

A NEW CROSS-SECTOR COMPETITION TOOL AND SECTOR SPECIFIC REGULATIONS ARE NECESSARY TO DEAL WITH ONLINE AND OFFLINE COMPETITIVE BOTTLENECKS

This note jointly addresses the questions posed by the European Commission in its consultation on the New Competition Tool (“NCT”) and the Gatekeeper Online Platforms (“GOP”)¹.

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1 The economic theory of competitive bottlenecks: from Mark Armstrong to DG COMP and OECD

Mark Armstrong developed the model of “competitive bottlenecks” in his seminal paper on two-sided platforms (i.e., operators serving two groups of users - group-1 and group-2). In the competitive bottleneck model, whereas group-1 agents join all platforms (“multi-home”), group-2 agents only join one platform (“single-home”). Multi-homing agents can only reach single-homing agents through a given platform, which therefore becomes a competitive bottleneck and can overcharge/exploit multi-homing agents whilst passing on the benefit to a greater or lesser extent to the single-homing customers².

¹ The author regularly advises suppliers active in the FMCG sector and their associations. However, the opinions expressed in this contribution are the author’s own and do not reflect the views of his clients. This contribution draws inspiration from previous works and presentations to public authorities on this topic, most notably, “Supermarket Power”, OECD Food Chain Analysis Network, 2013; “Supermarket Power: Serving Consumers or Harming Competition”, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401723; “Supermarkets and Competitive Bottlenecks: Competition and Regulatory Issues”, UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Fifteenth Session, 2016; “Supermarket Platforms”, Presentation to the Expert Sub-Group on private labels of the European Commission’s High Level Forum on Food Supply Chain, 23.11.2017.

² Mark Armstrong, “Competition in two-sided markets”, The RAND Journal of Economics, 37(3), 2006, (the first version of the article was distributed as early as 2002), pp. 669-670: “Here, if it wishes to interact with an agent on the single-homing side, the multi-homing side has no choice but to deal with that agent’s chosen platform. Thus, platforms have monopoly power over providing access to their single-homing customers for the multi-homing side. This monopoly power naturally leads to high prices being charged to the multi-homing side, and there will be too few agents on this side being served from a social point of view (Proposition 4). By contrast, platforms do have to compete for the single-homing

Armstrong identified the mobile telephony market as a competitive bottleneck, where competition to attract subscribers (via subscription and outbound call fees) coexisted with lack of competition in the termination of calls from subscribers of a competitor (via termination fees)³. Furthermore, he identified other competitive bottlenecks⁴ and developed two stylized models for advertising on media platforms and supermarkets. In the supermarket model, whereas the prices paid to suppliers were always too low, the prices charged to shoppers depended on the retail market power enjoyed by the supermarket, and the overall effect was socially undesirable (i.e., the harm to suppliers exceeded any benefit that shoppers could gain)⁵.

DG COMP relied on the competitive bottleneck theory in the assessment of the merger between two Global Distribution Systems (GDS)⁶ and it was discussed in an article published by an official of the DG COMP's Chief Economist Team in the Commission's Competition Policy Newsletter⁷. The article admitted that competition

agents, and high profits generated from the multi-homing side are to a large extent passed on to the single-homing side in the form of low prices (or even zero prices)."

³ Armstrong 2006, p. 678: "*The tariffs that mobile networks set in equilibrium have low charges for subscription and outbound calls and high charges for call termination. In particular, the models predict that high profits made from call termination are passed on to subscribers in the form of subsidized handsets or similar inducements. More precisely, the equilibrium call-termination charge is chosen to maximize the welfare of mobile subscribers and mobile networks combined, and the interests of those who call mobile networks are ignored. This feature—that the single-homing side is treated well and the multi-homing side's interests are ignored in equilibrium—is a characteristic of the models presented below. A competitive bottleneck is present: even if the market for subscribers is highly competitive so that mobile networks have low equilibrium profits overall, there is no competition for providing communication services to these subscribers.*"

⁴ *Id.*, p. 678: "*Other examples of this competitive bottleneck framework include: most people might read a single newspaper (perhaps due to time constraints), but advertisers might place ads in all relevant newspapers; consumers might choose to visit a single shopping mall (perhaps because of transport costs), but the same retailer might choose to open a branch in several malls; consumers might visit a single supermarket, but suppliers might wish to place their products on the shelves of several supermarkets; or a travel agent might use just one computerized airline reservation system, while airlines are forced to deal with all such platforms in order to gain access to each travel agent's customers.*"

⁵ *Id.*, p. 685: "*As with all the competitive bottleneck models, in equilibrium the joint surplus of the platforms and the single-homing group is maximized (supermarkets and consumers in this case, as given in expression (36)), and the interests of the multi-homing side (the suppliers) are ignored. The low level of compensation in (36) will exclude some relatively high-cost suppliers whose presence in the supermarkets is nevertheless efficient. (A supplier should supply if $a_2 < a_1 - c$, whereas the equilibrium price p_2 in expression (36) is strictly lower than $a_1 - c$ and supply is inefficiently restricted.) In other words, payments to suppliers are too low from a social point of view and there are too few products on the shelves. How well consumers are treated depends on competitive conditions on their side.*"

⁶ Commission Decision of 21.08.2007, Case COMP/M.4523-Travelport/Worldspan. This transaction was cleared after a 'Phase II' investigation. Both merging parties provide travel distribution services, in particular through their respective 'Global Distribution Systems' (GDS) Worldspan and Galileo (Travelport's brand). These technical platforms match travel content provided by airlines, hotel chains, car rental services, etc. on one side, and the demand for such content as conveyed by travel agents on the other side. The Commission considered that the two-sided GDS market contains a number of elements characteristic of the competitive bottleneck model: (1) The multi-homing (travel content providers) / single-homing (travel agents) configuration; (2) a limited degree of product differentiation; (3) asymmetries in indirect network effects, with indirect network externalities generated mainly if not exclusively on the travel agent side; and (4) a distribution of prices skewed towards the travel content side.

⁷ Stefano Vannini, "*Bargaining and two-sided markets: the case of Global Distribution Systems (GDS) in Travelport's acquisition Worldspan*", EU Competition Policy Newsletter, 2-2008. The author clarifies that the content of the article does not necessarily reflect the official position of the European Commission.

analysis should take into account two-sidedness if indirect network externalities are significant, otherwise, a one-side analysis of each side of the platform may be sufficient⁸.

The article elaborated on the concept of “indirect network effects” and listed a few two-sided markets, among which supermarkets⁹. Then, it addressed subscription patterns and incentives¹⁰ and focused on competitive bottlenecks¹¹. Finally, the article implied that competition law should intervene to correct the competition problems caused by competitive bottlenecks unless the multi-homing side enjoyed sufficient countervailing power¹². This was the case in the *Travelport/Worldspan* merger, where the countervailing power of multi-homing travel content providers vis-à-vis GDS platforms led the Commission to conclude that the merger would not restrict competition despite the single-homing pattern of travel agents dealing with GDS platforms¹³. Interestingly,

⁸ *Id.*, p. 43: “As emphasised in a series of recent articles, the two- (or multi-)sided nature of a market should explicitly be considered in evaluating the existence and magnitude of possible anti-competitive effects. However, the relevance of the two-sided nature of markets depends on at least two elements: (i) indirect network externalities and (ii) pattern of subscription (‘homing’) to the platform. Under specific circumstances, in particular when indirect network effects are negligible, the standard ‘one-sided’ analysis of each side of the platform in isolation provides a simpler analytical framework and a reliable proxy.”

⁹ *Id.*, p. 43: “Indirect network externalities (or cross-group externalities) arise when the value of a platform for users on one side is affected by the size of the users’ network on the other side. The willingness of customers on one side of the platform to pay in order to subscribe to a specific platform’s provider then depends on the size of the network of users covered by that same provider on the other side of the platform. For example, (i) the number of readers of a newspaper or magazine (or the audience of a TV broadcast) tends to attract advertisers, (ii) the number of customers of a supermarket chain (or shopping mall) tends to attract suppliers of products to be sold there, (iii) the number of holders of a given credit card increases the incentive for shops to accept the card.”

¹⁰ *Id.*, p. 43: “As a general rule, multi-homing on one side of the market (say A) decreases incentives for multi-homing on the other side (say B). Assuming for a moment that users of group A choose full multi-homing, they are accessible by users of group B no matter what platform provider these users adopt. The marginal value, in terms of network externalities, for B users of subscribing to an additional provider is then limited or non-existent. Therefore, the incentive to multi-home on side B of the platform is correspondingly limited or non-existent. Reversing this reasoning, if single-homing is prevalent among B users, this represents an incentive for A users to multi-home, because network externalities would be positive and significant.”

¹¹ *Id.*, pp. 43-44: “In other words, multi-homing prevailing on one side of the platform and single-homing on the other corresponds to a situation where indirect network effects are asymmetric and mostly arise on the single-homing side. This is the situation identified in economic literature as ‘competitive bottlenecks’, which, in its most stylised version, boils down to full multi-homing on one side and single-homing with no exceptions on the other. In this case, as soon as platform providers manage to get enough of both sides on board, they will be able to ‘tip’ the market in a way to allow them to extract rents from multi-homing A users. In this way, a platform provider can subsidise single-homing B users willing to join its platform, for whom providers have to compete fiercely. Single-homing on side B supports rent extraction on side A because providers appear to A users as gate-keepers to a number of B users.”

¹² *Id.*, p. 44: “Last but not least, customers on the multi-homing side A, for whom the platform’s provider represents a gatekeeper to single-homing customers on side B, may have some countervailing bargaining power. For instance, they can divert some of their traffic and circumvent the platform, thereby decreasing the total rent available for extraction by the platform provider. While remaining able to extract the same rent in relative terms, as compared to the total rent available, the platform provider will still see its rent decrease in absolute terms because of the diversion. Faced with this possibility, the platform provider may well decide to make concessions to multi-homing customers in order to limit diversion (and the related erosion of the total rent available for extraction)”.

¹³ *Id.*, p. 50: “In situations where a ‘competitive bottleneck’ is identified, it has to be considered whether platform users have any countervailing bargaining power. If that is the case, the theoretical result of the ‘competitive bottleneck’ theory, stating that the platform provider can extract all rents to the

the merger decision did not make a single reference to the regulatory framework that prevented GDS abuses (Regulation 2299/89, replaced by Regulation 80/2009).

It is worth noting that DG COMP linked the following elements to competitive bottlenecks:

“(79) The two-sided GDS market contains a number of elements which are characteristic of multi-homing /single homing situations as described in economic literature. These elements are (i) a limited degree of product differentiation, (ii) asymmetries in network effects (network externalities are generated mainly on the TA [Travel Agent] side and GDS providers have to create demand on that side in order to have demand on the TSP [Transport Service Provider] side) and (iii) a distribution of prices and revenues skewed towards one side of the platform (GDS providers obtain profit only on the TSP side of the market and partially use this profit to offset net losses on the TA side).”¹⁴

The OECD Roundtable on two-sided markets provided the European Commission and other competition authorities, a fresh opportunity to develop their standpoint on two-sided markets. In its contribution, the European Commission downplayed its practical experience in this field¹⁵ and focused again on competitive bottlenecks. It argued that platforms would exploit their “monopoly power” over the multi-homing side¹⁶ provided

detriment of multi-homing users, has to be adjusted. Travelport’s acquisition of Worldspan provides an interesting example in this regard, as it features (i) preliminary indications of possible unilateral effects on the basis of high market shares in a number of markets, (ii) a pattern of subscription to the platform broadly corresponding to the competitive bottleneck scenario and (iii) a dynamic aspect consisting of users on the multi-homing side developing bargaining tools to counteract the rent extraction predicted by theory in that scenario.”

¹⁴ Commission Decision of 21/08/2007, Case No COMP/M.4523- Travelport/Worldspan.

¹⁵ OECD 2009b, Note by the European Commission, pars. 9-11. See, in particular, par. 9: “*At the outset, it is necessary to point out that the EU Commission, possibly like other competition authorities, has not yet acquired any significant experience on the assessment of competition cases involving two-sided platforms. As a result this OECD Roundtable contribution, unlike past contributions in other topics, does not provide a summary of the EU Commission’s case practice regarding the competitive assessment of two-sided platforms. (...)*”. See also par. 10: “*Thus it is still early for a competition authority to adopt any definite views, let alone concrete policies or assessment methodologies, concerning the application of competition policy in cases involving two-sided platforms. Hence, the views and comments put forward in this paper are intended to add to the on-going debate and cannot be read as providing guidance on the EU Commission’s past or future assessment of competition cases involving two-sided platforms*”. One is bound to disagree with the Commission on this point. Competition authorities have dealt for a long time with two-sided markets and competitive bottlenecks even if under conventional one-sided methodologies.

¹⁶ *Id.*, Note by the European Commission, par. 33: “*As explained by Rysman (2007) the presence of multi-homing on one side of competing platforms influences the degree of competition. Whether agents at both sides of a platform participate in multiple platforms or just one has important implications for market power. If one side of a market practices single-homing, then the only way for the other side to reach those agents is through their preferred platform. Thus, platforms have monopoly power over providing access to their single-homing customers for the multi-homing side. This monopoly power naturally leads to high prices being charged to the multi-homing side and typically there will be too few agents on this side being served from a social welfare point of view.*” Theoretically, the exploitation of the multi-homing side occurs whether the multi-homing/single-homing outcome is assumed (see Armstrong 2006) or endogenously created (Note by the Delegation of the European Commission, par. 40: “*In particular, Gabszewicz and Wauthy (2004) assume agents are heterogeneous and allow for an endogenous participation in each side of the market (i.e. registering to no platform is allowed, and is observed in equilibrium). However only registration fees are allowed in this model implying that it is best viewed as representing a situation where the agents in one side of the market have access to a set of transactions whose size is endogenously determined by the number of affiliated agents in the other side. In this model, one side multi-homes, whereas the other one single-homes. This equilibrium has similar features as identified by Armstrong (2004) with the multi-homing side being “exploited” and the other being targeted “aggressively”. A key-difference is that Armstrong assumes the homing structure (single-*

three conditions are met¹⁷, and dealt with its practical implications from a competition law perspective¹⁸. Finally, the note relied again on Mark Armstrong's model to argue that even in a highly competitive inter-platform market, the bottleneck single-home/multi-home model may lead to socially inefficient outcomes (exclusion of multi-homing agents) and, therefore, some sort of regulation may be pertinent¹⁹.

To sum up, the common features of competitive bottlenecks are the following:

- They facilitate interactions between distinct groups of users that value each other (indirect network externalities, sometimes negative, e.g., advertising).
- Price structure matters: the most valuable user group (end-consumer) is treated favourably to promote a single-homing trend (exclusivity) whilst the multi-homing business user group is exploited/mistreated.
- The pricing structure may lead to socially inefficient exploitation/exclusion on the side of the multi-homing user group whilst end-users (consumers) are being offered attractive prices at least under a short-term static analysis.
- Platform competition may produce a counterintuitive effect: it may increase platforms' upward vertical integration incentives, the exploitation/exclusion of the business user group and the socially inefficient outcome.
- Competitive bottlenecks normally fall outside the competition law radar except when dominance can be established following a restrictive approach to market definition (e.g., Amazon and e-commerce, Google and general searches, Apple and Apple store).

homing on one side, multi-homing in the other) whereas in Gabszewicz and Wauthy (2004) the unique equilibrium outcome emerges endogenously."

¹⁷ *Id.*, Note by the European Commission, par. 35: "Vannini (2008) recalls that this extreme homing configuration (and related rent distribution pattern) is based on a series of assumptions: (i) that there is no differentiation among different platform providers, (ii) that customer preferences on the same side of the platform are sufficiently homogeneous and (iii) that customers on the multi-homing side have no bargaining power allowing them to limit rent extraction by the platform provider. Under these assumptions theoretical models such as Armstrong's (2006) predict intense competition between platforms on the single-homing side of the market and almost non-existent competition on the multi-homing side". Indeed, the first two conditions relate to the multihoming/singlehoming configuration, therefore only the third one (countervailing power on the multihoming side) is relevant once the multihoming/singlehoming configuration has been ascertained."

¹⁸ *Id.*, Note by the European Commission, Sections 3 (Assessment of competition cases involving two-sided platforms) and 4 (Significance of two-sided platforms in selected merger cases).

¹⁹ *Id.*, Note by the European Commission, pars. 57: "Armstrong points out that even if the platforms do not make excessive profits overall, the multi-homing side faces too high a charge from the point of view of social welfare. Bolt and Tieman (2006) in a comparatively simple two-sided platform model, obtain a similar result. They show that in the social optimum, platform pricing leads to an inherent cost recovery problem... It follows that even adequate competition policy enforcement alone may not always lead to best outcomes. This suggests, at least in some instances regulation may be pertinent."

2 Regulation of competitive bottlenecks is an old phenomenon in the EU

Economists have long argued that customer lock-in (single-homing) and switching costs facilitate inefficient pricing structures and exploitation of business agents in a growing number of markets²⁰.

Indeed, several two-sided markets have been subject to extensive regulatory remedies. A representative list of sectors includes the following: (1) Computer Reservation Systems (CRSs), now known as Global Distribution Systems (GDSs); (2) Mobile Communications Networks (mobile call termination and mobile virtual network operators); (3) Internet Service Providers (Net Neutrality); (4) Internet Search Engines; (5) Internet Domain Name Registration (separation of registry and registrar operations); (6) Media Platforms (fair treatment of advertisers); (7) Card Payment Networks (Regulation 2015/751, fair dealing of merchants, separation of scheme and infrastructure and non-discrimination obligation), (8) Fintech (Directive 2015/2366, FRAND access of payment service providers to payment systems and credit institutions), (9) financial indexes (Regulation 2016/1011 on conflict of interest rules and FRAND access to critical financial benchmarks and Directive 2014/65 on FRAND access, co-location and fees regarding markets in financial instruments)²¹.

²⁰ Armstrong and Wright, “*Mobile Call Termination*”, Working Paper, September 2007, p. 1: “There is an important, and perhaps growing, set of markets in which monopoly prices emerge even when competition is intense. That is to say, while industry profit is not excessive overall, there is an inefficient balance of prices: too high for some services, too low for others. Familiar examples involve consumer “lock-in” of various kinds, including markets with switching costs. In these markets the typical pattern of prices involves “bargains-then-ripoffs”, so that firms attract new consumers with generous deals up-front, consumers pay high (perhaps monopoly) prices once locked in. If competition is vigorous, the monopoly profits from locked-in consumers are transferred to new consumers, and the lifetime profitability of a consumer is approximately zero. In a sense, a new consumer’s “future self” is exploited by the “present self”. A related, but distinct, set of markets exhibit what might be termed “competitive bottlenecks”. Here, firms compete to attract one group of consumers. For natural technological or geographical reasons, each consumer in this group wishes to deal with just one firm. A second group of consumers wishes to interact with the first group and, because each consumer in the first group deals exclusively with one firm, that firm can charge the second group high prices (or pay low input prices) for access to its captive customers. If competition is vigorous, the monopoly profits generated by the first group are passed back to these consumers in the form of subsidised service. Here, the first group may be said to exploit the second group. Examples of this kind of market include: newspaper advertising (where most readers tend to read a single newspaper due to time constraints, and so a newspaper can charge high fees to advertisers for access to its captive readers) and supermarkets (where a consumer tends to visit just one shop over the relevant time horizon, and so the supermarket can pay low wholesale prices to its suppliers for access to these captive shoppers). At the end of the paper we will discuss another possible application of this approach, to the contentious issue of “net neutrality” on the internet. However, perhaps the leading example of a competitive bottleneck involves call termination on mobile telephone networks. Despite the distinction made between competitive bottlenecks and aftermarket, the evidence in competitive bottlenecks shows, at least in the retail grocery market, that the exploitation of a set of customers ultimately leads to the exploitation of the other set of customers, as both groups are interrelated.”

²¹ See, for a comprehensive analysis of the competitive bottleneck features of these sectors and the adopted regulatory remedies, Javier Berasategi, “*Supermarket Power: Serving Consumers or Harming Competition*”, 2014, Section 5.3.2.1 - The theory and practice on competitive bottlenecks and Annex 8.2 – Markets with competitive bottlenecks, and “*Supermarket Platforms*”, Presentation to the Expert Sub-Group on private labels of the European Commission’s High Level Forum on Food Supply Chain, 23.11.2017.

The CRS sector, perhaps the first competitive bottleneck regulated under EU law, reflects the EU's success in efficiently regulating competitive bottlenecks without undermining the competitiveness of the EU economy:

"The Code of Conduct for Computerised Reservation Systems ("the Code of Conduct") was first established in 1989 with the adoption of Regulation 2299/89. At that time, the vast majority of airline bookings were made through CRSs and most CRSs were owned and controlled by airlines. It was felt that, in order to deal with the competition concerns and consumer protection issues arising in the supply chain of air transport products, an ad hoc regulatory framework was needed, instead of solely relying on the generally applicable provisions of competition law.

The Code of Conduct recognised that computerised reservation systems required a certain degree of regulation in order to ensure that all airlines enjoy the same level of access to travel agents and consumers. Similarly, travel agents and consumers needed to be protected against competitive abuse or other harmful market practices (e.g. display bias). The Code was established with the aim of improving transparency and preventing discriminatory behaviour both by the system vendors themselves and also by airlines, especially parent carriers of CRSs. On the one hand, system vendors were required to deal in an even-handed manner with all carriers and travel agents, while, on the other, parent carriers of a CRS were required not to favour that system over the others. The Code also imposed obligations in terms of neutral display in order to avoid discriminatory treatment of airlines on the system's displays.

(...)

*The present proposal for a revision of the Code of Conduct does not entail per se a social dimension. Indeed, the Code of Conduct aims, in parallel and without prejudice to competition law, at market efficiency within the distribution chain for air transport products. It is meant to ensure that no undertaking in the chain is capable of capturing excess profits in the long run and/or of distorting competition to its own advantage and to the detriment of consumers."*²²

Nowadays, two of the three leading worldwide GDS are EU-based. This evidences that the regulatory intervention in the EU has not undermined the emergence of leading CRS/GDS in the EU.

3 Competitive bottlenecks often escape competition rules' dominance test

The different regulatory instruments dealing with competitive bottlenecks have expressly or impliedly admitted that competition law is unable/insufficient to deal with them. The gap lies with the conventional definition of (single) dominance under article 102 TFUE, which rarely applies to markets where competitive bottlenecks operate. As far as article 101 TFUE is concerned, competitive bottlenecks' practices (can) display a unilateral nature that rarely falls under the required concept of agreement or concerted practice.

Again, it is worth referring to the Commission's recent views on the regulation of CRS/GDS:

"Article 3 of the CRS Code of Conduct providing, among others, that CRSs shall not attach unfair and/or unjustified conditions to any contract with a participating carrier and shall not prevent the participating carrier from using another system may be considered going beyond Article 102 TFEU. Thus unlike Article 102 TFEU this provision applies regardless of whether the CRS holds a

²² COMMISSION STAFF WORKING DOCUMENT - Proposal for a regulation of the European Parliament and of the Council on a Code of Conduct for computerised reservation systems, SEC(2007) 1496, 15 November 2007

*dominant position or not. But this does not constitute an inconsistency with competition policy, since it is not uncommon that when necessary for achieving identified public policy objectives, regulatory measures may go beyond what could be considered justified under competition rules.*²³

The Regulation 2015/751 on interchange fees for card-based payment transactions went as far as to admit that “(t)he application of existing legislation by the Commission and national competition authorities has not been able to redress this situation”.

Indeed, markets where competitive bottlenecks operate tend to be concentrated (a handful of leading players) and exhibit a high degree of transparency and parallelism on the end-consumer side but single dominant positions rarely emerge because none of the leading competitive bottlenecks is deemed to be in a position to behave to an appreciable extent independently of its fellow-competitors. Indeed, even if one of them could exceptionally be qualified as a dominant operator, it is questionable whether some of its commercial practices would fall under the category of abuse. For example, the abusive character of self-preferencing is being challenged in the Google case (T-612/17 - Google and Alphabet v Commission) and the European Commission has for a long time held the view that an analogous practice in the CRS/GDS field is a contentious issue under competition rules:

“Given these circumstances, the 2007 impact assessment concluded that the risk of abuse of market power was higher than in other economic sectors and sole reliance on the general competition rules was not considered sufficient at that time. In addition, *some practices e.g. display bias were considered to be harmful to consumers but would not necessarily be captured by competition law.*”²⁴

Finally, several legal scholars have exposed the limitations of competition rules to deal with supermarkets’ competitive bottleneck role and this issue is discussed in the next section.

4 Supermarkets and Amazon: bottlenecks competing in the same sector

The dual role conflict of online platforms and the self-preferencing of their own offerings are at the core of the Commission’s antitrust investigation against Amazon (AT.40462 - Amazon Marketplace) and the regulatory initiative on online gatekeepers.

As far back as in 1989, the EU imposed FRAND remedies on CRS in order to preemptively address similar concerns in that sector. As explained above, several other sectors have also been regulated in order to deal with dual role conflicts and prevent self-preferencing and discrimination in broad terms.

However, opponents of the regulation of online gatekeepers have rightly pointed to one specific off-line sector where the leading players exhibit the same dual role conflict and openly favour their own brands over independent third-party brands in terms of access to and competition within their stores: supermarkets.

²³ COMMISSION STAFF WORKING DOCUMENT – EVALUATION of the Regulation 80/2009 of the European Parliament and the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems, SWD(2020) 9 final, 23.1.2020

²⁴ Idem.

This seemingly inconsistent/contradictory approach to supermarkets vis-à-vis online platforms has led the European Commission's Expert Group for the Observatory on the Online Platform Economy to try to differentiate the competitive role of supermarkets and online platforms:

*"In conclusion, although it is clear that differentiated treatment is not an isolated phenomenon of the online platform economy, the effects of differentiation on online platforms differ considerably from the context of supermarkets due to differences in business models, scale and issues relating to the use of data and algorithms for personalisation that are specific to the online environment. As a result, the fact that differentiated treatment has so far not led to competition concerns in the context of supermarkets does not mean that equivalent practices should be tolerated in the online platform economy."*²⁵

However, the theoretical reasoning that leads the Expert Group to this conclusion is flawed and evidences a lack of understanding of the real-life operation of supermarkets and the competitive impact of their practices²⁶.

First, the Expert Group overplays the scale of online platforms, their capacity to extend it and unlimited shelf-space. This point says nothing about the market power of online platforms and supermarkets. Amazon's worldwide turnover is smaller than WalMart's turnover and its turnover in the EU is significantly smaller than that of the main supermarket chains operating in the EU. Amazon's strengths have not so far allowed it

²⁵ Progress Report - Work stream on Differentiated treatment, Expert Group for the Observatory on the Online Platform Economy, 10.07.2020, <https://ec.europa.eu/digital-single-market/en/news/commission-expert-group-publishes-progress-reports-online-platform-economy>, pp. 8-9.

²⁶ This lack of understanding of the supermarket sector features even more prominently in the OECD Secretariat's background note to the OECD conference on "Line of business restrictions as a solution to competition concerns", 8.06.2020, <https://www.oecd.org/daf/competition/line-of-business-restrictions-as-a-solution-to-competition-concerns.htm>. The background note introduces the debate by arguing that non-discrimination obligations are rarely required by pointing to the supermarkets' practices ("6. Firstly, it should be said that LOBRs are rarely required. For example, they are unlikely to be necessary even if a vertically integrated firm favours or 'self-preferences' its own products, as when supermarkets promote or favour the sale of their own-brand products. The market power of the brands that these own-brand products compete with, combined with the lack of market power on the part of many supermarket chains, mean that these are unlikely to give rise to competition concerns.") but then suggests that the UK's Grocery Supply Code of Practice, a regulatory regime covering almost all UK supermarkets' in their dealings with their suppliers, may inspire a similar regime on the likes of Amazon ("86. In such cases, it is possible that even if Amazon were more efficient, and not interested in squeezing its downstream rivals' margins it might nevertheless create competitive distortions that hold-up investment by suppliers (see OECD, 2016b). While these concerns might not support an exclusionary abuse case, or a structural separation, it might nevertheless suggest that non-discrimination LOBRs, such as the codes of practice applied to dominant supermarkets, could have pro-competitive effects (see Box 5)". Box 5 of the background note describes the GSCOP, p. 22: "Box 5. Groceries Supplies Code of Practice (GSCOP)³⁹

Following a market investigation the CMA's predecessor, the Competition Commission, found that supermarkets with market power had exploited suppliers by engaging in conduct which damaged their investment incentives. For example, demanding retrospective rebates, delaying payment, and applying uncontracted deductions. In effect, these were examples of 'hold-up' problems that smaller suppliers were unable to resolve themselves due to the oligopsonistic market power of the supermarkets.

This led the Competition Commission to recommend that government create a Groceries Supply Code of Practice, which would restrict the ability of supermarkets to exploit suppliers. The code of practice was to be enforced by an independent adjudicator who could receive anonymised evidence (due to fear of reprisals by dominant supermarkets). The proposal was accepted by the government and the adjudicator was appointed in 2013. Actions have included investigations against Tesco for delayed payments, and limits on the use of forensic auditing. The adjudicator reports that the proportion of suppliers experiencing code-related issues has decreased from 79% in 2014 to 41% in 2019."

to play any meaningful role in the grocery retail markets where it operates and it has considered it necessary to establish an offline grocery distribution business to improve its market presence.

Second, the Expert Group points to the difference between the online platforms' intermediary nature (i.e., "*intermediate direct transactions between business users and consumers*") and supermarkets' one-sided reseller nature (i.e., "*it locates part of the risk and the ability to set prices with the supermarket (depending on the circumstances, such as when the supermarket can return unsold items to the supplier)*"). This differentiation is artificial and useless from a competition standpoint. Indeed, Amazon is both a marketplace and a retailer and supermarkets such as WalMart and Carrefour have started to operate marketplaces alongside their retailing operations. More importantly, as a US academic has rightly pointed out, the intermediation/retailing function is just a pure accounting issue:

"5. The only difference between a platform and a retailer is inventory risk

Sussman thinks there is another key difference in Amazon relative to other retailers:

*Amazon is a *retailer*, a *platform*, and a *producer*. I have no problem with them using the data they have as a *retailer* to develop products — just like Walmart. I do have a problem with Amazon using information they gather as a *platform/ad biz.**

First, it's important to know that ad fees on Amazon are analogous to slotting fees in brick and mortar stores. Brands have been paying for promotion in retail long before the e-commerce revolution. Prime shelf space and prime search rankings are both scarce resources that are auctioned off to the highest bidder. According to data from the Center for Science in the Public Interest, food manufacturers spend 70% of their marketing budgets on these "trade promotion fees" and 30% on advertising. At the end of the day, it's all marketing.

Second, while it's true that Amazon is simultaneously a retailer, producer, and platform, this is not economically different from traditional retailing. I've already explained how legacy retailers also engage in private label and are therefore "producers." And while they are not "platforms" in the technical sense of being open to anyone (sounds... anticompetitive), the business model is not significantly different.

Traditional retail charges a markup on the price paid to wholesalers or manufacturers (a percentage of the final retail price). The retailer can either purchase that inventory outright and assume the risk of it not selling, or it can include a "sale or return" provision, which reserves the retailer the right to return the inventory to the wholesaler or manufacturer if it does not sell. Inventory risk is just another cost and can be traded off with other contract provisions during the negotiating process.

Platforms, on the other hand, do not take custody of the inventory and instead provide services to sellers. In exchange, the platform charges a percentage of the final retail price. Whether it's a platform or a retailer, the business is the same: Partner with companies selling goods and collect a profit margin on the final retail price. The rest is just accounting."²⁷

Indeed, the real life operation of supermarkets discredits the Expert Group's reasoning. They acknowledge that "return of unsold items" policies may blur the intermediary/retail distinction. Indeed, modern supermarkets sell an increasing array of services to their suppliers and their trading terms with the latter may make it impossible

²⁷ Alec Stapp, "Amazon, Antitrust, and Private Label Goods", 27.04.2020, <https://medium.com/@progressivepolicyinstitute/amazon-antitrust-and-private-label-goods-bf8b8cc00e99>.

to distinguish both functions. For example, article 3.2.a) of the Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain authorises the return of unsold food items as long as it has been previously agreed. Furthermore, article 3.2 of the Directive 2019/633 also allows supermarkets to charge their suppliers fees for as many “services” as stocking, displaying or listing food products, or of making such products available on the market (letter b)); any discounts on food products sold by the supermarket as part of a promotion (letter c)); advertising by the supermarket (letter d)); marketing by supermarket (letter e)); fitting-out of supermarkets’ premises (letter f)). Furthermore, supermarkets often require their suppliers to guarantee them a retail margin through different means (e.g., ex-post adjustments to the procurement price, ad hoc service fees, unjustified penalties, price and service fee adjustments in subsequent contracts) or simply impose it unilaterally.

As far as supermarkets’ control over pricing is concerned, this reinforces their ability to self-prefer their products as compared to Amazon’s marketplace business because they are in a position to control the retail prices of their competitors and this offers a powerful tool to distort in-store competition between brands in favour of store brands²⁸.

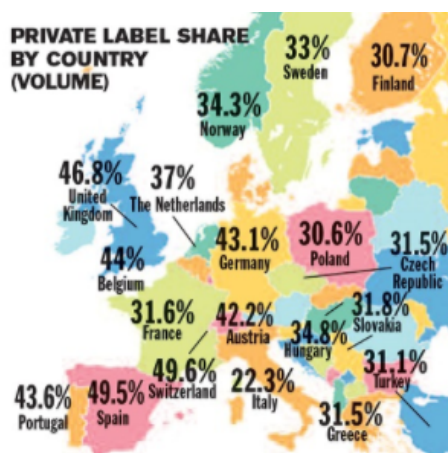
Third, the Expert Group admits that supermarkets’ increased use of consumers’ shopping data creates additional information asymmetries between them and their suppliers (*“At the same time, the increased use of data on customer preferences and behaviour and the integration of such data into supermarkets’ business practices, including through personalised shopping experiences, does create additional information asymmetries between suppliers and supermarkets”*) but argues that *“it seems reasonable to assume that platforms’ datasets on customers are richer by orders of magnitude, and therefore allow for personalisation that is much more sophisticated (although structured attempts of quantifying or describing have yet to be undertaken)”*. It remains to be seen how Amazon’s knowledge of a consumer’s preferences on technological devices (e.g., mobile phones and computers) may translate into a personalised offering of FMCG products, but the fact is that supermarkets knowledge of online and offline shoppers’ preferences (be it organically generated or procured by external consultants) rivals at least, and most likely outperforms “by orders of magnitude” that of Amazon. As a consequence, Amazon’s market performance as a marketplace or retailer of FMCG products shows that the company is for the time being only a marginal competitor to the leading supermarkets.

Fourth, the Expert Group adopts a fall back position when it concedes that even if the supermarkets’ self-preferencing practices may be similar to those of Amazon, their competitive effects are not:

²⁸ See, for a comprehensive assessment of supermarkets’ pricing strategies to self-prefer their own brands, Javier Berasategi, *Supermarket Power: Serving Consumers or Harming Competition*, 2014, 5.5.2.1 - Pricing practices (*“(…) Therefore, vertically integrated supermarkets may strategically use retail pricing in order to favour their own brands. Olbrich and Buhr have coined the term “price scenery”, thereby indicating that supermarkets fix retail prices without regard for the interests of individual competing brands608. (...) The main strategic pricing weapons in the hands of supermarkets in order to foreclose rival independent grocery brands are the following: (1) an artificial price gap with the leading independent grocery brand; (2) price-dumping of the independent brand in order to destroy its brand value; (3) pocketing of promotional wholesale prices; and (4) prohibition of on-packaging promotions.”*)

“While similar practices may occur in the context of supermarkets, their effects may not be as far-reaching as on online platforms. For instance, if a supermarket identifies a trend among consumers for a particular product that is offered by one of its suppliers, the supermarket can decide to develop its own-brand product with similar features, in order to extract more value from that particular market segment. However, in order to do so, it will need to invest in developing its own brand in order to compete with that supplier. Platforms, on the contrary, can decide to start selling the exact same product as offered by a business user – and possibly even against a lower price, because of their scale advantages – if the manufacturer is willing to supply the product. Alternatively, they can decide to start selling very similar products but which have a slightly lower price and/or some additional particular features that may make them more attractive to the customers. This way, without taking the same risk, the platform can compete intensely with businesses who took the risk in growing a market for a product whose success among consumers was not yet established at the initial launch of the product on the platform.”

The Expert Group utterly fails in their effort to differentiate supermarkets from online platforms. By now, all the supermarkets have developed their own brands and adding a new reference to that brand is dead easy for them. The market success of the leading supermarkets’ own brands has evidenced that their know how and market penetration outperforms that of Amazon by “orders of magnitude”. The combined market share of supermarkets’ brands have achieved high market shares in all the Member States and they exceed the 50% threshold in many categories:



Source: <https://www.plmaininternational.com/industry-news/private-label-today>

Indeed, supermarkets’ retailer model allows them to control the launch of innovations and their fate. Whereas online platforms such as Amazon are formally open platforms (even though their access fees and unilateral termination practices may raise access barriers) and innovators may in principle access them without restrictions, supermarkets operate much more restrictive access and unilateral termination policies. Under this restrictive access regime, suppliers must share their innovations with supermarkets months ahead of their launch date in order to be considered for listing and nothing prevents the latter from copying these innovations: procurement functions of third-party and supermarket brands are fully mingled, no supplier is able to impose legal covenants preventing the supermarket from misusing the secret know how of the supplier for the benefit of the supermarket brand, and no supplier has ever sued a supermarket for this unfair practice²⁹. Likewise, the seemingly decisive “ranking” practice in the online

²⁹ See the survey “*The Dual Role of the Retailer*”, compiled by Incidence for AIM, 2015 evidencing the magnitude of this fundamental distortion of the competitive process (“*The objective of this survey was to gather concrete facts and figures on the dual role of retailers as buyer/customer and*

world has long been known in the supermarket world as category management and supermarkets may channel consumers into buying supermarket brands through a panoply of tools such as non-listing/delisting of competing brands, copycat, self-space management, seemingly archaic but truly effective biased coaching –switch marketing - by store staff or online shopping assistants and pricing strategies that create artificial price differentials between third-party brands and their own brands.

In short, none of the arguments tabled in order to differentiate online gatekeepers from supermarkets or any other offline competitive bottlenecks stand rigorous scrutiny. Conversely, there is ample evidence, collected over many years, that supermarkets' gatekeeper role in the Fast Moving Consumer Goods sector and, most notably, in the food category is much more prominent than that of any online platform in any given sector. The supermarkets' role of competitive bottlenecks is stronger than that of Amazon in the FMCG sector for the following reasons:

First, whereas Amazon formally claims to be an open marketplace, supermarkets are closed ecosystems and they reserve the right to list/unlist suppliers and their products at will and, more importantly, they control the fate of innovations.

Second, whereas supermarkets have openly admitted or, at least, never refused having relied on the know how provided by suppliers of third-party brands to design and market their own brands, Amazon has claimed before the US Senate's antitrust committee that its internal policy prevents it from doing so³⁰, even though the Wall Street Journal revealed on 23.04.2020 breaches of this corporate policy³¹. Amazon itself has compared its own policy and limited market presence with that of WalMart, the largest US supermarket:

"Amazon News @amazonnews · Apr 23, 2019

We don't use individual sellers' data to launch private label products (which account for only about 1% of sales). And sellers aren't being "knocked out" – they're seeing record sales every year. Also, Walmart is much larger; Amazon is less than 4% of U.S. retail."

Third, despite Amazon's and other pure online players' attempts to enter the grocery retailing sector, their market shares are marginal and the leading offline supermarkets

competitor during 2012-2014. It especially addresses the abuse of this dual role when customer power is used to obtain sensitive information on manufacturer new product development and this information is then used to give unfair competitive advantage to their private label business.") and Copenhagen Business School, "The dual role of retailing – The European Survey", February 2019 ("Executive summary – Key findings: 1 – Extensive launch of new products – lower retention rate after first year (...); 2 – Extensive trade related barriers when introducing new products in retail (...); 3 – Sensitive information in relation to new products is requested shared with retailers (...); 4– Safeguards and NDA are rarely used between manufacturer and retailers (...); 5 – Information shared is misused to develop private labels (...); 6 – Consequences of misuse experienced are lost turnover and lost market share (...)".

³⁰ CNBC, "Amazon exec tells lawmakers the company doesn't favor own brands over products sold by third-party merchants", 16 de Julio de 2019, <https://www.cnbc.com/2019/07/16/amazon-tells-house-it-doesnt-favor-own-brands-in-antitrust-hearing.html>

³¹ WSJ, "Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products", 22.04.2020, <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>. More information on CNBC, "Amazon uses data from third-party sellers to develop its own products, WSJ investigation finds", 23.04.2020, <https://www.cnbc.com/2020/04/23/wsj-amazon-uses-data-from-third-party-sellers-to-develop-its-own-products.html>.

command the online distribution channel as well. In many categories, supermarkets' own brands exceed the 50% combined market share and the largest supermarkets in each geographic market account for the largest part of this number. Indeed, grocery retailing is the only sector where Amazon has established an offline presence, pointing to the indispensability of an offline store in order to be a viable competitor.

Fourth, Amazon users (including their prime members) tend to multi-home more than grocery shoppers. For example, an Amazon user willing to buy a mobile home will certainly search the Amazon offering but by searching on Google shopping it will have direct access to the offerings of many other marketplaces/retailers or to the results of price-comparison sites. However, a grocery shopper may search and compare different supermarkets once (e.g., when he/she locates to a new dwelling/workplace) and afterwards remains loyal to the chosen store. The repetitive, low-value and "boring" shopping experience explains this single-homing pattern³².

Fifth, alliances of supermarkets have reinforced supermarkets "intermediary" role (i.e., they provide services to their suppliers). The clusters or sometimes overlapping international and national alliances offer services to suppliers and also procure supermarket brands for their members. These services are nothing else than access fees, because suppliers cannot contract with alliance members as long as they have not reached an agreement with the alliance. These alliances may reinforce the vertical exploitation of suppliers but also may serve a horizontal foreclosure goal: they raise independent suppliers' costs and show a commitment of the alliance members to their own common brand to the detriment of independent brands. The European Commission, following numerous requests from the European Parliament, is reflecting on these alliances and has commissioned a study from the Joint Research Centre³³.

³² See, for a comprehensive assessment of shoppers' single-homing trend, Javier Berasategi, "Supermarket Power: Serving Consumers or Harming Competition", 2014, Section 5.3.1.4 - Consumer lock-in: ("*...*).The comprehensive study of the UK grocery shopper's behaviour has evidenced that convenience/location is a key factor in the selection of the preferred/main store for grocery shopping²³⁶: car journey to the store has gone down on average to 10 minutes²³⁷ and more consumers reach their store other than by car, most notably by foot²³⁸. Furthermore, customers' perceived "loyalty" to the main store has grown from 58% to 65%²³⁹. This suggests that grocery shoppers are locked-into a deterministic (constrained) demand pattern/routine²⁴⁰, driven primarily by the geographical proximity of the store²⁴¹, and the rare changes in their shopping behaviour respond to changes in the household context rather than changes in the parameters of competition between existing stores²⁴². (...) The conclusions of the Portsmouth Study can be extrapolated to other grocery markets in the EU and beyond. In particular, the importance of proximity/convenience in the selection of the main grocery store and the high degree of loyalty to the main store is almost a universal principle²⁴⁵. For example, Nielsen data reveals that store loyalty is a global phenomenon in the grocery retailing: (...)

As far as the UK is concerned, the findings of the The Portsmouth Study are in line with the conclusions of the consumer survey made for the UK Grocery Report 2000²⁴⁶. (...) Loyalty to the preferred store was also found to be significant. At the time, 85% of shoppers had used the same store over the past year. 54% of shoppers claimed to almost always visit the same supermarket for their main grocery shopping, whilst 26% were semi-loyal and 14% regularly used two stores. (...).

As far as the Spanish grocery retail market is concerned, several surveys highlight the critical importance of the proximity/loyalty to the main store. For example, a study from the Spanish Ministry for Agriculture reveals the evolution of consumer loyalty to the supermarkets. In 2010, 83% of the surveyed consumers revealed that they like to shop at the same stores and 79.9% of them expressed that they normally shop at the stores closest to their home. (...)"

³³ Colen, Bouamra-Mechemache, Daskalova, and Nes, "Retail alliances in the agricultural and food supply chain", European Commission's Joint Research Centre (JRC), 2020, <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/retail-alliances-agricultural-and-food-supply-chain>

However, as the study has conceded, these alliances seem to fall outside the realm of competition rules and only regulatory remedies seem to be able to address their exploitative and exclusionary practices.

Sixth, at least from 2003 onwards, several economists have developed models where supermarkets' self-preference may distort competition in the market and, most importantly, reduce innovation:

- Bergès-Sennou, Bontems and Réquillart, 2003, Economic impact of the development of private labels, 1st Biennial Conference of the Food System Research Group, University of Wisconsin, Madison, June, 26-27 (*"In a longer term analysis, even if no specific work has been done on this topic, the impact of PL could well be less positive. The argument is the following: the development of PLs leads to a different share of profits within vertical structures. A decrease in the profits of the upstream producers could lead to less innovation and thus reduce the variety of goods available to consumers. This mechanism is reinforced by the strategy of retailers who develop 'me-too' products. This strategy is nothing else than free-riding on research and development of new products. This free-riding will discourage the efforts devoted to the development of new products in the long term. Moreover, the development of PLs can modify competition between retailers in the long term. For example, PLs enable greater differentiation between retailers and thus lower price competition among retailers which is detrimental to welfare (for a discussion on long-term effects, see Dobson, 1998)"*).
- Mark Armstrong, "Competition in Two-sided platforms", Rand Journal of Economics, 37 (3) 2006, pp.668-691 (*"This level of payment will exclude some high-cost suppliers whose presence in the supermarkets is nevertheless socially desirable. In other words, payments to suppliers are too low from a social point of view and there are too few products on the shelves. How well consumers are treated depends on the competitive conditions on their side. If they choose their supermarket according to the Hotelling specification, consumers keep the joint surplus except for the market power element retained by the supermarkets."*).
- Marie-Laure Allain, Claire Chambole, and Patrick Rey, "Vertical Integration, Information and Foreclosure", TSE Working Paper, n. 11-237, March 2011, revised November 2011 (*"This paper studies the impact of vertical integration on competition and performance in markets where firms need to exchange sensitive information in order to interact efficiently with their suppliers or customers. We show that, by altering a supplier's incentives to protect or exploit its customers' information, vertical integration degrades the supplier's ability to interact with downstream competitors. In case of limited competition upstream, this leads to input foreclosure, raises rivals' cost and limits both upstream competition and downstream development. A similar concern of customer foreclosure arises in the case of downstream bottlenecks"* and footnote 2: *"Brand manufacturers have for example stressed such issues in connection with the development of private labels. As the promotional activities associated with the launch of new products generally require advance planning with the main retailers, manufacturers are concerned that it gives these retailers an opportunity to reduce or even eliminate the lead time before the apparition of 'me-too' private labels."*).
- Inderst, Roman & Jakubovic, Zlata & Jovanovic, Dragan, 2015. "Buyer Power and Functional Competition for Innovation," MPRA Paper 61214, University Library of Munich, Germany (*"Our analysis starts from the observation that with progressive consolidation in retailing and the spread of private labels, retailers increasingly take over functions in the vertical chain. Focusing on innovation, we isolate various reasons for why when a large retailer grows in size, this can lead to an inefficient shift of innovation activity away from manufacturers and to the large retailer. One rationale for this is the retailer's control of access to consumers, which gives rise to a rent-appropriation motive for innovation, next to a hold-up problem. With retail competition, through crowding out the*

manufacturer's innovative activity, a large retailer obtains a competitive advantage vis-à-vis smaller retailers. We further analyze when inefficiencies are aggravated in case a large retailer's presence threatens the manufacturer with imitation of his innovations.”)

- Stéphane Caprice, and Shiva Shekhar, “On the countervailing power of large retailers when shopping costs matter”, TSE Working Paper, n. 17-771, March 2017 (“*Another policy implication follows: as wholesale prices are less distorted under a ban on slotting fees, we can claim that banning slotting fees increases social welfare.*”)
- Stéphane Caprice, “Private Label Positioning and Product Line” TSE Working Papers 17-816, Toulouse School of Economics (TSE), 2017 (“*This article examines (i) how retailers position private label products, (ii) why private labels are sold in some product categories but not in others, and why some national brand products may have difficulty in accessing retailers' shelves, (iii) why some private label products are positioned as "premium" brands, and (iv) how consumers' surplus and total welfare are affected by private labels. We find that private label positioning leads to less differentiation in product category, which structurally changes a retailer's product line in return. Consumer welfare and total welfare are lower.*”)
- Alec Stapp, “Amazon, Antitrust, and Private Label Goods”, 27.04.2020, <https://medium.com/@progressivepolicyinstitute/amazon-antitrust-and-private-label-goods-bf8b8cc00e99> (“*1. All major retailers use data on what sells in stores to build their private label businesses. (...) 2. Amazon is not dominant in retail: “(...) It seems difficult to argue that it's a problem when Amazon uses data to inform its private label business, but not when a company [Wal Mart] more than three times its size (\$388 billion vs. \$121 billion) does the same thing at a rate 15 times higher (15% vs. 1%)”. 3. Online retail platforms are more open to competition than physical stores: (...). It also seems worth noting that prior to the internet, third-party sellers had no option at all for selling directly to consumers. They had to negotiate with one of the big box retailers for placement on store shelves. Online platforms give them a new channel for reaching customers directly). (...) 4. Retailers don't have private data on cost structures for manufacturers: (...). Yes, Amazon has more data than rival brick-and-mortar retailers (particularly on what consumers look at but never purchase), but the jury is still out on how much of a competitive advantage this affords them relative to big players like Walmart (which also has its own online marketplace and spends more on IT per year than Microsoft and Facebook). (...) 5. The only difference between a platform and a retailer is inventory risk: (...). First, it's important to know that ad fees on Amazon are analogous to slotting fees in brick and mortar stores. Brands have been paying for promotion in retail long before the e-commerce revolution. Prime shelf space and prime search rankings are both scarce resources that are auctioned off to the highest bidder. According to data from the Center for Science in the Public Interest, food manufacturers spend 70% of their marketing budgets on these “trade promotion fees” and 30% on advertising. At the end of the day, it's all marketing. Second, while it's true that Amazon is simultaneously a retailer, producer, and platform, this is not economically different from traditional retailing. I've already explained how legacy retailers also engage in private label and are therefore “producers.” And while they are not “platforms” in the technical sense of being open to anyone (sounds... anticompetitive), the business model is not significantly different. Traditional retail charges a markup on the price paid to wholesalers or manufacturers (a percentage of the final retail price). The retailer can either purchase that inventory outright and assume the risk of it not selling, or it can include a “sale or return” provision, which reserves the retailer the right to return the inventory to the wholesaler or manufacturer if it does not sell. Inventory risk is just another cost and can be traded off with other contract provisions during the negotiating process. Platforms, on the other hand, do not take custody of the inventory and instead provide services to sellers. In exchange, the platform charges a percentage of the final retail price. Whether it's a platform or a retailer, the business is the same: Partner with companies selling goods and collect a profit margin on the final retail price. The rest is just accounting.”)*

Seventh, different studies have found evidence of adverse effects on innovation in the FMCG sector across the EU³⁴ and, most notably, in Spain³⁵.

Eighth, many legal scholars have exposed the legal gaps of competition rules when it comes to addressing supermarkets' exploitative and self-preference practices vis-à-vis their suppliers:

*"The past decade has seen growing antitrust concerns about the impact of private label goods on consumer welfare and competition in the grocery trade. Market investigations of the sector have been launched in several Member States, and there have also been legislative attempts to curb the power of large grocery retailers. Private labels have provoked interest not only because they increase the bargaining power of a retailer, but also because they fundamentally change the relationship between retailers and suppliers from one between trading partners to one between competitors. **Because they place the retailer in the double role of a customer and a competitor of its suppliers, private labels are believed to create incentives for the grocery chains to resort to practices, which in turn lead to unfavorable outcomes for the consumers. Some of these practices include: misuse of a branded good's product information to introduce competing private label products, de-listing of tertiary brands in order to replace them with undifferentiated me-too private labels, and using the strict rules on resale price maintenance to position the private label product in a more favorable position vis-à-vis the brand.** Legal scholars and practitioners have been under pressure to find out in what ways competition rules may be used to limit these practices. The goal of this paper is to give a comprehensive overview of the competition law issues that might arise in the context of private labels. The paper is divided into two parts: first, it contextualizes the claims related to the welfare effects of the introduction and continued presence of private labels. **It shows that private labels may lead to a reduction in consumer welfare and discusses the practices and conditions that might lead to this negative outcome.** The second part of the paper sketches the applicable legal framework under EU competition law as it may apply to the practices mentioned. **The paper concludes with a discussion of the challenges for the effective treatment of harm arising from the retailer practices associated with private labels.**"*³⁶

³⁴ See "The economic impact of choice and innovation in the EU food sector", independent report prepared for the European Commission, and the discussion on the evidence of negative effects on innovation, despite the methodological limitations of the study, in the submissions of AIM and PROMARCA (all the stakeholder submissions are available at https://ec.europa.eu/competition/sectors/agriculture/overview_en.html).

³⁵ See, most notably, LEI, "The impact of private labels on the competitiveness of the European food supply chain", study prepared for the European Commission, 2011, https://ec.europa.eu/growth/content/impact-private-labels-competitiveness-european-food-supply-chain-0_en ("The number of new product introductions has become very low in Spain due to the fall in the number of new product introductions from 2005 till 2009. This is probably due to the growing market share of discounters and other retail formulas with a limited product assortment (see section 6).") (p.91); CNC, "Report on the relations between manufacturers and retailers in the food sector", 2011, https://www.cnmec.es/sites/default/files/1186012_7.pdf: "That higher pace of investment, however, does not seem to have been accompanied by similar growth in the introduction of new products, which has slowed during the economic crisis, which may end up curbing innovation in the future. The data on introduction of new products from 2003 to 2010 in the eight product categories analysed in this Report indicate that the pace slowed during the last four years of that period (Figure 16), and more markedly in manufacturer brands (Figure 17) than in retailer private labels (Figure 18)." (p. 72); Kantar-WorldPanel "Radar de la Innovación", yearly (2012-2019) report prepared for Promarca, available at <http://www.promarca-spain.com/estudios/>.

³⁶ Daskalova, V. I. (2012). Private labels (Own Brands) in the Grocery Sector: Competition Concerns and Treatment in EU Competition Law. (TILEC Discussion Paper; Vol. 2012-002), TILEC. Daskalova is the co-author of a study on retail alliances for the European Commission Comisión Europea: Colen, L., Bouamra-Mechemache, Z., Daskalova, V., Nes, K., Retail alliances in the agricultural and food supply chain, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720, JRC120271.

“Concern with chilling competition and ensuring accuracy has prompted the Commission to order an extensive study on the impact of retail concentration on choice and innovation, 170 but there is no knowledge of the Commission using its investigative powers to undertake dawn raids or sector inquiries, as it has done in other sectors in the past.¹⁷¹ When it comes to the food sector, at the EU level, no big case was pursued, no formal sector inquiry was opened, and no guidelines were introduced.¹⁷² This stance is especially peculiar when contrasted with the approach of the Commission to similar competition concerns in other sectors. **Let us consider the issue of private labels, which essentially concerns the customer-competitor conflict between supermarkets and their suppliers. The issue of supermarkets replacing ‘tier-B’ brands with own label products which compete head-to-head with other brands or the use of private labels as threat in negotiations, has been discussed in the competition law literature for more than a decade already.** 173 **The study commissioned by DG Competition on concentration in food markets revealed that under some circumstances, the presence of private labels might result in less innovation.**¹⁷⁴ **No action has been undertaken by the Commission against the self-preferencing practices of supermarkets in the case of private labels.**¹⁷⁵ **The same practice of self-preferencing is, however, at the core of the decision in the Google Shopping case.**¹⁷⁶ Even though there are debates as to the extent to which the existing EU competition law doctrine covers this theory of harm, 177 the Commission proceeded with the case.

Another example concerns the attitude of the Commission on matters of fairness and distributive justice, especially with respect to the division of ‘rents’ between trading partners. The Commission has been reluctant to intervene in such cases in the food supply chain.³⁷

“In recent decades, the grocery retail sector has witnessed a trend of concentration and as a result, it has been increasingly dominated by large retailers with significant buyer power that enables them to impose their position when bargaining with suppliers. **The fact that these retailers have begun to offer private label products competing with brand products has brought a different dimension to this imbalanced relationship between retailers and suppliers.** Although the introduction of those own labels has resulted in reduced prices and more choices, on the other hand, it has also increased the large retailers’ incentive to abuse their buyer power against brand product suppliers.

The main EU competition law rules, ie articles 101 and 102 TFEU, fall short of effectively addressing those behaviours of quasi-dominant retailers. The reason why article 101 TFEU is not an effective tool in tackling those concerns related to private labels is that the retailers’ abusive behaviours usually arise from unilateral conduct falling outside the scope of the provision. However, article 102 TFEU is also unlikely to serve to address those concerns because it is very rare that retailers are found to be individually or collectively in dominant position. Nevertheless, considering the abusive behaviours of retailers based on their bargaining power, which grants them an economic power similar to that of dominance, it seems necessary to utilise some other tools to eliminate those competition concerns.³⁸

“Traditional competition law is not well-equipped to deal with the anticompetitive effects of private labels. The reason is that the retailing sector has been generally considered highly competitive, because of its low profit margins, and not easily lending itself to monopolization, because of low entry costs. Hence, most of the competition practice consists of merger review, which should prevent the creation of single firm dominance in local markets, and competition

³⁷ Daskalova, Victoria I., “Counterproductive Regulation? The EU’s (Mis)Adventures in Regulating Unfair Trading Practices in the Food Supply Chain” (September 26, 2018). TILEC Discussion Paper No. 2018-027.

³⁸ S.Erzene, “Buyer power in the Context of Private Label in the EU”, Global Antitrust Review 106 (2012), 106-137.

advocacy urging for the removal of legal barriers to entry that exist in a number of EU Member States (e.g. France and Belgium³⁶). Moreover, the buyer power of supermarkets has been seen as a positive competitive force, which may limit the power of branded good manufacturers to impose price increases. As a consequence, the prohibitions of competition law have been designed and interpreted mainly as instruments to curb market power on the supply side of the market. Current rules of competition law cannot easily cope with anticompetitive exclusionary effects of superior bargaining power of vertically integrated retailers. Such analysis boils down to a control of unilateral behaviour of a powerful company, which is not necessarily dominant in the traditional sense (Article 102 TFEU), because of its low market share.”³⁹

Ninth, in light of the failure of competition rules to address supermarkets’ exploitative practices, regulatory remedies have been adopted in countries all over the world⁴⁰. The outstanding question from a regulatory standpoint is why supermarkets are prevented from exploiting their trading partners but not for self-preferencing their brands (the only exception being the ban on the misuse of suppliers trade secrets in force in some jurisdictions such as Spain – article 13 of Law 12/2013 – and article 3.1.g) of the Directive 2019/633).

5 Conclusions

The EU has a long track record of regulating competitive bottlenecks. This track record evidences that competitive bottlenecks may arise in different sectors and business models, both online and offline, but all of them share some common features that have been exposed in the economic literature and were applied in the *Travelpot/Worldspan* merger decision.

These bottleneck features are present in many online activities intermediating between business users and consumers (e.g., Amazon and Google) but even more compellingly in the grocery retailing sector. Therefore, authorities and experts advising them should not err trying to differentiate supermarkets from online platforms with flawed arguments in order to avoid the comparison between supermarkets unconstrained self-preference of their own brands and any future proposal to ban self-preference by online platforms. On the contrary, this contribution has identified eight grounds supporting the conclusion that supermarkets nowadays exhibit more powerful bottleneck features than an online platform such as Amazon. Indeed, the regulatory remedies against supermarkets’ exploitative practices adopted in many countries across the world and most notably in most of the EU Member States evidence that these operators are already regulated due to their competitive bottleneck status and the experience gained assessing

³⁹ H Nevo and R van den Bergh, ‘Private Labels: Challenges for Competition Law and Economics’ (2017) 40(2) *World Competition*, 271.

⁴⁰ For an overview of the regulatory developments in the EU and the Member States, reference is made to the Commission’s *Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe*, COM/2013/037 final, Commission’s *Communication - Tackling unfair trading practices in the business-to-business food supply chain*, COM/2014/0472 final, the “*Study on the legal framework covering business-to-business unfair trade practices in the retail supply chain*”, prepared by members of CEPS and EUI for the European Commission, DG Internal Market, DG MARKT/2012/049/E, 26.02.2014, and Fabrizio Caffagi and Paola Iamicelli, “*Unfair trading practices in the business-to-business retail supply chain - An overview on EU Member States legislation and enforcement mechanisms*”, European Commission’s Joint Research Centre’s Technical Reports, 5.9.2018.

their trading practices and their competitive effects should inspire and justify the regulation of online bottlenecks' practices⁴¹.

Finally, the regulation of online bottlenecks should guarantee a level playing field between them and other offline bottlenecks competing in the same sector. For example, once concluded that banning Amazon from applying self-preference as well as other exploitative practices is justified in light of its competitive bottleneck status, the coherence of the regulatory framework would call at least for the same prohibitions to apply to supermarkets competing against Amazon in the grocery sector. Otherwise, how could it be justified from a sound regulatory policy standpoint that a company enjoying a marginal market share of the sales in a given market was subject to more stringent obligations than the leading operators in the same market?⁴²

The European Parliament's most recent Resolution on competition policy has correctly identified that the gatekeeper/bottleneck issues, dual role conflict and exploitative/exclusionary abuses emerge indistinctly in offline and online markets and that the required regulatory response should ensure consistency treatment of online and offline bottlenecks, especially if they are competing in the same sectors.

"29. Stresses that some entities, which benefit from dual status as both platforms and suppliers, abuse their position to impose unfair terms and conditions on competitors, independently of whether they are active online or offline; calls on the Commission to look into the issue of self-preferencing and enforce the necessary laws and use the instruments required on those entities that practice self-preferencing; calls on the Commission to assess the possibility of imposing ex ante regulatory obligations where competition law is not enough to ensure contestability in these markets, therefore avoiding competitors' foreclosure and ensuring that emerging bottlenecks are not perpetuated by the monopolisation of future innovation;

(...)

62. Calls on the Commission to guarantee fair competition and greater transparency in offline platforms' commercial practices, including supermarket and hypermarkets, so as to ensure that EU producers receive fair conditions and prices for their products; calls on the Commission to continue its in-depth analysis on the extent and effect of buying alliances, related to both pricing and non-pricing strategies, on the economic functioning of the agricultural and food supply chain, taking particular account of the effects on small-scale suppliers and farmers; regrets the fact that selling at a loss is not on the list of practices that are prohibited at EU level; highlights that the Farm to Fork strategy and EU competition law must recognise the important contribution made by primary producers in supplying high-quality food and delivering public goods to society";⁴³.

The Opinion of the European Parliament's AGRI Committee, annexed to the Draft Resolution, expressly stressed the "parallels" between Amazon's dual role practices and those of supermarkets:

⁴¹ Certainly, the regulatory remedies on supermarkets' practices have focused on exploitative abuses and have so far only dealt with one specific manifestation of the self-preference principle (the misuse of the suppliers' trade secrets in order to favour their own brands), but the lack of a more comprehensive treatment of the self-preference only shows a gap – an area of impunity - in the regulation of supermarkets' practices.

⁴² The marginal role of Amazon in the grocery sector is evidenced under any measurement system. For example, the grocery sales intermediated/resold online by Amazon as well as its offline sales represent a small margin of the leading supermarkets' online and offline sales in each Member State of the EU, as well as in any other country outside the EU.

⁴³ European Parliament resolution of 18 June 2020 on competition policy – annual report 2019 (2019/2131(INI)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0158_EN.html

“18. Welcomes the publication of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services[25]; takes note of the opening by the Commission of a formal antitrust investigation to assess Amazon’s use of sensitive data from independent retailers and possible abuses of its dual role as retailer and marketplace, and expresses concerns about possible parallels in European supermarket platforms; stresses that possible differentiated or discriminatory treatment between own brands and other retail goods might distort competition in the market and reduce innovation and product choice for consumers; stresses that the Commission and national competition authorities must play their roles in ensuring that such situations do not arise;”⁴⁴

In light of the foregoing, both the New Competition Tool and the regulation of Gatekeeper Online Platforms are indispensable legal tools to address offline and online competitive bottlenecks and both of them should be applied coherently in order to ensure a level playing field between online and offline competitive bottlenecks competing in the same markets.

⁴⁴ OPINION OF THE COMMITTEE ON AGRICULTURE AND RURAL DEVELOPMENT (28.1.2020) for the Committee on Economic and Monetary Affairs on competition policy – annual report 2019 (2019/2131(INI)), https://www.europarl.europa.eu/doceo/document/A-9-2020-0022_EN.html#title3