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## Online and offline retail distribution

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## Introduction

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## Analysis of online vs. offline competition in a spatial framework

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## The assessment of mergers in online and offline retail sales: Are new tools needed for the economist's toolbox?

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## Competitive assessment of digital comparison platforms: In search of consensus

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## ABSTRACT

In this On Topic we explore a number of competition issues that arise at the intersection of online and offline retail distribution. We first provide a brief overview of the effects of online distribution and the associated potential challenges for competition policy. In the first paper, we present a framework for the economic modelling of competition between online and offline retailers. Using this framework, we analyse some salient features of that competition and discuss how the framework can be used in the context of antitrust analysis. In the second paper, we discuss the tools that economists use to evaluate mergers of competing retailers, and how those tools are changing in practice due to the increasing importance of online competition. We summarize recent decisions by competition authorities in Europe and the US, and describe how enforcers have used those tools to arrive at those decisions. Finally, in the third paper, we consider platforms, and in particular digital comparison tools. We explain some of the consumer benefits and efficiencies that they may bring about, while also setting out some of the potential competition concerns that some of their practices may raise under certain conditions. And we highlight the need for an international consensus on some key enforcement issues.

*Dans cet article nous explorons un certain nombre de problèmes pertinents à la concurrence qui se posent à l'intersection de la vente au détail en ligne et de celle en dur. Nous proposons d'abord un survol des effets de la distribution en ligne et les potentiels défis qui lui sont associés par rapport à la politique de concurrence. Dans le premier texte nous présentons un cadre pour la modélisation économique de la concurrence entre détaillants en ligne et en dur. À l'aide de ce cadre nous analysons quelques-unes des caractéristiques principales de cette concurrence et traitons la façon dont le cadre peut être utilisé dans le contexte de l'analyse anti-monopole. Dans le deuxième texte nous abordons les outils dont se servent les économistes pour évaluer les concentrations de détaillants concurrents et comment ces outils sont en train de changer sur le terrain, à cause de la croissante importance de la concurrence en ligne. Nous synthétisons des décisions récentes prises par les autorités de la concurrence en Europe et aux US, et décrivons comment les autorités judiciaires ont utilisé ces outils pour arriver à ces décisions. Pour conclure, dans le troisième texte nous prenons en considération les plateformes et en particulier les outils de comparaison digitaux. Nous expliquons quelques-uns des avantages et des facilités qu'ils peuvent représenter pour les consommateurs, tout en exposant aussi quelques problèmes de concurrence potentiels que certaines de leurs pratiques peuvent poser dans des conditions données. Nous soulignons également la nécessité d'un consensus international sur certains problèmes fondamentaux d'application de la loi.*

# Introduction\*

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1. E-commerce platforms have decisively reshaped the retail distribution landscape. The exhibit costs and business models associated with these platforms carry many potential advantages relative to physical stores, and they have diminished the roles of, or in some cases removed entirely, links in the supply chain. This has resulted in lower distribution costs, along with a lower fixed-cost structure. Furthermore, online retail operators can offer a greater variety of products for sale: online book retailers, for instance, offer 23 times as many titles as a typical physical Barnes & Noble store.<sup>1</sup> Finally, e-commerce platforms and digital comparison tools (DCTs) tend to reduce consumer search costs, thereby fostering competition in the retail distribution sector.

2. These competitive advantages explain, at least in part, the spectacular growth of online sales. For instance, in the UK, the value of internet sales as a proportion of total retail sales rose from 2.7% in January 2007 to 17.1% in January 2018. In France, the value of online sales has increased tenfold from 2005 to 2017, with a 14% increase occurring during just the last 12 months. This growth is striking, even though the market share of online sales remains below 20% in the UK and below 10% in France.

3. The changes produced by the rise of e-commerce pose great challenges for competition policy. The three papers that follow address aspects of this evolving sector relevant to competition analyses. Nikita Piankov's paper differentiates the experiences of online and brick-and-mortar retail, and proposes a comparative competition model. Emily Cotton and Aaron Fix discuss the analytical techniques needed to analyse mergers in this area. Finally, Claudio Calcagno and Joshua White assess the competitive consequences of DCTs, which have received an increasing level of interest from competition authorities over the past five years. This foreword sets out the general context and principal issues that competition policy faces when dealing with cases in a retail industry in which online operators and physical stores are competitors.

\* The views presented in this article are those of the author and do not necessarily reflect those of Analysis Group Ltd. or its affiliated companies.

1 See P. Ghemawat and B. Baird, *Leadership Online (A): Barnes & Noble vs. Amazon.com*, Boston, MA: Harvard Business School Publishing, 2004; P. Ghemawat and B. Baird, *Leadership Online (B): Barnes & Noble vs. Amazon.com in 2005*, Boston, MA: Harvard Business School Publishing, 2006.

## I. The impact of online retail distribution in market outcomes

4. E-commerce platforms have affected the retail distribution sector in two significant ways – with respect to *price* and *market structure*.

5. *Impact on price* – Online sales now play a major role in how prices are set. A growing number of studies on this topic have focused on the potential for e-commerce to reduce prices, as well as price dispersion across both channels.

– *Reduced prices* – The reduced search and distribution costs of online retail constitute the main driver in reducing retail prices. A series of empirical studies in a variety of markets have detailed this impact. Brynjolfsson and Smith<sup>2</sup> and Clay, Krishnan and Wolff<sup>3</sup> have found that prices drop due to the introduction of online book markets; Scott Morton, Zettelmeyer and Silva-Risso<sup>4</sup> have shown that consumers who used an online service to help them search for and purchase a car paid, on average, 2% less than other consumers; Brown and Goolsbee<sup>5</sup> found that the use of price comparison websites caused prices for term life insurance policies to fall by between 8 and 15%; and Sengupta and Wiggins<sup>6</sup> have documented airline ticket price reductions driven by online sales.

2 E. Brynjolfsson and M.D. Smith, Frictionless Commerce? A Comparison of Internet and Conventional Retailers, *Management Science*, Vol. 46, No. 4, pp. 563–585, April 2000.

3 K. Clay, R. Krishnan and E. Wolff, Retail Strategies on the Web: Price and Non-price Competition in the Online Book Industry, *Journal of Industrial Economics*, Vol. 50, No. 3, pp. 351–367, September 2002.

4 F. Scott Morton, F. Zettelmeyer and J. Silva-Risso, Internet Car Retailing, *Journal of Industrial Economics*, Vol. 49, No. 4, pp. 501–519, December 2001.

5 J.R. Brown and A. Goolsbee, Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry, *Journal of Political Economy*, Vol. 110, No. 3, pp. 481–507, June 2002.

6 A. Sengupta and S.N. Wiggins, Airline Pricing, Price Dispersion and Ticket Characteristics On and Off the Internet, NET Institute Working Paper, No. 06-07, November 2006.

– *Reduced price dispersion* – Another major consequence of the development of online sales on prices is much lower dispersion. It is extremely difficult for a click-and-mortar retailer to charge different prices at a store and on its website, since consumers will have access to perfect information on prices, creating a constraint on the retailer's ability to discriminate on price between the two stores. This, in turn, considerably reduces price dispersion within retailers. In his comparative study of online and offline prices, Cavallo considered the largest retailers selling both online and offline in 10 countries, collecting prices for a random set of goods at both the website and a physical store. He found that click-and-mortars charge very similar prices online and offline for the same product; in 72% of the cases, the prices were exactly the same. He also found that there was less dispersion between retailers, with almost 40% of click-and-mortar retailers setting prices equivalent to those found on Amazon for the same product.<sup>7</sup>

**6. Impact on market structure** – Another consequence of the development of e-commerce platforms is a substantial restructuring of the retail market. The growth of the internet has influenced both the number and type of producers that operate in a given industry. The number of travel agency offices in the US, for example, fell by 47%, from approximately 29,500 to 15,700, between 1997 and 2007.<sup>8</sup> Goldmanis, Hortaçsu, Syverson and Emre have shown that e-commerce's power to reduce consumers' search costs has resulted in a significant reallocation of US market share, from high-cost to low-cost producers, and they produce evidence of this change in three industries: travel agencies, bookstores and new auto dealers.<sup>9</sup> They also found that growth in consumers' online shopping is linked to drops in the number of small (and presumably high-cost) establishments, but has either no significant impact or even a positive impact on the growth of large establishments. The results from car dealerships are noteworthy. As car manufacturers and dealerships are prohibited from selling cars directly to consumers online, the reallocation of sales between dealerships is channeled through consumers' abilities to comparison shop (see Calcagno's and White's paper on this specific topic) and to find the best local outlet at which to buy their car, not through changes in the technology dealers use to deliver cars.

7 A. Cavallo, Are Online and Offline Prices Similar? Evidence from Large Multi-channel Retailers, *American Economic Review*, Vol. 107, No. 1, pp. 283–303, January 2017.

8 See E. Lieber and C. Syverson, Online vs. Offline Competition, *Oxford Handbook of the Digital Economy*, Oxford: Oxford University Press, 2012; available at [https://www3.nd.edu/~elieber/research/online\\_offline.pdf](https://www3.nd.edu/~elieber/research/online_offline.pdf).

9 M. Goldmanis, A. Hortaçsu, C. Syverson and O. Emre, E-commerce and the Market Structure of Retail Industries, *The Economic Journal*, Vol. 120, No. 545, pp. 651–82, June 2010.

## II. Challenges for competition policy

7. These changes pose serious challenges for competition policy, because competition authorities can no longer apply existing formulas to the retail distribution market. Two observations illustrate this point.

**8. Market shares are flawed** – As Piankov explains in his article, the online and offline retail market is one that faces two different kinds of competition: online sales are driven by price competition, while offline sales are driven by spatial competition. It follows that one cannot directly compute market share in this sector, since the competitive pressure exerted by online retailers through lower prices is stronger than the one exerted by a local store. Therefore, one cannot simply combine online and offline sales to obtain market share. Furthermore, the effect of online sales on retail prices is not directly linked to online retailers' market share, which is still low compared to the competitive pressure they exert on the market. One interpretation of this phenomenon is that offline retailers have adapted to the presence of online retailers and significantly reduced their prices, and therefore margins, in order to slow the growth of online sales. In other words, the presence of online retailers has increased the level of price competition in the offline sales market. This is why other methods of assessing market share are necessary, both for the general evaluation of the retail market and, as Cotton and Fix discuss in their paper, for the assessment of the competitive impact of mergers in this market.

**9. Competitive assessment of anticompetitive behaviour** – Practices that have anticompetitive effects when implemented in single-sided markets may not have these effects when implemented in the context of two-sided platforms such as e-commerce websites. Consider the case of two competing e-commerce platforms that attract designer brands on one side and customers on the other. If customers could find the exact same brands (at the same price) on each platform, why would they multi-home (that is, participate on both platforms)? Without multi-homing, the platform with a small competitive advantage (perhaps due to earlier entry into the market) would attract all the customers, driving the slightly less attractive competitor out of the market even if that competitor was more competitive on other dimensions. Exclusivity clauses are a simple way for platforms to differentiate and induce multi-homing. This example highlights a fundamental difference between single-sided markets and multi-sided platforms: In single-sided markets, product differentiation mitigates competition; in two-sided markets, by contrast, product differentiation on one side may foster competition on the other side, since it allows customers to multi-home.

10. However, there is a growing literature that shows that an internet platform can profitably implement an anticompetitive strategy that might be exclusionary or may be used as a collusive device. For example, most-favoured nation (MFN) clauses implemented by some DCTs may

have the effect of reducing competition. As Calcagno and White show, MFNs can reduce the incentive for DCTs to compete on the commissions charged to suppliers, or reduce the ability and incentives for a new DCT to enter the market.

**11.** These three papers offer insights that will help any practitioner to better understand aspects of a market that has experienced considerable upheaval in the last several years, posing challenges for both academics and enforcers who shape today's competition policy. ■

# Analysis of online vs. offline competition in a spatial framework\*

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1. Online retailing has become extremely popular in the past fifteen years, with some industry analysts pointing to the phenomenal growth of online retailers as the underlying cause of many traditional brick-and-mortar stores suffering bankruptcies and shutting down. In this short paper, we outline an economic framework for modelling online vs. offline competition, discuss some salient features of this competition and summarize how to apply the framework in some antitrust settings.

2. Online competitors have advantages over traditional brick-and-mortar retailers because of their low fixed costs compared to their customer reach. An online retailer, out of a single warehouse and with a single customer service group, can serve customers across an entire country. Conversely, a brick-and-mortar store, with a similar need to maintain a store/warehouse and customer service personnel, will only serve customers who live within a few miles of that store. Spreading the fixed costs across a larger volume of sales in the case of the online retailer will likely enable that retailer to offer lower prices than the regular store.

3. On the other hand, the online retailer faces challenges on other aspects of customer experience. Many customers prefer to physically inspect the product prior to purchase, which they cannot do at an online retailer.<sup>1</sup> Some consumers also prefer to have the instant gratification of purchasing the product in person rather than waiting several days for it to arrive. Some may hesitate to provide a payment and other information online and then trust the shipping company to deliver the product on schedule and without damage.

4. Aside from price, some other aspects of the online experience favour the online retailer. Shopping online cuts out transportation time and cost, allows for

potentially quicker and more convenient product search tools, and offers product information that is not available at a conventional retailer, such as product reviews.

5. To sum up, online and offline shopping are differentiated experiences, with different consumers having different preferences for the two options depending on various factors specific to both the product at issue (need to inspect or try out, etc.) and the specific consumer (distance to physical stores, level of comfort online, etc.). Online and offline retailers must compete in this space, taking the points of differentiation into account. One useful way of summarizing the key aspects of this competition has been offered by Balasubramanian, who studied it in the spatial competition framework described below.<sup>2</sup>

## I. The spatial competition framework

6. A key assumption of the spatial competition framework is that consumers are located on a line (typically either an interval or a circle), where the sellers pick both a location and a price. Consumers need to “travel” to the store(s), and their willingness to pay for the good depends on the distance traveled—they incur a cost proportional to that distance. While physical location and transportation costs are the easiest ways of conceptualizing the framework, they need not be taken literally. A seller’s “location”—that is, the characteristics that determine where the consumer needs to “travel”—can be interpreted as smartphone screen size, product colour or some other set of features. For some consumers, the selected combination of features is their ideal view of the product, while others incur “transportation costs”

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1 Sometimes consumers have the option of inspecting the product at a brick-and-mortar store and then ordering online due to better pricing. This results in online retailer “free-riding” on the service being provided by the physical store. This is known as “show-rooming” behaviour by consumers.

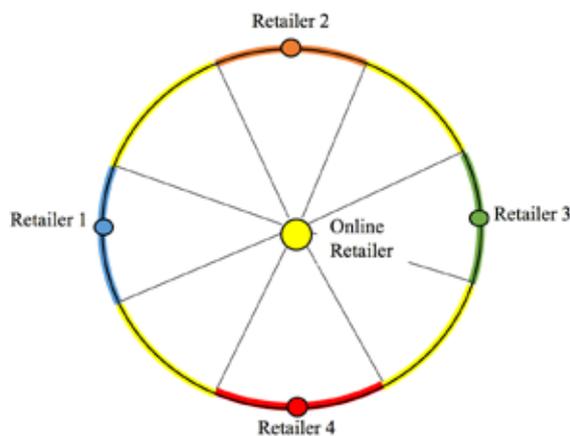
2 S. Balasubramanian, Mail versus Mall: a Strategic Analysis of Competition Between Direct Marketers and Conventional Retailers, *Marketing Science*, Vol. 17, No. 3, pp. 181–195, August 1998.

to accept the various compromise products available from the different sellers. Every consumer will trade off “distances” needed to travel to different sellers against the product prices offered.<sup>3</sup>

7. Balasubramanian formalises the competition between online and offline retailers in this framework by locating offline stores on a circumference, with the online competitor situated in the center. In that way, the online competitor has some “transportation cost” disadvantages against the offline competitors (due to shipping cost, inability to physically inspect the product, delay in receiving it, etc.). However, it is located equidistant from all the consumers, so they are all equally inconvenienced by purchasing from the online seller. Based on this setup, some predictions of the model are almost obvious: i) offline sellers will serve the customers that are closest to them; ii) the online seller will serve consumers that are located fairly far from any stores; and iii) both types of sellers will likely earn a premium for being the convenient choice (closest to its group of customers).

8. This is illustrated in Figure 1 below. In this illustration, consumers are located along the circumference. There are four offline retailers (1 through 4), all located on the circumference, so some consumers have zero distance to travel to a store. The online retailer is assumed to be located in the center of the circumference, so every consumer needs to “travel” a certain distance to shop there. In equilibrium, offline retailers are likely to serve the consumers next to them (along the same color arc), whereas the online retailer will serve consumers in between offline retailers (yellow arcs).

**Figure 1. Illustration of spatial competition model with online competitor**



<sup>3</sup> Even if a consumer is at the same location as one of the sellers (and that seller’s product is ideal for this consumer) he does not necessarily purchase from that seller if that ideal product is too expensive relative to some alternative. However, we would expect that this does not happen in equilibrium, and that each seller has some “captive consumers” in its immediate vicinity.

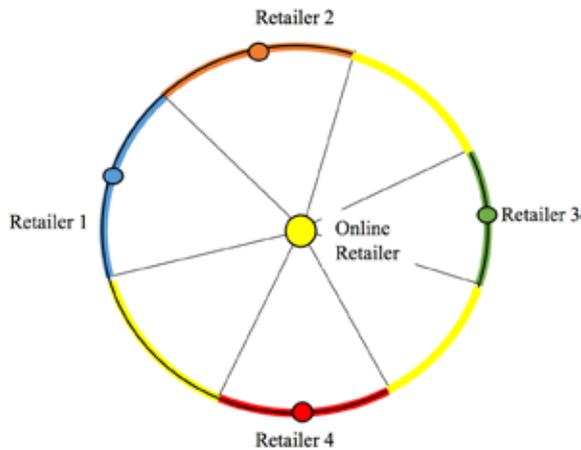
9. Some other, less obvious implications from this model are nonetheless useful. In particular:

- There is likely to be a limit to the amount of share that the online seller can capture. As long as the offline sellers do not exit the market, they can sell to customers in their immediate vicinity. For this to be true, the “transportation costs” need to be positive for the online seller. If that is the case, the offline retailers will have an advantage over the online seller, and even if the online seller could, in principle, set the product price sufficiently low to capture 100% of the market, it would not be profitable. As a result, the online seller will not increase its share beyond some threshold.<sup>4</sup>
- In the example shown in Figure 1, the presence of the online seller effectively insulates offline sellers from competing with one another—the online seller becomes their primary competitor. In equilibrium, customers who are located sufficiently far away from the closest offline retailers (e.g., equidistant from two adjacent retailers) will be the prime target of the online retailer. Those customers are facing high transportation costs for access to offline retailers, so the online option will look relatively attractive to them. Figure 1 shows no customers over which the offline stores compete with each other, because there are gaps between customer bases of offline retailers.
- However, this outcome of competition depends on the assumption that offline retailers are spread out around the circle evenly. When the gaps between the offline sellers are the same (or very similar), the online competitor would set its prices to pick off customers between the offline retailers. If some offline retailers are spaced closer together—this can be literally (i.e., geographically) close, or in the sense of being the closest substitutes in a differentiated market—the online retailer may not be able to sell profitably in between such retailers. Figure 2 shows an example of this: with Retailers 1 and 2 closer to each other than they are to Retailers 3 and 4, the online retailer no longer sells to customers located between Retailers 1 and 2. As a result, Retailers 1 and 2 will be directly competing for customers located between them.<sup>5</sup>

<sup>4</sup> Balasubramanian shows that under reasonable assumptions, even if transportation costs were zero, the online seller would at most capture two-thirds of the market, with the rest of the market served by offline retailers.

<sup>5</sup> A further refinement of the model would be to consider multi-product competition. Sellers’ “distances” to customers would differ for different products, and some products will be better adapted to online sales, other products less so. As a result, offline sellers may compete head-to-head on some products and be effectively isolated from each other on competition for other products.

**Figure 2. Competition with uneven distribution of retailer locations**



- If the offline sellers’ fixed costs are sufficiently higher than those of the online seller, the presence of the online seller will induce at least some offline sellers to exit. However, even if all offline sellers have the same fixed costs, in equilibrium some offline sellers will remain: exit by some sellers increases the level of differentiation among remaining sellers and therefore among prices, allowing the remaining stores to be profitable (or to not suffer losses).
- The degree of competition between online and offline sellers depends crucially on how well “adapted” the product is to online sales. Some costs of online shopping will likely always remain (due to shipping costs, delayed gratification, etc.), so the “transportation costs” in this type of spatial model will never go fully to zero. However, these costs also depend on other product characteristics that vary across products. For example, certain products (e.g., clothes) require consumers to touch, feel and try them before they can make up their mind on purchasing. Seeing an online review from even 1,000 other customers will not necessarily answer the question of how that product will work for you. This type of product will effectively have high “transportation costs,” and the online seller would be at a disadvantage. For other products, such as commodities or familiar products (e.g., light bulbs, iPhone), a consumer can just evaluate the characteristics of the product online, perhaps with the assistance of product reviews, and make the purchase online. For these products, the “transportation costs” will be relatively low—these products will be well adapted to the online channel, and the online seller would expect to capture a high market share.

- The online seller, under certain conditions, may want to limit its advertising. It would seem intuitive that any retailer would want to advertise broadly and make more potential customers aware of its existence. However, that intuition can fail for online retailers: by advertising its presence, the online retailer would force the offline retailers to compete more aggressively and set lower prices. If the cost of reaching more consumers (lower prices by competition) is higher than the benefit (larger customer base), the online retailer will not want to advertise broadly. In other words, the online seller may want to distance itself from competing with offline stores too aggressively if it is not well equipped for such competition. This is particularly likely to happen when the online retailer’s product is not well adapted to online sales.

## II. Click-and-mortar

**10.** Some retailers choose a mixed strategy with both offline and online presence. This was the case with some formerly offline retailers who chose to build an online presence (e.g., Walmart). Recently, some popular online retailers have started opening physical retail locations (e.g., Apple, Amazon), and many different types of businesses currently have both online and offline presence.

**11.** The click-and-mortar strategy can be readily analysed in the framework described above. Technically, it would mean that the online retailer controls one (or more) of the offline retailers and optimizes joint profits for both types of stores by setting online and offline prices.<sup>6</sup> The incentives for retailers to use this mixed store strategy and the impact on pricing outcomes can be analysed using this framework.

**12.** Why would an online retailer want to open offline retail stores? In this framework, the “distance” from the online retailer to the customers could be too great (e.g., due to the product being not well adapted to the online channel). By opening offline retail stores, the seller could capture a significant number of additional customers.

**13.** Similarly, an offline retail chain with an online portal could broaden its reach, becoming a viable option for customers who do not live near the current set of physical stores. In both cases, using an additional distribution channel is a point of differentiation that the seller can use to its advantage in reaching additional customers and potentially improving its profitability.

<sup>6</sup> The prices can be required to be uniform across the channels or be allowed to differ. For example, some click-and-mortar retailers offer instant coupons for online shoppers (e.g., Advance Auto Parts in the US), effectively discounting online prices relative to offline.

### III. “Showrooming”

14. In the discussion above, one important differentiation factor between online and offline stores is how well a product is adapted to online sales. Can a consumer make an adequate decision remotely, or does he need to “experience” the product and perhaps get advice from a salesperson before making a decision? However, for products not well adapted for the online channel, consumers have another option: visit an offline store, inspect the product, ask for advice from sales staff and then make a purchase online. This type of behaviour (“showrooming”) would be particularly acute for high-value items (e.g., TV or digital camera), where the cost of an additional store visit is small relative to the price of the item and the potential online-offline price differential.

15. Showrooming behaviour can also be captured in the spatial competition framework. In effect, for certain types of products, the “distance” from the online retailer to the consumer could be lowered by a visit to a neighbouring offline store. A consumer would need to balance the distance he travels to that offline store against the gains from showrooming (reducing the “distance” to the online retailer and then buying at the presumably lower price). Both types of stores would then need to take the showrooming behaviour into account when setting their prices for each type of product. Clearly, some products will be affected more than others by this behaviour.<sup>7</sup> The model can be extended by allowing for more complex pricing strategies, such as price matching by the offline retailers.

<sup>7</sup> Showrooming behaviour was analysed in a paper by C. Wu, K. Wang and T. Zhu, *Can Price Matching Defeat Showrooming?* available at [http://www.haas.berkeley.edu/groups/marketing/sics/pdf\\_2015/paper\\_wwz.pdf](http://www.haas.berkeley.edu/groups/marketing/sics/pdf_2015/paper_wwz.pdf). In that paper, the authors also use a spatial competition framework to study the introduction of price matching by Best Buy, aimed at competing more effectively with Amazon. They provide a theoretical model and document empirically that for products subject to showrooming behaviour, price match policy resulted in lower prices at both Best Buy and Amazon, while for products not particularly affected by showrooming, prices went up at both retailers.

### IV. Implications for antitrust

16. This analytical framework is more than just a tool to understand competition; it can also serve as a basis for various types of empirical analyses in an antitrust setting. The framework can be used to provide insights into the following issues:

- **Market definition.** Which sellers should be included in the relevant market, both across product types and across geographies?
- **Merger analysis.** Is the merger of two offline retailers or an online and an offline retailer (e.g., Amazon purchasing Whole Foods) likely to result in higher prices for consumers? Is consumer choice going to be affected?
- **Analysis of competitive strategies.** For example, the price-matching strategies mentioned above as a tool to combat showrooming are thought to potentially be anti-competitive.<sup>8</sup> Analysing the particular strategy in this framework, supported by corresponding empirical analysis, can help address such issues. ■

<sup>8</sup> See, for example, K. S. Corts, *On the Competitive Effects of Price-matching Policies*, *International Journal of Industrial Organization*, Vol. 15, No. 3, pp. 283–299, May 1997.

# The assessment of mergers in online and offline retail sales: Are new tools needed for the economist's toolbox?\*

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1. The central questions in evaluating the unilateral effects of a merger of two retailers are (i) the degree to which the products sold by the merging firms are good substitutes for one another; and (ii) the degree to which there are good substitutes sold by other competing retailers. If the merging firms' products are relatively close substitutes, we may observe anticompetitive effects on price, output and/or quality, if good substitutes are not also available from other retailers.

2. The economic tools necessary to answer these questions are arguably among the most advanced and well-understood in the antitrust economist's toolbox. Sophisticated models of consumer demand allow for the estimation of own- and cross-price demand elasticities that indicate the degree to which different products are substitutes for one another. These estimates serve as inputs to calculate diversion ratios and upward pricing pressure indices, to define markets and/or to simulate mergers. These predicted effects of a proposed merger can then be compared to—or, in some jurisdictions, offset against—potential efficiencies generated by the merger or new entry into the market.

3. The increasing share of e-commerce in retail sales has significant implications for the analysis of mergers in retail markets. While the necessary economic tools have not changed, the increasing importance of online competition has implications for their implementation. This article considers those implications for the analysis of horizontal competition between merging and non-merging retailers, merger-specific efficiencies and potential entry.

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## I. Competition between traditional retailers

4. Historically, when two competing brick-and-mortar retailers have merged, the primary competitive concern has been the degree to which consumers view their store locations as substitutable. If two retailers have physical store locations that are close to one another and that compete with one another for the same consumers, then their merger could remove price competition between those locations for those consumers. For example, this loss of direct, head-to-head price competition was the primary concern in the US Federal Trade Commission's (FTC's) decision to challenge the proposed merger of Staples and Office Depot, two office supply retail chains, in 1997.<sup>1</sup>

5. Quantifying the loss of direct, head-to-head price competition requires defining “catchment areas” around each store location, which delineate the geographic area from which each store draws its customers.<sup>2</sup> This is done using data on drive-times and walk-times from

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1 *FTC v. Staples, Inc. and Office Depot, Inc.*, 197CV00701, District of Columbia, available at <https://www.ftc.gov/enforcement/cases-proceedings/9710008/staples-inc-office-depot-inc>.

2 A. Chapsal and L. Eymard, Remarks on the Calculation of Local Market Shares, *Concurrences Review* No. 1-2011, pp. 37–41, available at <https://www.concurrences.com/en/review/issues/no-1-2011/law-economics/remarks-on-the-calculation-of-local-market-shares>.

consumers' homes or places of employment, actual sales transactions of the merging parties, survey evidence and other quantitative techniques.<sup>3</sup>

6. Enforcers then evaluate the degree to which the proposed merger would increase concentration in each of those catchment areas. Because retailers located in different places are imperfect substitutes for one another, recent high-profile cases have seen competition enforcers in France and the UK use a variety of techniques to “weight” competition from different retailers at different locations on effective competition in a given retailer’s catchment area.<sup>4</sup> These techniques may account for the degree to which retail competitors are close to one another in “product space” (i.e., how similar their products are) or geographic space (i.e., how close their stores are to one another).

7. For example, the UK Competition and Markets Authority (CMA) evaluated the merger of Ladbrokes PLC (Ladbrokes) and Gala Coral Group (Coral), two national operators of licensed betting offices (LBOs), which are physical locations that supply various gambling products to consumers. The CMA assigned a higher weight to competition from other national operators, and a relatively lower weight to independent regional operators, due to evidence suggesting that national operators exerted a greater competitive constraint and were viewed by consumers as closer product substitutes. In evaluating the merger, the CMA also assigned higher weights to operators’ stores that were geographically closer to the merging parties’ locations at the center of each “catchment area.” The result of this analysis was a recommendation that the merger be allowed to proceed unchallenged, subject to the divestiture of a large number of stores to other competing LBO operators.<sup>5</sup>

## II. Competition between traditional and online retailers

8. In *Ladbrokes/Coral* (2016), the CMA specifically did not consider online operators in its calculation of weighted concentration measures, finding that, while some consumers place bets using both brick-and-mortar and online operators, this was not sufficient to demonstrate that the two channels are substitutes for all retail customers. This finding that traditional and online

retailers operate in separate markets was consistent with prior findings by the CMA and other competition authorities, both in Europe and in the US.

9. The French Competition Authority (FCA) recently broke with European precedent in its *Fnac/Darty* (2016) decision by including both online and offline retail sales of consumer electronics within the same market. The FCA used a weighted “scores” method to calculate concentration measures accounting for the intensity of competition provided by each competing store (offline or online), using the results of a survey and other quantitative evidence. Stores that provided greater competition within a catchment area received a relatively higher score, and catchment areas for which the sum of all competitors’ weights exceeded a certain threshold were deemed sufficiently competitive. Fnac was ultimately allowed to acquire Darty, conditional on the divestiture of a handful of stores in catchment areas that the FCA deemed insufficiently competitive post-merger. Notably, online-only retailers were collectively assigned the highest possible score of 3 in each catchment area.<sup>6</sup> Thus, the effect of the FCA’s inclusion of online sales in the relevant market was to lower the sum of offline retailers’ scores necessary for a catchment area to be deemed sufficiently competitive.

10. The FCA’s analysis demonstrates how existing tools can be used to account for the degree of competition between online and offline retail channels in merger analysis. While the FCA’s assignment of a single collective score of 3 for online retailers may seem blunt and ad hoc, competition authorities can refine this approach in the future, using the types of data and evidence that are typically available during merger investigations. Data on online and offline sales from merging parties and from third parties, as well as survey evidence, will allow competition authorities to estimate scores for both online and offline retailers that are specific to each catchment area.

11. While online distribution is a substitute for brick-and-mortar distribution for at least some consumers and some products, the relevant question is whether it is a close enough substitute, and for a sufficiently large percentage of customers, for competition authorities to consider that both distribution channels are competing in the same relevant antitrust market. Because consumers’ online shopping habits vary by age, income and geography, traditional retailers have at least an incentive (if not the ability) to price-discriminate in the face of competition from online sellers. According to the CMA, for online competition to effectively discipline the prices charged by merging parties, “*bricks-and-mortar retailers cannot segment their customers and charge different prices to those who are likely to divert online and those that are unlikely to do so.*”<sup>7</sup>

3 See, e.g., UK Competition and Markets Authority, Retail Mergers Commentary, CMA62, April 10, 2017 (“CMA Retail Mergers Commentary”), available at <https://www.gov.uk/government/publications/retail-mergers-commentary-cma62>.

4 CMA Retail Mergers Commentary, pp. 21–23; F. Agnoletto and H. Bourguignon, Quand l’Autorité innove dans l’évaluation de la pression concurrentielle locale en contrôle des concentrations : La méthode des scores, *Concurrences Review*, No. 3-2017, pp. 42–49. (“Agnoletta and Bourguignon, 2017”)

5 CMA Retail Mergers Commentary; CMA, Ladbrokes and Coral: A report on the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited, July 26, 2016.

6 Agnoletta and Bourguignon, 2017..

7 CMA Retail Mergers Commentary, p. 27 (“*In past cases the CMA has found that the constraint from online retailers requires that bricks-and-mortar retailers cannot segment their customers and charge different prices to those who are likely to divert online and those that are unlikely to do so. In most retail sectors, customers are anonymous and retailers have little information on their shopping habits. However, in some sectors, retailers that operate across both channels might be able to identify those bricks-and-mortar customers who also shop online and offer them cheaper prices in store without extending these offers to other customers*”).

12. Recent evidence from the US further illustrates that the answer to this question is case-specific. Sixteen years after successfully challenging the proposed merger of Office Depot and Staples, the FTC elected not to challenge the 2013 merger of Office Depot and Office Max, due in part to “*the explosive growth of online commerce, which has had a major impact on this market.*”<sup>8</sup> However, just three years later, the FTC successfully sued to block the proposed acquisition of Office Depot by Staples for the second time in two decades, due to concerns that the merging parties could price-discriminate between individual consumers for whom online and other channels are close substitutes, and business customers that purchase office supplies under contracts.<sup>9</sup>

### III. Mergers of traditional and online retailers

13. Combinations of traditional retailers with online retailers have generally not led to antitrust challenges. Acquisitions by established brick-and-mortar retailers of relatively small online competitors are generally viewed as defensive attempts to compete with the likes of Amazon in a rapidly changing retail landscape. Recent examples from the US include *PetSmart/Chewy* (2017),<sup>10</sup> *Walmart/Jet.com* (2016),<sup>11</sup> *Walmart/Bonobos* (2017)<sup>12</sup> and *Home Depot/The Company Store* (2017).<sup>13</sup> Acquisitions of traditional retailers by online retailers are less common, though recent high-profile examples include *Amazon.com/Whole Foods* (2017)<sup>14</sup> in the US and *GVC/Ladbroke's* (2018) in the UK.

14. While claimed merger efficiencies are generally viewed with skepticism by antitrust enforcers,<sup>15</sup> there may be reason to give such claims more weight in the case of a

8 Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC File No. 131-0104, November 1, 2013, available at [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/office-depot-inc./office-max-inc./131101officedepotofficemaxstatement.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./office-max-inc./131101officedepotofficemaxstatement.pdf).

9 *FTC v. Staples and Office Depot*, Memorandum Opinion, May 17, 2016, pp. 62–70.

10 The Potential of PetSmart's Acquisition of Chewy, *1010 Market Insights*, p. 1.

11 Walmart Completes Acquisition of Jet.com, Inc., <https://news.walmart.com/2016/09/19/walmart-completes-acquisition-of-jetcom-inc>.

12 Walmart to Acquire Bonobos and Appoint Andy Dunn to Oversee Exclusive Consumer Brands Offered Online, <https://news.walmart.com/2017/06/16/walmart-to-acquire-bonobos-and-appoint-andy-dunn-to-oversee-exclusive-consumer-brands-offered-online>.

13 The Home Depot Acquires The Company Store, Broadening Capabilities in Home Textile Categories, <http://ir.homedepot.com/news-releases/2017/12-21-2017-130042075>.

14 L. Thomas, Amazon says Whole Foods deal will close Monday, with discounts to begin then, *CNBC*, August 24, 2017.

15 In the US and Europe, parties must demonstrate that claimed efficiencies are “merger-specific,” i.e., that they could likely not be obtained in any way other than a merger. Horizontal Merger Guidelines, p. 30 (“*The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects*”); Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *Official Journal C* 031, 05/02/2004, ¶85.

merger of two firms with different distribution channels. Mergers of online and offline retailers are not strictly horizontal combinations of competitors in overlapping retail categories, such as Staples and Office Depot, Fnac and Darty or Ladbroke's and Coral. For example, Amazon's 2017 acquisition of Whole Foods, a national grocery chain in the US, was expected to lead to efficiencies and benefits for at least some consumers, such as lower prices for some items and enhanced grocery delivery services.<sup>16</sup> Meanwhile, Amazon has obtained a showroom for some of its own devices, and has begun to offer customers the option to pick up and return non-food items bought on Amazon at Whole Foods locations.

### IV. Mergers of online retailers

15. While mergers of online retailers with different product offerings have not thus far led to antitrust challenges, the tools necessary to evaluate them are well known, and largely the same as those described above. Competition authorities may use survey evidence, the parties' sales data, “click-through” data or other evidence to measure the degree to which the merging parties, as well as other online and offline retailers, compete in the same relevant market. Competition enforcers may also assess the degree to which brick-and-mortar retailers provide a competitive constraint on the merging parties. Because online retailers typically operate at a national level, it is often not necessary to identify the catchment areas of the merging parties. Rather, it may be useful to understand whether brick-and-mortar retailers can provide a competitive constraint nationwide and across consumer subgroups (e.g., individual vs. business customers).

16. In evaluating recent mergers of online retailers, the CMA has concluded that brick-and-mortar retailers do not provide a competitive constraint on online retailers in a variety of settings.<sup>17</sup> However, those mergers have gone unchallenged because the acquired firms were generally small, the CMA concluded that sufficient competition existed from other online competitors and the CMA concluded that barriers to entry or expansion were low. Given the degree of entry and expansion that has occurred in online retail markets in recent years, the threat of online entry is likely to remain an important consideration in evaluations of retail mergers, even as continued consolidation leads to greater scrutiny of combinations of purely online retailers. The question of whether traditional brick-and-mortar retailers will be considered a competitive discipline for online retailers may change over time and will likely remain, as with most factors, a fact-specific question. ■

16 L. Thomas, Amazon says Whole Foods deal will close Monday, with discounts to begin then, *CNBC*, August 24, 2017.

17 See, e.g., *Amazon/The Book Depository* (2011), *YOOX/Net-a-Porter* (2015) and *Mapil Bidco/Chain Reaction Cycles* (2016).

# Competitive assessment of digital comparison platforms: In search of consensus\*

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1. As the world has become increasingly digitised over the past three decades, there has been a proliferation of online platforms connecting consumers with businesses, businesses with other businesses and consumers (or, more generally, users) with each other. These platforms take a variety of forms, from digital marketplaces enabling customers to connect with each other and with businesses (e.g., Amazon or eBay) to platforms that provide a service to consumers in exchange for connecting them with advertisers (e.g., Facebook or Google).

2. Digital comparison tools (“DCTs”), which the UK Competition and Markets Authority (CMA) defines as “digital intermediary services used by consumers to compare and potentially to switch or purchase products or services from a range of businesses,”<sup>1,2</sup> have received an increasing level of interest from competition authorities over the past five years. DCTs act both as a source of information for consumers and as an online distribution channel for suppliers. DCTs cover a large range of services, including retail financial products; household services such as telephony, internet and energy; and online travel bookings; but they can provide comparisons

of physical goods as well.<sup>3</sup> Typically, these services are free to consumers, with the platforms earning commissions (of some form) from the suppliers whose goods and services are presented on or purchased through the site.<sup>4</sup>

3. Both consumers and businesses can benefit from the existence of these platforms. Competition authorities have recognised that DCTs can have significant pro-competitive effects—for example, by lowering search and switching costs. As we discuss below, amongst other things customers can benefit from having a “one-stop shop” that allows them to compare and purchase products. Businesses can, in turn, benefit from increased access to a broader range of potential customers. Indeed, a primary focus of the CMA’s market study was to examine how these benefits can accrue to the widest possible group of consumers.<sup>5</sup> Furthermore, a number of recent government initiatives have been focused on increasing access for individuals to their personal financial data, such that better comparisons are enabled, for example, when comparing retail financial products.<sup>6</sup>

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\* The views presented in this article are those of the authors and do not necessarily reflect those of Analysis Group Ltd. or its affiliated companies.

1 UK Competition and Markets Authority, Digital Comparison Tools Market Study Final Report (“DCT Final Report”), 26 September 2017, at Footnote 1; available at <https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>.

2 The CMA excluded shopping comparison websites (e.g., Google Shopping) from its DCT market study, in part due to the European Commission’s antitrust investigation into Google’s comparison shopping service (see [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf)). Unless specifically noted, our discussion in this article can largely be applied to shopping comparison websites as well. See DCT Final Report at Footnote 19.

3 For example, Edmunds.com in the United States provides reviews of car models but also allows customers to submit requests for quotations on new cars to partner car companies and dealerships. See <https://www.edmunds.com/about/faqs.html>.

4 A small number of DCTs (e.g., *Consumer Reports* in the United States) have adopted a model whereby they charge the consumer for access to product comparisons. These sites may also earn commissions for completed sales from retailers that affiliate with the site. See <https://www.consumerreports.org/cro/about-us/our-partners/commercial-partners/index.htm>.

5 DCT Final Report.

6 Following the CMA’s Market Investigation into Retail Banking (2016), banks were required to implement Open Banking, which allows individuals and small businesses to share their financial data securely with third parties in a standardised format. The CMA envisioned this would spur the uptake of more customised DCTs that assessed financial products based on individual usage patterns. In Europe, the Payment Systems Directive 2 also requires financial institutions to make available to individuals their financial data, which can then be shared with third parties.

4. However, competition authorities and academics have also been concerned with the potential for anticompetitive effects associated with a number of practices by these new platforms. As a result, the CMA and other enforcers have initiated market-wide reviews and enforcement actions, including not only the CMA's DCT study, but also, for example, multiple investigations into online hotel bookings across Europe,<sup>7</sup> along with the European Commission's broader-sector inquiry into e-commerce.<sup>8</sup>

5. In this article, we provide a brief overview of the primary benefits of DCTs for competition and consumers, and examine how a number of these benefits apply to other types of platforms as well. We then discuss how certain contractual provisions utilised by DCTs—namely, most-favoured nation clauses (“MFNs”)—on the one hand, have the potential to generate these benefits; but on the other hand, can also lead to a potential reduction in competition. Finally, we briefly comment on the apparent regulatory divergence in enforcement priorities and perspectives across jurisdictions, and on the implications for future platform developments.

## I. Pro-competitive effects of DCTs

6. DCTs typically bring about a number of pro-competitive effects (or efficiencies), which ultimately benefit consumers (or end users).<sup>9</sup> These benefits can accrue from better and more efficient search and matching, greater access to consumers by small innovative businesses and lower costs.

7. DCTs enable more efficient consumer search, as DCTs typically allow around-the-clock “one-stop” digital searching, often with the ability to customise searches on the basis of individual preferences, which then return targeted and ranked results. This lowers the time needed to browse through individual manufacturers or suppliers (whether online or offline) and increases the quality and reliability of the information obtained by consumers. Consider, for example, the ability to obtain dozens of car insurance quotes in one search.

8. Beyond lowering search costs, DCTs also generally lower switching costs by making it easier for a consumer to switch between providers. For example, DCTs may handle the communication with the service provider, display all necessary details in an organised way and secure the necessary approvals from the consumer. In addition, consumers who opt for accounts with certain DCTs can pre-fill many of the details relating to a switch based on previously entered data.

9. DCTs also increase consumer engagement through advertising campaigns that highlight the scale of the potential savings, and the ease of searching for and switching to a lower-cost service provider. This generates greater consumer awareness and engagement, even for consumers who may not switch to a lower-priced service but may, as a result of visiting DCTs, better understand the characteristics of the product or service that they use and the range of potential alternatives available.

10. DCTs are also likely to spur upstream competition (i.e., among manufacturers, suppliers or service providers), thus creating the potential for lower prices, higher quality, greater innovation and wider choice for final consumers. While DCTs do not buy or retail the upstream provider's products, their scale and access to a broad final consumer base are important drivers of this competitive pressure and may result in savings for all consumers regardless of whether they switch products or services.<sup>10</sup>

11. Additionally, DCTs with large scale and with a particular focus on advertising have the potential to allow businesses to reach a wider potential consumer base at a lower cost than would be achievable for a given provider through traditional marketing and distribution channels. This is likely to apply particularly to smaller, more innovative providers with superior new products, which are likely to experience higher acquisition costs per customer (at least in the short run) absent the immediate and efficient access to a large customer base that DCTs provide.

12. Finally, DCTs also have the potential to expand markets through access to new customers for existing businesses, as well as by lowering barriers to entry for new entrants by giving them access to marketing and distribution channels that would otherwise be costly to operate on their own. These two effects can further expand markets by creating a positive feedback loop, where the availability of new, more innovative products encourages more customers to use the DCT, and the increase in the number of consumers reached by the DCT encourages more providers to enter.

13. Of course, the precise set of applicable efficiencies and their magnitude will depend on specific market characteristics—including, for example, the nature of the

7 See, for example, Bundeskartellamt, December 2015, available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23\\_12\\_2015\\_Booking.com.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html); Autorité de la concurrence, April 2015, available at [www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=607&id\\_article=2535](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2535); Konkurrensverket, April 2015, available at [http://www.konkurrensverket.se/globalassets/english/news/13\\_596\\_bookingdotcom\\_eng.pdf](http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf); Autorità Garante della Concorrenza e del Mercato, April 2015, available at <http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/660EE2E99780F7B5C1257E350039D1CD.html>.

8 European Commission Final Report on the E-Commerce Sector Inquiry, 10 May 2017. The EC sector inquiry focused on the relationship between online retailers and DCTs (including any vertical restraints adopted by manufacturers and online retailers), rather than on the commercial relationship between DCTs and suppliers (one of the key areas of the CMA market study).

9 See, for example, DCT Final Report. See also Price Comparison Websites Final Report, UK Regulators Network, 27 September 2016.

10 For example, a survey by the CMA in the DCT market study found that “44% of those recently using a DCT for search but not for purchase used the results from the DCT to negotiate a better deal with their existing or new supplier.”

product, the behaviour of consumers and the nature of the DCT or platform. Generally, the greater the extent of competition between DCTs, and the greater the ability for consumers to multi-home across DCTs (i.e., to use multiple DCTs depending on their needs), the greater the chance the likely benefits will be passed on to consumers, all else equal.

## II. The ambiguous impact of most-favoured nation clauses

14. The strength (or sometimes the very existence) of a number of these efficiencies, however, is at least partly driven by specific contractual clauses that some DCTs have in place, particularly MFNs. For example, DCTs, as well as others, have argued that DCTs need to ensure that a supplier cannot undercut the DCT by offering a lower price on its website than the price quoted through the DCT for the same product—otherwise consumers may lose trust in DCTs and fail to use them effectively. Furthermore, such price differentials (absent MFNs) may generate a free-riding problem. If customers can perform their research and comparisons on the DCT, effectively treating the DCT as a shop window, but can then secure a lower price for the goods or services through another distribution channel, the DCT may not be compensated for the investments it has made in its platform. This, in turn, reduces the incentives for DCTs to invest in improving their platforms and may, in extreme cases, cause DCTs to exit the market, reducing potential efficiencies, including those set out above. MFNs offer a potential solution to these problems by ensuring that the DCT's price is not undercut by its supplier through either the supplier's direct sales channels (a "narrow MFN") or any other distribution channel (a "wide MFN").<sup>11</sup>

15. Despite these potential benefits, MFNs also have the potential to lessen competition.

16. First, MFNs can reduce the incentive for DCTs (or platforms) to compete on the commissions charged to suppliers. With an MFN in place, a lower commission would result in the supplier either (i) retaining more of the rent in the supply chain (that is, paying a lower commission to the DCT but quoting the same price as before the decrease in the commission); or (ii) lowering its prices on competing DCTs, thus negating any competitive advantage for the DCT that considered reducing its commission level.

<sup>11</sup> Further potential pro-competitive effects of MFNs have been identified. See, for example, M. Samuelson et al., *Assessing the Effects of Most-Favored Nation Clauses*, paper prepared for the ABA Section of Antitrust Law Spring Meeting 2012. ("Samuelson, 2012")

17. Conversely, a DCT enforcing a wide MFN may increase its commissions without reducing the competitive attractiveness of the platform to consumers, as the supplier will either absorb the increased cost of the higher commission or increase its prices across all distribution channels.

18. Second, MFNs can reduce the ability of and incentive for a new DCT (or platform) to enter the market. Absent MFNs, a new DCT may gain market share by accepting lower commissions than incumbent DCTs, and thereby quote lower supplier prices on its website to attract consumers. Wide MFNs reduce the incentive for the supplier to agree to those lower prices, since the same price level would need to be offered on the incumbent DCT that had a wide MFN in place. Alternatively, the supplier would need to stop listing its products on the DCT utilising the MFN, thereby potentially losing demand. At the same time, the presence of a wide MFN between an established DCT and one or more suppliers reduces the incentive for the new entrant DCT to offer to accept a lower commission from a supplier, even if the supplier were to agree to this offer. The wide MFN ensures that the new entrant DCT does not post a price that is lower than the price posted on the DCT that enforces the MFN. As such, the new entrant cannot pass on the lower commission to consumers in the form of a lower price, and therefore does not benefit from being more competitive on price than existing DCTs.

19. Given that MFNs can both generate efficiencies and reduce competition, the question of how MFNs (and price parity clauses more generally) should be treated by authorities has received a great deal of attention from both academics<sup>12</sup> and enforcers.<sup>13</sup> The debate is far from settled. At one end of the spectrum, despite calls from a number of academics,<sup>14</sup> the US has largely followed a non-interventionist approach.<sup>15</sup> At the opposite end, EU Member States (e.g., France and Italy) have enacted legislation banning the use of MFNs in the case of online hotel bookings. Other jurisdictions have opted for a more nuanced approach: the UK, for example, has taken a

<sup>12</sup> See, for example, P. Akman and D. D. Sokol, *Online RPM and MFN Under Antitrust Law and Economics*, *Review of Industrial Organisation*, Vol. 50, No. 2, pp. 133–151, March 2017; J. B. Baker and J. A. Chevalier, *The Competitive Consequences of Most-Favored Nation Provisions*, Paper 277, *Articles in Law Reviews & Other Academic Journals*, American University Washington College of Law, 2013; J. B. Baker and F. Scott Morton, *Antitrust Enforcement Against Platform MFNs*, *The Yale Law Journal*, Vol. 277, No. 7, May 2018 ("Baker and Morton, 2018"); A. Fletcher and M. Hviid, *Broad Retail Price MFN Clauses: are they RPM "at its Worst"?*, *Antitrust Law Journal*, American Bar Association, Vol. 81, 2016; J. P. Johnson, *The Agency Model and MFN Clauses*, *The Review of Economic Studies*, Vol. 84, No. 3, 1 July 2017, pp. 1151–1185; Samuelson, 2012; S. C. Salop and F. Scott Morton, *Developing an Administrable MFN Enforcement Policy*, *Antitrust*, Vol. 27, No. 2, Spring 2013.

<sup>13</sup> See, for example, Bundeskartellamt press release, *Amazon abandons price parity clauses for good*, November 2013, available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26\\_11\\_2013\\_Amazon-Verfahrenseinstellung.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html); Office of Fair Trade, *Amazon online retailer: investigation into anti-competitive practices*, October 2013; CMA, *Auction Services Investigation*, June 2017; *U.S. v. Apple Inc.*, 2nd U.S. Circuit Court of Appeals, No. 13-3741. See also the online hotel booking cases referred to in footnote 7.

<sup>14</sup> For example, Baker and Morton, 2018, pp. 2176–2202.

<sup>15</sup> With the notable exception of *U.S. v. Apple Inc.*, which held that Apple's contracts with five of the six main publishers—including MFNs—amounted to a price-fixing conspiracy.

more aggressive stance against wide MFNs,<sup>16</sup> while the CMA has suggested that, on balance, narrow MFNs have not significantly restricted competition in the cases they have examined.<sup>17</sup>

20. Beyond MFNs, other practices may offset some of the pro-competitive effects of DCTs.<sup>18</sup> For example, in the DCT market study, the CMA also considered other agreements between DCTs and suppliers that may lead to potential anticompetitive effects, such as advertising restrictions and non-resolicitation agreements.<sup>19</sup> The advertising restrictions considered included: (i) non-brand bidding, whereby firms agree not to bid, in their online ads auctions, on terms containing a competitor's brand name(s); and (ii) negative matching agreements.<sup>20</sup> Non-resolicitation agreements instead forbid a DCT to contact customers who have purchased a supplier's product from that DCT, thus potentially reducing competition between suppliers during the period covered by the clause. On balance, the CMA concluded that neither of these potential concerns has had material impacts thus far, but, in view of their potential impact, both would "remain area[s] of interest to the CMA."<sup>21</sup>

16 For example, at the time of writing, the CMA is investigating the use of wide MFN clauses in the home insurance sector (see CMA press release of 26 September 2017 available at <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>). In 2014, the CMA banned wide MFNs in private motor insurance, following a market investigation into that sector.

17 DCT Final Report, para. 4.95–4.101.

18 Of course, beyond the specific contractual provisions and behaviours described here, there is the broad range of possible anticompetitive conduct by platforms with market power that may amount to an abuse of a dominant position. These would need to be assessed by competition authorities in any investigation of DCTs or platforms more generally. See, for example, the European Commission's investigation of Google Shopping (decision available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf)). Consumer protection issues may also potentially arise. The CMA for example recently opened a consumer protection enforcement action against a number of hotel booking sites, due to concerns regarding how search results are ranked, pressure selling, claims on discounts offered and hidden charges. See CMA press release of 28 June 2018 available at <https://www.gov.uk/government/news/cma-launches-enforcement-action-against-hotel-booking-sites>.

19 DCT Final Report, para. 4.109–4.117.

20 According to the CMA, these are defined as situations "where the restricted advertiser agrees to add another advertiser's brand name to its 'negative keywords', which prevents its ad appearing when the search term includes that brand name alone or with other (non-brand related) words (eg 'broadband', 'insurance', 'compare', 'prices', etc)." DCT Final Report, para. 4.50.

21 DCT Final Report, pp. 64–65.

### III. The need for consensus on evaluating the competitive impact of DCTs, platforms and MFNs

21. With the rapidly increasing role of platforms for digital commerce and for mediating interactions between and among consumers and businesses, identifying where enforcement is required is crucial. There are risks on both sides, with over-enforcement perhaps leading to reduced benefits to consumers from DCTs, and under-enforcement possibly harming the competitive process and reducing consumer welfare. There has been divergence among authorities on how to assess the relative benefits and harm of a number of the practices engaged in by DCTs. This heterogeneous approach to competition enforcement and regulation with regard to DCTs, and platforms more generally, demonstrates the lack of an international consensus on how best to maximise the pro-competitive effects of platforms while minimising the harm to competition that some of their practices might bring. Considering the international reach of many of these platforms and their customers (which are often businesses themselves), this lack of consensus also brings significant uncertainty, risks and costs.

22. We are arguably at a critical juncture. It is crucial for competition authorities to correctly distinguish between pro-competitive and anticompetitive conduct, and to intervene based on an internationally consistent, evidence-based approach. ■

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