COMMERCIALISATION AGREEMENTS WITH COMPETITOR INTERMEDIARIES (DUAL ROLE CONFLICTS)

The emergence of leading intermediaries/platforms between suppliers of consumer goods/services and consumers represents a new economic paradigm that is not addressed in the current HGL. These intermediaries play a dual role because they cooperate with unaffiliated suppliers in the commercialisation of their goods/services but they also compete horizontally against them with their own goods/services. This horizontal competition may relate to the branded goods/services (e.g., the private labels of Amazon and supermarkets) sold to consumers and to the retailing activities (e.g., Amazon retailer competing against merchants in the Amazon marketplace). This dual role raises an inherent conflict of interest that threatens the competitive process in consumer goods markets. Understandably, Commissioner Vestager has alerted against the distortion of competition that platforms' dual role may engender:

> *"That's why, in April, the Commission proposed new laws to make platforms deal openly and fairly with their business customers. And I hope the European Parliament and the Council will very soon make those proposals into law.*
>
> *One important part of those proposals is to make sure that platforms are open about whether they're treating their own services more favourably than their customers'.*
>
> *Because businesses that rely on platforms sometimes find themselves competing with a part of the very company that runs that vital platform. Like a comparison shopping provider that has to compete with a service offered by the search engine that it relies on to bring in customers. Or a seller on an online marketplace that finds that the owner of that marketplace is competing with it to sell, say, TVs or computer games.*
>
> *That's an uncomfortable place to be – and not surprisingly. Because there's a serious risk here of a conflict of interests, when the same company is both the platform, and on the platform, at the same time – when it acts as both player and referee. (…).*
>
> *But one of the main concerns was how platform businesses that are also users of their own platform could deny rival users a chance to compete.*

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It's not hard to see the temptation, in a situation like that, for a powerful platform business to undermine competition; for it to manipulate the way the platform works, to give its own services a head start, and make it hard for others to compete.

And if that's happening, then there's reason to be worried. Because competition is a vital guarantee of a fair deal for consumers. (…)

We've also started to look at Amazon's position, as both player and referee, and its possible impact.

Amazon's Marketplace is a platform that links sellers and buyers. But Amazon also sells products directly – often in competition with the very same sellers. That raises the question of how Amazon uses the data it collects about other sellers through the platform, and whether that use leads to unfair competition against them.

This is still at a very early stage. We certainly can't say today that Amazon has done anything wrong. But one thing is clear – we need to keep a close eye on whether platform businesses are using the power of their platforms to undermine competition in other markets. (…).

In this modern world, we depend on those platforms, almost as much as we depend on the electricity or the water that run into our homes. And we need to discuss what that dependence means for us. We need to think about the rules that we want to put in place – besides the competition rules – to make sure platforms behave in a way that's good for society."[1]

Some leading online intermediaries are now subject to competition investigations into their dual role conflicts and all of them, regardless of their size, are also subject to transparency obligation regarding differentiated treatment of own/affiliated goods and services (article 7 of Regulation 1139/2019). However, this dual role conflict is not circumscribed to the online world. It has raised serious concerns in other sectors such as finance, utilities, global distribution systems and grocery retailing. Indeed, par. 210 of the Vertical Guidelines deals with the risk of horizontal foreclosure of unaffiliated brands created by the discriminatory category management practices of supermarkets

[1] Commissioner Vestager, "New technology as a disruptive global force", Youth and Leaders Summit, Paris, 21 January 2019. https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/new-technology-disruptive-global-force_en

that favour their own brands. This concern should have been dealt with in the HGL following Article 2(4) of the current VBER. To add further confusion to this legal framework, par. 27 of the current VGL seems to negate the competitor status of intermediaries subcontracting the manufacturing of own-brand goods. This reasoning overlooks the fact that mere manufacturing is not relevant from a competition law perspective. Indeed, many independent companies manufacture for both unaffiliated grocery brands and the brands of supermarkets and competition policy has special rules for sub-contracting agreements. The relevant competition in the market takes place between brands and those who exercise business control over them, regardless of who manufactures them.

The revision of the HGL offers a unique opportunity to address coherently and generally the legal framework of cooperation agreements with vertically integrated intermediaries, abandoning the incoherent and failed references in par. 27 and 210 of the VGL.

The Commission could consider devoting a new section to this type of agreements or update the current Section 6 of the HGL to deal with them. Section 6 deals with reciprocal and non-reciprocal commercialisation agreements between competitors and identifies potential anticompetitive effects regarding price fixing and collusive outcomes (including the sharing of sensitive commercial information). However, it overlooks the dual role of intermediaries, the evolving nature of these commercialisation agreements (e.g., they may relate to retailing but also to the provision of services such as marketplaces) and the harm to the competitive process that some of their practices may engender. These practices may undermine dynamic competition (innovation, quality, variety) regardless of any claimed sort-term “benefits” (e.g., the misuse of sensitive commercial information may allow unfair short term competition by a copycat product but will kill innovation incentives).

Restriction of competition 1 – Misuse of sensitive commercial information

This practice is being investigated in the online sector, it is also partially addressed in article 9 of Regulation 1139/2019, article 3.1g) of Directive 2019/633 (although it only protects operators up to a given turnover threshold) because it is pervasive in the FMCG sector. Be it because the intermediary imposes the free use of the information collected (e.g., Amazon) or because it refuses to sign a confidentiality agreement preventing the undue use of the suppliers’ sensitive

commercial information (e.g., supermarkets), the fact is that this explicit or implicit agreement enables it to use all the sensitive commercial information provided by the suppliers for the benefit of its own affiliated goods/services.

Therefore, the misuse of a supplier's trade secrets by a platform to compete against the former should be treated as an objective restriction of competition, should not enjoy any presumption of compatibility with article 101 TFUE below any given market share threshold (e.g., 15%) and the guidance for the assessment of its competitive effects should take into account the distortion of the competitive process and the harm to dynamic competition[2].

Restriction of competition 2 – Differentiated treatment vis-à-vis the consumer

This practice is being investigated in the online sector, it is also partially addressed in Regulation 1139/2019 and it is dealt with in par. 210 of the Vertical Guidelines in the context of supermarkets' dual role.

Therefore, the Commission should harmonise the differentiated treatment of own goods/services by an intermediary and abandon the current incoherent framework of the VGL. This practice should be treated as an objective restriction of competition, it should not enjoy any presumption of compatibility with article 101 TFUE below any given market share threshold (e.g., 15%) and the guidance for the assessment of its competitive effects should take into account the distortion of the competitive process and the harm to dynamic competition. Intermediaries are free to pursue vertical integration and a closed eco-system business model (e.g., Apple and Aldi) subject to Article 102 TFUE but if an intermediary chooses to play a dual role regarding competing goods/services or retailing activities, it should not distort the competitive process by abusing its intermediary role to favour its own activities.

[2] See Marie-Laure Allain, Claire Chambolle and Patrick Rey, "Vertical Integration, Information and Foreclosure", TSE Working Paper, n. 11-237, March 2011, revised November 2011. The article refers to the grocery sector: "*Brand manufacturers have for example stressed such issues in connection with the development of private labels. As the promotional activities associated with the launch of new products generally require advance planning with the main retailers, manufacturers are concerned that it gives these retailers an opportunity to reduce or even eliminate the lead time before the apparition of "me-too" private labels*".

Restriction of competition 3 – tie-in of services

This practice is being investigated in the online sector (e.g., Amazon tie in of is logistic services to the marketplace use), it is also partially addressed in article 6 of Regulation 1139/2019 and it is pervasive in the FMCG sector. The merchants complaining against Amazon's tie-in of services argue that cheaper or better services can be procured through third parties and, therefore, the supracompetitive prices charged by Amazon push merchants' prices to consumers upwards. Likewise, in the FMCG sector, retailers and their alliances have increasingly tied the purchase of goods to demands for payments linked to "artificial" services that are not demanded by the suppliers and are priced without consideration for the cost incurred. Again, this amounts to an inefficient risk transfer, raises rivals' costs and their prices to consumers.

Therefore, the tie-in of intermediary services to ancillary services should be considered an objective restriction of competition, it should not enjoy any presumption of compatibility with article 101 TFUE below any given market share threshold (e.g., 15%) and the guidance for the assessment of its competitive effects should take into account the distortion of the competitive process and the harm to dynamic competition**.**

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