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 sixteenth annual symposium on competition amongst retailers and suppliers

Held on Friday 11th June 2021
Online

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# CONTENTS

# OVERVIEW

This report provides an overview of the sixteenth annual symposium discussing Trends in Retail Competition. The symposium, held online, covered four themes relevant to competition involving branded producers and distributors: sustainability, consumer protection in digital markets, algorithms and distribution strategies.

The symposium focused on the nature of competition in digital markets and the future of cooperation between competitors for sustainable initiatives.

The first session, on sustainability, looked at how the competition rules can be read in order to allow companies to collaborate on sustainable initiatives without engaging in anticompetitive practices.

A speaker from DG CNECT, participating in the second session on consumer protection in digital markets, highlighted the importance of transparency in the new Digital Services Act and discussed the provisions most relevant to ensuring that online platforms act responsibly. The session also looked at the recent work of the Digital Markets Taskforce and the Digital Markets Unit in the UK.

The afternoon programme opened with an overview of algorithmic practices and how these can be used to both help and hinder competition. The speakers focused on how to avoid the risks of personalisation and targeting.

The final session of the programme provided an insightful discussion on the work of the Commission on vertical restraints, including the upcoming revision of both the Vertical Block Exemption Regulation and the accompanying guidelines. The speakers suggested ways in which the Commission could further help businesses to prove efficiencies in this area.

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 LLP. It was held under the Chatham House Rule.

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PROGRAMME

10.00 Introduction
*Professor Ulf Bernitz*

**SESSION 1 – A ROLE FOR COMPETITION LAW AND POLICY IN BUILDING A SUSTAINABLE FUTURE?**

Chair *Simon Holmes, Competition Appeal Tribunal*
Panellists *Angélique de Brousse, Johnson & Johnson*
*Jordan Ellison, Slaughter & May*
*Martijn Snoep, Dutch Competition Authority*

11.45 **SESSION 2 – CONSUMER PROTECTION, BRAND INTEGRITY AND FAIR TRADING PRACTICES IN DIGITAL MARKETS**

Chair *Professor Amelia Fletcher, University of East Anglia*
Panellists *Alexander Simpson, Amazon*
*Catherine Batchelor, Digital Markets Unit, Competition and Markets Authority*
*Diana Vlad-Calcic, European Commission, DG CNECT*
*Martha Weis, Reckitt*

14.00 **SESSION 3 – DIGITAL COMPETITION AND THE REGULATION OF ALGORITHMS**

Chair *Professor Ariel Ezrachi, Centre for Competition Law and Policy, Oxford University*
Panellists *Agustin Reyna, BEUC*
*Dr Friedrich Klein, Ferrero*
*Gareth Shier, Oxera*
*Dr Stefan Hunt, Competition and Markets Authority*

15.30 **SESSION 4 - POLICY CONSIDERATIONS FOR THE DISTRIBUTION OF BRANDED PRODUCTS**

Chair *Professor Richard Whish, King's College London*
Panellists *Adrian Majumdar, RBB Economics*
*Dr Christoph Leibenath, Nestlé and Chairman, Competition and Legal Affairs Committee, AIM*
*Philippe Chauve, DG Comp, European Commission*
*Stephen Smith, Bristows*

# SESSION 1

# A ROLE FOR COMPETITION LAW AND POLICY IN BUILDING A SUSTAINABLE FUTURE?

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Sustainability is becoming an ever-prevalent consideration in competition law and policy and there is growing awareness of the climate crisis. It is increasingly important that work is done to ensure that competition law and policy take account of sustainability and environmental issues. As part of their Covid-recovery packages, OECD countries and key partner economies have allocated $336 billion to environmentally positive measures and it is essential that state support focuses on renewables. For example, the European Commission has consulted on environmental guidelines for state aid (climate energy and state aid guidelines).

Regulation can be a useful first choice of policy tool to address environmental issues in competition law, but it is often slow, limited in scope or simply not ambitious enough. Companies will compete individually on the sustainability of their products, but often will suffer cost disadvantage and therefore a competitive disadvantage. Often individual action will not move the dial at the speed necessary, with industry needing to co-operate to achieve certain goals. The recent consultation on horizontal guidelines demonstrates the sorts of co-operation in which business needs to engage, with the submission by Unilever particularly commended.

The problem centres around the very theory of competition law: one survey suggested that nearly 60% of companies walk away from sustainability projects for fear of competition law risks. In fact, it has been suggested that we already have the tools to deal with competition law issues and to promote sustainability.

Competition law may be misunderstood, notably the first condition under Article 101(3), that eligible agreements must contribute to improving the production or distribution of goods or promote technical or economic progress. Many sustainable initiatives improve economic progress, production and/or distribution. In the past, the European Commission and competition authorities have taken a more holistic approach than in recent years. We are seeing co-operation between suppliers and retailers but this is slower than it might be because of competition law concerns.

The Dutch competition authority is the clear European leader in addressing sustainability issues and whilst the UK competition authority (CMA) has not made significant progress, it has made climate change a strategic priority. The Netherlands has a long history of using private collective action to achieve national goals, notably in working to establish structures to protect rising sea levels. Despite this, the Dutch competition authority has noticed a conflict between the business community who want to use this type of collective action and the rules that they believe stand in their way. The Dutch

competition authority has invited companies to come forward with ideas for tackling environmental problems on the basis that companies won't invest in these ideas if they are not told what is, and isn't, allowed.

**Key points to address**

1. There are many examples of co-operation that fall completely outside the scope of competition rules. These provide inspiration to companies and are written in a way that is accessible to non-specialised competition lawyers;

2. The authorities have some discretionary power and should suggest that companies come forward with options for collaboration. The rules could be changed so that fines would not be imposed where an agreement resulted in anti-competitive effects but was initially discussed in good faith and the guidelines followed;

3. When assessing the benefits of an agreement, a fair share must go to the consumers of products attached to the agreement. In an agreement between companies that improves sustainable production but with a price increase of €1, what is the fair share of benefits for consumers of this product? Traditionally, Commission considers that consumers should be fully compensated for any negative effects i.e. consumers should at least receive a benefit of €1. In the case of agreements that improve sustainability, then a fair share may not necessarily be full compensation. It may be that benefits as a whole outweigh any negative effects of the agreement.

The Commission is expected to adopt some ideas around sustainability in its revised horizontal guidelines so we may move from current competition law rules. Businesses are beginning to speak out more but are still relatively reluctant to co-operate with competition authorities on their plans for collaboration, even where sustainability initiatives are involved.

There are some concerns surrounding the ACM guidelines:

- Concerns around distributional effects – some industry agreements will reach higher sustainability standards than others which in turn will make some products more expensive for consumers. Some consider that distributional effects should be determined by democratically-elected governments in setting environmental legislation;
- Concern from economists that free market and competition rather than co-operation is the correct way to achieve sustainability;
- Concern that if authorities were to allow co-operation agreements to fight climate change, the floodgates would open for other positive causes, for example supermarkets raising prices to fund the arts.

Climate change is an existential crisis and must be addressed. If there are difficulties in other areas these must stand or fall on their own merits. There is no call for a special exemption in competition law to account for climate change, simply to apply the law as it is written.

Authorities could start to look at Article 101(3) differently in the context of sustainability. For example, where the dollar value of emissions reduced is greater than the dollar value of a price increase to consumers, Article 101(3) would automatically be satisfied (similar to the way in which state aid rules are currently applied). This would alleviate any concerns around 'greenwashing' or any disproportionate price increases for consumers.

There were more than 200 responses to the European Commission consultation on this issue, indicating the strong interest in the subject and that sustainability is at the top of the agenda for many companies. There are, however, still practical issues that need to be addressed:

- Companies have long been warned of the risk of colluding with competitors, so are naturally cautious to collaborate on sustainability projects;
- Companies (particularly SMEs) may not be willing to conduct a full legal analysis of a co-operation agreement in advance;
- Sustainability initiatives do not often bring immediate financial benefit to a company.

Businesses need clearer guidance on what is, rather than is not, possible within the framework of competition law, which would lead to them being less risk averse on commercial decisions. As the various European competition authorities navigate the path to fighting climate change and implement varying guidelines, companies face challenges in implementing agreements across Europe. Authorities have demonstrated flexibility in reacting to a short term crisis in the context of COVID-19, so the same should be true for the environmental crisis and issues that stem from it.

It would likely be very difficult to enforce any form of cap with regards to price increase for consumers arising out of a sustainability co-operation, as competition authorities are reluctant to act as price regulators. A 'fair share' of the resulting benefit would seem to arise when society as a whole benefits more than any harm to specific consumers. Generally, most companies are only likely to be involved with schemes where a slight cost increase results. There may also be instances where prices increase in the short term but decrease in the long term.

Sustainability is unquestionably an issue that needs to be addressed and where progress can be achieved through collaboration between competition authorities and stakeholders.

# SESSION 2

# CONSUMER PROTECTION, BRAND INTEGRITY AND FAIR TRADING PRACTICES IN DIGITAL MARKETS

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|---|---|
| Chair | *Professor Amelia Fletcher, University of East Anglia* |
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**Digital Services Act: What does it represent?**

The Digital Services Act represents an important and exciting milestone in the evolution of the internet, along with the Digital Markets Act put forward last year by the Commission.

Although not strictly concerned with competition and consumer protection in a strict sense, the Act contains a series of measures that will support consumer protection and their interests in relation to online platforms. The Act is particularly important as it contains one set of rules for the whole of the EU as to the scope of the role and responsibility of online intermediaries. The element of consumer protection is also provided in the rules on illegal goods and illegal content.

There are a number of measures which are particularly relevant to consumer protection:

- The 'notice and action' system will allow consumers to flag any issues encountered such as consumer protection infringement e.g. unsafe or counterfeit goods. This is an important step forward in establishing governance over the actions of online intermediaries;
- More information will have to be provided on business users and traders will be dissuaded from using illegal behaviour to target consumers;
- Algorithms and user experience will be assessed to ensure that consumers are presented with the correct information.

The main theme of the provisions is transparency, with the aim of ensuring that consumers can understand what is happening online through empowerment and strong regulatory oversight. More responsibility will lie with the platforms in cases where consumers are misled.

**Consumer transparency**

Freedom of expression is an important theme in the Act. However consumers express views online, for example on the performance of the product or whether it is defective or counterfeit, which may lead platforms to react and remove content without first establishing the truth of the situation, thereby under-serving the consumer.

Questions have also arisen as to product safety and how this will be enforced under the Act which sets a baseline for digital services generally. The risk-of-harm profile differs between the selling of toothbrushes and the provision of social media content. It is important to target regulation

appropriately to differing levels of harm. Product safety is of universal concern and consistency of approach is needed to drive consumer confidence and trust. A focus on core principles can lead to inflexibility, so the ability to target the major areas of harm in a way that is proportionate to the risks makes sense. This is an issue both for the regulation and for consistency of enforcement across the many actors involved.

The Digital Services Act ensures due process, including informing the seller of the mandatory information to be listed and when their content is about to be removed. There are also several steps of redress, including an obligation for an internal redress process and an out-of-court dispute settlement. Article 12 of the Digital Services Act sets out the way in which platforms are expected to act, ensuring that when restrictions are applied, sellers and platforms must be diligent and non-discriminatory in their approach and must take account of fundamental rights.

**Work of Digital Markets Unit and Digital Taskforce**

The Digital Markets Unit is part of a new pro-competition regulatory regime established in the UK to regulate firms with 'strategic market status'. This will be crucial both for consumers and competition. Its tools will include a code of conduct based on trust and transparency to allow consumers to make informed decisions, around the use of their data for example, and pro-competitive interventions by the CMA, around inter-operability for example.

Many of the behaviours go beyond the practices of the most powerful digital firms and the issues remain regardless of the power or size of the company. Recommendations were made to address this as part of the Digital Markets Taskforce's advice to Government last year.

The Government needs to reform consumer law to enable regulators such as the CMA to tackle content or activity hosted by online platforms that leads to economic harm, complementing the Online Safety Bill. Together, these two measures would provide protection akin to the scope of the Digital Services Act. Without that reform, there is a gap in relation to some of the issues CMA has devoted significant time to recently, such as incorrectly labelled social media endorsements and fake online reviews.

Furthermore, more effective powers are needed to address 'nudge-and-sludge' type practices by platforms that impede consumer choice, practices which may be tackled effectively in the analogue, but not the digital, world.

Business supports a pragmatic evidence-based approach to regulation as this is felt to provide predictable legal certainty of outcome and sound judicial interpretation. There is however a different view that it is precise regulatory rules rather than evidence that delivers certainty.

Big does not always mean bad. Large commercial entities can deliver positive consumer outcomes through scale and choice. The rules in the Digital Services Act however are designed with proportionality in mind, not to favour small companies and hurt large ones but to deliver on the objectives of consumer harm and competition. Smaller operators need to comply with a smaller number of rules.

Consistency and synergy across the EU and the UK, with as unified a framework as possible, is easier for companies operating across national markets to understand and integrate into their ways of working. This is an important rationale underpinning the Digital Services Act in the context of the EU.

**How effective is regulation in digital markets?**

There has been a lack of enforcement in relation to online platforms. Platforms play an important role connecting the seller to the consumer and are in a unique position to police sellers that breach consumer protection rules. Some platforms enforce well, some not at all and others take a blended approach, being selective in when and what they enforce. In some categories, platforms have declined to enforce consumer protection rules, such as local language requirements for medicine and cosmetic packaging. How can incentives be aligned to deliver consistent enforcement and outcomes?

Decisions tend to hinge on local regulatory pushback that a platform can expect to encounter in the event of violation. An example concerns medical devices where there is a nearly universal requirement for usage instructions to be in the local language. Some regulatory regimes, such as UAE and Saudi Arabia, have a reputation for readily enforcing these requirements whilst elsewhere, in the EU for example, these rules tend not to be fully enforced. This in turn affects the behaviour of platforms. Where enforcement is weak, having stronger sanctions where there is enforcement may redress the balance.

The Digital Services Act does not duplicate other rules, such as consumer protection, to cover for enforcement shortfalls. The Commission has taken robust steps in co-operation with the consumer protection network across the EU to engage platforms when issues occur. The Act does however put the behaviour of platforms under public scrutiny, placing the spotlight on unlawful behaviour. The seller of the good is not in control of the interface so there is an obligation on the seller and platform to ensure compliance of the interface.

**Practical example of platform action: Amazon**

Amazon is first and foremost a retailer and has been serving customers in the UK for around 20 years. Today there are over 1.9 million selling partners, most of which are SMEs and account for most sales. During COVID lockdowns, Amazon worked hard to ensure that customers and selling partners could access what they needed. Simultaneously, many 'bad actors' attempted to use COVID to their advantage and there were widespread reports of organisations trying to raise prices inappropriately or restrict product availability. Amazon took steps to minimise the impact of these practices including using mechanisms to prevent price gouging and the selling of counterfeit products. Amazon wants consumers to have confidence and trust in the products they buy through:

- Robust proactive controls using machine learning and human investigators (e.g. vetting third party sellers);
- Powerful tools for brands e.g. Brand Registry and transparency programmes which applies serial numbers to products;
- Direct enforcement action e.g. partnering with law enforcement to instigate litigation, seek freezing injunctions and injunctive relief.

Although consumer protection and safety law is largely well-defined, the regulatory approach is multifaceted with many regulators such as ASA, CMA, OPSS, Trading Standards and over 500 product regulators across the EU. In turn, the laws that enable direct enforcement are more complicated than those in other parts of the world, making civil enforcement route difficult. Regardless of complexities, litigation is still important to eliminate bad actors and minimise risks to consumers. There is an opportunity for closer co-operation between business, regulators and law enforcement in the interests of consumers.

# SESSION 3
# VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES

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|---|---|
| Chair | *Professor Ariel Ezrachi, Centre for Competition Law and Policy, Oxford University* |
| Panellists | Dr *Agustin Reyna, BEUC* |
| | *Dr Friedrich Klein, Ferrero* |
| | *Gareth Shier, Oxera* |
| | *Dr Stefan Hunt, Competition and Markets Authority* |

**Understanding algorithmic challenges**

The competition landscape can often be distorted and there is a need to better understand the changing technologies and dynamics of competition to adjust the enforcement approach. New technologies such as direct/indirect data harvesting, AI and algorithms influence competition enforcement, as do new value chains that impact on business strategies. At times, the invisible hand of competition is replaced, to some extent, by the 'digitalised' hand and the ability of algorithms to alter the dynamics of competition. Despite a platform appearing like a real market, parameters of competition may well be controlled.

There are many benefits that algorithms deliver. They can assist with information exchange or asset sharing and there are positive reasons to embrace algorithms in pricing strategy. Many businesses entering the market for the first time will use these tools to their advantage. There are, however, multiple risks associated with algorithms:

- **Explicit collusion** – The Commission's E-commerce Sector Enquiry found that the majority of online firms were using price monitoring tools which simplify the implementation of an agreement (e.g. the posters case and consumer electronics case);
- **Hub-and-spoke arrangement** – Algorithms can inadvertently become hubs for coordinated pricing regimes and there is a growing trend of providers offering algorithms;
- **Tacit coordination** – when similar Algorithms are used by different suppliers to set pricing strategies unilaterally, they may inadvertently alight on a supra-competitive price in their attempts to find the optimal prices for certain products;
- **Autonomous collusion** – whereby price-setting algorithms 'learn' how to play a coordination game with competitors, holding prices high only if competitors do the same.

It is important to take a practical approach in addressing these different risks and authorities already have good tools in place to deal with explicit collusion and hub-and-spoke arrangements. Focus should be placed on the prevention of situations of tacit coordination.

These technological practices can significantly dampen competition but are not yet firmly on the radar of many competition authorities. As they start to address the issues that stem from algorithms, brand owners may face unique challenges in ensuring compliance in both vertical and horizontal settings and adjusting strategies. The digital era presents new challenges for competition authorities as, for the first

time, anti-competitive practices may be a direct result of technological performance rather than human behaviour.

***Eturas*: Lithuanian travel agency case**

This case concerned an online booking system to which around 20-30 travel agencies subscribed. At a certain point, the platform sent a message to impose a maximum cap on discounts and rebates of 3%. The algorithm ensured that this cap was not exceeded and could only be done so if the agencies actively overrode the algorithm (the agencies did not do this and were subsequently fined). This case underlines the fact that companies involved in these problematic algorithmic situations cannot avoid participation in collusive behaviour simply by being passive. That is the risk and challenge in relation to algorithms. Indirect passive contact, even via a non-competing third party, can give rise to a cartel offence.

**Action in the UK**

With regards to the Competition and Markets Authority (CMA), there are many issues that are being studied and considered, with the available evidence on algorithms and their effects receiving a lot of attention. At the end of January the CMA published its paper on algorithmic harms which detailed information on techniques and practices used, reflecting the work of a team of around twenty data scientists and engineers. The CMA is also in regular contact with a range of other authorities with an interest in harms arising from algorithms, e.g. the Portuguese Competition Authority which published a 2019 paper on 'Digital ecosystems, Big Data and Algorithms'.

**Personalisation and targeting**

Companies and multi-sided platforms have brought many efficiencies to consumers. The business models of many of these companies depend on maximising engagement with consumers and with other services. Through the design interface and the implementation of so-called 'dark patterns', platforms can steer consumers to make choices which are arguably in the interest of these companies and not always in the interest of consumers. Platforms with a dual role seem to encourage these types of practices and distort the landscape (e.g. the Google Shopping case).

BEUC and its members have assessed how consumers engage with these services and have identified that while many consumers perceive that there is choice on these multi-sided platforms, they are unaware of the hand behind the company steering them and influencing the choice architecture.

This manipulation of choice may have multiple effects:

- **Consumer perspective** – There is a belief that you are presented with the best prices and products while in reality this might not be the case. Recommendation systems show that consumers have very little control over how offers are presented to them and whilst most consumers rely on reviews before buying, many of these may be fake. Such reviews influence product visibility which is not driven by merit but of manipulation;
- **Seller perspective** – Visibility is key and they must rely on the platform to give them certain placement, something that may encourage the use of fake reviews when sellers are unable to compete on the merits. None of the platforms want to remove these companies as they need them to create the perception that they offer lots of product choice.

This distorted presentation of choice that is presented to consumers widens the risk of undermining consumer trust in markets.

There is a vast amount of personalisation happening online and even if this can bring some benefits to consumers, authorities should still be focus on how to minimise the risk. These techniques include nudges and monitoring of behavioural effects:

- Personalisation
- Rankings
- Potential for steering people towards products that are more expensive
- Filtering algorithms
- Manipulating user journeys and using dark patterns
- Algorithmic discrimination.

Cases concerning these types of harmful techniques are already being investigated by many different enforcement authorities, for example:

- FCA General Insurance Pricing Practices market study
- CMA hotel booking consumer protection case
- Commission Buy Box case
- ACCC Trivago case.

**Challenges in marketing and online advertising**

For branded companies, digital competition is centred on personalisation as brand owners thrive on engaging with consumers. The value of personal data now exceeds that of the product itself. The challenge for companies has become access to this data and how to engage consumers in a legitimate way. Germany has recently amended its Antitrust Law to deal with these potential market abuses by large digital companies, anticipating the Digital Markets Act. For brand owners engaging in digital markets, self-preferencing by the gatekeeper platform affects the visibility of products while the withholding of data by the gatekeepers affects online targeting and KPIs. It is favourable for brand owners that these are becoming areas of focus. Germany is no longer just concerned over the effects of such practices on small and medium-sized suppliers but also on larger suppliers that equally depend on data.

**Platform power and efficiencies**

The focus has been on the role that platforms play as an intermediator. There are other things that platforms are doing along the way, with few providing simple intermediation alone. Many platforms now have an 'aggregator' role and are actively investing in building scale economies to reduce transaction costs and building trust.

Platforms are also innovators and it is essential that they can unlock economies of scope and can act dynamically to offer new or enhanced products and services. Many of these platforms are genuinely value-enhancing for the customer and this presents the possibility to also improve products for the consumer.

Despite the fact that there is greater information asymmetry in some areas than others, authorities are beginning to build up a variety of techniques to start identifying a pipeline of enforcement cases in consumer protection and merger cases. Many authorities including the CMA are developing specialist skills and employing technical specialists to gather granular data and to understand more about how algorithms can both hinder and help competition.

# SESSION 4

# TERRITORIAL SUPPLY CONSTRAINTS

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|---|---|
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| | *Stephen Smith, Bristows* |

The most recent enforcement activity of the Commission involving vertical restraints includes:

- *Parallel trade / Territorial Supply Constraints*: Guess, AB InBev, Mondelez
- *RPM*: Commission (Asus, Denon & Marantz, Philips, Pioneer, Guess), NCAs
- *Online restrictions*: Guess, Amazon
- *Exclusionary abuses*: Coca-Cola
- *Retail alliances*: National investigations in France and Belgium; Commission investigation (Casino-Intermarché)
- *Protectionist agreements*: retailer agreements in Bulgaria and France

The Commission is also reviewing the vertical and horizontal guidelines:

*Vertical*

- RPM: there have been requests to allow for more RPM and the Commission is seeking instances where RPM may be pro-competitive, with few concrete submissions to date
- Dual distribution: currently guidelines are lenient but the market has changed with growing direct sales, raising questions on horizontal competition between distributors
- Online/offline sales: rules restricting dual pricing have led to concerns that offline sales are no longer competitive

*Horizontal*

- Retail alliances: the Commission has received input on alliances as well as purchasing arrangements (e.g. by hospitals). Current guidelines are focused on arrangements that include purchasing, while current retail alliances tend not to purchase products, instead negotiating some terms of the purchase. This calls for clarification of the legality of such alliances.

**Territorial supply constraints**

These constraints have long been an issue at a European level. Recently, DG GROW published a study on the subject while DG COMP has undertaken enforcement action which has followed established case law.

The study arose from strong lobbying by some retailers that led DG GROW to believe that there may be a single market impact. Published last year, the study reports on some instances of territorial supply constraints. Some constraints (such as refusals to supply or quantity restrictions by dominant operators) have been investigated under competition rules for a number of years.

The study looked at other constraints such as product differentiation, a common practice that would not normally raise concern when implemented independently of trade. This complicates the policy discussion, already complex with the involvement of two DGs.

The report suggests that there are significant constraints and that their elimination could save the consumer up to €14.1 billion. However, this may be misleading. Territorial supply constraints are a form of price differentiation and their removal may allow some prices to fall in some territories but price rises in others (essentially a 're-balancing' of prices). In the absence of market power, it is likely that the losers in this scenario would outnumber the winners. The report does not seem to take full account of the likelihood that some prices will rise and it should not be assumed that constraints are harmful.

The decision to lead the AB InBev case on Article 102 rather than Article 101 and 102 together suggests there may be an enforcement gap where a non-dominant firm applies certain practices that constrain cross-border trade and that are not the subject of an agreement with distributors. This is being looked at by DG GROW. In addition, it should be recognised that many firms have some market power, even if not dominant.

These types of practices apply to both manufacturers and retailers and where private label products sold in different member states are concerned, retailers apply different pricing according to the competitive structure in particular member states.

*Where does the UK fit into the picture?*

There will undoubtedly be significant change in the way in which goods are supplied between mainland Great Britain and the rest of Europe following Brexit. This is also intertwined with the IP regime and the exhaustion of rights, on which a consultation has recently been published, though it contains no recommendation. The likely outcome is a degree of asymmetry between the EU and UK.

**Resale price maintenance**

In the past, the EU approach to RPM has traditionally been strict, though the current review of the Vertical Block Exemption represents a potential opportunity for change. Branded businesses may wish to protect their brand value or defend brand value against practices of a retailer, both of which are difficult under current RPM rules. Markets have evolved and retail market power has increased, something not reflected in the current guidelines. An example practice is where a retailer with market power seeks compensation from suppliers for its own margin shortfalls which the supplier may find hard to refuse.

In practice, the bar is set high to satisfy Article 101(3), making RPM de facto illegal and it is not expected that a major revision of the rules will occur in the short term.

*Example of the Denon case*

In this case, pressure was imposed by the manufacturer on retailers to price above a certain level. There were three tiers: a recommended retail price, a grey area where no overwhelming pressure was applied and a level where rules were stricter on selling below a certain 'street price'. An important question concerns the assessment of harm. At the time, the audio visual sector was undergoing significant and fast change, there was strong inter-brand competition, bricks-and-mortar retailers were investing in sophisticated listening rooms, the manufacturer was innovating to compete and online retailers were undercutting prices. The manufacturer did not have market power and if it set its recommended prices

too high, it would be punished by the market. While price is a key factor in assessing harm, it should not be the only consideration.

Many of the recent RPM cases are clear examples of law infringement. Some consider that harm would appear to be absent as there is no market power. The Commission considered that inter-brand competition was affected given the transparency and automatic adjustment of online prices.

Given the hardcore nature of RPM, many are cautious about coming forward with proposed efficiencies. The Festool case in Australia is relevant as it involved a product where pre-sale consumer advice was important (chainsaws) and the company had a market share below 10%. The competition authority was cautious, it being an RPM case, opting to review the impact on the market over a few years. That review concluded there to be no problem and, furthermore, it allowed RPM to be extended to another Festool brand.

The existing guidelines in principle allow RPM in the case of launching products. However, they are challenging for companies in relation to new products due to the enforcement regime and the risks of getting it wrong. Practice would suggest that very few businesses will rely on the limited guidance in the existing guidelines, whilst to ensure the guidelines are followed, each new product would need to be assessed individually. This is simply unrealistic for most companies and there is no route to discuss potential benefits in individual cases in advance with regulators. As a result, RPM is commercially and practically impossible, even where justified.

In the current review of the regulation and accompanying guidelines, examples were provided of efficiencies, though only in relation to new products (already in current guidelines) and fulfilment contracts. The Commission is open to receive examples in other areas and it is actively looking at examples involving offline and online distribution.

In RPM cases, the Commission needs efficiency to be demonstrated. In recent cases, the evidence showed the pricing mechanism used online was not only based on the specific products involved but all competing products. Once there are a few major players applying RPM, even if their individual market shares are low, price competition in the market overall could be markedly reduced.

**Gatekeepers and distribution**

The Commission has been investigating Amazon and its role as a dual distributor (marketplace for reseller products and marketplace for its own products). There are roughly 800,000 sellers that sell products on Amazon marketplace where Amazon also sells its own products, prompting the question whether this situation is any different to most large supermarkets.

It is useful to draw parallels with past cases involving offline retailers, such as the Tesco and Booker UK merger case in 2017, cleared unconditionally at Phase 2. A theory of harm was that Tesco could obtain information from manufacturers that could then be used to produce its own similar products. This could harm innovation, though the CMA also recognised a potential pro-competitive effect in that the retailer may be able to roll-out the innovation quickly to the benefit of consumers. This was not investigated further however as the merger gave rise to only a small increase in market share.

It is interesting to compare the Tesco and Amazon cases, for example in the relative concentration and market power of the two. Another difference is data-related, where online retailers have strong data on the consumer purchase decision process in contrast to offline retailers.

For brand owners, little difference is seen between offline and online markets where gatekeepers operate. Competition authorities have not identified gatekeeper concerns for retailers in the same way as they identified them for online platforms. There are several reasons for that. First, there is little evidence of dominance of the retailers involved. In addition, data for online platforms is more extensive in scope (e.g. in terms of consumer behaviour in terms of search and selection before purchase) and far more granular than data held by supermarkets.

**Retail buying alliances**

Retail buying alliances with strong bargaining power that press manufacturers to reduce their prices are multiplying. They present the Commission with some questions:

- Is it acceptable for buyers to gain market bargaining power without adding any efficiency through merging purchasing activities?
- Are the methods used to force manufacturers to agree to prices acceptable e.g. delisting?
- Once prices are reduced, can this have a long term impact on supply?

These issues are not currently addressed in the guidelines though they will be considered in the review.

# BIOGRAPHIES

## Adrian Majumdar

*RBB Economics*

Dr Majumdar is a Partner at RBB Economics. Prior to taking his post at RBB, Adrian was the Deputy Director of Economics (spending 6 months as acting Chief Economist) at the UK competition authority, the Office of Fair Trading (OFT), now part of the Competition and Markets Authority.

Adrian is referenced in Who's Who as "an undisputable leader in the field" and "one of the absolute best" when it comes to complex investigations work, topping the rankings for EMEA economists in 2019.

Adrian has advised on some of the leading competition law cases in Europe, including *Intel* (for AMD) and *Post Danmark II*. His experience includes many Phase II mergers and other matters before the European Commission and national competition authorities around the world. Adrian has also provided expert testimony under cross examination and in the 'hot tub' before the UK Competition Appeal Tribunal and other courts.

Adrian is a co-author of the textbook, *UK Merger Control, 2016* and several research papers published by the UK competition authorities, covering selective price cuts and fidelity rebates, buyer groups,

cost pass-through, and consumer savings from competition policy. While at the OFT, Adrian was the principal author of the *Competition Act guidelines on Market Definition and the Assessment of Market Power*.

Adrian lectures for King's College London, where he is a Course Director of the Postgraduate Diploma/Masters in Economics for Competition Law, attended by staff from many competition authorities. Adrian completed his undergraduate studies at Cambridge University and his PhD at the Centre for Competition Policy at the University of East Anglia.

## Agustín Reyna

*BEUC*

Agustín is Director of Legal and Economic Affairs at The European Consumer Organisation, BEUC. 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. Agustín supervises five policy teams (Financial Services, Digital, Consumer Rights, Competition, and Consumer Redress and Enforcement) and coordinates the organisation's work on competition law enforcement. Agustin is 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. Since 2018 he acts as non-governmental advisor for the Commission to the International Competition Network. He holds a PhD. in law from the University of Bremen and often publishes in scientific journals on issues related to EU law.

## Alexander Simpson

*Amazon*

Alexander is the UK Legal Director and AGC of Amazon. Prior to joining Amazon in 2020, Alex was General Counsel and Company Secretary of Asda Stores Limited, one of the UK's largest retailers

serving around 19 million customers each week. Alex was also Chair of the Asda Foundation, which focussed on supporting numerous charitable projects and corporate philanthropy programmes including those designed to alleviate child hunger. Before moving into industry Alex attended the Queens University, Belfast and Trinity College Dublin before qualifying as a corporate lawyer at Walker Morris. Alex is also a NED and the Senior Independent Director at the IoD. Alex lives with his wife, two children and numerous animals in York.

## Amelia Fletcher

*University of East Anglia*

Amelia is a Professor of Competition Policy at Norwich Business School and Deputy Director at the Centre for Competition Policy. She is also a Non-Executive Director of the Competition and Markets Authority and a member of the Enforcement Decision Panel at Ofgem. She was recently a member of the HM Treasury-commissioned Digital Competition Expert Panel, which reported in March 2019.

She has been a Non-Executive Director of the Financial Conduct Authority (2013-20) and Payment Systems Regulator (2014-20) and Chief Economist at the Office of Fair Trading (2001-2013). While at the OFT, she also spent time leading its Mergers and Competition Policy teams. Prior to that, she was an economic consultant at Frontier Economics (1999-2001) and London Economics (1993-1999).

Her academic work focuses on competition policy, consumer policy and sector regulation, with a particular focus on behavioural economics and digital markets. Amelia has a DPhil and MPhil in economics from Nuffield College, Oxford.

She has been on the Councils of the Royal Economic Society, the Association of Competition Economics and on the advisory panel for the ESRC Centre for Economic Learning and Social Evolution (ELSE) and the Berlin Centre for Consumer Policies (BCCP). She was a member of DG Comp's Economic Advisory Group on Competition Policy (2017-20). She was appointed OBE in 2014 and CBE in 2020.

## Angélique de Brousse

*Johnson & Johnson*

Angélique is Senior Legal Counsel, Head of the Competition Law & Policy Group, EMEA at Johnson & Johnson. She is responsible for all aspects of competition law across-sector in EMEA, including acquisitions, divestitures and other transactions, as well as antitrust litigation and investigations, competition policy, training and counselling. Prior to joining Johnson & Johnson, she was Counsel at Freshfields in Paris and Brussels, where she worked for international clients in various industries. She completed her legal education at Paris Nanterre, Sorbonne and London Universities.

## 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 *Competition Overdose* (2020 harper Collins), *Virtual Competition* (2016, Harvard) and *EU Competition Law, An Analytical Guide to the Leading Cases* (7th ed, 2021, 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.

## Catherine Batchelor

*Digital Markets Unit, Competition and Markets Authority*

Catherine is a Director within the Digital Markets Unit at the UK Competition and Markets Authority, where she is responsible for leading work to prepare for the new pro-competition regime for digital markets. She previously led the Digital Markets Taskforce, providing advice to the UK Government on the design and implementation of pro-competition measures for digital markets, building on the proposals put forward by the Digital Competition Expert Panel, chaired by Jason Furman. She also leads the CMA's work on wider areas of the CMA's digital markets policy.

Prior to joining the CMA, Catherine worked at the Financial Conduct Authority, the UK's conduct regulator for financial services in a range of roles including considering competition and innovation within financial services, including a secondment to HM Treasury as Head of FinTech Strategy.

Catherine holds a BSc in Economics as well as an MSc in the Economics of Regulation and Competition.

## Christoph Leibenath

*Nestlé*

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

## Diana Vlad-Calcic

*European Commission, DG CNECT*

Diana is a Policy Officer at the European Commission's department for Communications Networks, Content and Technology. She works on range of policies regarding Online Platforms including the challenges and opportunities created by automatic decision-making in the online world.

Diana has a background in political science, public policy analysis and computer science, and has worked previously on projects for public sector innovation within the European Commission, including the use of big data for evidence-based policies.

## Friedrich Klein

*Ferrero*

Friedrich is Head of the Legal Department (General Counsel) for Ferrero Germany, Frankfurt. Before joining Ferrero in 2005, he worked as Legal Counsel at the German Advertising Federation (ZAW) in Berlin and as Lawyer for Pozzi & Partners in Milan, Italy. His primary fields of expertise include competition, antitrust and media law.

He completed his legal studies at the universities of Bonn, Rome, Hanover and in Berlin (legal clerkship) and holds a Doctorate (Ph.D.) degree of the University of Osnabrück, as well as a Master of European Law (M.L.E) of the University of Hanover. He was born in Hanover, Germany, in 1972.

## Gareth Shier

*Oxera*

Gareth specialises in competition, telecoms and media. He has advised clients from numerous sectors on a range of competition issues, including merger proceedings, abuse of dominance, collusion and vertical restraints. His experience includes cases before the European Commission, national regulators and the US FTC, covering sectors such as telecoms, broadcasting, airlines, energy, pharmaceuticals, FMCG, post and freight.

His telecoms and media experience includes advising a range of international clients, as well as regulatory authorities, on a variety of competition, regulation and commercial matters. These include mergers, regulatory impact assessments, wholesale-must-offer obligations, international pay-TV performance benchmarking, Next Generation Access pricing, copyright exceptions and content licensing.

## Jordan Ellison

*Slaughter and May*

Jordan has a strong competition and regulatory practice based in Brussels, representing clients before global, European and UK competition authorities and various sectoral regulators. He has been involved in a large number of high profile merger and cartel cases, including on appeal to the General Court in Luxembourg and in follow-on litigation before the national courts.

Jordan also advises clients on data protection and privacy issues, including advice on efficient strategies to ensure compliance with the EU General Data Protection Regulation and safeguarding customer and employee privacy in the context of regulatory investigations and corporate transactions.

Jordan is listed as a leading individual for Competition Law in Chambers Belgium, 2017 and is the author of the UK chapter of *The Merger Control Review*. Previously he worked in the mergers group at the UK competition authority.

## Martha Weis

*Reckitt*

As a member of Reckitt's Global Brand Protection Team, Martha developed and successfully rolled out a joint legal/eCommerce process to pinpoint and enforce against non-compliant sellers on 12 online markets spanning 8 jurisdictions. This cross-functional effort focuses on consumer protection, brand integrity and levelling the digital market playing field in support of Reckitt's dedication to the consumer. Prior to joining Reckitt, Martha worked as a lawyer both in private practice and in-house. As a US-qualified lawyer, she also holds an M.A. in Economics from Vanderbilt University.

## Martijn Snoep

*Netherlands Authority for Consumers and Markets*

Since September 1, 2018, Martijn has been the new Chairman of the Netherlands Authority for Consumers and Markets (ACM). Mr. Snoep obtained his law degree from Erasmus University Rotterdam. Until his appointment at ACM, he worked at De Brauw Blackstone Westbroek for 28 years. Operating from both their Amsterdam and Brussels locations, Mr. Snoep gave advice to businesses about the application of competition law in the Netherlands and abroad. As managing partner, he stood at the helm of the firm between 2010 and 2016.

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

## Philippe Chauve

*European Commission, DG Competition*

Philippe is the Head of the Food Task Force at the Directorate General for Competition of the European Commission. The Task Force is working on regulatory and antitrust issues in Fast Moving Consumer Goods (food, home care, personal care) agricultural products and agricultural inputs (fertilisers, pesticides etc) in Europe. Recently the task-force concluded a landmark case concerning practices of the world largest beer maker AB InBev preventing trade between EU member states and has been working on a number of investigations regarding manufacturers (e.g. Mondelez) and retailers (alliance Casino-Intermarché).

Philippe has extensive experience in antitrust enforcement and merger procedures. Before heading the Task Force he was enforcing competition rules in the energy sector, where he carried out a sector inquiry and many antitrust and merger investigations and implemented unprecedented remedies (such as the first large scale divestiture of assets in European antitrust history– sales of power plants and networks). In earlier jobs he also negotiated trade agreements for goods and services in the WTO and between the EU and its trading partners.

## Richard Whish

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Richard is Emeritus Professor of Law at King's College London; in 2014 he was appointed QC Honoris Causa. He was a non-executive director of the Office of Fair Trading in the UK from 2003 to 2009, and a non-executive director of the Singaporean Energy Markets Authority from 2005 to 2011. He is the co-author, with David Bailey, of *Competition Law, 9th edition 2018* (OUP), and the author of many other books, articles, case-notes and book reviews on various aspects of international competition law and policy. The *Richard Whish Liber Amicorum* highlights the global reach of Professor Whish's influence.

## Simon Holmes

*UK Competition Appeal Tribunal*

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

He is a Visiting Professor at Oxford University where he teaches competition law. He is also an adviser to the NGO, ClientEarth; a strategic Adviser to Sustainable Public Affairs in Brussels; a member of the competition commission of the International Chamber of Commerce (ICC); a member of the international advisory board of the LDC (Insituto de derecho de la competencia); and an associate member of the UCL Centre for Law, Economics, and Society (CLES).

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

## Stefan Hunt

*Competition and Markets Authority*

Stefan is the Chief Data and Technology Insight Officer at the UK's Competition and Markets Authority. He leads a group of data scientists and engineers using rich datasets, writing software or analysing algorithms, with a focus on digital markets. His unit also includes technology policy specialists, behavioural scientists and digital forensics.

He previously worked at the UK's Financial Conduct Authority, founding the Behavioural Economics and Data Science unit.

## Stephen Smith

*Bristows*

Stephen has over 20 years' experience advising across a broad range of EU and UK competition law matters. His practice includes distribution agreements, merger control, cartels and anti-trust investigations, abuse of dominance and competition litigation.

Stephen has represented clients before the European Commission and the Competition and Markets Authority in the UK and on appeals both to the European courts in Luxembourg and to the UK Competition Appeals Tribunal. He advised the Société Co-opérative de Production (SCOP), the company operating Eurotunnel's MyFerryLink business, in its landmark appeal. Stephen advised the owners of the Evening Standard and the Independent in the Competition Appeals Tribunal on their successful jurisdictional challenge against the Secretary of State for Culture, Media and Support's attempt to intervene in the sale of a minority stake to overseas investors and has been advising Dutch global window coverings business Hunter Douglas on its completed acquisition of 247 Home Furnishings Limited before the CMA.

Stephen's experience spans diverse sectors including life sciences, financial services, retail, manufacturing, telecommunications and technology. He also has experience of working inside a regulator, having worked at OFCOM, the UK's communication regulator, earlier in his career.

Stephen is fluent in French and is a former Chair of the Law Society's Competition Section, where he remains a member of the Committee.

## Ulf Bernitz

*Institute of European and Comparative Law*

Ulf is co-ordinator of the Stockholm-Oxford Collaboration and in this capacity he has been a member of the Institute since 2001. He is Professor of European Law at Stockholm University and Visiting Professor at Örebro University.

Ulf is working and researching primarily in EU law, focusing in the first place on the relation between EU law and national law. He takes special interest in intellectual property law, competition law and marketing and consumer law. He is preparing a book on the effects of EU law by way of influencing and changing national law. He is also engaged in revising several text-books.

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