their local or national offering, whether this is on price, quality, range of service (which is commonly abbreviated to PQRS).

In order to assess this issue, the CMA has used pricing pressure tests, particularly the Gross Upward Pricing Pressure Index (GUPPI). The intuition behind these tests is straightforward, namely they recognise that what constrains any differentiated business from increasing prices pre-merger is the volume and the value of the business that it would lose.

The GUPPI analysis tries to capture the value of the proportion of business lost from one merging party to the other. The GUPPI methodology requires the CMA to measure three variables:

- ii. Diversion ratios, namely the proportion of customers that are lost between the parties when they vary PQRS. These are generally measured using consumer surveys asking where consumers would shop instead if an outlet were to close, and potentially using surveys in some areas to extrapolate as to the likely results in other areas.
- iii. Gross margins, which may include the gross margins on other goods/services that are purchased by consumers at the same time.

The relative prices of the parties' products/services, which may be across a basket of items where consumers purchase ranges of products or services.

The higher is GUPPI, the greater the incentives to worsen PQRS post-merger. This raises the question of what GUPPI threshold for intervention should be set.

Perhaps the first point to note is that GUPPI will always be positive as diversion ratios will be positive (some customers will be lost between the parties, as otherwise they would not be competitors at all) and gross margins will similarly be positive (if gross margins are not positive, then losses would be minimised by not making the sale at all). Moreover, since GUPPI is calculated by multiplying three variables together, any measurement errors in estimating these variables will be multiplicative.

Accordingly, the GUPPI threshold for intervention cannot be set at zero, as otherwise all mergers between differentiated competitors would be viewed as problematic.

In the Sainsbury's and Asda merger, the CMA stated that the correct threshold for a substantial lessening in competition to be expected from a merger will be a matter of judgement and requires a case-specific approach. Before taking account of merger efficiencies (which create offsetting incentives to improve PQRS so as to increase sales and profits), the CMA set the GUPPI threshold at 1.5% for fuel and online and large supermarket sales, and 2% for convenience grocery sales. These thresholds were increased by 1.25% as regards groceries, as the CMA accepted that there would be merger efficiencies, albeit materially less than those identified by the parties. Contrary to the parties' views, the CMA concluded that there would be no merger efficiencies at all as regards fuel sales.

The CMA also appeared to set a very low GUPPI threshold as regards national competition concerns.

By any measure, the CMA set an unprecedentedly low threshold for intervention based on its GUPPI analysis. The CMA also did this without any assessment of local conditions of competition in specific local areas. For example, if only 10% of the business lost by one party pre-merger were to be won by the other (i.e. diversion ratios are only 10%, such that 90% of the business lost is won by other rivals or customers buying less) and gross margins are 30%, then this would suggest a GUPPI of 3.0% and thus a local SLC.

That low threshold had a significant impact on the number of divestments Sainsbury's and Asda would have had to have made to address the competition concerns raised against their proposed merger. This led to the merger being prohibited.

This case suggests that the CMA will reach an adverse finding – in groceries and fuel markets at least – even if many local competitors remain. Small-scale groceries mergers are also much less likely to generate substantial efficiencies and thus will be treated more harshly.

A former regulator's perspective on the Asda/J Sainsbury decision

Andrew Taylor, *Aldwych Partners*

Did the CMA make the right decision?

My view is that the CMA came to the right decision in its final assessment of the Asda/J Sainsbury merger. However, the strength of the adverse finding on competition in local grocery markets was surprising. Whilst some commentators have seen this as a shift towards a more interventionist CMA, overall trends in the food and drink sector perhaps suggest a more permissive stance. In using the much-discussed GUPPI methodology for assessing the potential impact of mergers in this sector, the CMA can be confident of a greater degree of consistency in its decision-making across local markets than its previous methods allowed. But there are trade-offs in relying on this type of quantitative approach.

Does the Asda/J Sainsbury merger signal a more interventionist CMA?

The commentary around the CMA's decision seems to suggest that it reflects a move towards the CMA becoming increasingly interventionist. This can perhaps be linked to the wider reform agenda of the CMA and of the government.

However, in other areas the CMA appears to be increasingly permissive. In 2018 four food and drink mergers were cleared in which the merging parties had market shares of more than 50%. That compares with only two in the previous ten years.

J Sainsbury and Asda's relationship with the CMA

During the investigation J Sainsbury and Asda took the CMA to court (and won, in the Competition Appeals Tribunal (CAT)). Success in merger control often depends on the parties getting marginal decisions to go their way. Maintaining a good relationship with the CMA can therefore assist in relation to marginal decisions. It was not clear to me that taking the CMA to the CAT was consistent with maintaining a good relationship with the CMA.

Maintaining credibility with the CMA will also assist in positively influencing the CMA decision-making process. Part of this is about making consistent arguments and making the important points, not every possible point. From an outsider's perspective, there seemed to be some questions over the consistency of J Sainsbury and Asda's overall arguments.

Strength of competition between different brands and stores

The CMA's use of its weighted share of shops methodology in this merger blurred the previously bright lines between store sizes and retailer brands/formats. This is in part because the new methodology better reflects the reality of the market, and also because new technology is allowing the CMA to process more data, facilitating a more nuanced approach.

The grocery market has also changed in recent years, with budget offerings such as Aldi and Lidl entering the market. Previous merger decisions have also suggested that, for some goods, private label products are an increasingly stronger competitor to their branded equivalents.

GUPPI methodology

The advantage of the GUPPI methodology is that it brings greater rigour and consistency in decision-making across local markets when compared to previous methodologies that relied more on a visual analysis of maps.

Conversely, there is scope for methodologies such as GUPPI to become a 'crutch' for decision makers, relying on the formulae without fully investigating what has been measured.

CMA findings on retail buyer power and the supply chain

A key issue for food and drink suppliers was whether the CMA would accept the argument from Sainsbury and Asda that they had no buyer power in relation to their suppliers (Parties' response to Issues Statement, para. 248). This was a difficult line of argument to sustain since the parties also maintained that the merger would allow them to extract lower prices from their suppliers. The CMA had also designated Ocado and B&M as subject to the GSCOP, saying they could be 'expected to have the ability to exert buyer power'.

Assessing the competition effects of European retail alliances

Michael Bauer, *CMS*

Main features of European Retail Alliances

Members of European Retail Alliances (ERA) operate in different countries and usually have a fairly high market share in their home markets. However, they generally do not overlap in the national retail markets.

ERAs aim to sell services for which they negotiate a very substantial 'on-top' bonus. This bonus is requested without offering anything substantive in exchange. In fact, the services offered, such as mediation support for disputes with the retailers, are of limited value for suppliers. Promotions and the terms governing the sale of products still have to be negotiated on a national level.

Hence, the ERAs mainly operate on a 'gatekeeper' principle; without the benefit of an international deal with the ERA, the supplier is not invited to national negotiations with the members of the alliance.

A new development in this area is the 'Testudo principle', wherein retailers group together and oblige suppliers to either enter into a deal with all the members of the ERA, or with none of them.

Retailers also try to support negotiations by the ERA internationally or by all of them nationally through the use of coordinated delistings, or at least threatening to delist, during the course of negotiations.

Why is that possible?

EU competition law, and in particular the EU Horizontal Guidelines (2011), still takes a liberal stance on retail alliances. This seems to be based on a traditional understanding of 'joint buying' which originally was deemed acceptable to enable smaller buyers to achieve better terms and conditions like their larger competitors.

The Guidelines apply a likelihood test, finding that restraint of competition through joint buying is unlikely if the market shares of retailers on both buying and downstream retail markets are below 15% and/or if retailers do not compete on the downstream retail market (safe harbour rules).

In practice, the EU Commission has recently conducted dawn raids (in February 2017 and May 2019) on retail alliances. At national level, there is a growing number of investigations into retail alliances, in particular in France, but there are also other national competition authorities who have already taken a closer look at the negative competitive effects of such alliances (e.g. Germany and Italy).

What are the borderlines for ERAs?

i. Allocation of markets

Retailers obviously cannot use retail alliances to allocate geographic markets, as doing so would be a hard-core infringement of EU competition law. Interestingly, ERAs only benefit from the safe harbour rules of the Guidelines if there is no overlap in the relevant retail market, since their members' national market share often exceeds the 15% threshold. Therefore, there is a certain need to avoid entering into other members' home markets. At the same time there are strong retailers who do not form part of an ERA. Interestingly, these retailers operate in a much higher number of countries than any of the ERA retailers. Hence, it appears that without their ERA membership it would not be unlikely that the retailers would also expand into other geographic

markets. From this point of view ERA members qualify as potential entrants and, hence, as potential competitors. Therefore ERAs lead or at least support a potentially anti-competitive allocation of geographic markets.

ii. Information exchange

Retailers within an ERA are forbidden from exchanging strategic information with each other if and to the extent they qualify as actual or potential competitors. If they are competitors, information might only be exchanged to the extent that it is indispensable for the ERA, and only then to the extent that the conduct of the ERA or its members is admissible. This could become an issue against the backdrop of potential competition (see above) since information sharing between members on their purchase terms and conditions could create an additional market entry barrier. Moreover, if the ERA is based on the principle of selling services to suppliers, there is certainly no need to exchange information on purchasing terms and conditions.

iii. Coordinated delisting ('collective boycott')

One of the most critical elements is the issue of coordinated delistings seen recently. One must ask if coordinated delisting is a necessary element of joint buying, or is it simply a serious restraint of competition? The Commission recently investigated a joint purchasing agreement by players in the car battery recycling industry (the Car Battery Recycling Cartel). The members of the cartel agreed on purchase prices; the Commission found that this infringed competition law and imposed a multi-million euro fine. The members of the cartel, who were downstream competitors, argued that agreeing lower purchasing prices allowed them to reduce the prices of the products they sold, thereby providing benefits to consumers. However, the Commission did not accept this argument, instead concluding that price-fixing is a by-object infringement. This begs the question of whether joint delistings by ERA members would have the same effects as fixing purchase prices. Indeed, there are good reasons to believe that coordinated de-listings qualify as a by-object restraint of competition like the fixing of purchase prices. This follows from the fact that coordinated delistings fix the competitive conduct of retailers and do have a very serious impact on competition and ultimately consumers since products disappear from the shelves. In this context it does not seem to matter whether the retailers are actual competitors on the retail market since co-ordinated de-listings harm competition if products disappear. In addition, ERA members qualify as potential competitors (see above).

iv. Foreclosure of other retailers/market tipping

Another question is whether ERAs harm the competitive position of other and, in particular, smaller retailers. This would be the case for example if the bargaining power by ERAs increase the spread of purchasing terms and conditions beyond a level where smaller retail businesses turn unprofitable. This would force smaller retailers to exit the market, as we have seen in Germany, for example. The tricky thing is that, in modern grocery, purchasing terms and conditions and a retailer's ability to operate profitably are very closely linked. There is an obvious spiral effect whereby any decrease in a retailer's sales to end-customers leads to less favourable purchasing conditions (e.g. due to volume rebate schemes and/or a decrease in buying power) and vice versa. Once this effect starts in a market, it is almost unstoppable (as we have seen in many online markets, where very similar concerns have been raised under the headline of 'network effects'). Ultimately, if retailers are forced to exit the market, there is a high risk of market tipping and, as reality has shown, any such development is often beyond regulatory control.

v. Bypassing of SCI rules

Many retailers in Europe are members of the Food Supply Chain Initiative (SCI) and several of them also joined an ERA. However, none of the latter are members of the former and therefore are not directly bound by its rules. However, being a member of an ERA does not exempt retailers from the SCI principles they have signed. This concerns all procedural rights and rules (e.g. the application of the SCI conflict resolution mechanism) and also the Good Practice principles, which describe fair and unfair trading practises. It follows that retailers which are members of both an ERA and of the SCI should not be able to bypass their SCI obligations by outsourcing certain parts of the negotiations to their ERA.

ADDRESSING UNFAIR TRADING PRACTICES (UTPs)

Micro foundations, market power and unfair trading practices – how our assumptions determine what we see

Bent Sofus Tranoy, *Inland Norway University of Applied Sciences and Kristiania University College*

Having served on a public commission which looked into market power in the food retail value chain, and seeing it from the point of view of a political scientist, two questions arose:

1. What is the extent of dubious and unfair trading practices?
2. Why was there such hostility to the public commission set up for the investigation (which was outside the competition authorities and part of an initiative from the farming sector) and why such deep reluctance to do anything about unfair trading practices on the part of competition authorities?

From the point of view of a political scientist, it is interesting to consider how we think about these things, and the norms we create (what we might term ‘neo-classical habits of mind’). This includes:

- **Overplaying the degree of unitary, rational, utility-maximising action**
If we really believe in the significance of these types of actions then in theory most markets will function correctly.
- **Competition as a natural state**
In general, the majority of markets function without outside intervention; we should be careful with our approach to interference.
- **Baskets vs. categories**
Although retailers generally think of things in terms of different ‘baskets’, the competition authorities think in terms of markets for given categories of products (e.g. how many suppliers there are for jam).
- **Theory over practicalities**
There seems to be a tendency to give priority to logic and theory rather than taking into account the real practical facts ‘on the ground’ in an investigation.
- **No real interest in processes**
There is a real focus on outcomes, e.g. prices and market shares, rather than processes; how the present market conditions came to be seems to be of less importance. There is a harmful lack of dynamism in this analysis.
- **The power of pricing**
There seems to be a willingness to only look at power when it is reflected in pricing. The kind of power which makes it possible to engage in unethical behaviour appears to be of less interest.

Adair Turner on Financial Regulation:

What the dominant conventional wisdom of policymakers therefore reflected was not a belief that the market economy was actually at an Arrow-Debreu nirvana – but the belief that the only legitimate interventions were those that sought to identify and correct the very specific market imperfections preventing the attainment of that nirvana.

Although Turner’s quote was given in the context of finance, it equally applies in this context. In retail investigations, the burden of proof falls on the party looking to make an intervention; there is therefore a need to single out one specific imperfection in order to do anything about it.

Compounding this is the fact that the CMA's approach to investigations does not allow any pushback or collaboration from the party under investigation; there seems to be no space for outsiders.

A number of empirical observations came out of the investigation, including the use of:

- Gatekeeping, in the form of non-commercially justifiable threats to delist;
- Partial punishments, e.g. delaying the introduction of new products or strategically removing elements of a portfolio;
- Use of own brands, which are strategically placed and priced;
- More general strategic shelf-placing.

Decision-making and consumer behaviour

The extent to which these methods actually work boils down to how one models consumer behaviour. In this context there are two systems in human decision-making:

Autopilot (used 70–80% of the time)

- not controlled
- no noticeable effort
- fast
- associative
- not self-aware
- skills
- multitasking

Conscious (used rarely; uses more energy)

- controlled
- takes effort
- slow
- deductive
- self-aware
- we use decision rules
- one thing at a time

This translates into two models of consumer behaviour:

Time-constrained affluence

- impulsive shopping
- path of least resistance
- shelf-placement is important
- one-stop shop
- convenience is paramount

The 'professional housewife'

- disciplined and planned
- finds what she is looking for
- willing to visit more than one shop
- willing to travel

Market power models

In terms of competition, it is important to compare consumer models with market power models. The British sociologist Steven Lukes proposed, in 1974 (in his work *Power: A Radical View*) that there are three general types of power:

- Power over outcomes (controlled by, for example, making threats)
- Agenda-setting power (dictating what is on the table and what is not)
- Ideational power – influencing how people think about things; what is reasonable/desirable/possible.

Put into the context of the retail sector, these models of power translate into:

- **Gatekeeping power, reflected in threats of delisting**
Gatekeeping power is supported by habit-driven loyal consumers, reinforced by their time constraints and willingness to take the path of least resistance. The cost structure of suppliers also plays a role in this context, as many need several customers in order to gain the necessary economies of scale.

- **Choice architecture**

For example, where products are placed on shelves. The balance of power is mostly in favour of supermarkets in this context.

- **Brand power**

Ideational power in retail is best represented by the power of brands, and how suppliers shape consumer choice and preference by building brand loyalty. If consumer choice only depended on brands, and consumers left a shop every time they could not find their preferred brand, then delisting would not be a powerful method. Consumer choice does not operate in a vacuum; consumers do not decide exactly which brand of each product they will buy before entering a shop, they are significantly affected by choice architecture. The challenge for brands in the retail sector is to create the kind of relationship with consumers that some cars and fashion brands do, where consumption of a certain brand is perceived as being linked to the consumer's identity.

Conclusions

- The gatekeeping and choice architecture power of the supermarkets trump the ideational power of the suppliers.
- This creates the opportunity to engage in dubious and unfair trading practices.
- If real-life customers were more similar to the neo-classical consumer they would punish retailers that abuse the delisting lever.

The future

- The mechanisms and dynamics discussed above are likely self-reinforcing.
- The general trend is one of moving more and more towards integrated value chains with the supermarket groups as the hub, or rather the control centres.

What have we learned from the regulation of unfair trading practices?

Rona Bar-Isaac, *Addleshaw Goddard*

Barriers to effective enforcement

Supplier Side

From the supplier side, it has been well-documented that there is a fear of retaliation when raising issues with a larger trading partner. The climate of fear has been pervasive for a period of years and still persists today – 67% of suppliers fear the negative consequences of a complaint to their retailer.

When dealing with unfair practices there is very rarely a clear-cut answer. Outcomes depend on the commercial flexibility in the given situation, but the ambiguity around rules and guidance can be damaging for suppliers, who consequently do not know how to approach issues with retailers.

In the retail sector, decisions must be made quickly, often on a week-to-week or even daily basis. Therefore, an enforcement regime which has very lengthy decision-making processes is not entirely fit for purpose.

Buyer side

There needs to be a level of consequence, otherwise there is no motivation to change behaviours. Negative publicity, or a lack of publicity, is one consequence which can be used very effectively. The recent Co-op investigation proved that inertia in decision-making and a lack of sufficient external motivation to improve practices can also be barriers to change.

Effective enforcement regime

The nature of the enforcer at the heart of the regime is critical. In particular, they must:

- encourage interaction between the enforcer and the retailer;
- encourage interaction between the enforcer and the supplier;
- enforce effective sanctions and consequences;
- manage risk for suppliers.

United Kingdom

Key features

The UK's enforcement regime attempted to implement a voluntary code in 2000, and then, in 2013, proposed a mandatory code, before concluding after a parliamentary debate that full regulation was necessary. The UK therefore has one of the most comprehensive enforcement regimes in the world, with an independent adjudicator for the Grocery Code.

The Grocery Code Adjudicator's powers include the imposition of significant financial penalties and ability to initiate investigations, without relying on a direct supplier complaint. The Groceries Code Adjudicator can therefore use her own powers to test endemic problems, without suppliers having to make a complaint and put themselves in a difficult situation with retailers.

Monitoring progress (e.g. through annual surveys) is a key part of the UK system. Penalties and sanctions are only effective to the extent that they have a positive effect on the behaviour on the market.

Key issues

A lack of awareness and understanding of the GSCOP in some places.

Reluctance on the part of suppliers to use the dispute resolution systems available to them. There are constant appeals for suppliers to come forward with issues and the formal arbitration facilities in place are very poorly used, being seen as a measure of last resort.

Rest of the World

Australia

Australia's regime is in many ways a voluntary managed scheme. A Code Compliance Manager (CCM) operates within each signatory, investigating and resolving supplier complaints. There is a degree of oversight from the commission, though it is at one remove.

Key issues in Australia include there not being a sufficient degree of independence on the part of the CCM and there being no requirements for the CCM to protect suppliers' confidentiality.

Ireland

The Irish regime applies to retailers and wholesalers with greater than 50 million euros turnover. Its commission monitors compliance and has its own investigatory powers, including the power to issue contravention notices.

Key issues with the Irish system are that there is no substantive dispute resolution procedure and the Irish Farmers Union has recently highlighted the need for an industry-specific regulator.

France

Retailers in France are governed by the French code of commercial practices. It has recently implemented a new law preventing excessive price cutting. France has a judicial dispute process and its General Director for Competition has investigative powers.

France, however, has no judicial recourse, a lack of confidentiality obligations and various problematic cost implications.

Jurisdictional Comparison

Juristictions	Supplier anonymity	Sanctions			Enforcement action
		Fines	Publicised	Injunctions	
Australia	No	No	Optional	Injunctions	No
Ireland	N/A	€3,000 (1 st summary conviction) €10,000 (subsequent conviction on indictment)	N/A	6 months imprisonment (1 st summary conviction) 2 years imprisonment (subsequent conviction on indictment)	No
Spain	Yes	€3,000–€1m	Yes	Recommendations	347 sanction proceedings / 95 fines (2016)
France	Yes	Admin fines €75,000 (ind.) €375,000 (entity) Civil sanctions €5m	Yes	Injunctions	52 investigations / 6 civil proceedings / 134 criminal sanctions (2016)
Czech Republic	Yes	Up to €39,141,000 / 10% of turnover	Yes	Injunctions	31 investigations (2016)
Hungary	Yes	Up to €1,591,000 / 10% of turnover	Yes	Injunctions Trader commitments	152 investigations / 29 fines / 11 trader commitments
UK	Yes	1% of UK turnover	Yes	Recommendations	2 investigations

Key qualities of an effective regime

Continuous engagement between the regulator and the industry is important – the ability for both sides to communicate outside of investigations could encourage better compliance.

There has to be a ‘safe space’ for suppliers to secure their anonymity when voicing concerns. This needs to be balanced, in circumstances where the retailer faces heavy sanctions, with the ability for the retailer to defend themselves against those sanctions.

Sanctions are crucial but the bar must be set at a level that is fair to the buyer and the supplier in its context.

VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES

Vertical restraints and e-commerce – recent enforcement

Fabian Kaiser, DG Competition, *European Commission*

Increased focus of the Commission on vertical restraints in competition enforcement

As part of its digital single market strategy, the Commission's e-commerce sector inquiry was aimed at bringing down barriers to cross-border sales within the European Union. While other measures of this strategy targeted regulatory barriers to cross-border sales, the sector inquiry looked in particular into contractually-erected barriers to cross-border sales in distribution agreements with a focus on territorial restrictions.

Sector inquiry – key findings

More price transparency and price competition has been beneficial for customers, who can easily compare offers with reduced search costs. The increased transparency has also facilitated price monitoring at all levels. Retailers are now using automated tools to set their online prices to match those of their competitors. Many manufacturers also monitor systematically online prices set by their distributors.

Brands have reacted to these developments in a number of ways:

- There is an increase in the presence of manufacturers at the retail level (i.e. manufacturers opening their own webshops).
- Equally, there is an increased desire to control how brands' products are sold, especially online. This feeds into an increased recourse to selective distribution networks and the introduction of further selection criteria in such networks.
- Vertical restraints are increasingly prevalent, including pricing restrictions, territorial restrictions, and online sales-related restrictions, such as marketplace bans and bans on using price comparison websites.

Enforcement

Following the sector inquiry, there has been increased enforcement activity of the Commission in the area of verticals, in particular with respect to territorial sales restrictions and resale price maintenance (RPM) practices. Decisions or statement of objections (SO) that have been issued over the last two years with respect to territorial sales restrictions include the following:

- Pioneer (07/2018)
- Pay-TV commitments (03/2019)
- Video games SOs (04/2019)
- Guess decision (12/2018)
- Nike licensed merchandise (03/2019)

RPM

The Commission also renewed its interest in RPM cases, issuing Decisions against four consumer electronics manufacturers in July 2018 (Asus, D&M, Philips and Pioneer).

Strategy

The conduct in all four consumer electronics cases was similar. There were no explicit RPM clauses in the distribution contracts, but there was a clear strategy by the companies to influence the price setting of retailers whenever they went below a desired communicated price level (e.g. the recommended resale prices or so called 'street prices'. Moreover, all four companies monitored retail prices very closely and targeted particularly price aggressive online retailers. Some of the companies tracked serial numbers in order to identify the origin of low-priced products, which could be followed up with intervention. Strategies also included bonus systems and partnership programmes and colour-coding systems to show which retailers were furthest from the desired price level.

Threats

In all four cases, the brands applied threats or sanctions, which could take the form of the termination of the contractual relationship, the suspension of deliveries or the withdrawal of bonuses and partnership programs.

Evidence

Conduct constituting RPM generally took place fairly secretly as the companies were fully aware that they were crossing the line of what is allowed. Discussions often took place orally on the phone or in Skype chats. Evidence relied upon in the Decisions also consisted of screenshots of price comparison websites that showed the deviation of a retailer with the desired price level. These screenshots were sent to the low pricing retailer by e-mail with an instruction to raise the price of the product.

Pricing algorithms

An interesting angle of the cases relates to the role of pricing algorithms. Many online retailers use pricing software which automatically adjusts retail prices to those of competitors; therefore, price restrictions imposed on only a few (low pricing) online retailers likely had a broader impact on overall online prices for the respective products.

The Guess decision

Guess operated an EEA-wide selective distribution system. In this system Guess restricted its authorised distributors from:

- selling to end users located outside the authorised distributors' allocated territory, in breach of Article 4(c) VBER;
- cross-selling among authorised wholesalers and retailers, in breach of Article 4(d) VBER;
- determining their resale prices independently, in breach of Article 4(a) VBER;
- using the Guess brand names and trademarks for the purposes of online search advertising;
- selling online without first obtaining a specific authorisation, which Guess had full discretion to either grant or refuse, and where no quality criteria had been specified, for deciding whether or not to grant an authorisation.

Guess's primary objective was to protect its own online sales activities and to limit intra-brand competition by authorised retailers as much as possible.

The online search advertising restriction was aimed at allowing Guess to keep its own spending on online advertisements low and to avoid a decrease of visibility of its own webshop. EU trade mark law allows restrictions on such bidding if the consequent search results would cause confusion as to the origin of the goods in question, but here the restrictions were all made against Guess's authorised distributors selling genuine Guess products, so there was no risk of confusion as to the origin of the products. The Commission did not see any valid brand protection considerations in this case. By severely restricting the use of online search advertising by its authorised retailers, Guess limited the 'findability' and ultimately the viability of retailers selling its products online in particular outside their contractual territory or area of activity. The Commission considered such a restriction to fall under Article 4(c) of the VBER and a 'by object'-restriction under Article 101(1) TFEU which ultimately aimed at partitioning markets.

The online sales restriction (i.e. the requirement to obtain written authorisation of Guess to sell online with full discretion for Guess) was considered to have as the object to partition the market, since they restricted authorised retailers from actively or passively selling the contract products online to customers, in particular outside their contractual territory or area of activity. This restriction was equally considered as a 'by object'-restriction and a hardcore restriction under Article 4(c) VBER. This would not have been the case if the authorisation requirement had been based on objective, quality-based considerations.

Review of the Vertical Block Exemption Regulation (VBER)

- The VBER review was launched on 3 October 2019; the VBER expires on 31 May 2022.
- The review is divided into two phases: evaluation (lasting approximately 18 months, until Q2/2020) and impact assessment (approximately 24 months, until expiry).
- The public consultation phase is from 4 February to 27 May 2019.
- The evaluation phase is aimed at gathering evidence on the functioning of the VBER (together with the accompanying Guidelines on Vertical Restraints).
- A dedicated stakeholder workshop is planned for autumn 2019.
- The review is being run in close cooperation with national competition authorities.
- The context of the review is the increased importance of online sales and the emergence of new market players such as online platforms.

Panel discussion

Chair: Simon Holmes, *Competition Appeal Tribunal*
Panellists: Alessandro Tajana, *Johnson & Johnson*
Thomas Graf, *Cleary Gottlieb Steen & Hamilton*
Emma Trogen, *Cosmetics Europe*
Jan Werner, *Metro AG*

Are there too many false negatives – things not exempt, black listed or excluded, that ought to be recognised as not anti-competitive?

Are there too many false positives – things which are not excluded but should be?

Are there things currently within the block exemption that should be removed?

Do the VBER or Guidelines need to be updated?

You have to update the framework with respect to overall changes in the environment. There has been a change of mindset, which started with the e-commerce sector inquiry. Brands today integrate online into their commercial strategy; that would not have happened in the same way in 2009. Today brands make concerted efforts to have coherent online commercial strategies. Some brands are more reliant on online content than others; within this subset there are also more forward-thinking brands, which have integrated social media into their online strategies. Preserving brand equity is more difficult online than offline. We have to start by thinking we have to integrate into the VBER and the Guidelines a level playing field that works for all brand owners. Brands need to have the flexibility to adapt to a changing environment.

To be able to create a consumer experience environment offline is also important to brands, which is why we are seeing an increase in brick and mortar requirements. Brands also need to be able to compensate within the network so as to have more clarity as to dual pricing.

E-commerce is a huge opportunity for brands, as has been recognised in the case law. For example, Coty recognised that it is necessary to be able to protect the image of a brand.

Have we got the right balance between the manufacturer and the distributor; should the supplier be controlling everything?

To a degree we understand brands' desire to control how their products are distributed, but at the same time brands can go too far, as in the case of Guess. Since the Coty decision, many suppliers have tried to tighten up the terms of their contracts.

There is a need to counter the processes which are giving suppliers more control. For example, platform bans could be excluded in the light of Coty and Guess. Platforms can be the only opportunity for some retailers to have an online presence. There is also a need for more clarity around the extent to which selective distribution agreements are permitted only for luxury products, and what constitutes luxury in this context.

To what extent should manufacturers select the channels they sell through, since this will have market consequences?

Brands should have the right to be able to decide how they present their products (for which they have likely worked hard to develop a positive image) to the world.

Does it really restrict competition? If there is sufficient inter-brand competition then it should be okay. For online sales there is a tendency to look at online restrictions. There is an opportunity to clarify that the Pierre Fabre judgment is only relevant where competition is to some degree more limited because the products can only be sold within a limited network. Outside selective distribution systems, dealers are free to sell. Restrictions on online sales should therefore be narrowed down.

There is a genuine difference in the cost structure between an online retailer and a physical retailer. This raises questions of how to organise a distribution system and how to manage the different channels.

Dual pricing is something the Commission is currently considering but it is currently maintained as a hard-core restriction on the basis that it would allow brands to circumvent the requirement to allow online sales. On selective distribution, Coty clarified that selective distribution is allowed for luxury products, but it is equally permissible for highly technical products.

The current regulation (Article 4(a) and the Guidelines at para. 48) take a strict approach to RPM. Is this still justified?

The Guidelines recognise efficiencies such as promotions and product launches, but in practice there may be some pro-competitive practices which do not take place because of uncertainty around the current regulation. Would it make sense to clarify the language of the Guidelines, knowing they are not binding at national level? Taking a different approach to RPM might require carving out certain activities from the blacklisting in Article 4(a). The threshold is fairly high: if something is blacklisted then it is because there is certainty that it will have anti-competitive effects. However, there may be scope to find spaces of legality within the current prohibitions.

One reason the Commission has now looked into these markets more closely is to drive consistency between national practice and the guidance.

The recent case law in the area has been useful in clarifying some issues with regards to e-commerce, but it might also be useful if the Commission published non-infringement decisions, in the same way that the CMA does in the UK.

Algorithmic pricing

Short of reforming the block exemption, providing more guidance around new pricing technologies would be valuable. The relevant systems allow suppliers to give recommendations for resale price via pricing technologies and databases which the retailers receive. The question is where the limit is between RPM and non-binding price recommendations.

There is a need in some cases for joint-branding or joint-advertising, and RPM should not stand in the way of this.

Distributor vs. agent

Controlling a genuine agent's price is not only permitted, but it is a necessary element of their agency. On the other hand, controlling the price of a reseller is RPM and is problematic. Is there anything we can do to improve the difficulty a supplier has?

Contrary to the tenor of the Guidelines and the Block Exemption, the nature of the agent is fairly formalistic and dogmatic. There is a list of qualifiers without which a relationship will not qualify as one of agency. The question is whether there is scope for something less binary where the relationship between the intermediary and the supplier is more of a partnership, where the supplier takes on certain risks by, for example, marketing the product downstream. In such a partnership relationship it should be possible for the supplier to define some terms as to how the resale happens.

TERRITORIAL SUPPLY CONSTRAINTS

The AB InBev case and its implications

Matthias Eisenbarth, *AB InBev*

European Commission decision

In 2015, the European Commission (the Commission) raided retailers as well as AB InBev (ABI) in the context of an investigation into food retail.

In its statement of objections, the Commission alleged that ABI had tried to restrict the flow of its products between the Netherlands and Belgium. The allegations concerned ABI's Jupiler brand and two customers: one retailer and one wholesaler. The specific incidents with which the Commission took issue had all ended at that point.

ABI decided to settle with the Commission. This allowed for a quicker resolution and a lower fine. During the settlement discussions, ABI brought additional evidence to show that the scope of the infringement was narrower than the original allegations. ABI committed to a labelling remedy as part of the settlement as well.

One of the allegations related to ABI having labelled Jupiler products with slogans and pictures relating to the Dutch football team (for the Dutch market) and the Belgian football team (for the Belgian market) as a marketing tie-in for the occasion of the 2014 World Cup. The Commission found that this had also been done to restrict cross-border sales as an object infringement. The Commission also took issue with the removal of food labelling information in French from cans in the Netherlands. This led to ABI committing to using bilingual (French and Dutch) labelling for 19 of its brands sold across the Netherlands, Belgium and France:



Compliance step-up

Spurred by the investigation, ABI strengthened its antitrust compliance training, focusing on building a culture of ethical owners. This revamp revolved around three main areas: teams, targets, and technology:



Teams

ABI's improved training is based around considering the commercial realities its staff face and trying to reflect that in different modules based on scenarios such as, for example, pricing, negotiation, M&A, and category management. ABI recognised that it is equally important to train its legal teams on antitrust, running more than 10 three hour legal workshops throughout 2018 and 2019.

Targets

ABI aims to apply consistent consequence management by implementing a policy of withholding performance bonuses for individuals who breach competition policies. The company also encourages accountability of team leaders by making them responsible for any failure by their teams to adhere to policies.

Technology

Similar incentives were used in the overhaul of the workflows and matrixes used to ensure the right decisions are made in the supply of products, promotions, SKU differentiation, etc. ABI is piloting G-Smart audit tools, AI-driven risk assessments and live dashboards to monitor and remediate antitrust risks.

Territorial supply constraints – a new legislative initiative?

The Commission noted in its Retail Communication of 19 April 2018 that so-called 'territorial supply constraints' are an issue. It is currently considering if additional legislation is necessary to address this.

Additionally, the Commission's call for tender of 1 March 2019 concerns a study designed to look into the alleged gap left by the competition rules.

Is an extra layer of rules for European businesses really necessary? The Commission must first define the issue in order to assess how it should be resolved. This requires a clear alignment between competition rules and any potential new legislation. As the AB InBev case shows, competition rules might be enough to protect the single market sufficiently.

COMPETITION POLICY IN THE DIGITAL WORLD

Competition law and its effectiveness in a digital world

Augustin Reyna, *BEUC*

What is bringing the debate around antitrust enforcement to a new level is the rapid digitalisation of markets and the take-up of digital technologies by market operators across sectors. Looking at digital markets and consumers, we find some common characteristics which are not prevalent in other markets:

- Intermediation (two-sided and multi-sided platforms)
- Zero-price services
- Network effects
- Tracking and personalisation
- Data as a driver for innovation
- Efficiency biases

When considering these issues, consumer organisations consider their effects on three main areas for consumers: price, choice and quality.

“Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.”

Post Danmark (C-209/10)

New challenges

- Cases to become more complex, e.g. incorporation of non-monetary considerations
- Overlapping competences between enforcement authorities
- Timing of proceedings and use of interim measures
- Design and testing of remedies
- Post-enforcement assessments

These new challenges demand a holistic approach to digital markets. This approach must take into account:

- **the merits of the markets** – allowing for healthy competitive processes;
- **the autonomy of consumers** – providing consumers with a decision-making process free from manipulation;
- **trust** – both in the form of safety and security of products and services, and consumer trust towards traders and markets.

There was recently a request to the Commission asking for a cross-institutional investigation of Facebook's activities. We currently have different national authorities across different member states using different enforcement tools to address the same infringement. The recent decisions of three national competition authorities against Facebook illustrate this point:

Belgian Data Protection Authority (2015, confirmed in 2018)

- No valid consent for tracking users outside Facebook through cookies
- Legal base: Data Protection Law: cookies rules

Italian Competition and Consumer Authority (2018)

- Aggressive commercial practices when obtaining consent
- Legal base: Unfair Commercial Practices Directive

German Federal Cartel Office (2019)

- Abuse of dominant position
- Legal base: German Competition Act (GWB) + German Act Against Unfair Competition (UWG) + GDPR

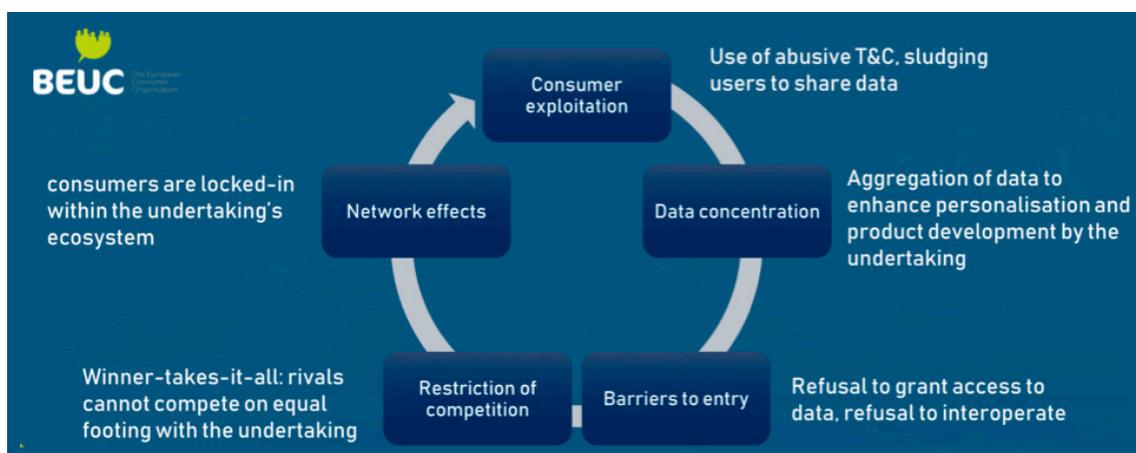
This demands a more coherent approach. The application of different legal regimes to the same set of facts leads to a fragmentation of the competition landscape, the enforcement of different remedies, and different standards in different countries.

If we look closer at the types of practices for which Facebook was punished, we can identify certain patterns within consumer behaviour:

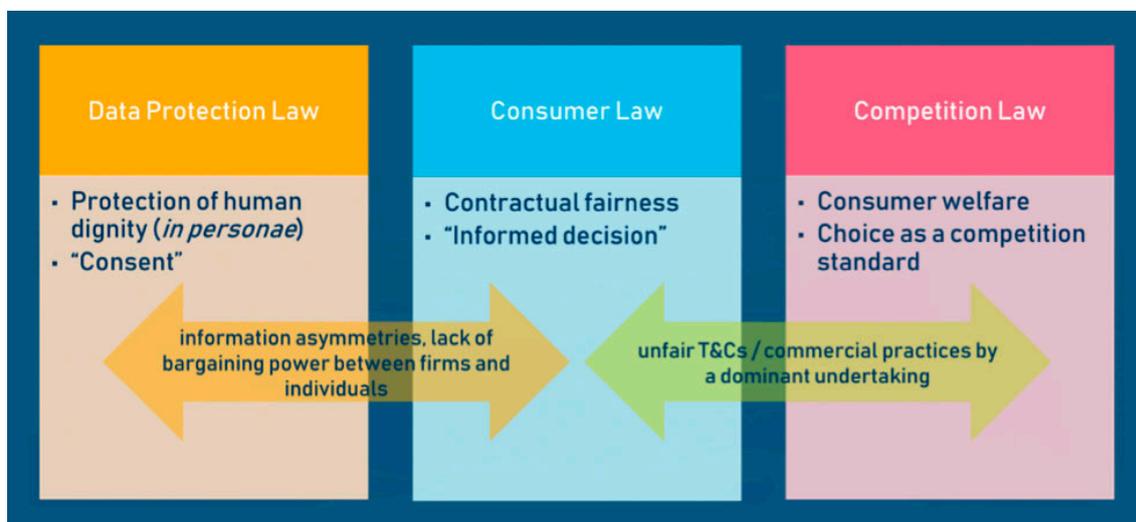
1. The illusion of being in control of one’s personal data.
2. Being manipulated into sharing data by default (e.g. through the design of site interfaces).
3. The conditionality of the acceptance of terms and conditions to use the service.
4. Being resigned to the feeling that one has no other option but to use the service.

Is this a competition law problem?

When these aspects of consumer behaviour are combined with the practices of companies exploiting big data online, it creates a vicious cycle of consumer exploitation:



The cycle of data exploitation affects areas governed by data protection law, consumer law and competition law. These three areas cannot be seen as entirely distinct in this context, as there is an amount of synergy between them. The extent to which each is successful may well depend on the success of the other(s):



Institutional considerations

Because one type of behaviour can lead to infringement of multiple laws, a number of institutional considerations are raised:

- Identification of intervention benchmarks within each legal regime on substance and form.
- Allocation of competences: what criteria do we follow in case of (a) silence in the law, or (b) concurring competences.
- Remedy: its effectiveness depends on its design; can one remedy tackle multiple harms?

It is therefore extremely important to enhance the dialogue between different agencies. There are three models which can be explored in this context:

1. Informal ad-hoc dialogue between authorities, especially where the decision of one authority might affect one or more other member states. For example, GDF Suez data access interim measure (Autorité de la Concurrence, 2014), the Facebook decision (BKM, 2019).
2. Structured dialogue: Consumer Protection Cooperation Network, e.g. enhanced cooperation, sharing of information.
3. Integrated dialogue – is there scope for joint decisions? This raises many questions around the autonomy of authorities, but is aimed at having greater consistency between the member states.

Market power, platform power and exclusionary practices

Ariel Ezrachi, *Oxford University*

Competition dynamic

There are significant benefits to the competition dynamic but there are a number of concerns surrounding virtual competition. Many of these concerns are ones that we have seen over a long period of time, but the scale of the issues faced today means that the aggregated effect is much larger than what we have seen before. The digital landscape presents several key characteristics which arguably differentiate it from many other markets, among them: big data, big analytics, network effects, friction and switching costs, and controlled ecosystems.

Markets are now experiencing a tipping effect to the degree that our assumption that markets will be able to readjust and fix themselves may no longer be correct. We have seen this in markets with an obviously dominant player, such as social networking and search engines. This leaves limited competition in the market and shifts our focus to competition for the market. However, the latter may fail to deliver, as the control over innovation paths, barriers to entry and expansion, and the presence of extreme network effects may undermine disruptive innovation.

The accumulated result of the above characteristics has been a digital environment which may appear dynamic but is often characterised by increased concentration and increased market power. An environment in which key players are able to dictate the nature and flow of innovation, the entry into market, the expansion of services and the interface with consumers.

Welfare effects

While it is widely agreed that network effects, big data and big analytics are necessary in order to yield greater efficiencies and, as such, have the potential to promote consumer welfare, their combination, alongside other business strategies, has led to the rise of exploitative and exclusionary practices which the market dynamics seem unable to curtail. Among these practices noteworthy are:

Platform exclusionary practices

The presence of a handful of gatekeepers that control an ecosystem has bestowed, on these select few, the power to determine the rules of the game and engage in ongoing self-favouring. With market power and limited outside options, key platforms are increasingly able to dictate the terms and conditions, levy increased charges for use, control data flows from sellers to users and distort the competitive process to their advantage.

Self-favouritism and search engine manipulation effects

Linked to the above is the ability of leading platforms and search engines to engage in self-favouritism, ranking biases, search suggestions through filtering and ordering, and search engine manipulation. Manipulation may affect the ability of downstream operators to compete effectively with vertically integrated entities that control the search parameters and results. Such exclusionary practices may also lead to exploitation and could further impact on the users' perception of the market for goods, services and ideas.

Exploitation of upstream providers

The control over key interfaces and platforms may enable a powerful intermediary to exercise market power in its dealings with service and content providers. Such practices may distort upstream markets and have a direct adverse effect on service providers and indirect consequences for consumers. Practices may involve, among others, margin squeeze, scraping of content and abuse of bargaining power.

Discriminatory practices

The asymmetry of information and analytical capacity in the digital economy enables companies to deploy advanced algorithms and machine learning techniques to facilitate targeting, discriminatory practices and behavioural manipulation. These practices may affect demand patterns and distribution of wealth.

Control over the competitive process

In the digital environment, what we see now are some companies that obtain the level of power which enables them to act as architects of their own competitive environment, as competition happens within their controlled ecosystem. Due to network effects, sellers are often left with little choice but to sell and compete through these ecosystems, while being subjected to their internal rules and regulations. As the platforms engage in vertical expansion, they can favour their own operation, extract greater fees from competitors and control data flows.

The scope of competition law and economics

While the international community strives toward convergence, these efforts cannot guarantee full assimilation of thought and enforcement as competition laws around the world are path-dependant and rooted in ideology. As such, they may differ in their scope and mandate. This reality implies that arguments, theories and law from outside the EU cannot simply be imported and implanted as if they exist in a vacuum. Such implantation disregards institutional design and legal framework, and amounts to the imposition of values and norms advanced by the exporter. As such, it ignores antitrust being a subcategory of ideology. While competition regimes worldwide share in common their core mission to advance consumer welfare, they may differ in their scope of protection and approach to distribution of wealth and fairness. They may also be subjected to ongoing changes in policy, affected by their social, economic and political environment. Similarly, while all regimes share their reliance on economic theory to ensure measured and effective intervention, they may differ in their focus on price-centric models, qualitative or behavioural dimensions and application on a case-by-case level.

On that point, one should note the potential discrepancy between the goal of EU competition law and the narrower economic benchmarks of consumer surplus used to approximate them. Clearly, there is a broad consensus as to the crucial role that economics plays in shaping competition enforcement and intervention. The centrality of economic analysis provides a valuable prism which helps ensure the compatibility of decision-making with the overall aims of competition. Importantly, however, economic theory should not eradicate the wider goals of EU competition law, nor should it strip it from its constitutional values and moral norms. The marginalisation of competition law's societal role, by means of economics, should be opposed, not least as narrow economic theories are not free of normative and political influence, and may reflect a political choice and a selective cultivation driven by well-resourced interest groups.

Conclusions

There have been a number of recent decisions in this area, as well as high profile reports, that suggest that action needs to be taken.

Among the reports, noteworthy are the UK expert panel report (*Unlocking digital competition*), the EU Commission special advisors' report and the Chicago University Committee for the Study of Digital Platforms 2019 report. All acknowledge the new market reality and the need for competition enforcers and regulators to adapt.

Competition agencies and relevant regulatory bodies need to take measured action. One can no longer hide behind the slogan that 'the market will self-correct'. Failure to adapt may result in the tipping of markets, consumer harm and long-term distortions. It may also risk undermining consumer confidence in the ability of markets to deliver welfare and prosperity.

Potential regulatory approaches to competition concerns in digital markets

Hal Singer, *Econ One Research*

Appropriation and discrimination

There are two main threats to edge innovations posed by dominant platforms owing to their two-part scheme:

1. Dominant platforms can appropriate an edge idea/business.
2. Dominant platforms can steer users to their cloned service using their platform power.

This scheme can be easily referred to as 'appropriation and discrimination'.

Antitrust enforcement

Antitrust enforcement in the US pays lip service to innovation harms, but is ineffective when the only harm to competition is an innovation harm. The last pure innovation harm case in the US was the Microsoft case over 20 years ago and even that was not a monopoly extension case, but rather a monopoly preservation case. Monopoly extension is now a 'dead letter' in antitrust law.

Judges in the US increasingly require economic experts when applying the consumer welfare standard to demonstrate a tangible short-run consumer injury and to connect it to the conduct that is being challenged. Even if the consumer welfare standard could capture the types of harm discussed here, the snail's pace of antitrust law is too slow to keep up with edge innovation.

The Department of Justice's (DoJ) competition report came out in 2008. From a review of 22 of the cases concerned, it took an average of 35 months for them to get to the lower courts. Most cases are subsequently appealed to the Federal, and potentially Supreme, Court.

Evidentiary burden

What is the evidentiary burden for a complainant in this area?

The Media Bureau has to make a determination whether there is a prima facie case and whether the complainant will survive and be able to prevail before an Administrative Law Judge (ALJ).

The burden is then on the claimant to show the following three evidentiary factors:

1. The complaining network is similarly situated to the cable operator's network which is being afforded favourable treatment.
2. The complainant must establish that the reason why they were 'put in the doghouse' was their lack of affiliation (this is where the economists generally give evidence).
3. As a result of 1 and 2, the independent was materially impaired in its ability to compete.

Note the absence of any requirement of consumer harm. Congress understood it would be impossible for a complainant to establish a causal connection between a discriminatory act and a reduction in edge innovation. Instead, the harm to the independent serves as a proxy for harm to innovation.

Vertical integration or innovation?

Rather than ban vertical integration entirely, Congress permitted cable operators to have a toe in the content space. They gave them a choice – either stay out of content and put whatever you want on the dial, or vertically integrate and be subjected to the non-discrimination standard. This was the least invasive approach which balanced two objectives fairly well:

- It protected edge innovation.
- To the extent the cable operators had anything positive to contribute in the content space, they were allowed to move forward.

In the seven years following the implementation of this approach, there was an explosion in innovation. The growth among independents outpaced the growth of cable-affiliated networks.

Cable operators such as Comcast have been able to experiment with their own content and there is no evidence that the restriction has in any way lessened their profitability.

How would this non-discrimination work in the tech space?

We need a venue in which independent tech companies can lodge a discrimination complaint and an evidentiary standard. We do not need any additional bureaucrats to administer such a system, just an Administrative Law Judge.

The venue

Placing the tribunal inside an agency means that once the fact-finder renders a decision, it is subject to a vote of the Commissioners. There have been two cases which have gone this far, and in each case the vote has been along party lines.

The idea of regulating the tech sector in the same way that the cable networks are regulated has been picked up by some US politicians. Senator Elizabeth Warren embraced the concept of non-discrimination in the tech sector.

People have come to recognise that non-discrimination sits outside the problem of antitrust law. In a paper released by the Committee for the Study of Digital Platform Market Structure and Anti-trust subcommittee, they acknowledged that antitrust is not up to the task of policing non-discrimination. They suggested, instead, a new agency – the Digital Authority – be created. One of the new authority's main responsibilities would be enforcing a non-discrimination regime against tech platforms.

Concluding Remarks

The pushback received from this idea is the notion that there has been no innovation harm. However, economists recognise that innovation is the most important contribution to consumer welfare and while there is an abundance of evidence of platforms 'chasing out' innovation today, the harm is that would-be innovators are put off by the sense that they will not be able to get funding for their innovation. We cannot prove that as a certainty, but there was no econometric proof of innovation harm when Congress passed the 1992 Cable Act; it was motivated by political preference to create breathing room for the independents, since they are perhaps the best source of innovation.

Panel discussion: Keeping digital markets competitive

Chair: Ariel Ezrachi, *Oxford University*
Panellists: Stefan Hunt, *Competition and Markets Authority*
Alec Burnside, *Dechert LLP*
Hal Singer, *Econ One Research*
Oliver Bethell, *Google*

What do you see as the role of competition law?

- There are those who believe antitrust should change radically. There are also those that say the law and enforcement efforts are fine as they stand. But, there seems to be an increasing consensus that the dynamics of digital markets require measured action. We cannot be content with the current enforcement and regulatory approach.
- No doubt antitrust has something to contribute without being the panacea for all ills. The law is flexible enough to allow us to address many of the issues in a measured manner.
- The burden of proof and standard of judicial review may need to be updated to reflect the new market reality. Similarly, our analysis has to move beyond a price-centric approach. The Facebook case in Germany is an excellent example of antitrust going past fixations on pricing to bring in other values. The Bundeskartellamt leant on the GDPR standards as a proxy for damage by a dominant player. This shows how antitrust can work in an integrated way.

What are the harms that arise from online platforms?

- Platforms are essentially markets themselves, in which the platform itself has the choice of architecture for the market. This causes concerns regarding behaviour, i.e. how ranking and listings affect consumers.
- Looking at a combination of machine learning and nudges, there is a great potential for consumers to be influenced to make decisions which are not in their best interests, however.
- Can platforms like Google be neutral? To offer value added to the user, they have to try and second-guess what the customer wants. What comes out of that is that there will always be an element of discrimination. On the other hand, looking at the Microsoft case, in some cases it is demonstrable that the consumer choices which have been influenced deliver clear consumer benefits, with superior products being favoured.
- Google could in theory be neutral with search results. If the pro-affiliate weighting is removed from the search algorithm then the OneBox should reflect what is purely objectively the best search result for the user. However, doing so could mean that consumers lose the benefit of the integration of some Google services. Creating a 'fair race' in search results might have to mean ignoring some efficiencies created elsewhere. DuckDuckGo has tried to replicate Google's functionality without exploiting user data and they have failed to make inroads into the market.

The effectiveness of antitrust and structural remedies

- Reports have suggested that in the digital economy the burden of proof should be different. One proposal is to shift to a balance of harm approach, i.e. rather than having to prove consumer harm, we objectively assess the likelihood of behaviour causing consumer harm.

- Another area for debate concerns structural remedies. If Facebook and Google were broken up, and we had several smaller social media platforms, there is no reason to think that those smaller companies would have any less of an incentive than larger companies to engage in practices which exploit user data. At the same time, one cannot disregard the possibility that network effects will recreate a dominant player.
- There is significant uncertainty as to how these markets will evolve. Considering the uncertainty and the reduced likelihood that disruptive innovation will triumph, we will likely have to take a policy decision that over-intervention is better than under-intervention.

Amazon's selling practices

- There are many ways in which Amazon can afford itself preference, including shipping costs, price points, algorithms, the buy box, etc. Using services like Amazon Prime allows consumers to reap short-term benefits, but there are concerns as to the long-term effects of Prime tying users to Amazon and the ability to affect competition within the Amazon ecosystem.
- As the controller of the ecosystem, Amazon has a perfect view of what is sold on the marketplace, what are the demand characteristics and opportunities for growth. With this capacity, it can invade profitable spaces, pushing out as-efficient downstream competitors. To self-favour its own operation, Amazon may use the 'buy box' to steer users to their own products. The affected sellers are essentially forced to leave the platform altogether.

Are we underestimating the intelligence of consumers?

- We all tend to overestimate our level of control and ability to cope with choice. Most of us walk on a path designed for us by the platform, with a sense of autonomy and control which is misplaced.
- Some people are more price-sensitive and choice-sensitive. They are the ones that take action and explore outside options. But most of us are captured and are not aware of it. We lack appreciation of the true power which platforms possess.
- The move away from physical shops to online, and in turn to 'digital butlers', takes choice further out of consumers' hands – if a user asks a digital butler to order a product, it is up to the device (or the provider) which exact product to offer for purchase.

What is the proof necessary before intervention is made?

- The Chicago school requires us to consider the future would-be competitor and to count the exits from the market, comparing a counterfactual of what that entry would otherwise look like, then converting that into a reduction of consumer welfare in the future. It is near impossible to quantify that, and so it is important to recognise that some level of harm must be shown, but we should not accept an impossible undertaking.
- It seems reasonable to say that we cannot currently prove every type of harm occurring in the sector, but we can recognise concerns. We should be thinking creatively about remedies and there are a number of interesting opportunities here, considering choice, transparency and consumers being given choices as to alternatives.

Are you optimistic?

- In the US the Democrats have demonstrated an appetite to deal with these issues. There will likely be a debate over the necessary level of intervention. A digital authority with competition and regulatory powers may have a better chance of gaining backing than any plan to break up the large platforms.
- In the recent reports, despite the concerns around the developing issues in the sector, there is a desire to find creative solutions. This gives rise to optimism.
- The large tech companies seem to – at least in part – recognise the problems we discussed. If they do so and can collaborate to try to develop a new regime, then they can potentially benefit without causing harm to consumers.
- Europe's new Competition Commissioner's character will have a great bearing on how this debate progresses.

SPEAKER BIOGRAPHIES

Rona Bar-Isaac

Addleshaw Goddard

Rona specialises in UK and EU competition law with particular expertise in the retail and consumer goods sector, working with both suppliers and retailers on a range of mergers and investigations. She has advised on unfair trading practices and the relationships between retailers and suppliers over the last 20 years.

Michael Bauer

CMS

Michael is a partner at CMS located at the CMS EU Law Office in Brussels where he spent most of his career. Since 2019 Michael also heads the CMS practice group Competition & EU, which comprises 180 competition lawyers worldwide.

Being a competition lawyer for more than 20 years, Michael represented clients in more than 250 merger control or competition cases, both on the EU and national level. He has a particular expertise in advising clients from the FMCG sector and has been heading the international CMS industry sector group for clients from the consumer products sector for many years. Moreover, Michael has been advising numerous clients from the FMCG industry in many competition matters. Among his list of permanent clients are various well-known global brands but also smaller players from concentrated FMCG markets. In addition, Michael is advising the German brands association (Markenverband) and is representing the association in competition law cases and in court proceedings.

Ulf Bernitz

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Ulf Bernitz is Professor of European Law at Stockholm University, as well as Senior Research Fellow at St Hilda's College, University of Oxford. He is also Director for the Söderberg Foundation Oxford/Stockholm Venture in European Law, based at the Institute of European and Comparative Law, Oxford. His research interests are in the fields of European law and private law (especially competition and marketing law, intellectual property law and consumer law). He has published widely in these fields. He is President of the Swedish FIDE Association for European Law.

Oliver Bethell

Google

Oliver currently leads Google's EMEA competition team. He joined Google in 2008, working first in London before a four year stint in the US. He returned to London in 2017. Oliver was the Competition Individual of the Year, 2018 (Global Counsel Awards and European Counsel Awards). Recent publications include 'Competition Law and Tech – A New Approach'.

Alec Burnside

Dechert LLP

Alec is a Partner in the law firm Dechert LLP, resident in Brussels since 1989. He practices in the field of EU competition law, working equally on cartels, dominance, mergers and state aid. Alec is described by Chambers Global as ‘one of the icons of the competition bar in Brussels’, recognised for his ‘strong analytical skills and intellectual curiosity’. Alongside his client practice Alec has written and commented extensively on developments in the law, as an advocate for reform in both substantive law and in procedures.

Alec has advised a number of companies as complainants in the European Commission’s investigations into Google’s abuse of dominance. He has been prominent in the debate around the nexus between antitrust, big data and privacy.

Matthias Eisenbarth

InBev

Matthias heads AB InBev’s European competition and antitrust legal department, which includes dealing with matters such as compliance, regulatory approvals, and other related issues. In addition, as Counsel for Scandinavia and their export markets in Central and Eastern Europe, he advises on all commercial law and corporate affairs issues. Previously, Matthias worked as an associate at Freshfields Bruckhaus Deringer, where he focused on all aspects of competition law. Being a German qualified lawyer, he also holds an LLM in European Law from the College of Europe, Bruges.

Ariel Ezrachi

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 *Virtual Competition – The Promise and Perils of the Algorithm-Driven Economy* (2016, Harvard) and *EU Competition Law, An Analytical Guide to the Leading Cases* (6th ed, 2018, Hart). Professor Ezrachi’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.

Thomas Graf

Cleary Gottlieb Steen & Hamilton

Thomas is a partner with Cleary Gottlieb and has been practicing EU competition law since 2000. He regularly advises clients on vertical restraint questions across a number of different industries. And he has represented clients in many landmark cases before the European Commission, national competition authorities and the European courts.

Simon Holmes

Competition Appeal Tribunal

Simon has some 40 years' experience of competition law and policy as a practitioner, academic and now as a member of the judiciary. Until 2017 he was global head of competition law at King & Wood Mallesons (and formerly SJ Berwin) advising many of the world's leading branded goods companies. He is a member of the Competition Appeal Tribunal, a Visiting Fellow at the Centre for Competition Law and Policy, Oxford University, and an advisor to the NGO Client Earth. Recently, he has been assisting UNCTAD develop an agreement on International Cooperation in Competition Law Enforcement.

Simon has first class degrees in law and economics from Cambridge University and in European Law from the Institut d'Etudes Européen, Université Libre de Bruxelles. He had spoken widely on competition law issues around the world.

Mat Hughes

AlixPartners

Mat is a professional antitrust economist, who has been advising on the application of economics in EU and UK competition law for 29 years, covering a wide range of industries and markets, and acting on behalf of leading corporates and law firms. He has acted on a wide range of matters, including investigations by the European Commission and the Competition and Markets Authority, litigation and damages actions, and regulatory disputes.

In relation to mergers, he has acted on over 30 Phase 2 mergers and a large number of Phase 1 mergers, including a range of retailer mergers. He recently secured an unconditional merger control clearance in relation to two retailers of outdoor clothing, footwear and equipment (JD Sports/Go), with the Competition and Markets Authority recognising for the first time at Phase 1 the importance of internet retailers in its unconditional clearance decision.

Mat started his career as an economist at the UK Office of Fair Trading and joined Ashurst LLP to develop their economics teams and became a partner equivalent in 2000. He joined AlixPartners in April 2013.

Stefan Hunt

Competition and Markets Authority

Stefan is the Chief Data and Technology Insights Officer at the Competition and Markets Authority. He leads a group of data scientists and engineers working on cases using rich datasets or requiring complex analysis, particularly relating to digital competition or technology.

He previously founded the behavioural economics and data science unit at the Financial Conduct Authority. The unit provided state-of-the-art solutions to regulatory problems – setting a price cap for payday loans using econometrics or building machine learning models to predict which firms and people within firms need regulatory attention.

He is an Honorary Professor in economics at the University of Nottingham and has a PhD in economics from Harvard University and a bachelor's degree in experimental psychology from the University of Cambridge.

Fabian Kaiser

DG Competition, European Commission

Fabian is a 'case handler' in the Directorate-General for Competition of the European Commission (DG COMP), where he works in the antitrust unit dealing with e-commerce and the data economy. Previously, he spent several years as Senior Counsel Competition in the legal department of Siemens AG in Munich. In this function, he advised the company on a variety of competition law matters ranging from merger control and antitrust compliance to distribution, licensing and R&D contracts. From 2009 to 2012, he was a case handler in DG COMP dealing with antitrust matters in financial services. Prior to joining the European Commission, he worked as an associate in the competition law team of a leading international law firm in Düsseldorf, Germany.

Fabian studied law at the Universities of Passau and Lausanne and completed a master's degree in European Studies at the Center for European Integration Studies (ZEI) in Bonn.

Agustín Reyna

BEUC

Agustín is Head of Legal and Economic Affairs of the European Consumer Organisation, BEUC. BEUC represents 43 independent national consumer associations from 31 European countries. The primary task of BEUC is to act as a strong consumer voice in Brussels and to ensure that consumer interests are given their proper weight in all EU policies. Within the organisation, Agustín supervises four policy teams (Financial Services, Digital, Consumer Rights and Consumer Redress and Enforcement) and coordinates the organisation's work on competition law enforcement and policy. He is responsible for providing the consumer viewpoint to the European Commission's competition directorate in high-profile cases affecting consumer markets. In 2017 Agustín was elected co-EU chair of the Intellectual Property committee of the Trans-Atlantic Consumer Dialogue, a network of over 75 organisations representing consumers' interest in the US and the EU. Agustín obtained his law degree in the National University of Córdoba, Argentina. He studied ICT law in Spain (ICADE, Comillas Pontifical University) and Belgium (CRIDS, University of Namur). He is a PhD. candidate at the University of Bremen, Germany. He often publishes in scientific journals on issues of consumer law and policy.

Hal Singer

Econ One

Hal is an expert in antitrust and regulation. He has researched, published, and testified on competition-related issues in a wide variety of industries, including media, pharmaceuticals, sports and finance. He has extensive experience providing expert economic and policy advice to regulatory agencies in the United States and Canada, as well as before congressional committees. Dr. Singer is also a Senior Fellow at the George Washington Institute of Public Policy and an Adjunct Professor at Georgetown University, McDonough School of Business, where he teaches advanced pricing to MBA candidates. He was recently honoured by the American Antitrust Institute with an Antitrust Enforcement Award for his work in the *In re Lidoderm Antitrust Litigation*.

Alessandro Tajana*Johnson & Johnson*

Alessandro is a member of the Law Department of Johnson & Johnson. A Legal Director in the Consumer Group, he provides legal support to the Global Customer Development Team and to the affiliates of the Consumer Group in South Europe, Africa and the Middle East. Prior to joining Johnson & Johnson, Alessandro has worked as a lawyer both in private practice (Linklaters) and in industry associations (Confindustria). Alessandro is a member of the AIM Competition and Legal Affairs Committee and holds an LLM in European Law (College of Europe).

Andrew Taylor*Aldwych Partner*

Andrew is a highly experienced adviser on Competition and Markets Authority merger reviews. This includes advising on competition risks for transactions at the planning stage through to obtaining CMA clearance at Phase 1 and 2. Andrew also advises on issues around anticompetitive behaviour and state aid, and his sector experience includes health and care, retail and wholesale, food manufacturing and financial services. Prior to establishing Aldwych Partners, Andrew was Senior Director, Inquiries at the UK Competition Commission and Chief Executive of the NHS Competition Panel.

Bent Sofus Tranoy*Inland Norway University of Applied Sciences and at Kristiania University College*

Bent Sofus is professor of Political Science at Inland Norway University of Applied Sciences and at Kristiania University College and a guest researcher at ARENA Centre for European Studies. He was a member of the Government Commission behind the Official Government Report on Power in the food retail chain (NOU 2011:4) and he has published, taught, supervised and spoken on this topic ever since, bringing the analytical tools of political science, sociology and behavioural economics to bear on a subject matter most often handled by competition economists and legal scholars. Most of his other publications are within the fields of Comparative and International Political Economy, but he has also published on public policy, organizational theory, qualitative methods and the sociology and history of science.

Emma Trogen*Cosmetics Europe*

Emma is Director of Legal Affairs at Cosmetics Europe, where she is in charge of compliance, contractual and regulatory matters. She is deeply involved in the association's work on all EU regulatory topics of relevance for the industry. As a qualified associate lawyer, she previously worked in the Swedish firm Vinge's EU and antitrust practice in Brussels. Prior to joining Vinge she worked in the Brussels office of Skadden Arps Slate Meagher & Flom. In 1998 she attained her law degree from the University of Nantes, France, and has also studied EU law at the University of Rennes, France, and the University of Cardiff, Wales.

Jan Werner

Metro AG

Jan is Head of Legal Services International at METRO AG. He joined Metro in 2005. Before that he was Legal Counsel at Continental AG, a tyre and automotive parts manufacturer.

As Head of Legal Services International, Jan is overlooking legal matters for Metro in 16 countries, covering Asia and Middle and Eastern Europe. This especially covers expansion, new market entries and regulatory restrictions on operations for retailers, especially in Eastern Europe.

Further, Jan is a member of the Internal Market and Consumer Affairs (IMCO) Committee, as well as the Supply Chain Committee at Eurocommerce, the largest European trade association. In this role he is contributing to discussions about the changing environment for retail and wholesale. Current discussions centre around geo-blocking, multichannel approach for retailers, and alleged 'unfair trade practices' between retailers and their suppliers.

Jan is admitted to the German bar and holds a Master of Laws (LLM) degree from University of Georgia.

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