

Distributing and Competing in Online Markets

Revisiting old problems in new contexts

Retailers face increasing challenges, particularly in grocery and fashion

- Rise of the discounters
- Online retailers, particularly PPI
- Platforms / marketplaces
- Intermediaries e.g. price comparison websites

Rise of online retail

- Smart phones are becoming the predominant way for consumers to shop online
- Increasing price transparency through comparison e.g. supermarkets' price matching schemes

Retailers are responding:

- Integration of bricks and mortar and digital offerings to become truly multi-channel
- New delivery solutions
- Internationalisation, particularly using digital means to expand their customer base beyond the UK
- Convenience formats and diversification e.g. smaller space and smaller product offering which may include services as well as goods
- Some purely digital retailers have started to look at branching out and opening physical stores, e.g. Misguided in the UK and Amazon in the US
- Personalisation of products and customer recognition to optimise customer experience
- Greater innovation in pricing offers, including customisation of discounts and offers

The winners of the future are likely to be those who either own the upstream intellectual property and can use this to capture value, or who can offer online services (including intermediaries) rather than a purely goods-based offering. Retailers may lose out if they are unable to capitalise on these channels.

Challenges for regulators

- Vulnerable / less sophisticated customers less likely to benefit from digital-focused developments
- Online selling makes it trickier to assess relevant markets
- Assessing complex pricing offers e.g. price discrimination, time limited discounts
- Where does social media fit in?
- Role of marketplaces within a complex 'ecosystem'

Supplier-retailer relationships revisited

The changing retail landscape means that competition issues have also changed and it has become increasingly complex to apply the competition law rules to new retailing models. The key issue is not the law itself but how to apply the law to the facts, as there are still many grey-areas that are not delineated with case law or decisions.

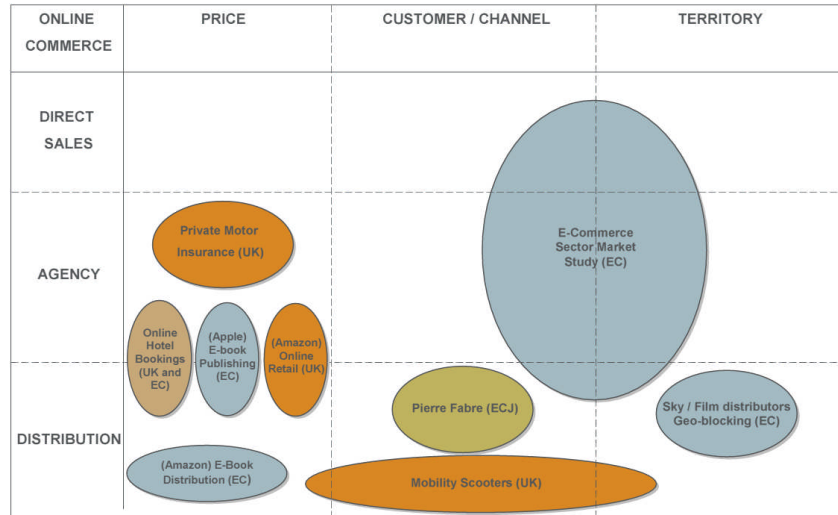
Vertical agreements

- Traditional retail relationships were vertical (direct manufacturer to distributor or distributor to retailer relationships)
- Normally benign – vertical agreements block exemption applies where the market share of both supplier and buyer <30%
- Key exceptions for hardcore restrictions (territorial/customer restrictions, resale price maintenance, active v passive sales)

Agency model

- Companies may choose to take an agency approach, as competition law will not apply
- Key issue is whether there is a genuine agency relationship – who takes the commercial risk?

All of this has been reflected in the activities of the competition authorities – key cases are plotted in the chart below.



Key issues for online retailing

- Revisit – what is passive selling online?
- Resale price maintenance still apply e.g. minimum advertised pricing requirements
- Best price agreements etc – when are they OK?
- Banning internet sales is not an option
- Pricing for online/bricks and mortar – how much flex?
- Selective distribution criteria e.g. online / bricks and mortar equivalence

Flashpoints

- Online tools as a mechanism for collusion
- Big data implications
- Role of platforms
- Managing pan-European distribution

The German perspective

The Federal Cartel Office (FCO) in Germany provides an example of the growing divergence in approach across EU competition authorities and it often takes a stricter approach to competition law than other EU competition authorities. The FCO has a particular interest in best price/price parity clauses, third party platform bans and dual pricing schemes.

Recent cases include:

- HRS' 'most favoured nation' (MFN) or 'best price' clause found to be anticompetitive and HRS was not acting as a genuine agent. HRS was restricting competition between platforms for lower room prices and for lower commissions, impeding the market entry of new online hotel portals and reducing competition amongst hotels
- Booking.com's 'best price' clauses were anti-competitive, as they did not allow hotels to display lower prices on their own website than those given to Booking.com
- Adidas and Sennheiser - producers may not prohibit authorised retailers from using the manufacturer's brand names to direct customers to their own online shops e.g. via Google AdWords. Suppliers must also not prevent authorised retailers from using price comparison engines for their online presence, nor can they ban third party platform sales
- Bosch Siemens Home Appliances (BSH) - dual pricing schemes for online versus offline sales were anti-competitive

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