

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Summary of Discussion of the Roundtable on Implications of E-commerce for  
Competition Policy****Annex to the Summary Record of the 129th Meeting of the Competition Committee held on  
6-8 June 2018****6 June 2018**

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 129th meeting of the Competition Committee on 6 June 2018.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm](http://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm)

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**JT03447510**

## *Summary of Discussion of the Roundtable on Implications of E-Commerce for Competition Policy*

By the Secretariat

On 6 June 2018, the Competition Committee held a Roundtable on the Implications of E-Commerce for Competition Policy. Introducing the Roundtable, the Chairman, Professor Frédéric Jenny, noted that many of the issues to be discussed would already be familiar to participants as typical retail-level antitrust concerns. Nonetheless, competition authorities across the OECD have seen a significant increase in cases involving e-commerce, many of which raise distinctive problems, including the relationship between offline and online retail channels, the question of market power in the digital sphere, and specific anti-competitive practices involving, for instance, price comparison tools, vertical search engines and online advertising.

An impressive response to the call for contributions meant that the discussion to follow would count with submissions from 26 countries and other organisations, supplemented by expert opinion provided by three invited panellists:

- **Pinar Akman** (Professor of Law and Director of the Centre for Business Law and Practice, University of Leeds)
- **Avantika Chowdhury** (Partner, Oxera Consulting, London)
- **Lars Kjølbye** (Managing Partner, Latham & Watkins)

The Chair then proposed to divide the Roundtable into three distinct strands:

- General competition dynamics and market definition in e-commerce.
- Vertical restraints in online retail.
- Abuse of dominance and other regulatory issues in the e-commerce sector.

### **1. General Competition Dynamics and Market Definition in E-Commerce**

The discussion began with an overview of the issues covered in the OECD background note, presented by **Niamh Dunne** on behalf of the Secretariat. A broad definition of e-commerce was being used in this context, including all retail value chains that result in the online sale of products for final consumers. This encompasses a wide variety of different business models. Although e-commerce is, at its core, a question of retail competition, several quite specific features have informed competition enforcement in this area to date. These include greatly expanded consumer choice, which has intensified competition online, but which may also prompt problematic practices such as collusion or vertical restraints. The growing role of consumer data collection and utilisation is also relevant: raising a broad range of issues from barriers to entry, to whether such data might be considered an essential facility, to personalised pricing, to its importance in terms of online advertising. Although e-commerce is by definition internet-based, however, the sorts of products and services ultimately provided to final consumers are not so *inherently* digital that the typical objections to application of competition law in the digital economy are applicable with full force here.

In terms of enforcement practice to date, the most frequent issue that has arisen is the problem of vertical restraints. Typically, such restrictions are imposed by manufacturers, seeking to develop a degree of equivalence between offline and online retail channels. Increasingly common restraints include selective distribution, resale price maintenance (RPM), and bans on use of tools like price comparison websites or marketplaces. Online marketplaces themselves are another source of vertical restrictions. The rationale for such restrictions is, usually, the prevention of free-riding. The optimal antitrust treatment of vertical restraints remains a much-disputed question within competition policy.

Unilateral conduct is another area of increasing scrutiny and discussion. In e-commerce markets, the risk of anticompetitive unilateral conduct raises two importance questions. First, whether dominance can arise in practice in digital economy markets. This requires enforcers to grapple with numerous issues, including the treatment of multisided markets, the relationship between offline and online retail channels, the characterisation of intermediation services, the existence or otherwise of barriers to entry, and how innovation should be factored in to any assessment of market power. Second, it is necessary to identify a robust theory of harm, which may involve well-established theories such as predatory pricing, or more unusual ones such as discriminatory leveraging or ‘forced free-riding’.

Finally, the Background Paper briefly addresses two other areas of potential enforcement activity. The first issue is horizontal collusion. While a hard-core cartel occurring within the e-commerce sector would be plainly illegal as in any other market, two more specific concerns have arisen: namely, the risks of algorithmic collusion, and of hub-and-spoke cartels. The second issue is the question of possible regulatory alternatives to competition enforcement. These include the use of issue-specific regulation to proscribe or prescribe certain behaviour in e-commerce markets; the application of consumer protection or data protection rules to safeguard final consumers; and the introduction of quasi-utilities regulation to control the activities of the so-called ‘tech giants’.

The Chair then turned to **Mr. Kjølbje**, to provide some initial remarks on the competition dynamics and the task of market definition within the e-commerce sector. He began by noting the changes brought about by the emergence of the digital economy to the conventional vertical value chain framework. With digitalisation, business models have become far more complex, individualised and differentiated. Thus, there can be no one-size-fits-all approach within competition policy going forward. It also underlines the crucial importance of understanding how a business models works – that is, how the company concerned actually makes, or proposes to make, money – in order to appreciate the possible competition issues that might arise. What may be central to the business model of one online platform may be less important to others; for example, some platforms need “eyeballs” to sell to advertisers, whereas others rely upon gaining access to high-value customer data. A sophisticated understanding of the relevant business model should be the driving force of competition analysis within the digital economy, in tandem with and perhaps even more important than the conventional task of market definition.

An example of this might be seen in the area of algorithmic collusion. Before drawing any conclusions about the legality of such practices, it is vital to understand how business model differentiation might affect incentives to collude, making such coordination more or less desirable from a business perspective. For instance, a large online retailer, which increases its value through business growth, may have significantly different incentives to programme its algorithms in a manner which facilitates collusion than a more traditional brick-and-mortar retailer, which is valued primarily in terms of the profits that it makes.

Another area where digitisation is breaking down traditional legal categories is the distinction between agency and distribution. With digital distribution, the economic risk criterion as dividing line between agent and third-party distributor becomes less meaningful, as neither takes on any significant degree of risk. Yet, ultimately, the distinction is not particularly relevant from a competition perspective, as both agents and distributors, in essence, provide a service and earn a margin on that service. What is important, in competition terms, is that agents or distributors actually compete on that distribution margin, in the same way that suppliers compete in relation to the products that they supply. How things are labelled is less important in substance.

A new and increasingly important phenomenon in the e-commerce context is the emergence of marketplaces. These are, in effect, service-providers to entities that sell products and also to consumers that buy products. Marketplaces charge a commission on the services that they provide, and, from a competition law perspective, they should be free to compete with other platforms providing similar services. Concomitantly, suppliers or merchants which use a platform should be free to, and should in fact, compete with other sellers. A more contentious question is how to assess ‘hybrid’ retail platforms, which operate both as marketplaces and as direct resellers to consumers. In such circumstances, a hybrid operator may have an incentive to favour its own retail operations, at the expense of competing retailers that use its marketplace services. From an antitrust perspective, Mr Kjølbbye argued, doing so may be unproblematic: retail-level users benefit from their association with high-profile retail platforms, and the platform itself should be permitted to take its own interests as a reseller into account in organising its marketplace business. Yet competition law recognises that the fact of vertical integration may change the assessment of certain practices at one level of the value chain. This illustrates once again how important it is to understand, right from the outset of any competition analysis, how particular business models work within the highly differentiated digital environment.

The Chair thanked Mr Kjølbbye for his contribution, and invited **Professor Akman** to respond. Professor Akman first noted that the suggested decreasing relevance of market definition in the e-commerce sphere mirrored the viewpoint advanced by the EAGCP in its 2005 report to the European Commission. Yet, at the time, this suggestion was rejected by most legal commentators, as incompatible with existing jurisprudence. Second, in relation to algorithmic collusion, Professor Akman observed that the emergence of machine self-learning may pose additional antitrust difficulties, where collusion is the outcome of the self-learning process. Finally, Professor Akman argued that the formal distinction between agent and distributor is vitally important from a legal perspective, because it may be determinative of whether a particular restrictive practice falls within – or without – the scope of competition law. This distinction would be discussed further in her own presentation.

Turning to the issue of competition dynamics in practice, the Chair invited **Romania** to present the findings of its recent market studies involving the e-commerce sector. Romania noted that it has conducted two major studies into this sector in the past year: a sector inquiry into the marketing strategies of online retailers, and a study of digital platforms. The sector inquiry revealed that online retailers make heavy use of price promotions to market their products, with evidence that national legislation regulating price formation is not being respected. Although not directly related to competition enforcement, this conclusion is likely to inform future advocacy, as it indicates a need to amend the relevant legislation. The study of digital platforms was intended primarily to lay the groundwork for future enforcement. It has resulted, *inter alia*, in an on-going investigation into alleged abuse of dominance by the largest online retailer in Romania, which also operates the

largest domestic online marketplace. The investigation will consider whether this hybrid operator has engaged in anticompetitive unilateral conduct with respect to retail competitors which sell through its marketplace platform.

The delegates from the United States were asked to discuss their views and findings on the relationship between offline and online retail channels. The **DOJ** noted that, today, it is more the rule than the exception that an industry will involve both online and more traditional offline distribution. This may involve different firms operating in the different retail channels, or the same firm engaged in both functions. The relationship between offline and online retail tends to be fact-specific, but can have significant implications for antitrust analysis. For instance, where a firm is present in both the offline and online segments, this may prompt it to adopt a uniform pricing policy across the US which extends to its brick-and-mortar stores. Such an approach may have implications for the scope of any geographic market definition. Alternatively, offline and online channels may be rigidly separated, or online sales within a particular market sector may be relatively insignificant and thus have little material impact on competition.

One major case taken by the DOJ involving online distribution is the *Apple E-Books* investigation. The case arose following the entry by Apple into the e-books market. At the time, book publishers were dissatisfied with the low prices for e-books maintained by the incumbent, Amazon. Efforts to prevent equivalent low pricing by Apple resulted, ultimately, in a horizontal conspiracy to raise e-book prices, which was orchestrated and implemented by Apple. Nonetheless, Apple's own business model was never in question, and its entry into the e-books market was pro-competitive. Instead, the horizontal conspiracy was a specific and distinct fact within this market, which formed the focus of the investigation.

The **FTC** added further observations about its own experiences of the role of e-commerce in terms of impacting competition within the office supply sector. When the FTC blocked the proposed *Staples/Office Depot* merger in 1997, online sales were not a major factor. In its 2013 review of the successful *Office Depot/Office Max* merger, it noted the intervening growth of e-commerce in this sector. Yet, in opting to block the second proposed *Office Depot/Staples* merger in 2016, where the competition concerns lay in the business-to-business (B2B) segment, the FTC rejected the merging parties' arguments that Amazon was an effective potential competitor. While Amazon is indeed active in online retail of office supplies, it is not competitive in the B2B segment, and so its presence was insufficient to tip the balance in favour of the merger.

**Italy** then spoke about its experience of market definition in the e-commerce sphere. This issue has arisen in enforcement cases related to both vertical restraints and merger control. The task of market definition is highly context-specific. In its well-known *Booking.com* case, pursued in tandem with the French and Swedish competition agencies, the AGCM identified relevant markets for online hotel bookings and online hotel bookings services, as distinct from traditional offline markets. This assessment took into account several factors which distinguished online services on both the demand and the supply sides. On the demand side, consumers benefitted from a broad range of additional offers provided online travel agents, as well as ratings and reviews. On the supply side, online travel agencies applied different levels of fees on hotels.

Different provisional conclusions on market definition have been reached, however, in two pending investigations that address alleged vertical restraints between taxi drivers and the main taxi companies in Rome and Milan. Here, the concern is that such restrictions prevent drivers from joining innovative online taxi reservation systems, leading to foreclosure of

the online platforms. In its decision opening the investigation, the AGCM took the view that taxi-hailing apps do not constitute a separate market, but rather belong to a broader market for reservation and dispatch services which includes more traditional operators. That is of relevance because this case concerns, not the downstream market for taxi services, but the upstream relationship between taxi drivers and taxi companies.

Finally, Italy noted that, typically, it approaches the task of market definition in the e-commerce context on the basis of the available evidence, in line with established principles and case-law. Particularly in the digital field, however, the AGCM increasingly carries out empirical studies to obtain a deeper understanding of consumer habits in specific sectors.

The Chair asked for clarification of the identified distinction between the hotel reservation and taxi reservation markets in the AGCM's practice. Italy explained that, in the latter cases, the investigation is focusing on competition from the perspective of taxi drivers rather than users. In this context, it has taken the view that the online and offline markets must be assessed together for competition law purposes.

The Chair noted that the case-by-case nature of market definition is further reflected in the enforcement practice of the UK's CMA, which has considerable merger control experience in the e-commerce area. He asked the delegate from the UK to elaborate upon the sorts of methodologies deployed to define online markets. The UK agreed that market definition is an entirely facts-driven exercise, which requires a case-by-case analysis. The delegate mentioned two recent mergers which illustrate this. First, in a merger involving two online bicycle retailers that each had significant market shares, the CMA was nonetheless able to approve the transaction due to (a) the fierce existing online competition, and (b) the continuing competitive constraints posed by offline retailers. Second, in a merger involving two online food delivery platforms that together possessed about an 80% market share, the merger was approved because the market was highly dynamic and contained numerous actual and potential competitors with clear plans for future expansion.

On the other hand, it is important, going forward, to review these transactions and identify any lessons that may be learned to improve future enforcement practice. The CMA is currently engaged in a number of antitrust investigations involving markets that were previously subject to merger control, thus raising questions of whether those transactions should have been permitted. Although any analysis must be driven by the facts at the time, there is also a risk of over-estimating the possibilities for new entry, even in dynamic sectors.

**Israel** then spoke about its on-going market study of the digital economy. Although Israel does not have any notable dominant players in the e-commerce space domestically, the IAA has received various complaints about alleged anticompetitive or unfair practices in this sphere. These include issues of geo-blocking, and unfair taxation. Moreover, although there is no dominant player domestically, Israel is increasingly affected by anticompetitive e-commerce practices which may originate abroad.

## 2. Vertical Restraints in Online Retail

The Chair turned the discussion to the issue of online vertical restraints. He noted that this topic had, for many years, rather gone out of fashion in terms of competition policy. Yet the growth of e-commerce, and attendant vertical restraints, has reinvigorated this area of antitrust law.

The second part of the Roundtable began with a presentation from **Japan** on recent revisions to its guidelines on vertical restraints, which were amended to take account of online retail. The starting point for these guidelines, originally adopted in 1991, is that any competition analysis of vertical restraints should take account of potential foreclosure or price maintenance effects in light of market circumstances. The revisions reflect the findings of a study group convened by the JFTC, which identified potential competition problems including “most favoured nation” (MFN) clauses used by online platforms, online RPM, and restrictions or prohibitions on online distribution. The JFTC took the view that the existing analytical framework continued to be suitable in the online context, but any analysis needed to take account of the digital market characteristics. This includes, for example, direct and indirect network effects.

The Chair noted that the antitrust treatment of MFN or price parity clauses in the e-commerce sphere has been an issue of concern for many other competition authorities across the OECD. He therefore asked **Professor Akman** to discuss the analytical methodologies that might be deployed to determine the optional treatment of such restraints. Professor Akman began by clarifying that MFN clauses essentially comprise a promise by one contractual party (e.g. a supplier) that the counterparty (e.g. a buyer) will be treated as favourably (e.g. in terms of price or product offering) as the supplier treats its best or “most favoured” customer. Outside the platform context, MFN clauses typically link e.g. prices charged to different customers of the same seller. Within the digital context, MFN clauses typically arise between a given seller and an individual platform, whereas the effect of the promise is felt by third parties, namely buyers who purchase via the platform. Accordingly, platform MFN clauses ensure that the price charged to a buyer who purchases via platform 1 will never be higher than the price of that product from the same seller via platform 2.

In this sense, in the e-commerce context, MFN clauses are closer to so-called “price matching guarantees”. Like such guarantees, moreover, online MFN clauses potentially generate both procompetitive and anticompetitive effects. MFNs can deliver lower prices for consumers; and incentivise investment in a particular transaction by lowering the risk of free riding. On the other hand, MFNs may reduce a seller’s incentive to lower its prices, where to do so would oblige it to lower prices across the board. Alternatively, such clauses may facilitate collusion between suppliers by reducing incentives to cheat, where to do so would trigger market-wide price reductions. Finally, MFNs can function as a barrier to entry, where suppliers are unable to grant price reductions to new customers entering downstream markets.

The question of how we should treat platform MFNs under competition law has several aspects. The first is whether such arrangements might fall within the rules governing anticompetitive agreements. One obstacle to applying coordinated conduct rules is that the relationship between a platform and its suppliers may in fact constitute an agency relationship, insofar as the platform takes on little or no risk. The agreement would thus fall within the single economic entity doctrine, and outside the competition rules governing coordinated conduct. Even if this is not the case, the next question is whether the theory of

harm is focused on competition between platforms, or competition between suppliers which sell via platforms, or whether it is focused on the vertical relationship between the platform and its suppliers. Such ambiguities are created by the two-sided nature of platform markets. Yet it is vitally important to the analysis of MFN clauses, because, to the extent that such restrictions are conceived as being vertical in nature, they should only be considered problematic where market power exists. Moreover, the free-rider rationale suggests that such restraints are unsuitable for “by object” or “per se” prohibition.

Professor Akman then described the variety of perspectives visible within enforcement practice against such restraints, discussing specifically the differing approaches in various hotel booking investigations across the EU. In particular, she noted that, although each of these cases was premised upon breach of Article 101 TFEU arising from vertical agreement between the platform and hotels, the formal decision was directed only against the platform. This suggests that the ultimate competition concern was a fear of price-fixing by platforms, yet the decisions contain no evidence of collusion.

Accordingly, the real theory of harm might be a danger of anticompetitive *unilateral* conduct, meaning that the competition rules against monopoly or abuse of dominance – or collective dominance – are more appropriate. Even if collective dominance can be found in such markets, it would still be necessary to identify a relevant theory of harm. Potential candidates include unfair pricing, discrimination, the imposition of unfair trading conditions, or an exclusionary abuse premised upon raising barriers to entry. Nonetheless, it is necessary to bear in mind the possibility that such behaviour may be defended by reference to legitimate business justifications, and in particular, the argument that platform marketplaces simply would not work absent protection against free riding.

Professor Akman concluded her remarks by noting that market power appeared to be the core concern in the context of MFN clauses. Thus, from an antitrust perspective, such restraints should arguably only be considered problematic in the absence of strong inter-brand competition.

The Chair invited the other panellists to offer thoughts on the points made by Professor Akman. **Dr Chowdhury** began by agreeing that, from an economic perspective, there may be comparatively little difference between the effects of narrow and wide MFN clauses. Therefore, the fine distinctions between these varieties of MFNs that are seen in some enforcement practice to date may make less sense in substance. Dr Chowdhury also identified what she considers to be the key question to be asked in respect of vertical restraints generally, namely, what is the business rationale for a particular – allegedly restrictive – practice? In many instances, what look like anticompetitive restrictions at first glance may appear more benign when it is understood how these are informed by a firm’s business model and incentives.

**Mr. Kjolbye**, on the other hand, disagreed with some of the remarks previously raised, arguing that these could reflect an outdated model in comparison with the business dynamics within today’s e-commerce sector. For instance, while in the conventional understanding of the single economic entity doctrine an agent is treated as part of the same undertaking as its principal, in practice agents compete in the supply of services, which is of vital importance in terms of platform competition. Similarly, the conventional wisdom that robust inter-brand competition renders intra-brand competition less relevant still holds true in the context of traditional vertical value chains. Yet platforms are not simple vertical value chains; instead, they are aggregators, which often sell thousands of different products, charging suppliers a commission for doing so. Platforms should, therefore, compete on the commissions that they charge. If competition law is not applicable to the relationship

between platforms and suppliers, because of the single economic doctrine, then large swathes of the market structure (which may account for a significant portion of the final price to consumers) are essentially immune from antitrust scrutiny. If that is the case, then the law in this area needs to change.

In response, **Professor Akman** agreed that the competition rules may require modernisation to ensure their full applicability. If one follows established antitrust principles, it is likely that e-commerce platforms would constitute agents when applying Article 101 TFEU and equivalent provisions in many instances. To the extent that platforms should be treated instead as service providers, this issue might be addressed at the market definition stage. Yet, ultimately, the law itself may have to adapt to ensure that such practices are covered by competition law.

The next contribution came from **Australia**, where the ACCC is coordinating a project on vertical restraints being undertaken in the context of the ICN. The project has thus far asked participants to respond to a hypothetical scenario involving the use of MFN clauses by online travel agents. To date, the project has mainly focused on similarity and divergences across agency approaches to different types of MFN clauses, narrow and wide, while future work will seek to draw out such distinctions more clearly.

The **UK** discussed its enforcement experience against RPM in the online context. Allegations of RPM comprise a large percentage of the complaints received by the CMA. In deciding whether to pursue an investigation, the agency considers both the existence of market power, and the prevalence of such practices across a sector. The CMA has adopted three recent decisions on RPM, and in each instance, there were aspects of the practice which gave the agency specific cause for concern. The CMA's approach to RPM focuses on substance over form, and the delegate agreed that, in this context, it is necessary to understand what is really happening within a market. Moreover, while the CMA both aims and is required to fit its enforcement practice within the existing case-law, the agency also seeks to clarify the law in new areas. For reasons of efficiency, each of the recent RPM infringement decisions was directly solely against the supplier, although future enforcement activity might also target complicit retailers. Importantly, an *ex post* evaluation of these decisions has revealed greater awareness of and compliance with competition law in the sectors concerned, alongside early evidence of positive effects on prices.

**Sweden** spoke about a case involving a ban on multi-homing by service providers, imposed by a digital platform active in the market for online ordering and delivery of fast food. In response to new entry by a competing platform, the incumbent issued ultimatums to its existing restaurant customers, threatening expulsion from its platform if those customers chose to affiliate with the new entrant. This *de facto* ban on multi-homing had the effect of foreclosing the entrant, as restaurateurs were reluctant to incur the negative financial impact of de-listing by the most popular delivery platform. Ultimately, the incumbent changed its policy, making clear that multi-homing was permitted, and the case was closed without the need for a formal infringement decision.

The issue of dual pricing, whereby a supplier charges different prices for goods to be sold through online versus offline retail channels, was considered by competition enforcers in **Croatia**. In 2016, it opened an investigation into suspected dual pricing by a manufacturer of household appliances, allegedly implemented through the firm's standard rebate policies. The investigation revealed that its rebate policies did not discriminate against online sales as such, but instead resulted in lower discounts only to those retailers who sold exclusively online (that is, hybrid retailers with both offline and online retail operations

qualified for rebates). Specifically, such rebates were granted in consideration for additional services provided by brick-and-mortar retailers, while online-only retailers benefitted from a bonus system. Moreover, no consumer harm could be identified, as online retailers continued to offer equivalent or lower prices than brick-and-mortar or hybrid retail outlets. Nonetheless, during the course of the investigation, the manufacturer voluntarily changed its rebate policies to eliminate any disparity between prices for goods supplied for online versus offline sales, thus eliminating any potential competition concerns.

**Chinese Taipei** discussed two enforcement cases involving restrictions on retailers' ability to engage in online sales. The first involved a bicycle manufacturer, which required any retailer to get its written consent before displaying its products for sale online. This restriction was held to violate competition law, because it restricted the freedom of retailers to access consumers. Conversely, the second case, which involved restrictions on the online sale of water purifiers, did not result in a finding of infringement. In that instance, the FTC was satisfied that online sales were incompatible with the multi-level marketing structure of the product concerned, including the necessity for face-to-face promotion.

The Chair noted that many of the cases discussed in the Roundtable had involved an almost "per se" illegal treatment of the relevant vertical restraints. He turned to the contribution submitted by **Germany**, which could be read to suggest that supplier-imposed bans on sales via online marketplaces should be treated as "by object" restrictions. The delegate from Germany emphasised that the Bundeskartellamt's enforcement activity against online vertical restraints is intended primarily to keep online markets open. Much of its recent enforcement practice has involved scrutiny of restrictive clauses in online selective distribution systems, as these may have a considerable impact on the extent of competition in e-commerce markets.

Restrictions such as online marketplace or price comparison tool bans may effectively prevent consumers from finding the best offers online, and could, for instance, allow a manufacturer to reserve the lion's share of e-commerce sales for itself. Such measures formed the subject of the Bundeskartellamt's 2015 decision against Asics, a running shoe manufacturer, in which a bundle of restrictive practices were held to violate Article 101 TFEU. The decision primarily concerned prohibitions on the use of the brand name for online advertising and a ban on price comparison engines. The additional ban on sales via online marketplaces could have been qualified as a restriction of competition by object but this question was not included in the substantive part of the decision and ultimately left open. The Bundeskartellamt found that the relevant restrictions had the potential to limit the efficiency of the online sales channel. That decision was subsequently upheld by the Federal Court of Justice. The case can be distinguished from the CJEU's landmark decision in C-230/16 *Coty*, on the basis, first, that Asics did not involve a luxury product, and second, that the bundle of restraints at issue reduced the findability of authorised dealers in a more far-reaching way than the simple marketplace ban under scrutiny in *Coty*.

Going forward, the compatibility of online marketplace bans within a selective distribution system remains questionable. It is the Bundeskartellamt's view that efficient access to customers should be a priority in safeguarding a level playing field at the retail level. Nonetheless, even where a prima facie breach of Article 101(1) TFEU is identified, it remains open for manufacturers to justify restraints by reference to the Article 101(3) TFEU exception, where concrete efficiencies can be identified.

The representative from **BIAC** identified four principles that should guide competition enforcement in the e-commerce sector. First, enforcement should focus on identification of consumer harm, and not merely disruption to existing economic operators. Second, the

existing antitrust enforcement framework – encompassing both hard and soft law tools – appears to be sufficiently broad and flexible to address any competition problems that might arise. Third, potentially what is different here is the sorts of retail business models that are emerging. In this context, it is vitally important to understand how the markets concerned operate, alongside the business rationale for any allegedly anticompetitive practices. Finally, given the newness of some of product markets and business models concerned, it is necessary to provide clear guidance and safe harbours for businesses, setting out the acceptable parameters of competition in the digital sphere. Moreover, any enforcement activity should be evidence-based and premised upon sound theories of harm that establish concrete anticompetitive effects.

Despite the considerable growth of e-commerce, **Spain** has not experienced a substantial increase in competition complaints related to this sector. The competition authority has investigated allegations of RPM relating to online sales in the pharmacy sector, but ultimately decided against pursuing the case due to the low market share of the defendant. It has also examined alleged vertical restrictions imposed by several large internet marketplaces, but found insufficient evidence to support any antitrust violations. Nonetheless, the CNMC is currently conducting several new preliminary investigations into vertical restraints in the e-commerce sphere, and it appears likely that such enforcement activity will increase in parallel with the volume of online sales. It is worthwhile to consider the optimal policy instruments to apply in this context, and in particular, whether sector-specific or other regulation would be more effective in addressing the power imbalances that may arise.

**Lithuania** has taken action against a hub-and-spoke cartel implemented through an online platform used by travel agents. Those agents compete within the commission that they earn, and here, it was alleged that there had been discussions regarding a coordinated reduction in the maximum level of discounts offered to customers. Although the competition authority could not establish evidence of such discussions, it could show that the platform operator had subsequently sent a system message to all travel agents, informing them of newly-introduced technical restrictions which prevented the offering of higher discounts. The competition authority treated the receipt of this message as evidence of a cartel, despite protestations from some agents that they had not seen or acted upon the email. On a preliminary reference from the Lithuanian court in *C-74/14 ETURAS*, the CJEU held that the presumption of innocence precluded the competition authority from treating the mere dispatch of the message as proof of coordination. Where, however, other indicators of collusion were established, a rebuttable presumption of coordinated conduct could be inferred. Following this judgment, the national court confirmed some findings of infringement – for example, if an agent had clearly read the message – but overturned other findings – for example, if an agent had not read the message and did not alter the rate of discounts offered. The case also established that “public distancing” from cartel involvement could be established through the systematic application of higher-than-agreed discount levels.

Responding to the comments made by Germany on the treatment of online platform bans, **Dr Chowdhury** mentioned a study conducted by Oxera for the UK’s CMA on the business rationale for vertical restraints. Some of the smaller manufacturers surveyed had expressed considerable concern about their loss of bargaining power vis-à-vis the large online retail platforms. Thus, while a prohibition of marketplace bans may keep online markets open in the short term, there is a risk that such platforms may gain undue market power in the longer term, leading potentially to anticompetitive unilateral conduct.

### 3. Abuse of Dominance in the E-Commerce Sector

Remarking that Dr Chowdhury's comments brought the discussion neatly to the final section, the Chair introduced the third topic, namely potential abuse of dominance issues in the e-commerce sector. This topic comprises two sub-questions: how to establish dominance, and what sort of practices should be considered harmful to consumer welfare in this context?

**Dr Chowdhury** began by noting that, although there has been less enforcement activity against unilateral conduct than against vertical restraints, there have been various cases to date, which are worth reflecting upon. The growth of e-commerce has hugely increased the market importance of digital platforms. Moreover, the risks to competition and consumer welfare that may be posed by a platform depend, primarily, on the degree of market power it possesses. This leads to questions, for example, about the possibilities for multi homing, the impact of network effects, and the extent to which data may function as a barrier to entry.

In order to categorise the existing jurisprudence on unilateral conduct in the e-commerce sphere, Dr Chowdhury suggested that two criteria are relevant when sorting the case law. The first criterion is the question of "closeness to consumers", i.e. where within the market or value chain the practice actually occurs. The second criterion is the question of "efficiency benefits", i.e. whether plausible efficiency justifications arise. By sorting allegedly anticompetitive conduct in this manner, it is possible to identify the most obviously problematic from an antitrust perspective: those which cause the most direct harm to consumers, and which generate little or no countervailing efficiencies.

Another important issue within digital economy markets is the centrality of data. While data acquisition and control may raise competition concerns, it is also a source of potential consumer benefit in terms of better quality products. The extent to which data functions as a barrier to entry depends upon two characteristics. The first is the cost of acquisition: certain forms of data (e.g. social graphs) have a higher acquisition cost than others (e.g. personal data such as name, address, age). The second is the depreciation rate: the length of time for which the data acquired will be relevant to advertisers, merchants etc.

Finally, Dr Chowdhury addressed online advertising, which to date has seen little antitrust enforcement activity, but where it is possible to envisage competition problems arising in future. Returning to her categorisation framework, she noted that such practices tend to be rather removed from consumers, and that this is an area where it is likely that efficiency benefits might be identified. Accordingly, it is not clear that restrictions of competition in the online advertising sector would result in harm to consumers, even if they serve to disadvantage competing platforms or advertisers. Moreover, some of the potential solutions that have been identified – e.g. sharing of consumer data – may facilitate contentious practices like personalised pricing. Ultimately, this is an area where competition law may not be best suited to address the sorts of public policy concerns that are emerging; instead, data protection, consumer protection or sector regulation may be more appropriate.

**Lars Kjølbbye** agreed with Dr Chowdhury's conclusions and with the emphasis placed on identifying cases that result most obviously in consumer harm. However, he flagged the risk that, by focusing on direct consumer harm, the boundary between competition law and consumer protection law may become blurred. One of the most significant impacts of the growth in e-commerce from an antitrust perspective has been greater levels of enforcement against practices that directly involve the business-to-consumer relationship. Another difficulty is that, in the digital economy, often the product under scrutiny is provided for

free, which complicates the market power analysis. The question arises as to whether we can adapt our existing tools, or whether we must abandon methodological rigour entirely for a qualitative assessment. Alternative approaches to assessing market power might include asking whether a firm has the power to exclude, because it controls some unique asset required by other firms to operate in the market; or whether it has the power to exploit consumers, because it is unique in some way that allows it to act in a manner that other firms cannot.

**The Netherlands** reported on the findings of 2017 study that it had conducted into the market for online video platforms. This is a fast-growing and dynamic sector. Revenues in this market are generated primarily from online advertisements. Video platforms comprise multi-sided markets, involving a viewer market, a content market, and an advertising market. The most important driver of competition is content, more specifically the volume and variety of content available. The study did not reveal evidence of dominance held by any platform on any relevant market. Viewers tend to multi-home across numerous platforms, while even the largest platforms do not charge prices for advertising that are significantly higher than less popular platforms. While data is becoming ever more important to competition, it does not pose an insurmountable barrier to entry at present.

The **EU** then discussed several recent cases it has pursued in e-commerce markets under Article 102 TFEU. The *Google Search (Shopping)* case from 2017 involved allegations of leveraging by Google of its dominant position in general search into the adjacent market for comparison shopping services, thus giving its own product an artificial advantage. This comprised the systematic demotion of competitor services by its general search algorithm, coupled with the prominent placement of its own services within general search results pages. The finding of abuse was supported by a detailed analysis of the market impact of the practice, in particular the effect on traffic for competitors. The result was that Google foreclosed competition in the adjacent market for comparison shopping services, which resulted in consumer harm.

The *Amazon E-Book MFN* case, also from 2017, investigated an alleged breach of Article 102 TFEU arising from parity clauses imposed by Amazon on e-book publishers. The case was not only about price, but also about non-price elements including promotion and distribution models. The concern was that the MFNs reduced publishers' incentives to support and invest in differentiated business offers with Amazon's competitors, thus hindering entry or expansion in the relevant market. Amazon made binding commitments to conclude the case without a formal finding of breach, agreeing not to enforce existing MFN clauses or introduce such provisions into new contracts. The Commission considers the case to be important as a statement of how EU antitrust law enforces inter-platform competition and fosters innovation and consumer choice.

A similar investigation has been pursued in **Korea** against the dominant domestic search engine, which held a 75% market share. The dominant firm was systematically favouring its own search advertisements at the top of the search results, without clearly indicating that such results had been paid for by advertisers. This was held to mislead users, who could not distinguish effectively between organic and paid for search results. During the investigation, the defendant proposed a set of remedies to address the KFTC's concerns: first, to indicate clearly which search results comprised advertisements, and second, to inform users that the search engine had received payment for such advertisements. The KFTC approved the remedies and closed the investigation, taking the view that these measures resolved the competition concerns, and would not harm dynamic competition in the market.

**France** described the results of two sectoral inquiries that it had conducted into potentially abusive dominant practices in online advertising markets. The first, concluded in 2010, considered “search” advertising, while the second, concluded in 2018, looked at “display” advertising. There had been an accelerated growth in levels of online advertising generally between the two reports, attributable in part to the concomitant growth of social media platforms. The 2010 inquiry was unique at the time, in trying to develop a framework for the antitrust analysis of potential abuses of dominance in this sector. It focused on two possible forms of abuses: predatory behaviour leading to market foreclosure, and exploitative abuses. That inquiry was followed by a commitment decision involving Google, then the dominant operator in the online advertising market, which resulted in the modification of certain standard contractual terms that were considered to impose discriminatory and non-objective obligations on customers. This case is particularly interesting because it demonstrates how competition regulators have a broad array of enforcement tools available in order to develop a level playing field in the e-commerce sphere.

**Mexico** noted briefly several on-going investigations in the e-commerce sector, which originated in its sector inquiry into competition issues within the digital economy that began in September 2017. The investigation itself has raised various challenges, such as how to process huge quantities of technical data; how to conduct wide-scale consumer surveys; how to assess online market power; and how to reinterpret the existing competition rules to address online vertical restraints. The authority has also taken the opportunity to discuss best practices with other competition authorities worldwide.

Finally, the Chair gave the floor briefly to the delegates from BEUC and Consumers International, to provide the consumer perspective on the growth of e-commerce. **BEUC** agreed that, in this area, we see competition enforcement overlapping with both data protection and consumer protection law. Yet each of these areas of law pursues different aims and protects different interests. Competition law, essentially, is concerned with protecting the freedom of consumers to make informed market choices. The *Google Search (Shopping)* case presents an example of this: it protects the ability of competitors to compete on the merits, to the advantage of consumers. Nevertheless, competition law has its limits, and it is important to combine antitrust enforcement with other regulatory measures. A good example is the EU’s proposal for specific legislation regulating online B2B transactions, in order to ensure a level playing field for competitive behaviour.

**Consumers International** focused on the centrality of consumer data in the e-commerce sphere. While this is not an entirely negative market feature, pervasive data collection that permits for example comprehensive consumer profiling is a worrying development. Moreover, in e-commerce markets, there is a risk that dominant firm practices might manifest themselves on individual as opposed to market-wide bases. For example, consumers may be targeted with personalised pricing practices that seek to exploit them based on individual ability to pay. Accordingly, the concern is that data collection, when combined with market power, may undermine for instance the reference prices used by consumers, and thus facilitate discrimination against certain customers, including on prices.

Summing up the Roundtable, the **Chair** remarked that, throughout the discussion, the delegates had provided ample illustrations of the sorts of market problems that had been signposted at the beginning of the afternoon, stemming from the much more complex business models that one encounters in the e-commerce sphere. Moreover, the traditional tools of competition analysis that have been developed for the offline environment may be less sharp when applied within the online context. Within many of the cases discussed,

there is a tension between two public policy goals. Competition authorities are determined to keep online markets open and competitive, and in particular to prevent established firms from engaging in exclusionary conduct. Yet economists are concerned about the lack of a link to consumer harm in many of the case theories pursued. The treatment of vertical restraints is perhaps the most contentious issue, and the one in which we may have the greatest difficulty reaching consensus. Referring to the vertical restraints project being conducted under the auspices of the ICN, **Australia** added that, even if consensus could not be reached, there is value in understanding where and why divergence arises. Concluding the discussion, the **Chair** thanked all the participants, including the expert panellists, and noted that, even if not every competition authority in attendance was convinced, the roundtable had at least opened the discussion about an increasingly important topic.