



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 twelfth annual symposium on
competition amongst retailers and suppliers

Held on Friday 10th June 2016
at Mary Sunley Building, St Catherine's College Oxford

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OVERVIEW

This report provides a broad overview of the twelfth annual symposium discussing Trends in Retail Competition. The symposium considered the consumer choice, competition and growth in the single market.

The programme was divided into two parts. The morning session concerned choice, innovation and competition in the grocery market, with talks and a roundtable discussion covering market trends, unfair trading practices, buying alliances and the EC guidelines on vertical restraints. The afternoon session concerned choice, innovation and competition in the digital single market, with talks and a roundtable discussion covering retail developments, the e-commerce sector inquiry, geo-blocking, virtual competition and the Digital Single Market Strategy.

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

CHOICE, INNOVATION AND COMPETITION IN GROCERY

09.40 Choice, innovation and competition in grocery
Oliver Koll, Europanel

10.10 Some competition issues in the EU grocery sector
Philippe Chauve, DG Competition, European Commission

10.35 Unfair trading practices – remedies in the single market
Caroline Hobson, CMS Cameron McKenna

11.25 Buying alliances – theories of harm
Michael Bauer, CMS Hasche Sigle

11.50 EC guidelines on vertical restraints and the definition of manufacturers
Elisabeth Eklund, Delphi

12.15 Discussion on Unfair Trading Practices
Chairman Ulf Bernitz
Panellists: Maria Rehbinder, DG Grow
Örjan Brinkman, BEUC
Caroline Hobson, CMS Cameron McKenna
Ravi Bhatiani, Independent Retail Europe

OVERVIEW

13.50 Online markets in the world of retailing
Alan Giles, Saïd Business School, Oxford University

CHOICE, INNOVATION AND COMPETITION IN THE DIGITAL SINGLE MARKET

14.15 The e-commerce sector inquiry
Thomas Kramler, DG Competition, European Commission

14.40 The Digital Single Market and geo-blocking
Bill Batchelor, Baker & Mackenzie

15.20 Virtual competition
Ariel Ezrachi, Centre for Competition Law and Policy

15.40 Following up the Digital Single Market strategy – an EU approach to online platforms
Maria Rehbinder, DG Grow, European Commission

16.00 Discussion on e-Commerce
Chairman: Ariel Ezrachi
Panellists: Jarig van Sinderen, Autoriteit Consument & Markt
Örjan Brinkman, BEUC
Emma Trogen, Cosmetics Europe
Samuel Laurinkari, eBay
Thomas Kramler, DG Competition, European Commission

17.00 Closing remarks
Professor Ulf Bernitz

CHOICE, INNOVATION AND COMPETITION IN GROCERY

Choice, innovation and competition in grocery

Oliver Koll, *Europanel*

This presentation explored consumer choice, innovation and competition in the grocery sector. It reported on research covering eleven European countries (including the UK), based on purchasing data from 134,000 households collected from 2011 to 2014. The study covers up to 79 categories per country in the FMCG sector, has full coverage of selling channels and focuses on assortment, private label strategies and innovation success in the top five retailers and retailer groups by country. The key conclusions of this study for the UK are set out below.

Enough choice?

- **Assortment.** In the UK, retailers stock a significant number of unique SKUs, which dwarfs the actual number of products purchased by consumers. Assortment sizes are broadly stable across Europe. Shoppers however are shopping less frequently in most European markets (not the UK), which reduces their exposure to the choice available.
- **Concentration.** There are high levels of concentration in many European markets and the share of the top 5 retail groups continues to grow. The exception is the UK where their share has fallen due to the growth of discount retailers that are not (yet) in the top 5.
- **Private label.** The value share of private labels has continued to grow globally since 2007. However, in the last three years the European private label share is showing signs of stagnating for the first time ever, at a 32% share.

Choice in new

- **Number of launches.** In most countries, the number of launches in a given year is just below 10% of the assortment size (although we see more in the UK). That said, the number of new launches is down in number and value for both national brands and private labels, and this is more pronounced for innovations than renovations.
- **Pricing of new products.** New products in the UK are generally priced at 30% to 40% more than existing brands or private labels, arguably as a means to counter commoditisation.
- **Success of new products.** Private label launches in the UK tend to show steady growth over time, whereas national brand launches tend to grow quickly and then stabilise. Notably, less than 50% of new launches in the UK make it to their fourth year.

Retailer impact

- **Retailer support.** In the UK, retailer listings of new branded products vary, with only 15% being listed in all of the five top retailers. The percentage of new launches listed within one year of the launch date has remained stable in the last three years. So access to consumers via these retailers has not become more restricted over this time period.
- **Listing decisions.** Listing decisions in the UK are mainly driven by the current range of the retailer (i.e. more national brands in the assortment, more new branded SKUs will be listed). There does not appear to be a bias for retailers to list private labels over national brands – the percentage of private label listings is closely aligned with their assortment shares in most retailers.

- **Survival.** In the UK, larger brands have better chances of being listed in more retailers and, crucially, being listed in four or five retailers doubles the odds of survival. Notably, a private label launch has better odds for survival.

Key conclusions for the UK

- Listing by retailers is key to the success of national brand launches and the number of new national brand products being listed by retailers seems stable. However, there is less exposure to new products as there is a downward trend in new product introductions.
- There is no evidence that UK retailers limit access to national brand launches more than they did in previous years. But there is a lower likelihood that such products will remain on the shelves when compared with private label launches.
- Consumers have a huge amount of choice and this does seem to be in decline. In the future, the retail trend towards 'less is more' would suggest that a focus on fewer, bigger ideas may be beneficial.

NOTE: In this research, an innovation is defined as a new product introduced with a new brand name, or a sub-brand not yet used by this brand (whether national brand or retail brand). It is not a measure of 'first to market'. A renovation is defined as a change in size, variant or flavour but using an existing brand and sub-brand.

Some competition issues in the EU grocery sector

Philippe Chauve, *DG Competition, European Commission*

The Commission study on the EU retail sector

The Commission had undertaken a study into the EU retail sector following complaints at national and EU level that large retailers impose detrimental conditions on food suppliers and that this reduces their means to invest, thereby decreasing choice and innovation.

The Commission found that choice and innovation are driven by competition at local level, expansion of outlets and the size of product categories. It also found that more bargaining power for retailers and more competition among suppliers are associated with more innovation. However, the study shows that the proportion of private labels in a product assortment in a given shop appears to have a negative relationship with innovation proposed to consumers in that shop. There are a number of potential explanations for this:

- **Assortment effect theory.** Private label products may be less innovative by nature.
- **Consumer choice theory.** Retailers may be simply giving consumers what they demand. Alternatively, there may be little incentive to provide an innovative offering if consumers do not easily switch between shops.
- **Crowding-out effect theory.** Increased private label penetration may reduce brands' incentives to innovate, for example due to lack of scale or private label me-too products.
- **Missing piece theory.** The private label variable used in the study may capture the effect of an unexplained variable not included in dataset, such as variation in stocking policy.

The Commission continues to investigate these theories. Notably, the data gathered shows that private labels are not less innovative when taking into account their share of products (although less innovative in absolute numbers). Further, based on evidence in Germany, it appears that consumers do not switch easily between stores and brands. The Commission intends to carry out further analysis to test the other theories. If the Commission identifies retailer practices that limit innovation at market level, this may raise competition concerns.

The rise of protectionism

In recent years, there has been a rise of protectionism of domestic markets. First, there have been a number of private initiatives by parties along the supply chain. Already in 2012 domestic watermelon producers in Hungary agreed with supermarkets not to distribute imported watermelons or to only distribute them above a set price, and in 2015 in France the association of domestic vegetable producers agreed with the largest supermarket that it would sell only domestic vegetables. The parties to the latter agreement denounced it after the Commission started investigating it. In addition, in 2015 there were initiatives in some Member States by producers, processors and retailers of dairy products to give preference to domestic products. The Commission started investigating them.

Secondly, there have also been a number of state initiatives which raise concern. For example, fees were until recently imposed in Hungary that hit large non-Hungarian retailers heavily, in the Czech Republic retailers were obliged to notify authorities of imported goods, and several Member States are considering mandatory labelling initiatives.

Agreements to limit imports are against EU competition rules as they undermine the single market by removing the opportunity for farmers to sell produce across borders and potentially result in increased prices for consumers. State initiatives can also infringe the EU internal market and competition rules.

Unfair trading practices – remedies in the single market

Caroline Hobson, *CMS Cameron McKenna*

Unfair trading practices

Unfair trading practices (“UTPs”) are those imposed by a party with stronger bargaining power on a weaker party which can cause harm and potentially operate against consumer interests. Examples include:

- contractual issues (e.g. retrospective changes);
- payment issues (e.g. late payment, deductions);
- unfair termination of a commercial relationship (e.g. delisting);
- unfair use of information (e.g. private label relationship); and
- unfair transfer of commercial risk (e.g. shrinkage).

In the last five years there have been significant developments in the regulatory and enforcement landscape to deal with UTPs; more than twenty Member States have introduced or are planning to introduce legislation. However, the approach is inconsistent, forming a patchwork of national solutions which differ in scope and use a range of legal tools: competition law, unfair commercial practices law, contract law and targeted regulatory measures. The Groceries Supply Code of Practice in the UK provides an example of a relatively developed enforcement regime for UTPs, although it has taken some years to develop. Further, the Supply Chain Initiative (the “SCI”) is a jointly agreed voluntary framework which was established in 2013 by seven EU-level associations to increase fairness in commercial relations along the food supply chain.

The role of the European Commission

In January this year, the European Commission published a report on unfair business-to-business trading practices in the food supply chain. Notably, the report found that there was no need for an EU-wide regulation to address UTPs, instead recommending that Member States introduce legislation with the following key elements.

- **Coverage of the supply chain.** There must be adequate coverage of the entire business-to-business food supply chain, including operators from non-EU countries.
- **Four core types of UTPs.** The key categories of UTPs should be addressed: unfair transfer of risk, benefits requested in the absence of a related service, unilateral or retroactive changes to a contract and unfair termination of a contractual relationship.
- **Rigid and flexible enforcement.** Core categories of UTPs should be intrinsically prohibited, whilst other potentially unfair practices should be assessed on a case-by-case basis.
- **Confidentiality and own-initiative investigations.** Confidential complaints and own-initiative investigations by the enforcement authority must be allowed to address the so-called “fear factor”, the weaker party’s fear of compromising its commercial relationship.
- **Deterrent effect.** Measures introduced to tackle UTPs must act as a real deterrent.

The report also promoted the SCI, although it acknowledged that there was “room for improvement”, for example increased awareness of the SCI, improved confidentiality of complaints, and the grant of investigatory and sanctioning powers.

European Retail Alliances – consumer benefits or competitive harm?

Michael Bauer, *CMS Hasche Sigle*

European Retail Alliances (“ERAs”)

Many ERAs have an aggregate turnover of billions of Euro and target only the top 50 to 100 suppliers in Europe. Such ERAs generally have one of two functions:

- **The “gatekeeper” function.** Payments from suppliers are sought at EU level to provide access to negotiations plus a framework for services to be provided by the participating retailers at the national level.
- **The “toll collector” function.** Payments from suppliers are sought for which there is no measurable counterpart.

Both functions are reflected in the contracts with suppliers which usually foresee a so-called conditional and a non-conditional part.

Notably, the members of ERAs are rarely competitors on downstream markets as their sales do not generally overlap in national retail markets.

EU legal environment

An ERA may infringe the prohibition on anticompetitive agreements and information exchange under Article 101(1) of the Treaty on the Functioning of the EU even if the participating retailers do not compete on a downstream resale market.

ERA’s conduct implies elements of joint buying but also of joint selling.

Joint selling

In the context of the their “gatekeeper” function, ERAs could well be regarded as a means of joint selling, insofar as the participating retailers jointly sell access to their services (shelves, listings, marketing campaigns etc.) or at least a framework of services. This element of joint selling is executed by and among competitors to the extent that retailers even from different jurisdictions compete concerning the sale of access to their services. In cases where retailers operate in different jurisdictions (with no overlap on national downstream resale markets), the extent to which they compete depends inter alia on whether suppliers (of the goods) may shift their purchase budgets for such services from one jurisdiction to another.

If there is such joint reselling among competitors, any coordination among the participating retailers is very likely to be a hard-core restriction of competition since it directly refers to prices (the so-called “ERA-bonus”). In this case an exemption is very unlikely.

Joint buying

In the context of their “toll collector” function, where ERAs simply request payments without providing any measurable counter-services, they may well be regarded as a means of joint buying since the demanding of additional payments without measurable counter-service may qualify as a means of lowering purchase prices. The same might be true concerning the “access to negotiation element” in the context of the ERA’s gatekeeper function.

In relation to joint buying, the EU Commission’s Horizontal Guidelines provide that there is unlikely to be a restriction on competition if the purchasers are not active in the same selling market, unless the parties have a position in the purchasing market which is likely to be used to harm the competitive position of other (in particular smaller) retailers in the selling market. Indeed, ERAs may have a number of such negative effects:

- **Foreclosure effect.** Access of smaller retailers to suppliers’ promotional budgets may be affected as suppliers are forced by the ERAs to shift part of their limited budget to ERA members.
- **Waterbed effect.** Suppliers may seek to recoup from smaller retailers losses from any ERA-bonus paid without a measurable or adequate counterpart. In this context it needs to be considered that ERAs usually target the top 50 to 100 suppliers and, hence, focus on strong brands. Those strong brands are likely to have a better negotiating position towards smaller retailers which may be applied once those suppliers are forced to pay bonuses to ERAs. Based on economic theory one might ask the question whether suppliers really abstain from seeking better selling conditions towards smaller retailers until they are forced to pay an ERA bonus. However, at least reality confirms that suppliers usually have general margin goals which they intend to meet during a contract period, which indeed creates waterbed scenarios in case of suboptimal outcomes from negotiations with powerful ERAs.
- **Spiral effect.** Once a waterbed effect starts, it very likely creates spiral effects in that any detrimental effect towards smaller retailers (by means of less advantageous purchasing conditions) increases the market power of ERAs, which in turn facilitates even further demands for payments by the ERA from suppliers. It needs to be noted that, in modern retail, purchase prices count for about 75% of retailers’ total costs and, hence, purchase prices are the decisive element for failure or success. Interestingly, the German Competition Authority recently found both waterbed and spiral effects in its EDEKA / Kaiser’s Tengelmann merger decision.
- **Concentration.** Due to waterbed and spiral effects, smaller retailers may be forced to exit the market, which obviously increases concentration. Interestingly, this argument has been confirmed by the merging parties themselves in the EDEKA / Kaiser’s Tengelmann merger case. The parties tried to justify their merger by referring to the detrimental effects on Kaiser’s Tengelmann’s purchasing conditions arising from a former decision by the authority to block the creation of a buying group by and between Edeka and Tengelmann, arguing that this forced Kaiser’s Tengelmann to exit the market (by way of the proposed merger or otherwise).

All in all it appears obvious that ERAs might have substantial negative effects with regard to their joint buying function and in particular towards smaller rivals.

Where possible negative competition effects of joint buying exist, an individual exemption from the prohibition on anticompetitive agreements may be available if cost savings are passed on to consumers. However, under the circumstances where ERAs and their members operate on their

markets, it is unlikely that benefits will be passed on given that retail markets are often already highly concentrated (e.g. for Germany this has once again been confirmed by the Bundeskartellamt merger decision in EDEKA / Kaiser's Tengelmann). Even where this is not the case, it is doubtful that any benefits will be passed on to consumers. In particular, ERAs receive payments retroactively and on an overall level rather than in connection with a particular transaction in a national market. It appears likely that the passing on of such payments to the participating retailers is executed on an even more aggregated level. Accordingly it appears that the payment of ERA bonuses directly increases retailers' profits without having any impact on selling prices.

Finally, in any event, the payment of ERA bonuses by one supplier very likely will never end up in the hands of the consumer of that supplier's product given that retailers will use additional payments from ERAs not only to increase their profits but also to fund marketing campaigns. Those campaigns do not apply equally across all products. Accordingly, ERA bonuses paid by one supplier are likely to fund campaigns for other products, whether in other categories or the same category but for competing products. It seems unlikely that this sort of cross-subsidisation would be adequate to justify an exemption.

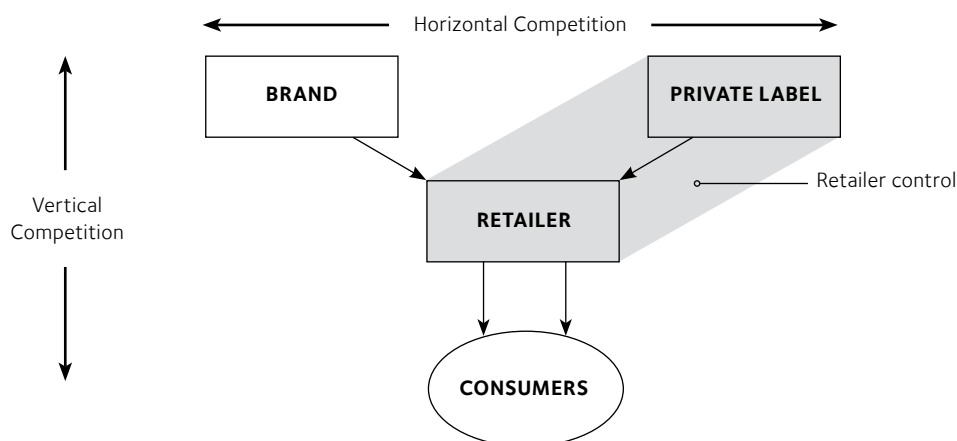
EC guidelines on vertical restraints and the definition of manufacturers

Elisabeth Eklund, *Delphi*

The dual role of retailers

Vertical competition has always existed between brand manufacturers and retailers. However, the rise of private label means that the retailers also compete horizontally with brand manufacturers.

This dual role of retailers raises a number of competition concerns. First, retailers have a gatekeeper position for shelf space, leading to strong buyer power. Second, as retailers control the prices of both branded and private label goods there is no real in-store price competition. Third, retailers request detailed information from manufacturers, such as ingredient lists and launch dates for new innovations, distorting competitive conditions. As a result, this dual role of retailers is likely to lead to higher prices and less innovation.



Source: Assessing Brand and Private Label Competition, Paul W. Dobson, Ratula Chakraborty, (2015) 26 ECLR

EC guidelines on vertical restraints

The EC guidelines on vertical restraints state that “[a] distributor who provides specifications to a manufacturer to produce particular goods under the distributor’s brand name is not to be considered a manufacturer of such own-brand goods”.

Notably, in an ongoing case, a Swedish trade association of retailers relies on this guidance to argue that private label retailers do not compete with brand manufacturers. This interpretation cannot be correct, as it would mean that private label retailers and brand manufacturers could freely exchange information about costs, and even coordinate on prices and product introductions, without falling foul of competition law.

Instead, it is argued that the guidance merely regulates the relationship between the retailer and the manufacturer of private labels, not manufacturers in general. This interpretation is supported by the European Commission’s view in *SCA v Procter & Gamble* and the General Court’s view in *Kaysersberg v Commission*, which both found private label and branded products to be competing.

It remains to be seen how the case in Sweden will be resolved, and what further guidance the Commission might provide.

Discussion on Unfair Trading Practices (UTPs)

Chairman: Ulf Bernitz

Panellists: Maria Rehbinder, *DG Grow*
Örjan Brinkman, *BEUC*
Caroline Hobson, *CMS Cameron McKenna*
Ravi Bhatiani, *Independent Retail Europe*

- **Recent Developments.** The European Parliament called for the EU Commission to introduce framework legislation at EU level to deal with UTPs in the food supply chain in a resolution voted on 7 June 2016. It is likely that any proposal by the Commission will reflect the principles set out in its January 2016 report on UTPs, including confidentiality protections and an effective deterrence effect. It remains to be seen what impact such legislation will have in reality as many Member States already have national regimes.
- **Fear-factor.** The fear of tarnishing commercial relations with retailers continues to discourage suppliers from making complaints. The significant buyer power of retailers makes this particularly difficult to overcome. To reduce the effect of the fear-factor it is critical that complaints are kept confidential. The approach of the UK regime is helpful – the Groceries Code Adjudicator (GCA) canvasses suppliers on particular issues and then aggregates and anonymises responses. However, despite this approach, it is notable that the GCA does not receive significant invitations from suppliers for discussion.
- **Enforcement.** There are two models for the enforcement of UTPs rules in the EU. First, systems with very strict rules and strong sanctions. In these Member States there are generally a large number of complaints but also more of a litigation culture. Second, systems that focus on facilitating dialogue between suppliers and retailers such as the UK system. Generally, the Commission prefers the latter system, although it accepts that different methods may be appropriate across the EU.
- **Consumers.** The EU consumer perspective is largely aligned with the Commission's approach. There should be a minimum level of protection at an EU level, but otherwise national legislation is more appropriate to deal with UTPs.
- **Supply Chain Initiative (SCI).** The biggest benefit of the SCI is that it facilitates dialogue between retailers and suppliers, as well as farmers. This collaborative approach can help to overcome issues relating to the fear-factor. The SCI is continually improving, for example by increasing its membership scope and simplifying its procedures and processes.

OVERVIEW

Online markets in the world of retailing

Alan Giles, *Saïd Business School, University of Oxford*

Challenges for retailers

In recent years UK grocery retailing has been undergoing unprecedented structural change, and it is predicted that traditional superstores and supermarkets will continue to be squeezed by online grocery on the one hand and discount formats on the other (IGD Retail Analysis, September 2014). Most notably online access has not only eliminated the issue of geographical distance from consumers' options, but has given them unrivalled price transparency and bargaining power.

Retailer responses

Retailers are responding to these challenges in a number of ways.

- **Multichannel.** Over time, store-based retailers are offering a more seamless multichannel service (i.e. both in store and online), narrowing the performance gap against online-only providers such as Amazon or ASOS that set the standard in terms of technology, agility and customer service.
- **Internationalisation.** Retailers are expanding outside the home market, for example Primark now has 45% of its space in stores in eight countries outside the UK and Ireland. Of course, digital businesses tend to colonise international territories much more quickly.
- **Services.** Some retailers are shifting their activities from goods to services, which may have higher margins and less price transparency. For example, Pets at Home reported like for like sales growth of 1.4% for merchandise and 10% for services.
- **Personalisation.** New technology and data analysis allows retailers to provide personalised offers, or more relevant product propositions to meet the needs of individual customers.
- **Innovation.** Retailers are innovating with new formats, services or products, for example opening new 'convenience' stores, product innovation, private label innovation, and so called "content", the convergence of content and commerce. That said, Amazon remains at the forefront of innovation, spending 10% of its revenues on research and development in 2015.

Challenges for regulators

Competition and consumer regulators are also faced with a number of challenges:

- **Market assessment.** Traditional frameworks for defining the geographical market may no longer be relevant in a multichannel world, particularly for local and national markets where arguably "distance is dead" (Cairncross, 1997).
- **Price promotions.** Innovations in price promotions raise new issues, for example Staples' time-limited discounts.
- **Loyalty schemes.** Innovations in loyalty schemes also raise new issues, for example two-tiered pricing (where inflated prices in store fund discounts) and even multi-tiered pricing (where inflated prices fund discounts for specific identified customers).

- **Market concentration.** Many digital markets exhibit extreme levels of concentration, for example in the US four companies account for 40% of all e-commerce (Amazon, Apple, Walmart, and Staples) and the top 50 companies account for three quarters of the market.
- **Market entry.** The drive for market share is very costly and scale continues to be critical. As a result, market entry is difficult requiring significant funds at an early stage.
- **Collaboration.** It can be difficult to understand the basis of competition in a market as competitors may collaborate, for example Ocado launched in 2002 selling groceries supplied by Waitrose, and in 2013 entered into another deal with Morrisons, who in turn has agreed to supply Amazon with fresh, frozen and ambient products.
- **Marketplaces.** In many markets, customers predominantly shop through e-commerce marketplaces and by 2018 more than 50% of e-commerce growth will be driven by marketplaces.
- **Complex eco-systems.** The broader eco-system within which some marketplaces, such as Alibaba and Amazon, sit makes it challenging to understand their role, incentives and behaviour.

Final thought

In the last forty years the most lucrative part of the value chain has shifted from brand manufacturing to retailing. Some commentators now predict that in the future the greatest rewards will be offered to those with upstream IP and innovation, or those downstream consumer-facing intermediaries who offer impartial, pan-retailer advice (OC&C Strategy Consultants, 2013).

CHOICE, INNOVATION AND COMPETITION IN THE DIGITAL SINGLE MARKET

Geo-blocking and EU competition law

Thomas Kramler, *DG Competition, European Commission*

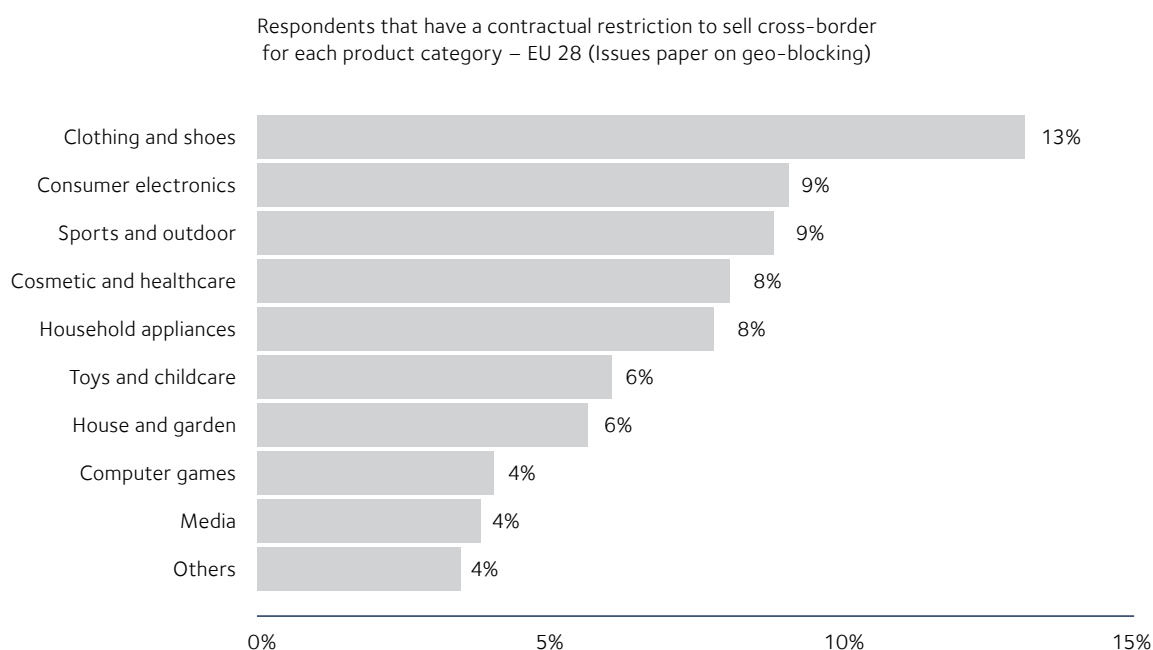
Digital Single Market

The European Commission's Digital Single Market Strategy aims to provide better access for consumers and businesses to online goods and services across Europe. As part of the strategy, the Commission has launched an e-commerce sector inquiry which aims to:

- gain a more comprehensive understanding of competition issues, market dynamics and business challenges in cross-border e-commerce;
- if appropriate, provide guidance to businesses through subsequent enforcement;
- look at the legal framework on online vertical restraints in the light of current market realities; and
- complement legislative initiatives.

Geo-blocking

Geo-blocking is a key area of focus of the Commission. It prevents users from accessing or purchasing consumer goods or digital content services online based on location or place of residence. Geo-filtering refers to different terms (in particular prices) depending on the location or place of residence of the user. As part of the e-commerce sector inquiry, the Commission has investigated geo-blocking, finding that it is more prevalent in larger companies and in certain industries (see below).



Crucially, the Commission has also found that only 12% of retailers across the EU reported contractual restrictions to sell cross-border. Geo-blocking cannot be dealt with by competition tools alone. In particular, geo-blocking for digital content may be the result of the national nature of underlying copyright. However, the EU Courts have found absolute territorial protection to be anticompetitive in relation to a number of IP rights from trade marks in *Consten v Grundig* to copyright in *Murphy*.

The Digital Single Market and geo-blocking

Billy Batchelor, *Baker & Mackenzie*

Digital content

The financing of digital content is heavily reliant on the licensing of copyright on a territory-by-territory basis. Consumers value content in a highly subjective way, dependent upon national and cultural preferences. So a hit in one country may be a flop in another. It is important that the value of sales in each territory can be predicted in advance to ensure that the significant upfront costs involved in the creation of such content can be recouped. These costs continue to rise as the industry develops (e.g. production values, special effects).

The application of competition law to licensed copyright works has been complex. The leading audio-visual precedent – *Coditel* – suggests that national territorial licensing is permitted because it falls within the specific subject matter of copyright and is important to the content industry for film financing, local investments and “windowing.” It is unclear whether, and to what extent, the later *Premier League* case law – which held cross-border passive sales restrictions to be anticompetitive – changes this, as the latter concerned a different type of copyright and sports, rather than creative content.

Geo-blocking – the proposed regulation

The European Commission published a draft EU geo-blocking Regulation on 25 May 2016. Notably, audio-visual services are not covered by the Regulation, which reflects a change in the Commission’s attitude, recognising the particular characteristics of the industry and its reliance on national licensing.

The Regulation does prohibit traders from preventing access to their “online interfaces” and requires customer consent for rerouting. In addition, discrimination based on residence is prohibited in circumstances where there is ‘easy delivery’. These ‘easy delivery’ circumstances are:

- The selling of physical goods where the trader is not involved in delivery of the products;
- The provision of electronically supplied services, other than where the main feature is the provision of access and use of copyright protected works or other protected subject matter;
- Services which are provided by the trader in a Member State different to the customer’s Member State of residence.

This regulation represents a fairly narrow start to a broader campaign against geo-blocking. That said it will require a review of, and potentially changes to, the contractual relationships of many businesses.

Virtual competition

Ariel Ezrachi, *Centre for Competition Law and Policy*

Changing market reality

The rise of the Internet, Big Data, computer algorithms, artificial intelligence, and machine learning all promise to benefit our lives. On its surface, the online world—with the growth of price comparison websites, dynamic pricing, web promotions, and smartphone apps—seems to deliver in terms of lowering prices, improving quality, widening the selection of goods and services, and hastening innovation. And yet, could it be that, after the initial pro-competitive promise, these technologies lead to higher prices, poorer quality, fewer options presented to us, and less innovation in things we care about, such as our privacy?

These dynamics lead us to onto uncharted ground; to a landscape that ostensibly has the familiar competitive attributes to which we are accustomed, and yet delivers far less than what we would expect. In some markets, competition as we knew it – the invisible hand of competition – is being displaced with a digitalized hand. The latter, rather than being a natural force, is man-made, and as such is subject to manipulation. The digitized hand gives rise to newly possible anticompetitive behaviours, for which the competition authorities are ill-equipped.

The collusion analytical framework

Big Data and Big Analytic – in increasing the speed of communicating price changes, detecting any cheating/deviations, and punishing such deviations – can provide new and enhanced means to foster tacit collusion or stabilize hub and spoke agreements through the use of similar software or single pricing algorithm.

Behavioural discrimination

The idea of an unbiased, impersonal Internet is fast giving way to an online world that, in reality, is increasingly tailored and targeted. Sophisticated algorithms may allow for price discrimination on a very narrow or even individual basis raising competition concerns. In addition, behavioural discrimination may enable sellers to take advantage of big data and personal biases (such as decoys, price steering, complexity and drip pricing) to extract more welfare from customers.

Enforcement choices

Technological innovations are neither inherently good, bad, nor neutral. Much depends on how the companies employ them, whether their incentives are aligned with users' interests, and the collective effects that their actions may subsequently have on markets. Optimal enforcement should be measured and carefully executed, to safeguard innovation while ensuring sufficient protection to customers and reduction in barriers to entry. The enforcement tool box includes, among other things, the competition provisions, data and privacy protection. Measures may be used ex-post or preferably ex-ante, to deal with market failures, rather than specific infringements.

An EU approach to online platforms

Maria Rehbinder, *DG Grow, European Commission*

The Commission's approach

The Commission aims to embrace the platform revolution and its many benefits by attracting, retaining and growing online platforms in the EU. Indeed, this forms part of the Digital Single Market Strategy. However, the Commission will also tackle any issues which emerge from online platforms, through existing competition law rules and a problem-driven approach to regulation. The Commission does not foresee the need for changes to the e-commerce directive to tackle these issues:

In May 2016 the Commission published its Communication on 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe'. This Communication sets out four principles for the development of platforms:

- ensuring a level playing field for comparable digital services;
- ensuring that online platforms act responsibly to protect core values;
- fostering trust, transparency and ensuring fairness; and
- keeping markets open and non-discriminatory to foster a data-driven economy.

Online platforms and business-to-business relations

The Commission's public consultation on platforms in 2015 highlighted a number of potentially problematic practices in the business-to-business relations between platforms and suppliers, including:

- unfair terms and conditions (e.g. access to data);
- refusing market access or unilaterally modifying the conditions for market access;
- dual role of platforms as intermediary and competitor;
- unfair 'parity' clauses; and
- a lack of transparency – notably on platform tariffs, use of data and search results.

Looking ahead, the Commission faces significant policy challenges in dealing with platforms. Indeed, the diversity of platforms means that there may not be one way to address all of the issues that arise. In addition, potential fragmentation of national regulation is arguably the Commission's biggest challenge. The Commission aims to determine whether additional EU action is needed by spring 2017. It will focus on voluntary dispute resolution mechanisms, transparency and better information measures or guidance.

Discussion on e-Commerce

Chairman: Ariel Ezrachi, *Centre for Competition Law and Policy, University of Oxford*

Panellists: Jarig van Sinderen, *Autoriteit Consument & Markt*

Örjan Brinkman, *BEUC*

Emma Trogen, *Cosmetics Europe*

Samuel Laurinkari, *eBay*

Thomas Kramler, *DG Competition, European Commission*

- **Online platforms.** The development of new technology has facilitated a fundamental change in commerce, reducing barriers to cross-border trade. The role of online platforms is fundamental to the digital economy – they act both as a gateway to the online world and a controller of vast amounts of data. It is critical that everyone can access and leverage the benefits of online platforms. The role that competition law and the regulatory framework should play in guaranteeing this level playing field is not yet clear.
- **Geo-blocking.** Dealing with the practice of geo-blocking is essential to ensuring that consumers obtain the full benefit of the digital single market. The review of rules in this area, as well as the costs of delivery services, are therefore welcomed.
- **Application of competition rules.** The digital economy has the potential to raise a number of novel competition law questions. However, by applying first principles it should be possible to deal with these issues through the existing competition law framework
- **Selective distribution systems.** Online selective distribution systems can have a positive impact – creating shopping experiences that consumers expect, rewarding marketing investments and avoiding free-riding by competitors. Traditional competition law principles for assessing such systems can be applied by analogy in the digital sector. Equally, it is important to distinguish between selective distributions systems and geo-blocking which are not necessarily the same.

SPEAKER BIOGRAPHIES

Morning session

Ulf Bernitz

Institute of European and Comparative Law

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 Koll

Europanel

Oliver is a branding consultant and scholar. For the past 14 years he has held the position of Strategic Insights Consultant with Europanel, a joint venture of GfK and Kantar Worldpanel, which is the world's leading source of insights from consumer panels. In this role, he works with international FMCG companies like Procter & Gamble, Unilever, Pepsi or Birds Eye – mostly on projects investigating the drivers and barriers to growing successful brands.

He is also the founder and managing partner of Institut für Marketing, a branding strategy and monitoring consultancy based in Innsbruck.

Finally, he holds a position as a post-doc fellow in the Marketing Group of the University of Innsbruck, where he focuses on research and teaching in the area of brand management and measurement. His work has been published in leading marketing journals and he is teaching in executive programs in Austria, Switzerland, Monaco or the UK.

Phillippe Chauve

DG Competition, European Commission

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 the food supply chain in Europe. This includes investigations of antitrust cases, the implementation of specific competition rules within the Common Agricultural Policy (concerning inter alia joint sales by farmers), the analysis of suppliers and retailer's relationships. The task-force delivered in particular in 2014 an ambitious study on the impact of competition and other factors on choice and innovation in food products.

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 in the E.ON electricity cases). In earlier jobs he also negotiated trade agreements for goods and services in the WTO and between the EU and its trading partners.

Caroline Hobson*CMS Cameron McKenna*

A partner in the competition team in CMS London, Caroline has more than 15 years' experience of advising on EU and UK competition matters and has extensive experience of advising clients in the FMCG sector.

She has advised clients seeking merger clearance from the European Commission and other national competition authorities. She has acted for clients on a number of investigations in the sector and has attended raids conducted by the UK and EU competition authorities. She regularly advises FMCG clients on the varied competition issues arising from their commercial and distribution arrangements, and assists clients with the implementation of compliance policies within their commercial and sales teams.

Caroline regularly advises grocery manufacturers on the application of GSCOP and their dealings with retailers. Caroline is a regular presenter at seminars and conferences on consumer products, competition and GSCOP issues.

Michael Bauer*CMS Hasche Sigle*

Michael has been a partner at CMS since 2001 and co-head of the CMS EU Law Office in Brussels where he spent most of his career. He is a well-known expert in EU competition law.

Being a competition lawyer for more than 20 years, Michael represented clients in more than 250 merger control or cartel cases both on the EU and national level. He represented clients as the lead partner in many complex merger control cases like, most recently, the second phase EU Commission investigation concerning the Telefónica/E-Plus merger.

Michael also has particular expertise in advising clients from the FMCG sector. Since 2009, he has been heading the 110-lawyers-strong CMS industry sector group for clients from the consumer products sector. Moreover, he 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.

Elisabeth Eklund*Delphi*

Elisabeth is a partner at Delphi in Sweden and specialises in competition law and regulatory issues. She has more than 15 years' experience in working as a lawyer and holds an LL.M. degree from the European University Institute in Florence. She has experience of handling all kinds of competition law issues, and also acts as counsel in competition law litigations.

Elisabeth has extensive experience from complex issues in a wide range of sectors, with particular experience from the life sciences sector and other regulated sectors, such as transports and broadcasting as well as the retail industry. Elisabeth is a guest lecturer at Stockholm University. She has written a large number of articles. Elisabeth is appointed as a non-governmental advisor for the Swedish Competition Authority in the ICN's working group on unilateral issues. She is ranked by several ranking institutes for EU/Competition law and Life Sciences.

Discussion

Panel chairman

Ulf Bernitz

Institute of European and Comparative Law

Panellists

Ravi Bhatiani

Independent Retail Europe

Ravi is the Director of Legal Affairs for Independent Retail Europe, the oldest EU retail trade association in Brussels representing 1.13 trillion euros of turnover and 5.88 million jobs. Ravi is responsible for policy development and legal issues. Ravi has worked at Independent Retail Europe for over four years and has extensively worked on supply chain and competition topics in that time. Indeed, Independent Retail Europe played a leading role in building and negotiating the EU level Supply Chain Initiative.

Before joining Independent Retail Europe, Ravi worked as a legal adviser in Brussels for a financial services trade association.

Örjan Brinkman

BEUC and Swedish Consumers' Association

Örjan is President of BEUC (the European consumer organisation) and President of The Swedish Consumers' Association. He was also a member of the Monitoring Committee and the Working Committee of the European Social Fund in Sweden until 2011, and of the Swedish Government's Disability Delegation in 2011.

Örjan graduated with a teaching diploma in 1978 and served as a pre-primary and municipality principal until 1988. He later worked as Head of Development and County Manager in TBV adult education (until 1996), Marketing Manager and expert on labour market and education in the Women's Forum Foundation (until 2002), Director of Administration in culture and education in the municipality of Sodertälje, Principal in primary and secondary education in Vittra (until 2006), and Secretary General of The Swedish Disability Federation (until 2012).

Afternoon session

Alan Giles

Saïd Business School, University of Oxford

Alan is an Associate Fellow of Saïd Business School, University of Oxford, where he chairs the Advisory Board of the Oxford Institute of Retail Management. He is also a non-executive director of Rentokil Initial plc, Perpetual Income & Growth Investment Trust plc and the Competition & Markets Authority, having been a non-executive director of the Office of Fair Trading from 2007.

Alan has extensive retail sector experience, having been Chairman of Fat Face from September 2006 until July 2013. Earlier in his career he formed HMV Group as Chief Executive in 1998 as a leveraged buy-out and led the Group through its London Stock Exchange IPO in 2002 before retiring from the Group in September 2006 to develop a portfolio of non-executive and teaching roles.

He graduated in Physics from the University of Oxford and holds a Masters in Management degree from The Graduate School of Business, Stanford University, California.

Thomas Kramler

DG Competition, European Commission

Thomas is Head of the Digital Single Market Task Force in the European Commission's Directorate General for Competition. He holds a law degree and a PhD from the University of Vienna, Austria. He has graduated with a Masters degree in European Community Law from the College of Europe (Bruges).

Previously Mr Kramler was deputy head of the unit responsible for antitrust cases in the information industries, Internet and consumer electronics sectors, and before joining the European Commission Mr Kramler worked as agent representing the Austrian government before the European Courts in Luxembourg.

Bill Batchelor

Baker & McKenzie

Bill is a partner in the firms' European & Competition Law Practice. He advises on merger control, investigations and EU regulatory matters. He has worked in the Washington DC, London and Brussels offices of Baker & McKenzie, as well as spending time at the EU and UK competition authorities. He focuses his practice on EU and UK competition law and represents clients in EU and global merger control matters, investigations and litigation.

Ariel Ezrachi

Centre for Competition Law and Policy, University of Oxford

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, editor and co-editor of numerous books, including *EU Competition Law, An Analytical Guide to the Leading Cases* (4th ed, 2014, Hart), *Intellectual Property and Competition Law* (2011, OUP), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011, Hart), *Global Antitrust and Compliance Handbook* (2014, OUP) and *Private Labels, Brands and Competition Policy* (2009, OUP). Professor Ezrachi develops training and capacity building programmes in competition law and policy for the private and public sectors, including training programmes endorsed and subsidised by the European Commission and the UNCTAD.

Maria Rehbinder

DG GROW, European Commission

Maria heads the business-to-business services unit in the European Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW). Her unit's remit includes B2B relations and policy development in the retail sector. She was responsible for co-ordination of DG GROW input to the preparation of the EU Digital Single Market Strategy and closely involved in the follow-up of the action on platforms.

Maria has been in her current job in 2013 following a period of more than ten years in the European Commission's Competition Department. She joined the Commission in 1996 having held posts at the Finnish Ministry of Finance. She studied economics at the Swedish School of Economics and holds a PhD in Law from the University of Helsinki.

Discussion

Panel chairman

Ariel Ezrachi

Centre for Competition Law and Policy, University of Oxford

PANELLISTS

Samuel Laurinkari

Senior Manager EU Government Relations, eBay Inc.

Samuel heads up eBay's work on EU policies impacting eBay and its users, such as e-Commerce legislation, online platform policy, consumer policy, competition policy, and cross-border trade policy.

Prior to joining eBay, Samuel worked in government relations for LVMH Moët Hennessy Louis Vuitton and as a consultant for FTI Consulting.

Samuel grew up in Finland and Germany and studied European law at Maastricht University in the Netherlands.

Jarig Van Sinderen*ACM, The Netherlands*

Jarig is Chief Economist at the Authority for Consumers and Markets (ACM). He is also part time Professor in Economic Policy at the Erasmus School of Economics at the Erasmus University, Rotterdam. Before Jarig became Chief Economist he was Deputy Director General for Statistics at Statistics Netherlands (2004–2006) and Secretary of the Scientific Council for government policy (2001–2004). For a long time he worked at the Ministry of Economic Affairs in different functions. He published recently on the impact of competition policy on productivity and on the strategy of ACM.

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.

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