



UNIVERSITY OF
OXFORD

Centre for Competition Law and Policy
Institute of European and Comparative Law

Trends in Retail Competition: Private labels, brands and competition policy

Report on the nineteenth annual symposium on
competition amongst retailers and suppliers

Held on Friday 14th June 2024
at Mary Sunley Building, St Catherine's College Oxford

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OVERVIEW

Held on 14th June at St Catherine's College, this Oxford Symposium was the nineteenth in the series, exploring the interface between competition policy, branded and private label products and retailers.

The rise of input costs has been a key feature of consumer product markets in recent years, leading to rapid consumer price inflation. This formed the dominant theme of the morning programme, with a range of panellists discussing a variety of price-related themes from differing perspectives.

Panel discussions focused on cost and price inflation in national markets, the extent to which competition authorities focus on price to the exclusion of other vectors of competition, the passing of inflationary pressures through the supply chain and how retailers and suppliers sought to manage the impact on shoppers. Discussions also focused on price differences between national markets, their cause, cross-border trade, retail buying alliances and the rising challenge of AI-influenced pricing.

The scale of price inflation in food prompted the UK's Competition and Markets Authority to look at the grocery market at both the retail and supplier levels. It found shoppers were switching from branded to private label products to save money while retailers remained under pressure to minimise costs. In conclusion, the CMA did not identify concerns that warranted an investigation.

RBB Economics opened the afternoon programme with a presentation comparing the business models of branded and private label products, the implications for competition law and the whether differences in net margins indicated some insulation from competitive pressures.

The panel discussion that followed switched focus to look at the intersection of online ecosystems and traditional High Street retail, examining the optimal balance for customers and competition. There is a dual reality in the digital economy, of efficiencies that benefit consumers on one side and the potential for market distortions, wealth transfers and exploitation on the other. The EU's Digital Markets Act (DMA) and the UK's Digital Markets, Competition and Consumers Act (DMCCA) were explored as potential solutions to concerns.

The final session delved into the potential for competition law and policy to address sustainability and wider societal concerns. One perspective saw potential in extending the traditional focus beyond price and consumer welfare to a wider array of issues. However there was also scepticism over the suitability of using competition law to address wider issues, arguing that targeted legislation may be a better route.

The Symposium was chaired by Professor Ariel Ezrachi and hosted by the Centre for Competition Law and Policy and the Institute for European and Comparative Law.

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PROGRAMME

09.30 Introduction

Professor Ariel Ezrachi

SESSION 1 – VECTORS OF COMPETITION AND THE ROLE OF PRICE

09.40 **Panel discussion: Perspectives on retail price competition**

Moderator Michael Grenfell, *Formerly with the CMA. Now with Clifford Chance*

Panellists Carole Dembour, *Fevia*

Dr Reto Batzel, *MARCK*

Matthew Johnson, *Oxera*

Meltem Bağış Akkaya, *Turkish Competition Authority*

SESSION 2 – A SECTOR REVIEW

11.15 **Assessing competition in the UK grocery market**

Lucy Eyre, Competition and Markets Authority

SESSION 3 – PARALLELISM AND DIFFERENTIATION IN PAN-COUNTRY TRADE

11.45 **Panel discussion: What do price comparisons between countries tell us?**

Moderator Rona Bar-Isaac, *Addleshaw Goddard*

Panellists Christoph Leibenath, *AIM*

Felix Engelsing, *Bundeskartellamt*

Sue Hinchliffe, *Clifford Chance*

David Foster, *Frontier Economics*

14.00 **SESSION 4 – COMPARING AND CONTRASTING RETAIL AND BRANDED SUPPLIER BUSINESS MODELS**

George Tucker, RBB Economics

SESSION 5 – ECOSYSTEMS VIS-À-VIS THE HIGH STREET

14.20 **Panel discussion: Striking the right policy balance for shoppers and competition**

Moderator Ariel Ezrachi, *Oxford University*

Panellists Nitika Bagaria, *Keystone*

Oles Andriychuk, *Newcastle University (now Exeter University)*

Max von Thun, *Open Markets Institute*

Tim Cowen, *Preiskel & Co*

SESSION 6 – PERCEPTIONS AND REALITY

15.40 Panel discussion: Dynamic markets and social goals – can markets and competition policy deliver?

Moderator Alec Burnside, *Dechert* – also a panellist

Panellists Phil Evans, *Competition Law Forum*

Isabelle Le Personnic, *JDE Peet's*

Julian Nowag, *Lund University*

16.45 Closing remarks

Ariel Ezrachi, *Oxford University*

SESSION 1

VECTORS OF COMPETITION AND THE ROLE OF PRICE

Perspectives on retail price competition

Moderator Michael Grenfell, Formerly with the CMA. Now with Clifford Chance

Panellists Carole Dembour, Fevia

Dr Reto Batzel, MARCK

Matthew Johnson, Oxera

Meltem Bağış Akkaya, Turkish Competition Authority

Session Focus

This session delved into the pivotal role of price within competition law, particularly in the retail sector, and examined the complexities introduced by an increasing focus on non-price considerations, inflation and online retail.

Session Summary

Price is central to both customer behaviour and competition law. The panel discussed to what extent price can and should remain the primary focus of the assessment and considered what issues arise against the backdrop of inflation and the shift towards online retail.

Price as main assessment parameter

Historically, competition authorities have predominantly focused on price competition due to its quantifiable nature. While other competitive parameters such as quality, innovation, service and range exist, they are often more challenging to assess. This has led to a primary focus on price concerns in many cases, serving as a useful proxy to assess competition. However, there is a growing view that an exclusive focus on price may overlook other forms of competitive harm. Consumer behaviour and competition – and sometimes collusion (e.g. in the European Commission's AdBlue case¹) – are often driven by a combination of factors, including price, quality, service and range. Recent cases, such as the German Federal Cartel Office's action against Facebook for its data practices² or private litigation against Apple for allegedly throttling iPhone performance (*Gutman v Apple*³), illustrate a shift towards greater consideration of non-price factors, particularly in the context of private litigation, though this remains rare.

This multifaceted approach opens a normative debate as to the focus of competition, especially as innovation, environmental and sustainability gain prominence. Consumers' increasing attention to non-price parameters necessitates a corresponding response from competition authorities, although practical implementation remains complex.

Referring to the example of food prices in Belgium, one view considered that a competition authority's primary task is to ensure undertakings do not inflate prices ("greedflation"); food should be as affordable as possible. At the same time, an excessive – or even exclusive – focus on price could neglect other similarly important characteristics, such as the sourcing and quality of ingredients, security of supply or sustainability aspects. A lower price might benefit consumers in the short-term but could be detrimental in the mid- to long-term (for example due to decreasing quality). One view therefore supported the notion of "fair" prices, allowing

¹ <https://competition-cases.ec.europa.eu/cases/AT.40178>

² https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

³ <https://www.catribunal.org.uk/cases/14687722-mr-justin-gutmann>

undertakings to invest, for example, in sustainability and energy efficiency. Nonetheless, in times of crisis, price considerations still tend to dominate both competition concerns and political debates.

The impact of inflation on competition analysis

High inflation rates can distort the role of price as a primary indicator of functioning competition. For instance, Turkey's high inflation rate complicates meaningful references to price. Unlike previous instances of high inflation, the current inflation rates are a function of several factors, including panic buying, a sequence of major crises like the Covid pandemic, international conflicts, global warming affecting agricultural production, as well as rising energy costs. This has altered consumer behaviour and the competitive landscape, with discount stores gaining market share.

At the same time, "skimpflation," where less quantity or lower quality is sold in similar packaging, effectively raises unit prices. This intersects with competition and consumer protection law, with both competition authorities and other sectoral regulators focusing on the topic. While some argue consumers can detect these price increases through reference to the displayed unit price, the consensus is that markets function best when consumers have effective agency.

Prolonged periods of high inflation rates also complicate the detection of price fixing or extortionate pricing, as undertakings may attribute high prices to increased costs, making competition law analysis more challenging.

The influence of e-commerce on competition

E-commerce has significantly impacted retail competition, including groceries. There is a growing trend towards online shopping for groceries, supported by the rise in price comparison websites, superfast delivery services (e.g. Getir), discounters moving online and traditional supermarkets providing delivery services (in spite of these services not always being profitable). Customers can compare prices more easily and are no longer bound to shop in physical stores, which may prompt competitors to differentiate themselves through loyalty programs that can sometimes inhibit direct comparisons. This evolving behaviour may necessitate a re-assessment of market definitions, both in terms of market participants and geographic scope. Whereas previously the geographic market might have been confined to a driveable distance, consumers might now be less willing to travel longer distances.

At the same time, digital solutions enable greater opportunities for co-operation. While price comparison tools enhance market transparency and competition for both sides of the market, buying co-operations require careful assessment to ensure they focus on joint negotiations rather than forced price transparency. Such co-operations can be beneficial and efficient in consolidated markets but also increase the risk of collusion.

The panel expressed a more sceptical view of retail buyer power. Previously seen as beneficial for consumers by ensuring downward price pressure, concerns were expressed by some that retailers may not always pass savings on to consumers, potentially leading to monopsony power that may ultimately impede competition and negatively affect consumers. Price matching practices, while not immediately concerning, do not eliminate collusion risks and can lead to degrading quality at stable prices.

Concerns about dynamic and intelligent pricing

Some members of the panel also considered the effects of surge or dynamic pricing. The view was expressed that these practices may be concerning if they lead to long-term price increases rather than discounts. The assessment hinges on whether dynamic pricing relies on market power, which could raise abuse of dominance concerns. However, surge pricing gives incentives to suppliers to provide capacity at times of high demand, allowing supply to meet demand, and also allows for discounting at off-peak times; moreover, any increase is often transitory and may not have a lasting impact, indicating that markets are working as they should. Competition authorities are aware of the issue but seem hesitant to interfere in the face of strong pro-competitive effects and efficiency gains associated with dynamic pricing.

The views expressed in this panel discussion do not necessarily represent the official position of any panellist's organisation. The summary offers a synthesis of comments from various speakers and cannot be attributed to a single speaker.

SESSION 2

A SECTOR REVIEW

Assessing competition in the UK grocery market

Lucy Eyre, Competition and Markets Authority

Session Focus

This session explored whether ineffective competition between grocery retailers and between manufacturers materially contributed to food price inflation in the UK.

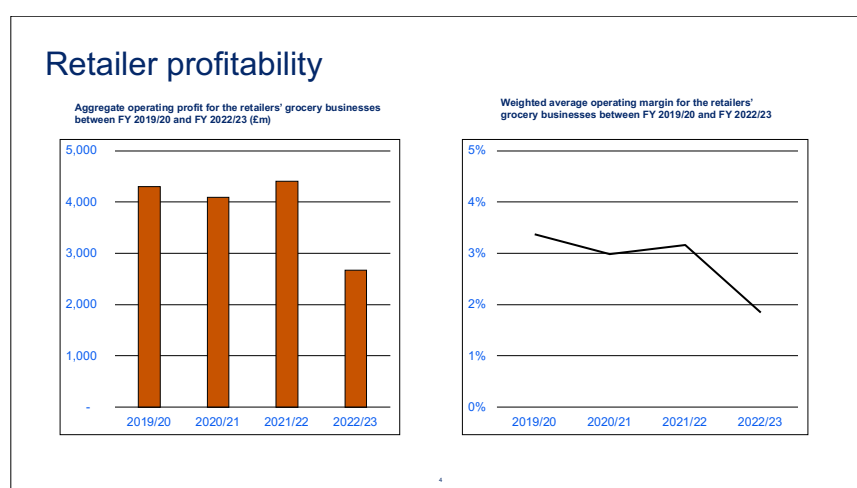
Session Summary

The session presented the findings from the Competition and Markets Authority's (CMA) study into the grocery sector,⁴ focusing on the significant price inflation for food, which reached a 45-year high of 19.2% in March 2023. Although this rate has since declined, it remains substantially higher than consumer price inflation overall and has led to increased profits for grocery retailers. The study aimed to determine whether high food prices were driven by inflation and increased costs or whether weak competition was also a contributory factor.

Competition among grocery retailers

The study utilised public data to analyse the relative market shares of grocery retailers. The rise of discount retailers has put pressure on traditional supermarkets to reduce prices, with higher-priced retailers increasingly losing market share. The data indicates that consumers frequently switch between retailers based on price, which suggests that effective competition exists in the sector.

The CMA analysed profits of 11 retailers based on voluntarily provided data. Despite a 3.6% increase in aggregate revenues due to higher prices, sales volume decreased significantly, indicating that customers purchased noticeably less during this period. In fact, aggregated profit margins for the industry as a whole fell by over 40%.



⁴ Price inflation and competition in food and grocery manufacturing and supply, CMA, November 2023, <https://www.gov.uk/government/publications/price-inflation-and-competition-in-food-and-grocery-manufacturing-and-supply>.

The food supply industry is complex, with each retailer stocking tens of thousands of products. To systematically analyse upstream competition, the CMA focused on 10 product categories and classified them into three distinct groups based on profit margins: Group A with mostly branded products and highest margins (e.g. infant formula, baked beans, mayonnaise, pet food), Group B with a mix of branded and own-label products and moderate margins (e.g. bread, lemonade, chilled desserts, ready meals), and Group C with essential, commodity-type goods and predominantly own-label products (e.g. milk, poultry). The data was collected by written requests to and conversations with branded and own-label manufacturers and presented a consistent picture.

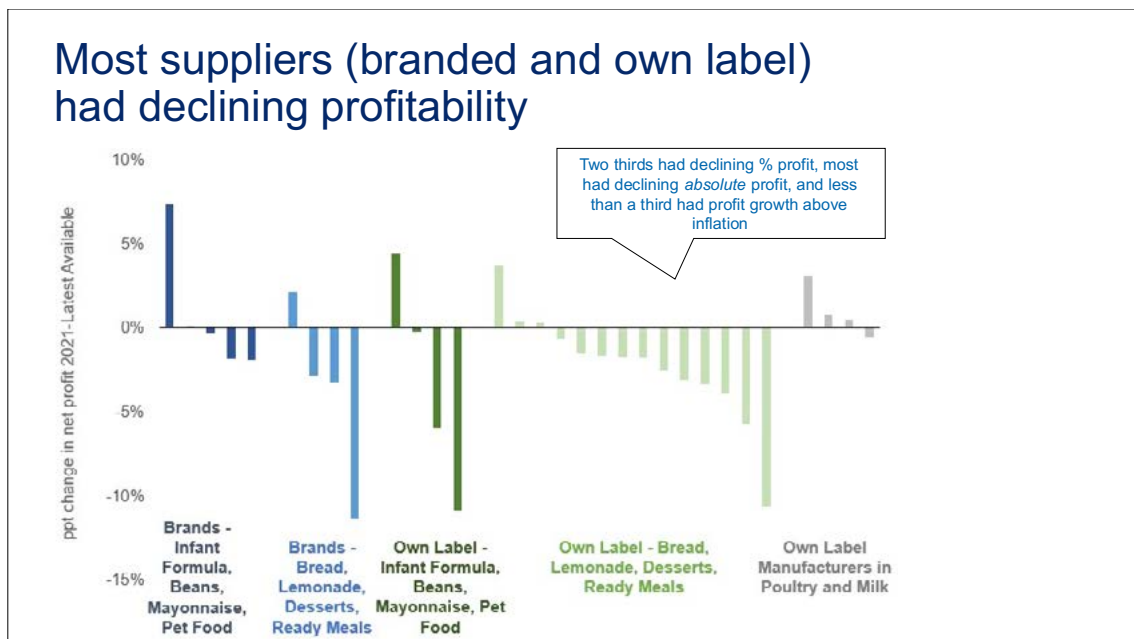
Manufacturer-retailer relationships – private label products

Retailers typically achieve higher margins on branded products but differentiate themselves through private label offerings, which shape their market image. Manufacturers of private label products compete intensely for a limited number of large tenders; contracts typically span several years. The contracts feature a high level of cost transparency, which allows retailers to pressure manufacturers to cut costs with a view to ensuring profitability. Retailers seem able to obtain competitive prices for their private label products due to competition at the manufacturer level, resulting in low margins for these products.

Manufacturer-retailer relationships – branded products

For branded products, there is necessarily only one manufacturer per brand. The annual negotiations are typically rigorous and focus on list prices, adjacent promotional funding and ancillary considerations, such as shelf positioning and product presentation. The negotiation dynamics depend on the brand's importance for the overall portfolio and the retailer's market share. Margins for branded products are slightly higher than for private label products but branded products carry significant risks due to investments in innovation and product development. Successful innovations are often quickly copied, which limits the period during which manufacturers can reap higher profits.

More recently, consumers have increasingly switched from branded products to private label alternatives to save costs, and from expensive grocery stores to cheaper retailers. However, where brands are important to consumers (e.g. Heinz baked beans), unit profitability has increased. Specifically, the cost per unit has risen by 24p on average, while the price per unit increased by 36p; this indicates that prices have increased more than necessary to cover the increase in cost. Nonetheless, profit as a percentage of revenue has fallen. The data also suggests that while the prices of each item have increased, purchasing volumes have decreased. As a result, almost all suppliers record a decline in profitability. Based on the data considered, the study concludes that retailers are still under pressure to minimise cost.



No investigation into the grocery sector

The CMA concluded that retailers obtain competitive prices from private label manufacturers and seem to pass these on to consumers. For many branded and some private label products, prices rose by more than the increase in cost. Customers who stay loyal to brands will pay more per unit, but many customers are willing to switch to cheaper private label alternatives. The CMA found that weak competition among retailers or suppliers does not materially contribute to overall food price inflation.

Consequently, the CMA did not identify concerns that would warrant an investigation into the grocery sector. However, it noted that not all customers have the ability to switch to private label products, particularly those who live in so-called "food deserts" with limited access to private label products or the cheaper prices at larger stores, or those who require specific product types, such as infant formula, that are rarely produced by private label manufacturers.

The views expressed in this presentation do not necessarily represent the official position of the speaker's organisation.

SESSION 3

PARALLELISM AND DIFFERENTIATION IN PAN-COUNTRY TRADE

What do price comparisons between countries tell us?

Moderator Rona Bar-Isaac, Addleshaw Goddard

Panellists Christoph Leibenath, AIM

Felix Engelsing, Bundeskartellamt

Sue Hinchliffe, Clifford Chance

David Foster, Frontier Economics

Session Focus

This session reflected on the causes and effects of price differences between countries, examining the case for regulatory intervention and how this could affect pricing and competition.

Session Summary

This panel discussed why price differences exist, whether something should be done about them and, if so, how this could be done.

Origin of price differences

Price differences are an inherent part of market economies, influenced by a multitude of factors ranging from local variations within a single city to differences across EU member states. From a consumer perspective, the desire for the lowest prices is understandable. However, regulatory regimes, cultural backgrounds and consumer perceptions vary significantly between countries, contributing to these price differences. In addition, disparities in purchasing power and retail strength across regions mean that competition often occurs at a national level, making price differences a logical outcome unless mitigated by external intervention.

Challenges of regulatory intervention

Within the EU, existing regulations address the issue of pricing differences to some extent. For instance, manufacturers are prohibited from influencing wholesalers' resale price strategies in markets outside their home countries. The European Commission (EC) believes that current rules on parallel trade are sufficient to address the issue of price differences.

From an economic perspective, three primary factors—supply side, demand side and competition conditions—can influence prices. Geographic price discrimination exemplifies the complexity of regulatory intervention. While intuitively perceived as negative, price discrimination can intensify competition by allowing market participants to leverage strong markets and price more aggressively in weaker ones. Conversely, regulatory attempts to ban geographic price discrimination, such as in the UK energy market, have sometimes led to increased retail prices.

Banning price differences between strong and weak markets could result in price averaging, potentially destroying economic value in the process. Uniform pricing across countries might render certain products unprofitable in specific markets, which can result in these products being taken off the market. Thus, regulatory interventions must be carefully considered to avoid unintended anticompetitive consequences.

Legal framework for price differentials and recent case law

In terms of the available legal toolkit, it is important to distinguish between agreements/concerted practices and unilateral conduct of a dominant company that may impede cross-border trade, prohibited under Articles 101 and 102 TFEU respectively. The EC has historically pursued cases on parallel trade restrictions, primarily in consumer markets, under Article 102 TFEU (e.g. AB InBev⁵). The recent Mondelez⁶ case is the first case in which the European Commission has relied significantly on Article 101 TFEU to pursue a case in relation to cross-border trade restrictions. However, differential pricing is not inherently anticompetitive and Article 101 TFEU does not generally cover it. In the absence of an agreement, differential pricing can only be considered as potentially abusive unilateral conduct where the undertaking is dominant.

Indeed, it is unclear if standardising pricing is even desirable, as it is challenging to determine appropriate boundaries. The European Commission and national authorities have initiated discussions on territorial supply constraints and potential new legislation. They want to close the gap on unilateral conduct of non-dominant firms which is not covered under the current rules. Post-Brexit, the issue of parallel trade and the pursuit of the internal market is less relevant for the UK, though other non-EU countries, like Switzerland, have their own regulations. It was clarified that the Mondelez case was about preventing arbitrage (brokers selling goods from low-price countries into high-price countries) rather than pricing, suggesting that price differentials between EU Member States are economic reality and that only measures taken to restrict arbitrage /cross-border trade raise issues under EU competition law.

Role of buying alliances on price differences

Traditionally, competition law has been lenient towards true buying alliances: they enable smaller buyers to remain viable by pooling purchasing volumes to negotiate better prices. Historically, these alliances have not faced significant scrutiny, especially in the UK and the US, as they can lead to consumer benefits through lower prices, provided there is sufficient downstream competition. European retail alliances differ from this traditional picture of buying alliances. They do not purchase goods but ask suppliers to pay lump sum “entrance fees” to be admitted to commercial negotiations. They act as gatekeepers for their national members. At least in the long-term, they may raise competition law issues and practices such as co-ordinated order stops across several countries may be considered unfair.

Impact of artificial intelligence on price differences

The rise of artificial intelligence prompts questions about the relevance of traditional concerns over price differences in a world where increasing degrees of price differentiation are possible (e.g. through personalisation). As pricing algorithms have yet to excel at assessing consumer price variations, the potential for radically personalised pricing remains uncertain. On the one hand, artificial intelligence could enhance competition as competitors would know precisely at which price point they could win a customer over, thereby maximising efficiencies. On the other hand, personalised pricing might allow for unnoticed price increases, as consumers struggle to compare prices. This practice is already in use and, coupled with market power, raises questions about competition law's response to these emerging challenges.

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⁵ <https://competition-cases.ec.europa.eu/cases/AT.40134>; see also: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2488

⁶ <https://competition-cases.ec.europa.eu/cases/AT.40632>; see also: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2727

SESSION 4

BUSINESS MODELS IN GROCERY

Comparing and contrasting retail and branded supplier business models

George Tucker, RBB Economics

Session Focus

This session provided a comparative analysis of the business models of brands and private labels, examining their implications for competition law and reflecting on recent case law developments.

Session Summary

The session drew inspiration from the CMA's study into the grocery market,⁷ which revealed a significant difference in average net margins between branded and private label manufacturers. This observation raised the question of whether branded manufacturers are more insulated from competitive pressures than their private label counterparts.

Business models of brands vs private labels

The CMA's merger inquiry into *Céréalia/Jus-Rol*⁸ shed light on the business models of brands and manufacturers within the industry.

Brands invest heavily in product development and innovation, which is resource-intensive and involves creating samples, testing and focus groups. Brands must also navigate a complex path to market entry, selling products wholesale to retailers who then reach end consumers. This process is fraught with risk and requires significant upfront investment, as illustrated by Jus-Rol's pioneering efforts in the ready-to-bake pastry sector.

Conversely, the private label model is retailer-driven, with retailers defining product specifications and outsourcing production to third-party manufacturers, such as Céréalia. This approach can be lucrative for retailers, potentially leading to higher margins and enhanced bargaining power over brands as they compete directly downstream, while also allowing for differentiation between retailers. Although this differentiation could potentially diminish competition among retailers, the rise of discount retailers like Lidl and Aldi in the UK, whose product range is primarily private label, has shown that it can actually intensify competition between retailers. Typically, although not always, private labels are less adventurous in innovation and adopt models that have already proved successful, thereby incurring lower risk.

Profitability and competition

In its 'Assessment of Market Power' paper,⁹ the Office of Fair Trading (OFT) explained that "*high prices or profits alone are not sufficient proof that an undertaking has market power: high profits may represent a return on previous innovation or result from changing demand conditions*". Given that innovation is risky and costly, competitive markets are expected to yield higher margins in industries that demand substantial initial investment. Thus, high margins alone are not indicative of weak competition.

⁷ See also Session 2; Price inflation and competition in food and grocery manufacturing and supply, CMA, November 2023; <https://www.gov.uk/government/publications/price-inflation-and-competition-in-food-and-grocery-manufacturing-and-supply>.

⁸ <https://www.gov.uk/cma-cases/cerelia-slash-jus-rol-merger-inquiry>

⁹ <https://www.gov.uk/government/publications/assessment-of-market-power>

When examining the relationship between profitability and competition, suggestions have been made, including by the Organisation for Economic Co-operation and Development (OECD), to assess return on investment by considering the costs and risks associated with innovation. This approach involves comparing profitability levels, as a percentage of initial investment, against benchmarks from competitive markets with comparable risk profiles, rather than comparing absolute margins. However, this metric is imperfect as it is challenging to quantify accurately the effort invested in product development, especially for intangible assets like brands, exemplified by the legal challenges faced by Apple.

To fully grasp whether brands are more sheltered from competition than private labels, it is essential to evaluate other indicators of market power and competition. This includes assessing the level of competition from other brands and the effectiveness of competition from private labels. In *Céréalia/Jus-Rol*, the CMA concluded that despite the presence of competing brands, the competitive constraint that they posed on Jus-Rol was limited. However, the CMA's theory of harm was predicated on competition from private labels competitively constraining Jus-Rol. By contrast, the CMA's merger inquiry into *Arçelik/Whirlpool*¹⁰ revealed effective competition from both branded suppliers and, at the market's lower end, private labels.

Retailer power

The intensity of private label competition raises questions about its potential to suppress innovation by eroding the margins necessary to recover investment. Intellectual property rights may help mitigate this risk, although their protective strength varies. Recent cases have scrutinised whether retailers' self-preferencing of private labels over branded products could harm innovation. This concern was dismissed in the CMA's merger inquiry into *Tesco/Booker*,¹¹ where the CMA determined that the retail market was sufficiently competitive to prevent this.

It remains to be seen whether these standards are universally applied by competition authorities, in particular when it comes to other sectors such as technology. For example, the European Commission's allegations in its review of *Amazon/iRobot*¹² suggested that Amazon's alleged self-preferencing of its robot brand could exclude competitors and stifle innovation, a theory of harm that was upheld despite evidence of robust retail competition.

The views expressed in this presentation do not necessarily represent the official position of the speaker's organisation.

¹⁰ <https://www.gov.uk/cma-cases/arcelik-slash-whirlpool-emea-merger-inquiry>

¹¹ <https://www.gov.uk/cma-cases/tesco-booker-merger-inquiry>

¹² <https://competition-cases.ec.europa.eu/cases/M.10920>

SESSION 5

ECOSYSTEMS VIS-À-VIS THE HIGH STREET

Striking the right policy balance for shoppers and competition

Moderator Ariel Ezrachi, Oxford University

Panellists Nitika Bagaria, Keystone

Oles Andriychuk, Newcastle University (now Exeter University)

Max von Thun, Open Markets Institute

Tim Cowen, Preiskel & Co

Session Focus

This session reflected on the intersection of online ecosystems and traditional High Street retail, examining how to strike the optimal balance for customers and competition.

Session Summary

Online shopping and digital environments offer numerous efficiencies, such as lower operational costs, competitive pricing, a vast selection of products, user-friendly search functions and greater transparency. These factors contribute to their appeal among consumers. However, the shift to online has altered competitive dynamics and led to an increased asymmetry in power as online shoppers may be subjected to practices such as data harvesting, targeting, manipulations, discriminatory pricing, etc. In addition, this shift has impacted the relationship between ecosystems and sellers, as platforms can increasingly determine the conditions of competition and the level of transparency in the market. This can lead to complex incentive structures and competitive challenges, particularly when platforms also actively compete in downstream markets. Online platforms may further influence consumer perceptions and shopping behaviours through tactics like nudges and dark patterns (i.e. online design practices which have the effect of misleading or manipulating consumers into taking actions they wouldn't otherwise have taken).

Thus, there is a dual reality: efficiencies that benefit consumers on one side, and on the other, the potential for market distortions, wealth transfers and exploitation. Various perspectives have emerged to address these digital ecosystem concerns, ranging from altering large platforms' business models, restricting abusive conduct or implementing regulatory measures such as the EU Digital Markets Act (DMA) and UK Digital Markets, Competition and Consumers Act (DMCCA), in addition to broader public policy approaches that align competition policy with societal objectives.

What are examples of potentially unfair practices by online ecosystems?

One speaker highlighted the concerns that have been raised by competition authorities against online retailer Amazon, questioning whether its success stems from innovation and customer convenience or from potentially unfair practices. Various practices that have become the subject of scrutiny from regulators were discussed, such as cross-subsidisation, self-preferencing/leveraging, data exploitation, the use of algorithms to match or undercut prices and "most favoured nation" clauses. Similar issues were noted in the *Google Shopping*¹³ case where Google was found to be preferencing its own comparison-shopping services over other third-party services. More broadly, the discussion also touched upon labour practices and tax strategies that may also provide a competitive edge that may warrant consideration.

¹³ Case T-612/17, Google and Alphabet v Commission (*Google Shopping*).

From an economic perspective, it was noted that Amazon's market position may be amplified by indirect network effects and personalisation techniques. However, academic research on Amazon's impact on third-party seller innovation presents a more nuanced picture. While current regulatory initiatives like the DMA aim to curb self-preferencing through ranking and use of data, the ongoing debate and mixed evidence call for an open-minded approach.

What are some of the consumer welfare implications of the growth of online ecosystems?

The cost-of-living crisis adds a political dimension to online shopping, as consumers grapple with preferences for data privacy and environmental concerns while often choosing the most affordable and convenient options in spite of such concerns. This dichotomy poses challenges for regulators and suggests a need for a paternalistic approach that accounts for long-term societal impacts.

One speaker discussed the welfare implications of online advertising practices and raised concerns in relation to Google and Meta's power in this space, which has been the subject of investigation by competition authorities. Their integrated advertising and product offerings in search results impact consumers and advertisers, particularly news publishers who struggle to compete for online advertising revenue.

How effective is competition law and proposed regulation in addressing these issues?

There is an appreciation that competition law is relatively limited in its capacity to address some of the issues raised by digital ecosystems, as it is mostly ex-post and price centric. This has led to a regulatory wave, including the DMA and DMCCA, that seeks to change the footprint of competition law enforcement in the digital sphere. Their effectiveness and the exercise of enforcer discretion, balanced against economic and wider societal considerations, remain to be seen.

Some optimism was expressed in relation to the potential of the DMA and DMCCA to address the concerns raised in relation to the digital economy, in particular as the legislation targets specific practices of so-called gatekeepers, such as data use and self-preferencing. However, there are limitations. The DMCCA arguably offers more flexibility than the DMA and is better equipped to deal with emerging business models, technologies and harms, as it does not seek to list exhaustively all problematic practices but seeks to adopt a more tailored approach.

Concerns were also expressed around the lack of co-ordination among regulators and stakeholders, which could undermine enforcement efforts. Effective enforcement mechanisms, including the possibility of interlocutory injunctions with complainant anonymity, are crucial. The rise in class actions in the UK, contingent on adequate funding, may partly fill this potential enforcement gap. Finally, concerns were raised around the risk that engagement with online platforms during the DMCCA's code of conduct development could lead to regulatory capture.

How might companies react and adapt to regulatory changes such as the DMA and DMCCA?

Taking Amazon as an example, its marketplace has been designated as a core platform service under the DMA, which requires it to abide by specific conduct requirements regarding ranking and data usage. However, the DMA's effectiveness and the interpretation of 'preferencing' are still uncertain, with the European Commission evaluating ranking criteria on a case-by-case basis to detect alleged algorithmic bias.

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SESSION 6

PERCEPTIONS AND REALITY

Dynamic markets and social goals – can markets and competition policy deliver?

Moderator Alec Burnside, Dechert – also a panellist

Panellists Phil Evans, Competition Law Forum

Isabelle Le Personnic, JDE Peet's

Julian Nowag, Lund University

Session Focus

The session delved into the potential of competition law and policy to address sustainability and wider societal concerns.

Session Summary

Can competition law and policy be effectively utilised to address issues related to sustainability and broader societal considerations?

One perspective put forward is that competition law has the potential to make a significant contribution towards societal goals. It could extend its traditional focus, which in the last few decades has predominantly been on price and consumer welfare, to include a wider array of issues such as privacy, environmental sustainability and the impact on gender, race and income equality. This broader approach, however, introduces complexities in terms of accurately quantifying and balancing these factors and determining the right stage at which these factors should be considered, for example within the market definition and the formulation of appropriate compliance guardrails.

At the same time, there was some scepticism about the suitability of using competition law as a tool to protect wider interests. In particular, concerns were raised that environmental or societal objectives might be used as a front for cartel-type restrictions. In this context, it was suggested that companies that seek exemptions from competition law to advance environmental objectives ought to be considered with caution.

Despite the current cost-of-living crisis, which underlines the significance of price for consumers, companies now recognise that price is no longer the only consideration for consumers. This is particularly true for the younger demographic, who may assign greater importance to sustainability when making their purchasing decisions. As a result, sustainability has emerged as a key differentiator for brands, with various stakeholders – including consumers, employees, suppliers and retailers – increasingly expecting companies to integrate sustainability as a central element of their business operations.

Does competition law obstruct the path towards sustainability initiatives? What actions have competition authorities taken to tackle this issue thus far?

Central to this discussion is the question of whether co-operation among companies should be allowed under certain conditions to achieve sustainability objectives. For example, companies might find it necessary to engage in co-operative ventures to establish essential infrastructure (e.g. for recycling), particularly in cases where substantial investment is required and no public infrastructure is provided.

In response to these types of co-operative efforts, the European Commission has introduced a specific chapter on sustainability agreements in its new Horizontal Guidelines.¹⁴ Similarly, the CMA and other national agencies have issued guidance on Green Agreements.¹⁵ These initiatives represent significant progress in clarifying how companies can work together on environmental sustainability without violating competition laws and offer a valuable framework for assessing such collaborations. Nonetheless, there is a concern that this guidance may not offer sufficient comfort to businesses. The authorities have invited companies to approach them for guidance but the level of take-up has been disappointing to date.

Globally, competition authorities are taking diverse approaches to this issue. The European Commission appears to be open but cautious, deliberating the role of efficiencies, while the CMA seems more open to a broader interpretation. However, this dialogue on sustainability has not been embraced universally, as evidenced by the lack of engagement from the Department of Justice and the Federal Trade Commission in the United States, which reflects political tensions within the US, in particular opposition from Republican quarters that are protective of the local fossil fuel industries.

It is open to debate whether businesses asserting their attachment to sustainability, but not taking advantage of the invitations to come forward for guidance, are revealed as engaging in green-washing. Overall there are many elements in the mix: uncertainty in the guidance that has been issued, inconsistency between the USA and other leading jurisdictions and the sincerity of businesses' attachment to sustainability.

A considerable challenge for European regulators is to devise a framework that promotes "sustainable competitiveness". Such a framework would empower European companies with international operations to compete effectively on the global stage while not losing sight of environmental objectives and, at the same time, would incentivise global companies with a European presence to maintain their operations within Europe. It is possible that many of these issues would be more effectively addressed through targeted legislation rather than the use of competition law.

How can the existing competition law guidance be made operational?

To make the current guidance operational, companies are encouraged to involve their in-house legal departments with the work of colleagues responsible for Corporate Social Responsibility (CSR). Any collaborative agreements that are related to sustainability should be drafted so as to be as non-restrictive as possible and should be subject to legal review to ensure compliance with competition law.

The views expressed in this panel discussion do not necessarily represent the official position of any panellist's organisation. The summary offers a synthesis of comments from various speakers and cannot be attributed to a single speaker.

¹⁴ https://competition-policy.ec.europa.eu/document/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en

¹⁵ <https://www.gov.uk/government/publications/guidance-on-environmental-sustainability-agreements>

BIOGRAPHIES In programme order

Ariel Ezrachi

Oxford University

Ariel is the Slaughter and May Professor of Competition Law at the University of Oxford and the Director of the University of Oxford Centre for Competition Law and Policy. He is the co-editor-in-chief of the *Journal of Antitrust Enforcement* (OUP) and the author, co-author and editor of numerous books, including, *How Big Tech Barons Smash Innovation* (2022 Harper Collins), *Competition Overdose* (2020 Harper Collins), *Virtual Competition* (2016 Harvard) and *EU Competition Law, An Analytical Guide to the Leading Cases* (8th ed, 2024, Hart). Ariel's research and commentary have been featured in *The Economist*, *The New Yorker*, *Wall Street Journal*, *Financial Times*, *The Guardian*, *Nikkei*, *New Scientist*, *Politico*, *WIRED*, *BBC*, and other international outlets.

Michael Grenfell

Competition lawyer. Former Executive Director of Enforcement, CMA. Now with Clifford Chance

Michael is a competition and regulatory lawyer who will be joining the international law firm Clifford Chance as a Partner in the global antitrust group, with effect from mid-August.

This follows ten years (2014-24) as a senior official at the Competition and Markets Authority, the UK's principal competition and consumer agency, where he was Executive Director of Enforcement, with overall responsibility for the enforcement of competition and consumer protection laws, and a member of the CMA Board. Prior to that, for 15 years he was a Partner in the law firm Norton Rose Fulbright.

He is the co-author of *Coleman and Grenfell on the Competition Act* (Oxford University Press), as well as of numerous articles on competition and regulatory matters. He is a frequent public speaker, and a commentator on TV and radio, on competition issues.

He also sits as an Independent Member (non-executive) of a decision-making committee of the Office for Students (the regulator for higher education).

He has an MA (Hons) in history and law from Cambridge University, and a PhD in political thought from the London School of Economics.

Meltem Bağış Akkaya

Turkish Competition Authority

Meltem is currently the Chief Competition Expert at the Turkish Competition Authority. She has been working for the Authority for 26 years and worked as the Head of International Relations and Strategic Planning Departments in 2020-21. She has a broad experience in handling merger & acquisition, cartel and abuse of dominance cases in a wide range of sectors ranging from retail, energy to digital platforms.

Meltem worked as an Economy Editor in the Turkish Daily News before joining the Authority. After graduating from Ankara University Faculty of Political Sciences, she received a master's degree on European Union Law from the University of Essex with distinction. Simultaneously with her work at the Authority, since 2012, she has been a member of Scientific Committee of Turin School of Regulation (Italy) and a Visiting Professor of regulation and competition at the same School. Since 2020, she has been a Visiting Professor of digital economy at Atilim University, Ankara (Turkey).

Meltem has other roles as editors of a number of prestigious journals (*Journal of Antitrust Enforcement*, *Mediterranean Bulletin*, *Competition Bulletin*). She has been giving seminars in various international

universities on digital economy in the last 10 years and has an extensive knowledge on competition, regulation and platform economy.

Dr Reto Batzel

MARCK

Reto is a partner and co-founder of MARCK, a boutique law firm based in Duesseldorf that specializes in competition law. Reto advises clients in German and European competition law and merger control law. Before founding MARCK in 2020, Reto worked inhouse at METRO AG, the international German grocery wholesaler, serving as head of the company's antitrust department as of 2017. Reto began his career in 2010 at Cleary Gottlieb Steen & Hamilton LLP in Cologne. Reto is a member of, among others, the Association of German Antitrust Lawyers (*Studienvereinigung Kartellrecht*), the American Bar Association (Antitrust Section) and the German Institute for Compliance (*Deutsches Institut für Compliance - DICO*), where he serves as head of the competition law working group.

Carole Dembour

Fevia

Carole is responsible for collecting economic data, analysing the latest economic trends and developments, as well as writing and supervising impact studies relevant to the food industry in Belgium.

This economic data, analysis and studies allow Fevia to engage on issues and positions that concern the Belgian food industry and strengthen the competitiveness of the sector. Carole works in close collaboration with the different departments of Fevia, the regional wings, the sectoral federations and other (inter-professional) employers' organisations.

Carole also co-ordinates the food chain relations within Fevia and is member of the Food Chain Concertation where farmers, food producers and retailers discuss common issues.

Matthew Johnson

OXERA

Matthew specialises in competition economics. His areas of expertise include merger analysis, abuse of dominance, and the effects of vertical and horizontal agreements between firms. He has provided analysis for clients involved in litigation, as well as those facing investigations by competition authorities in a number of jurisdictions.

Before joining Oxera, Matthew worked as an economic adviser at the UK Office of Fair Trading (OFT), now part of the Competition and Markets Authority (CMA), and at the European Commission. He has over 20 years' experience as a professional economist, and has been appointed economic expert in the context of UK High Court litigation proceedings. He has also advised on market investigations in a range of industries.

Matthew has acted as a non-governmental adviser to the International Competition Network (ICN) Working Groups on Mergers and Unilateral Conduct. He is listed in The International Who's Who of Competition Lawyers and Economists. He also sits on the advisory board of the Competition Law Journal.

Lucy Eyre

Competition and Markets Authority

Lucy is a Director in the Markets team at the CMA, where she led their 2023 review into price rises and competition in groceries.

Prior to this, Lucy worked as an economist in Ofcom and in several economic consultancies, specialising in regulation and competition issues.

Rona Bar-Isaac

Addleshaw Goddard

Rona is a Partner and Co-Head of Addleshaw Goddard's Retail & Consumer Sector Group who specialises in UK and EC competition and merger control law. She advises UK and international clients on the wide range of competition law matters, including of anti-trust litigation. She is recognised as a leading practitioner in her area and was acclaimed as one of the Lawyer's "Hot 100" for her contributions.

Her clients span a variety of sectors, including comprehensive experience of advising in the retail and consumer sector for over 25 years. She advises both multi-national FMCG businesses and major retailers.

Felix Engelsing

Bundeskartellamt

Felix is chairman of the 4th decision division of the Bundeskartellamt, which is responsible for the automotive, military, agriculture, food and retail trade sector. The division also deals with sustainability initiatives and patents/licenses.

Prior to that he headed the 2nd decision division responsible for e-commerce, food and retail trade where he led unilateral conduct proceedings against Amazon. Before, he was chairman of the 8th decision division (fuels, oil, electricity, gas, water) and the 10th decision division (abuse proceedings in the energy sector).

Since starting his career in the Bundeskartellamt Felix Engelsing was head of the German and European Antitrust Unit as well as the International Unit where he co-chaired the ICN Unilateral Conduct Working Group. He also worked for the legal department where he litigated cases before the Federal Supreme Court. Felix Engelsing worked for an international law firm in Brussels and for the German Association of Municipalities in Bonn/Brussels. He studied law at the University of Münster, worked as research assistant and received his Ph.D. at the University of Bonn.

Dave Foster

Frontier Economics

Dave is a Director in the competition practice, and has worked with Frontier Economics since 2005, dividing his time between its London and Brussels offices.

He regularly advises clients on competition issues in front of the European Commission, as well as handling merger, antitrust and competition litigation cases in front of national regulatory authorities and courts. He has particular expertise in Telecoms, Media and Technology, in FMCG and retail, and in public markets and the healthcare sector.

He is listed as Thought Leader in Who's Who Legal for competition economics, and has published in the Competition Law Journal. He sits on the Editorial Board of the LexisPSL Competition publication, for which he has authored a number of articles on the application of EU Competition Law.

Sue Hinchliffe

Clifford Chance

Sue specialises in EU and UK competition law across a wide range of industry sectors. She has 30 years' of experience working with clients to obtain antitrust clearances for complex global transactions as well as advising on antitrust investigations and litigation matters worldwide.

Prior to joining Clifford Chance, Sue worked at General Electric Company where she held the role of Global Executive Counsel, Competition Law & Policy, and oversaw a number of significant merger control matters and conduct investigations for the company globally.

Christoph Leibenath

AIM

Christoph is Senior Antitrust Counsel of Nestlé SA, Vevey, Switzerland. He advises Nestlé divisions globally on all antitrust issues, including mergers and acquisitions, antitrust investigations / litigation, trade relations and distribution agreements, license agreements as well as general compliance work. Christoph chairs the Legal Committee of AIM. Before joining Nestlé, Christoph worked in an international law firm in antitrust law in Brussels, Cologne and London. He holds a postgraduate degree in European Law from the University of Aix-en-Provence (Diplôme d'Etudes Approfondies) and has received his doctorate in the field of EU merger control at the University of Göttingen. Christoph is a German *Rechtsanwalt* admitted to the Cologne Bar.

George Tucker

RBB Economics

George is a Principal based in the London office. He has advised clients on a wide range of issues in litigation and competition authority investigations, including restrictive practices, abuse of dominance and merger control.

His experience spans numerous individual jurisdictions, including the EU, UK, Australia, South Africa and Brazil and across a variety of industrial, consumer, digital, transport and utilities markets.

Before joining RBB in 2015, George worked in the Chief Economist Team of the European Commission's DG Competition. He has a Master's in Industrial Economics and a degree in Economics from the University of East Anglia.

Nitika Bagaria

Keystone

Nitika is a Senior Principal in Keystone's London office. She has advised clients on merger control, cartel litigation and antitrust investigations. Since joining Keystone, she has advised on gaming and telecom mergers, a market investigation and litigation in digital advertising.

Prior to joining Keystone, she completed a secondment at the CMA where she led a Phase 2 merger. Previously, she has advised clients on matters before the European Commission, the CMA as well as other national competition authorities across the EMEA region. Her experience covers a wide range of industries including digital advertising, cloud technology, financial services, retail, aviation, telecommunications and media. She has a PhD in Economics from London School of Economics and MA in Economics from Columbia University. She has published in the Competition Policy International, Economic Journal and has taught postgraduate Econometrics at London Business School.

Timothy Cowen

Preiskel & Co

Tim is Chair of the Antitrust Practice at Preiskel & Co and is independently recognised as one of the leading competition/regulatory lawyers in the EU. He leads the competition law team at Preiskel & Co where his practice covers a full range of competition law and regulatory matters arising across the Tech, Media and Telecoms sector. Tim led BT's competition law and public policy team for many years, advocating liberalisation of the EU market and the system of law that promotes competition among telecommunication and technology companies. From a deep understanding of the reasons for the law, he now spends about half of his time on policy and the reasons either for reform or reinforcement of the system.

He was a member of Competition Appeal Tribunal for five years and former partner at Sidley Austin LLP the leading US firm. He was awarded the title of 'Distinguished Visiting Fellow' at the European Business School in

London and has lectured as a visiting professor at the City of London Law School and at Imperial and Queen Mary Colleges in London. He is a Barrister and holds an MA (Cantab) in law.

Oles Andriychuk

Newcastle University (now with Exeter University)

Oles specialises in competition law and digital markets and in the constitutional aspects of competition policy. He is engaged in several projects aiming to understand, conceptualise, inform and steer the ongoing regulatory reforms of competition in the digital economy in the UK, EU and some EU Member States. He also contributes to reforming the competition law and policy of Ukraine.

He is the Principal Investigator for the UK in a German Research Foundation funded 3-year study examining the effectiveness of the EU's Digital Markets Act, UK Digital Markets, Competition and Consumers Bill and (with Prof. Rupprecht Podszun) the amended German Competition Act.

Oles founded and directs the Digital Markets Research Hub, a professional YouTube channel with over 500 subscribers offering weekly in-depth discussions, webinars, panels and interviews with the leading authorities in the area of competition law and digital markets.

Max von Thun

Open Markets Institute

Max is the Director of Europe & Transatlantic Partnerships at the Open Markets Institute. He leads Open Markets' research and advocacy in Europe, alongside efforts to bring about greater alignment in transatlantic competition policy and enforcement. His work touches on a range of antitrust and competition issues in Europe, with a particular focus on technology and new legislative frameworks targeting Big Tech's market power. Prior to joining Open Markets, Max advised UK Parliamentarians on economic policy, led the research program at think-tank the Centre for Entrepreneurs and worked as a consultant on EU and UK technology and competition policy.

Alec Burnside

Dechert

Alec is Senior Counsel in the law firm Dechert LLP. He practices in the field of EU and UK competition law, working equally on cartels, dominance, mergers and state aid. Alec has been described by Chambers Global as "one of the icons of the competition bar", recognised for his "strong analytical skills and intellectual curiosity". Alongside his client practice Alec has written and commented extensively on developments in the law, as an advocate for reform in both substantive law and in procedures.

Alec's practice, in Brussels and London, has straddled many areas of the economy, with an increasing focus on all things digital.

Phil Evans

Competition Law Forum

Phil is Co-Director of the Competition Law Forum, Class Representative in the FX Class Action and Special Advisor for competition, consumer and trade policies at FIPRA. Phil has been an Inquiry Chair and Panel Member at the Competition and Markets Authority, Principal Policy advisor for economic issues at the UK Consumers' Association and an Editor at the Economist Intelligence Unit.

Isabelle Coste-le Personnic

JDE Peet's

Isabelle is Legal & Corporate Affairs Director for Europe at JDE Peet's, the world's leading pure-play coffee and tea company, based in The Netherlands. In her current role, she oversees all legal, compliance and corporate affairs matters in Europe and sits in the European Executive Committee, as well as in the Global Legal, Compliance and Corporate Affairs Leadership team. She joined from Danone where she served in the legal function in both France (M&A team) and The Netherlands. In her previous role as General Counsel, Chief Compliance Officer and Head of Regulatory Affairs for Danone Benelux, she led a diverse team of lawyers and regulatory experts and served on the local executive committee. She created and led the Danone EU general counsel's network and Danone EU compliance officers' network.

Earlier in her career, Isabelle was in private practice at Sullivan & Cromwell, Shearman & Sterling and Cleary, Gottlieb, Steen & Hamilton in Paris.

Isabelle earned her LL.B in English and French Law at King's College London, her *Maîtrise* and *license* in Law at Université Paris I, and her *Master 2 Recherche* on Business Law at Université Paris I. She qualified as an *avocat* in France.

Julian Nowag

Lund University

Julian is associate professor at Lund University specializing in competition law and a leading scholar in the area of sustainability and competition and also working on the intersection between AI and competition. As an associate at the Oxford Centre for Competition Law and Policy he is managing editor of *The Journal for Antitrust Enforcement*. His books include *Environmental Integration in Competition and Free-Movement Laws* (OUP 2016), *Global Antitrust and Sustainability: law, economics, enforcement* (OUP forthcoming summer 2024), and *Research Handbook on Sustainability and Competition Law* (ed., Edward Elgar forthcoming summer 2024). His paper *Algorithmic Predation and Exclusion* with Thomas Cheng received the Concurrences Prize for the Best Academic Paper Antitrust, Category Unilateral Conduct 2023. Julian is a qualified lawyer in Germany. His professional training focused on competition law with placements at the German Competition Authority's international co-operation unit, the European Commission (DG Comp, cartels unit) and Allen & Overy's German Antitrust unit in Hamburg.

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