

International Report

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1. Introduction

This International Report synthesizes the 11 (eleven) national reports¹ answering the questionnaire on the growth of online sales platforms.

Ahead of its October 2017 Congress in Brazil, the International League of Competition Law has gathered information relating to the following “*new economy*” antitrust question: “*What are the major competition/antitrust issues generated by the growth of online sales platforms, and how should they be resolved?*”

First, a clarification about the respondents is necessary in this International Report. In this survey, as in the past, most of the respondents are Member States of the European Union and these countries are under the European Union’s jurisdiction and therefore they must apply competition law in a consistent manner². Some other countries, namely Australia, Brazil and Switzerland, are not part of the European Union. Moreover, at this particular time there is the further issue of the United Kingdom’s decision to leave the EU. This complicated legal and political process is not taken into consideration for the purposes of this report as its implications are unclear and no comments have been made in the UK report.

The observations and conclusions of this international report are based on the information supplied by the countries that have answered the LIDC questionnaire. Although some major countries with substantial experience in competition policy and legislation are not within the scope of this report, we believe that information given by the 11 (eleven) respondents is sufficient to lead us to meaningful conclusions.

The challenge of analysing this set of national reports is as complex as analysing any other market relating to vertical agreements or even horizontal agreements, with the difference that in this case the subject is online platforms, which makes the subject matter even more complex.

¹ Austria, Australia, Belgium, Brazil, France, Germany, Italy, Hungary, Sweden, Switzerland and United Kingdom.

² Articles 3 and 15 of Regulation 1/2003.

This issue (the growth of online platforms) is about the effects of the “*new economy*”³ on competition law, and more specifically about internet-related businesses and enterprises.⁴

All respondents have concerns about the application of competition law to online platforms. This concept is considered for instance by the European Commission, as a software-based facility *offering multi-sided markets where providers and users of content, goods and services can meet*. Concerns at the supranational, EU level demanded a response by many of the European national policy makers.⁵ These concerns are shared in non-EU jurisdictions where competition law deals with online sales platforms as a category of business methods developed through computer software facilities including “*services provided online by online sales platforms, contractual relationships between the online platforms and sellers or buyers, information exchange, power and integration*”.⁶

The Australian Report indicates that online sales platform *specifically (they) may include: algorithms which can coordinate and monitor prices and other business practices among competitors; collecting, exchanging and blocking information and targeting specific customers (consumers or businesses); and creating innovation-driven new monopolistic markets or markets where one online platform possesses significant market power.*

Generally, the reports contributing to this international comparison consider that many specific features of the online sales platforms and their implications have impact on competition policy. Concerns about these phenomena have been raised in the academic literature and investigated by several national authorities. The main issues that arise from these features are predominantly related to the market power of these platforms and the impact of their bargaining power on the interaction between sellers and buyers.

New technology industries are different from traditional industries dedicated to the production and sale of material goods. Antitrust doctrine and practice have developed standards for the traditional economy, such as automobiles, electricity, clothes, steel, coffee, cigarettes, etc., considering their specific market characteristics. Nevertheless, the outputs of the new economy are different from the output of that first group of traditional industries and from the ordinary sale of material goods through physical (i.e. “bricks and mortar”) distribution. In this scenario, Intellectual Property concepts play a key role. For instance, both Amazon and e-Bay are very much dedicated to the sale of material goods as they are on-line sales platforms of “bricks and mortar” retailers (such as supermarkets’ online sales platforms). The key is that different forms of distribution are facilitated, avoiding bricks and mortar retail outlets.

Antitrust literature identifies the features of traditional industries in static competition where it takes place through pricing. Some of these features include multi-plant or multi-firm

³ For competition law purposes, the notion of the “new economy” covers three specific and related industries. The top element of this set of businesses and companies is the (1) manufacture of computer software; the second is (2) services provided by internet-based businesses; and, finally, (3) communication service and equipment as production factor for both businesses. In the international literature see Posner [].

⁴ This notion is considered in this International Report as referring to a service based economy from a manufacturing one. It ties in with the idea of Uber being the largest taxi company, but owning no taxis; or AirBnB owning no hotels. However, the issues with “online sales” are wider than this. Some online platforms – eBay, Amazon Marketplace, Etsy – have stimulated manufacturing.

⁵ See *Dynamic Competition in Online Platforms – evidence from five case study markets*, prepared by Europe Economics on behalf of the UK Department for Business, Energy and Industrial Strategy, March 2017, page 6.

⁶See the Australian International Report sec. 1.

production, complex industrial organization, high capital investment, reduced allocation of investment in innovation, stable markets, and limited flux of entry and exit of players.

Nevertheless, the new economy businesses may not share these features. Businesses operating in this new economic environment usually have a broad range of output, in many cases fewer capital requirements,⁷ high levels of innovation, fewer barriers to entry, and quick entry and exit into these specialised markets.

These new economy players seem to be born and to die more easily than before in traditional markets. These unstable market conditions demand that these internet-based industries search for business stability and for this reason, their business model often includes trying to arrive first in a new market and establish a monopoly or seek cooperation among competitors in standards setting. Here, this international report queries whether we should just focus on evidence based views. For example, this report could analyse if low start-up costs or cheaper distribution, visibility⁸ and direct access to a range of consumers means that businesses could be set up quickly or not.⁹

This is why network externality is a goal in this kind of business. It is natural that the company that creates a landmark invention or a new business process establishes a new standard and builds a new market does not tend to let competitors reproduce its methods, products or services so easily. These phenomena also take such discussion to another field, still related to competition, which is the importance of copyright and protection of industrial rights for the new economy and the competitiveness of the internet-based industries. There are two different points here: (1) Network externalities are a feature of platforms, as they are multi-sided business models; and (2) importance of IP protection. Even though IP protection is important to these business methods (as it is to the new economy at all), it is outside of the scope of this paper.

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As we know, competition law does not generally forbid a monopoly position acquired through efficiency. On the other hand, competition law does have to define the limits within which a monopolist may compete to keep its monopoly position.

A common aspect of both old and new economies is vertical integration. However, are the standards of antitrust analysis the same for the “old economy” and the “new economy”? The question is: do online sales platforms oppose to the antitrust criteria applicable to the old or traditional economy?

Some authorities’ (policy makers) studies have identified what has been considered as two pivotal areas of competition concern: 1) vertical and horizontal integration of online platforms;

⁷ To some stakeholders high investment costs are a feature of the online businesses. They don’t have to invest in bricks and mortar stores, but do have to invest in marketing, software creation. To others, it also allows suppliers to avoid investing in expensive retail distribution systems if they can link up to an established sales platform (e-bay/amazon) or sell through their own website.

⁸ To Hungary, *[t]he resulting restrained online visibility affects small and medium-sized dealers more adversely as they usually have limited resources for creating, adequately maintaining and promoting their own online stores than their large rivals*. See sec. 4.3. of the Hungarian national report.

⁹ According to the French report, sec. 20: *[I]n a case-by- case effects analysis, a prohibition of sales on marketplaces could be considered as creating a barrier to entry from the point of view of SMEs, which do not necessarily have sufficient resources to develop mobile applications with secure payment systems.*

and 2) vertical restrictions, referred to in the study as ‘exclusive practices’ or ‘exclusionary practices’.

Studies¹⁰ identified in the contributions to this survey considered that ‘regulatory neutrality’¹¹ was a key concern for competition policy in the ‘sharing economy’.

Some respondents, such as Switzerland,¹² considered that the consumers’ behaviour and market features have drastically changed in the last decade, following the development of the ‘digital market’. Among the advantages of e-commerce is the reduction of consumers’ search cost, the convenience of being able more easily to compare products and prices offered by sellers and ease of access to consumer reviews. These advantages, coupled with an increased number of retailers, lead to stronger intra-brand and inter-brand competition.

On the other hand, among the advantages to distributors is the increase in geographical reach, lower distribution costs and the possibility of developing new business methods.

The countries participating in this comparative study do not have the same culture and legal system. On the contrary, the respondents have distinct history and social and economic characteristics.

Nevertheless, many competition issues are common across all or almost all the countries surveyed. Examples include accommodation booking services. However, the development level of each economy in terms of traditional markets may influence the rules relating to the new economy and more specifically to internet platforms.

Many of the answers to the questions below about the information highway and high technology industries, as debates on them over the last 20 years show, depend on the definition – or perhaps the redefinition - of the objectives of antitrust law.¹³

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2. Positive Law

2.1. The Relevant Competition Rules

¹⁰Deloitte Access Economics, *The sharing economy and the Competition and Consumer Act* (2015, ACCC), available at <https://www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf> (‘Deloitte Study’).

¹¹*In particular, there is concern that, at present, sharing economy providers have fewer regulations applied or enforced than traditional businesses and this puts them at competitive disadvantage.* See Australia National Report, section 1.

¹²Switzerland National Report, sec. 1: [t]he use of the Internet as a decisive medium before making any purchase decision is increasing.

¹³ For more information see the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Fifteenth Session (2016).

2.1.1. The Material Law

This international report includes the declarations of the following countries: Austria,¹⁴ Australia¹⁵, Belgium,¹⁶ Brazil,¹⁷ France,¹⁸ Germany,¹⁹ Italy,²⁰ Hungary,²¹ Sweden,²² Switzerland²³ and United Kingdom.²⁴

¹⁴ Austrian Cartel Act 2005 complements the Cartel Act and contains rules on the Federal Competition Authority; EU's Directive 2014/104 on antitrust damages actions; Austrian Unfair Competition Act; Austrian Price Indication Act.

¹⁵ Competition and Consumer Act 2010; Australian Competition and Consumer Commission Misuse of market power guidelines; Australian Competition and Consumer Commission Authorization Guidelines; Australian Competition and Consumer Commission Merger Guidelines; Trade Practices Legislation Amendment Bill 1992, explanatory memorandum, paragraph 12, as cited in Merger.

¹⁶ European Commission, Guidelines on Vertical Restraints, OJ 2010, C 130, p. ("**Vertical Guidelines**"); Treaty on the Functioning of the European Union; Code of Economic Law (CEL); Article 1382 of the Belgian Civil Code.

¹⁷ The Brazilian Antitrust System is structured by Federal Law No. 12,529 of 30 November 2011

¹⁸ Law of August 6, 2015 for growth, activity and equal economic opportunities (known as the Macron Law); Loi n° 2016-132, 7 October 2016 for a digital Republic; French Consumer Code; Commercial Code; French Code de procédure civile

¹⁹ Act against Restraints of Competition (GWB); Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter: EC Merger Regulation)

²⁰ 101 TFEU; Law 287/1990 on the interpretation of the Italian antitrust norms; The Commission Regulation n. 330/2010 of 20 April on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

²¹ The competition Act: Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition regulates the entire scope of competition matters; Article 101 and 102 TFEU; Act CXL of 2004 on the General Rules of Administrative Procedures and Services; Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices; Directive 2005/29/EC of the European Parliament and council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market; Act V of 2013 on the Civil Code that contains the general rules for concluding contracts by electronic means; Act CVIII of 2001 on Electronic Commerce and on Information Society Services; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; Act XXV of 2005 on the financial service contracts concluded as distance contracts. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; Government Regulation No 45/2014 on the detailed rules of contracts between businesses and consumers; Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty; Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty The relationship of EU and national merger control is separately regulated by way of the EU Merger Regulation [Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings; National laws on B2C unfair commercial practices were fully harmonized by way of the Unfair Commercial Practices Directive; Government Regulation No 205/2011 (X. 7.) on the exemption of certain categories of vertical agreements from the prohibition of restriction of competition; Act XI of 1997 on the Protection of Trademarks and Geographical Indications.

²² The Swedish Competition Act of 2008 (Konkurrensskadelagen); Swedish Competition Damage Act of 2016; The Act implements the EU Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union; Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union.

²³ Cartel act on Cartels and Other Restraints of Competition (9RS 251.4) (1) Anti-competitive agreements (Article 5 CartA), (2) abuse of a dominant position (Article 7 CartA) as well as (3) merger control (Articles 9-10 CartA);

²⁴Section 26(1) and (2) of the Enterprise and Regulatory Reform Act 2013, with effect from 1 April 2014. Vertical Guidelines; Competition Act 1998; Health and Social Care Act 2012

None of the respondents considered their jurisdictions to have specific provisions relating to online sales platforms and competition, although issues regarding e-commerce have drawn attention of the relevant authorities. Rather, broadly drafted antitrust provisions have proved adaptable to the new situations created by the evolution of the market and on new distribution methods in all of LIDC jurisdictions surveyed.

Countries like Australia and Brazil indicate that they do not have any specific legal antitrust provisions related to online platforms, an issue that is subject to the generic competition and consumer laws. Moreover, to some respondents there are no different set of rules for each specific market neither do they indicate other institutions to enforce competition legal provisions²⁵ and the competition rules are to be applied to all sectors of the economy (for instance, this is the case in both Austria and Brazil).

All of the respondents stated that there have been no judicial decisions in which the courts have implied or recommended the modification of the existing competition legal provisions related to online platforms.

Some of the respondents have in their legislation a definition of digital platform outside the antitrust system. This is the case of the French legislation,²⁶ which defines an online platform as follows: “*Any natural or legal entity is qualified as operator of on-line platform proposing, professionally, in a paid way or not, a service of communication to the on-line public basing on : 1 ° The classification or the referencing, by means of computing algorithms, of contents, of the goods or services proposed or put on-line by third parties ; 2 ° Or the getting in touch of several parties with the aim of the sale of the good, the supply of a service or an exchange or a sharing of a contents, a good or a service*”.

It is evident that antitrust goals are not exactly the same among different countries (Europeans and non-Europeans), and among European Union level and its respective state members. As an effort to address such issues, the European Commission has prioritised the matter of a digital single market²⁷. Meanwhile, the aim of the Australian bill²⁸ is to provide what seems to be a political goal when it creates means to protect the SMEs against anticompetitive restrictions specially as it foresees that ‘no adverse cost order’ *for small business litigation in private cases and to assist with the process of a small business requesting a no adverse cost order*.

In addition to the EU effort, internally, the UK Competition and Markets Authority (CMA) has focused on "developments in new emerging markets", which has been set as a focus for the CMA by the UK Government itself²⁹. On the other hand, the codified law in Germany is in the

²⁵ See Brazilian National Report, introduction and sec.1.

²⁶ Law of August 6, 2015 for growth, activity and equal economic opportunities (known as the Macron Law), then was modified in 2016, Loi n° 2016-132, 7 October 2016 for a digital Republic, .

²⁷ UK report, Sec. 2.2. *Vide* also the DSM being one of President Juncker’s key objectives. https://ec.europa.eu/commission/publications/president-junckers-political-guidelines_en

²⁸ The Australian report (sec.2.1.) states that *reflecting one of the issues discussed in the Harper Report, the Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017, was introduced as a private members' bill on 16 February 2017 and proposes to address the issue connected with access to justice for small businesses. It recognises that small businesses do not possess the sufficient or significant financial resources necessary for litigating anticompetitive practices. This is particularly an issue for s 46 of the CCA (“misuse of market power”) litigation where the accused party possesses significant market (and/or bargaining) power while a potential private plaintiff will in most cases be a much smaller entity.*

²⁹ *Idem*.

process of being changed to include specific provisions applicable to two-sided markets in order to assess market power or the dominant position of an undertaking.³⁰

Having said that, it is necessary to make some general observations before going deeper in this section.

To start with, because of the wide scope of the antitrust provisions it is clear that the general provisions of competition law apply to online sales platforms, just as laws applied to commerce in general are applied to e-commerce. All respondents considered this proposition to be true, and it is clearly stated in many reports such as *inter alia* Austria, Australia, Brazil, France and Germany.

In some cases, consumer law is also applied in coordination with competition law,³¹ as is the case in Australia and Hungary. In other countries, consumer welfare is valued and is even an antitrust goal, but its enforcement occurs outside the scope of application of competition law.

In some countries, competition law is not limited to the prohibition of competition practices and goes further so as to prohibit unfair competition. In this sense, private rights may be considered alongside the market discipline³² i.e., the same authorities apply both rules (antitrust and unfair competition).

Nevertheless, in most of the countries surveyed, national competition law and provisions related to the prevention of unfair competition³³ are independent systems with different laws and both extend to the emerging business models of the new economy and especially to online platforms (e.g. Austria, Belgium, Brazil, France, Italy, Germany and UK³⁴). In this sense, unfair competition law works much more like some kind of tort or damages compensation provisions and not like a justification, a “legal monopoly” or an “automatic exemption” of all kind of anticompetitive restrictions.³⁵

For sure, some points of interaction between both laws are possible in many other situations, e.g. a private action related to a loss raised when an antitrust infringement (that may create distortions in a relevant market structure, a barrier to entry or an exclusionary practice) leads to a free riding³⁶ or an illicit client deviation. In such case, it is possible to compensate the victim

³⁰ German report, Sec. 2.1.2.

³¹ This is the case of Australia and Switzerland. Brazil has also a relevant Consumers’ Defence Code but not applied to the competition authorities, as it somehow used to happen in the prior competition law (1994).

³² Austria and Hungary.

³³ In the sense of Paris Union Convention from 1883 (according to the art. 10 of CUP, it is more related to Intellectual Property).

³⁴ The UK is not normally regarded as having a law of “unfair competition” (although it does have consumer protection, trademark, passing-off laws).

³⁵ In Brazil, in the 1990’ and 2000’ the policy maker used to consider de possession of IPR or related rights as an evidence of regular rights use and not subject to the antitrust law. See the Anfape Case.

³⁶ There is an example of an anti-trust infringement leading to free riding when a competitor uses exclusionary practices (like misuse of IPR) to deviate clients of an efficient competitor. They are widely regarded as anticompetitive even though do not involve cooperation between competitor. Probably this practice would be more common more common in concentrated markets, more likely in developing countries. In Brazil, the ShopTour case.

of the antitrust infringement through an unfair competition or a specific damage action³⁷ to be filed in the civil courts (see forward, sec. 2.7.). This is the case of most of the respondents in this survey.

This dichotomy (free competition and unfair competition) happens as in the same way as national jurisdictions of most of the Member States of the European Union where national competition laws are modelled on the EU legislation and apply in a complementary manner.³⁸

Moreover, the European influence related to the double aspect (public and private interests) of the competition policy also happens to a degree in the case of Australia, Brazil and Switzerland, even though a certain degree of harmonization does not mean that the EU law can be applied in these countries.

With some degree of reciprocal influence, national competition laws (especially in European countries) usually prohibit horizontal and vertical agreements and concerted practices, as their object or effect is a restriction of competition, such as the classic cartels and exclusive dealings. The EU competition provisions influence the national provision of its state members. This is the case of Austria, Belgium, France, Germany, Hungary, Italy and Sweden. For distinct reasons and at different degrees, this influence is also apparent in Brazil, in the Switzerland and in the UK.

As well as competition rules relating to the control of commercial agreements, we also need to consider rules relating to unilateral conduct like abuse of dominant position or misuse of market power (e.g. exclusionary practices³⁹) and anticompetitive mergers. This is the case in the 2011 Brazilian Competition Legislation: see in article 36 (I) (agreements and acts restricting competition) and article 36 (IV) (abuse of dominant position).

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Most of the countries surveyed (mainly in the EU) consider that certain types of restrictions in agreements and concerted practices are presumed to be anti-competitive “by object” (i.e., broadly, *per se*) and are “directly sanctioned by fines”⁴⁰. For instance, in Austrian national legislation, such restrictions result in voidness. The same seems to happen in some non-European countries, like Australia, where “*several forms of anticompetitive practices are expressly subject to per se prohibition, meaning that substantial lessening of competition does not have to be proved, but assumed*” (in this case, cartels, primary boycotts, certain forms of exclusive dealing – third line forcing – and resale price maintenance). In Brazil the control of horizontal dealings and concerted horizontal practices (Federal Law No. 12,529 of 30 November 2011, Art. 36, Paragraph 3th, subsections I, II, IV and V), follow the same criterion in the sphere of the administrative enforcement by the policy maker (CADE), but vertical agreements which depend on an analysis about the effects.

As happens in other specific sectors, certain types of conduct that are particularly important to online sales platforms (and which are also common in the distribution sector), such as horizontal

³⁷ Many systems of competition law provide for damages actions by victims (companies excluded from a market by an exclusionary abuse or customers charged higher prices because of as cartel). That is now true in all EU cases, as well as eg the US. In the UK, there is no compensation for “unfair competition” because they do not have that as a concept.

³⁸ Is the point that the boundary between competition law and “unfair competition” law is set in the same place for all EU countries, because in all them the scope of the competition rules is somewhat the same as the competition law and unfair competition are the two sides of the so-called competition policy.

³⁹Whereby a player with market power or dominant position eliminates competitors.

⁴⁰ Swiss national report, sec.1.

agreements, boycotts, passive sales, MFN clause or minimum resale price maintenance are in some countries *per se* prohibitions.⁴¹

All the respondents in this survey considered distribution through online sales platform under general provisions of ordinary competition law relating to the control of vertical restraints.

Nevertheless, the importance of law relating to vertical restraints in this field does not mean that other aspects of the competition rules – such as rules on misuse of market power or abuse of dominant position, and even prohibitions of hard-core cartels, are irrelevant to digital commerce or to the new business methods created to work through online platforms. Moreover, the application of merger control rules was raised in most of the national reports in this survey, although these are slightly less developed in relation to online sale platforms.

Most respondents indicate that restrictions that are considered not to be a hardcore agreement (such as some aspects of selective distribution systems), are reviewable by the competition authorities by a rule of reason analysis or on a case-by-case basis (Italy, Sweden, UK).

In the EU, a block exemption covering vertical agreements grants a “safe harbour” to recognised competition restrictions (subject to a threshold based on the parties’ market share). Some Member States of the EU do not have specific national guidelines to vertical restraints and the national courts, as in Belgium, apply directly EU rules such as the “Vertical Block Exemption Regulation” (Regulation 330/2010 of 20th April on the application of Article 101(3) of the TFEU).

Outside the European Union, Australia and Switzerland adopt a similar approach, under which it may be possible to justify an anti-competitive restriction by reference to a public interest consideration. The text of the competition legislation in Brazil, for example, has clearly been inspired by Article 101 (1) and (3) of the TFEU but the policy maker made the administrative option on the rule of reason basis rather than the prohibition / exemptions system for restrictive agreements. The Australian report states that Australian competition law does not adopt a block or a threshold exemption.

The competition rules in general do not enumerate an exhaustive catalogue of prohibited restrictions. In some cases, the broad types of restrictions are set out in a headpiece followed in the legislative text by an illustrative list of restrictions which may then be developed by administrative guidelines (Australia, Brazil and Switzerland).

In other cases, all that is provided in the legislative text is a general principle (without concepts and examples). But in general, in both cases the rules are based on broad concepts which allow the policy maker to follow changes in the market and deal more promptly with the problems of online sales growth.

As is the case with all of the respondents, the Australian national report indicates that there is no specific provision relating to online sales platforms and competition, so that general competition law (and consumer law) applies to online sales platforms. That report explains that competition law is under the jurisdiction of the Competition and Consumer Act 2010 (the

⁴¹ In the Austrian report, sec. 1.5.1.: “*Pioneer was fined in the amount of EUR 350,000 for violating Art 101 TFEU, namely agreeing in vertical price restrictions; Pioneer was also fined for hindering distributors from selling electronic products online. Without referring to a “restriction by object”, the Cartel Court considered this concerted practice of being a – literally - “key infringement”.*”

"CCA").⁴² In 2015, Australian competition law and policy were reviewed extensively by the 'Harper Review', with its final report⁴³ introducing relevant changes to the Australian Competition Law.⁴⁴ The recommendations of the Australian policy maker led to developments to the Australian system in the following years based on the specific goals of the Australian legislation. The changes introduced by that report are not restricted to competition law itself, and carried over to the Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017. That new Bill recognizes, for instance that small businesses do not possess sufficient or significant financial resources necessary for litigating anticompetitive practices⁴⁵. In a way, this improvement of the Australian competition system recalls the targets of the WIPO (World Intellectual Property Organization) development agenda (which includes some concern related to innovation policies, the level of employment, SME (small and medium size enterprises) protection against anticompetitive conducts, technology transfer, the national authorities training and promotion of improvements in competition law.

EU countries have their special features. This group of countries are subject to two competition laws applicable within the national jurisdiction. A typical example is the German national antitrust law, codified in the GWB (*Gesetz gegen Wettbewerbsbeschränkungen*) which, like all other Member States of the EU, has its roots in Art. 101 ff. TFEU and the EC Merger Regulation. Both EU and national legal regimes are generally applicable in parallel. The two bodies of law both prohibit restrictions of competition in relation to their respective geographical range and applicable procedural rules. Where conduct qualifies, it can be exempted by an individual or group exemption. EU law provides for several block exemption regulations which apply to different groups of agreements (like technology transfer) or industrial sectors (like automobile distribution). Among them, is the EU Commission's "Vertical Block Exemption Regulation".

These exemption regulations are also applicable in solely national cases brought before the national authorities of each state member (for instance, in Germany, according to § 2 (2) GWB, in Belgium and in Hungary).

Both kinds of regimes (the national and the EU) also prohibit the *abuse of dominant position* (Art. 102 TFEU). However, at the same time all the EU Member States have a national equivalent provision to that EU prohibition (see e.g., Austrian, Belgian, French, German, Hungarian, Italian and Swedish National Reports).

These jurisdictions assess dominance and its abuse according to the TFEU guidance (Art. 102) followed by the EU state members (the European Commission's notice on Enforcement Priorities under A102)⁴⁶. In this sense, the German national law (§ 18 GWB) serves as guidance

⁴²The Act was previously named the *Trade Practices Act 1974* (Cth). The Australian Constitution, the *Commonwealth of Australia Constitution Act (1900)*, limits the extent to which the federal government can legislate. For that reason, states and territories enacted a 'schedule' version of the Part IV of the CCA, which contains core provisions on competition law. The CCA and the enacted schedule ensure a nationally consistent competition law.

⁴³ See the 'Harper Report' (2015).

⁴⁴See the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 ("Bill 2017") and the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 ("Bill 2016").

⁴⁵Australian National Report, see section 2.1. *'This is particularly an issue for s 46 of the CCA ("misuse of market power") litigation where the accused party possesses significant market (and/or bargaining) power while a potential private plaintiff will in most cases be a much smaller entity.'*

when determining whether an undertaking is dominant to that effect by providing rebuttable presumptions and enumerating factors that have to be taken into account when assessing the undertaking's position.

These aspects of the competition rules were developed for traditional economic sectors but also apply to the challenges of the new economy sector. However, other factors are even more relevant for the emerging business models of the new economy sector.

One of the particular issues in the new economy sector is the definition of the relevant market. The respondents considered two or multi-sided markets to be features of online sale platforms. That is why the German legislator will introduce a new subparagraph (3a) to § 18 GWB which will be applicable in particular to two-sided markets. It enumerates factors that are crucial in the examination of an undertaking's position in the new economy sector (e.g. network effects, access to relevant data).

EU competition law is enforced both by the European and by national administrations under the principle of decentralisation of EU competition policy. However, a conflict appears when the two competition systems produce distinct conclusions for the same situation. The European provision prevails if it is stricter. But if the national law is stricter it prevails: see Art. 3 of Regulation 1/2003.

Further, there is the possibility of private lawsuits against an undertaking's conduct that violates antitrust law. If a contractual provision is not in line with antitrust law, the defendant can use that as a defence against an allegation of breach of contract.

The EU legislation may spill over to non-member competition policy. The Swiss national report indicates that the competition framework in Switzerland is the Federal Law on Cartels and Other Restraints of Competition of 6 October 1995, lastly amended in 2014 (CartA or Cartel Act)⁴⁷ and the Notices of the Commission. Article 1 establishes the goals of the Swiss Competition Law to “*prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy*”. The content of the Swiss Competition Law extends to three main objects: (1) anti-competitive agreements (Article 5 CartA), (2) abuse of a dominant position (Article 7 CartA) as well as (3) merger control (Articles 9-10 CartA).

Generally speaking, the first approach of any competition law is related in first place to horizontal agreements. In most of the countries, this is a central concern of competition policy and is occasionally treated as a structural phenomenon. In Brazil, for these reasons, these agreements and practices (cartels), which are object violations may not be subject to a cease agreement or a consent decree (what assure a decision on merits to the competition investigation about cartels), but only subject to the Brazilian leniency program under certain circumstances. The horizontal agreements in the field of the online sales platform are unlikely to be out of the range of the policy maker and of competition law enforcement.

⁴⁶ In the case of being a reference to the A102 case law of the European courts (which is binding, rather than “guidance” within the EU).

⁴⁷RS 251.4 available on the website www.admin.ch

The non-EU jurisdictions tend to consider horizontal agreements as a hard-core competition violation and in some cases an object violation. For instance, the Swiss legislation establishes that *in horizontal relationships, agreements that aim at directly or indirectly fixing prices, limiting the quantities of goods or services to be produced, purchased or supplied or at allocating markets geographically are considered as hard-core restrictions to competition*⁴⁸.

As regards vertical restraints, there are also prohibitions or provisions related to such competition restriction, even though these rules generally consider the features of vertical agreements and the effects of the vertical conduct before declaring it as a violation or providing an exemption (see, e.g. Australia, Brazil, Switzerland and UK). As it happens to the franchise businesses, the restriction on intrabrand competition is justified by the increase of interbrand competition, and these features of the vertical agreements are likely to spill over to the online sales platform. The respondents indicate the following conducts as a competition restriction that relates to *agreements, which set fixed or minimum resale prices as well and/or provide for absolute territorial protections are considered as hard-core restrictions to competition*⁴⁹.

The respondents (Australia, Switzerland and Hungary) brought decisions showing that the so-called hard-core restrictions are considered illegal, regardless of the intensity or scope of the impact on competition.⁵⁰ Even though, the effects of the conduct or agreement must be considered for other restrictions in a case-by-case analysis by the competition authorities.

The control of vertical restraints is not so harmonised outside the EU. The respondents do not provide in their legislation an exhaustive catalogue or a fixed definition of the competition restrictions or dispositions related to the functioning of markets. The broad definition of illegal restraints enables the authorities to develop their competition policies. For this task, in the Swiss report the main criterion is the intensity of its antitrust effects,⁵¹ ruled by the Commission through guidelines (Notice on the Treatment).

There are situations in which some restrictive agreements are deemed not to be a violation in an anticompetitive perspective, and in this case, they should be exempted. If so, these restrictions are justified as positive effects on competition can outweigh the negative effects. All EU countries (including the UK) and Switzerland have a notification system for vertical agreements, and some of them are the result of custom rather than the legislation provision (Australia). In its former competition law (1994), Brazil used to have a broad notification obligation for all restrictions (agreements and acts), inspired by the EU model, and few times prestigious by the administrative authority. This notification system has been restricted to merger cases by the competition law of 2011⁵², improved from an *ex post* to an *ex ante* obligation.

⁴⁸ Swiss National Report, Sec 2. Article 5 para. 3 CartA.

⁴⁹ Swiss National Report, Sec 2. Article 5 para. 4 CartA and Article 10 of the Notice on the Treatment of Vertical Restraints.

⁵⁰ Swiss Federal Case law 2C_180/2014 dated 28 June 2016, Gaba/WEKO. In this decision, the Federal Tribunal considered that the vertical agreements on territories are considered as hard-core cartels that presumably lead to the elimination of effective competition.

⁵¹ M. Amstutz, B. Carron, M. Reinert, Commentaire Romand, droit de la concurrence, ad. Article 5 CartA para. 2

⁵² Law number 12.529 form 30th november, 2011..

At a European level, an explanatory statement drafted by the Commission *provided some useful insight on how selective distribution systems and restrictions to e-commerce and the digital commerce might be controlled from an antitrust general perspective.*

Under the same legal framework, the art. 101 of TFUE (corresponds e.g., to the Italian provision art. 2 of Law 287/1990 on antitrust and because art. 1, paragraph 4 of Law 287/1990) imposes an interpretation of the Italian antitrust norms which conform to the principles of European antitrust and competition legislation. Therefore, the application of national law (like the Italian law in the art. 2 of Law 287/1990) would rarely produce different conclusions or outcomes compared to the application of Art. 101 TFUE.

Related to this, according to Art. 4, let. B) of the Block Exemption Regulation, the restriction of “passive sales” into an exclusive territory is considered a hard-core restriction and therefore is forbidden, while the restriction of territory regarding “active sales” is allowed.

Note that the (i) definition of “passive sale” sale is given by the Guidelines, which is not entirely clear; and (ii) because of the above, only a few cases involving “passive sales” have been decided by European authorities and Judges.

After all, competition law enforcement takes place through investigations grounded on suspicions of horizontal or vertical anticompetitive practices and agreements. In many countries, the competition authorities have not limited their efforts to certain restraint group or categories, and have applied their enforcement powers against the restrictive competition practices. Some countries direct their efforts upon a certain category of conducts despite others, e.g. horizontal agreements.

It is difficult for all respondents obtain data about the markets related to the new economy. A sector inquiry can be a relevant source of information. Even though, for many countries, like the Austrian authority’s view, *distributors might be hesitant in submitting claims to the respective competition authorities. Hence, in the FCA’s view, it might be that competition restraints will not be disclosed in the course of sector inquiries, but only based on investigations, particularly dawn raids.*

2.1.2. Efficiency, Authorization and Exemptions

2.1.2.1. General Aspects

All of the respondents considered the importance of “efficiency” to antitrust enforcement. As happens in other sectors, many types of exemptions from competition law can be found in the new economy and more specifically in the area of online sales.

The European Union adopted through the TCE a competition system specifically created to enable the functioning of the common market (assuring the free movement of goods). The communitarian competition provisions are grounded on a prohibition/exemption system. As a decentralized analysis method, a shortcut has been created to reduce the volume of individual notifications: the block exemptions guidelines.

Some countries have not adopted the prohibition/exemption system, e.g., Brazilian competition law, despite the fact that the law is clearly inspired by Art. 101 TFEU. Nevertheless, policy makers have adopted much of the so-called “rule of reason” as a direct influence of the United States competition policy and scholars’ intellectual production (literature).

In these cases, the notion of efficiency is important in situations of authorization or either if public benefit outweighs any anticompetitive harm or if the public benefit is such that the conduct (the restriction of competition) should be allowed. In the Australian system, for example, efficiency can play an important role when considering whether public benefit would prevail over the restriction of competition. The decision *Re Queensland Co-operative Milling Association*⁵³ states that:

...[T]he widest possible conception of public benefit [is]... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of *efficiency* and *progress*. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.⁵⁴

In addition:

...the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.⁵⁵

The Swiss national report informs us that the simple existence of an agreement carrying competition restrictions *is not always in itself unlawful*, so that, the competition law *only considers agreements illegal if they eliminate effective competition or restrict competition without being justified on grounds of economic efficiency*. But, to fulfil this condition and obtain an exemption it is necessary to prove benefits such as, for example, a reduction of production or distribution costs, improvements of products or production processes, dissemination of technical or professional know-how or research development, or a more rational exploitation of the resources and these achievements will under no circumstances enable the parties involved to eliminate effective competition. The list of pure economic criteria is limited in the legislation⁵⁶ and political and cultural matters might not be taken into account as an argument in rebuttal. The Swiss Competition Commission provided the grounds of economic efficiency in its Notice on the Treatment of Vertical Restraints. For example, *Commission shall review the market shares: an agreement can be considered as justified on grounds of economic efficiency, if both the supplier's and the purchaser's market shares on the relevant markets are below a 30% threshold within the relevant market*.

The justification of restrictive agreements must be analysed on a case-by-case method, following certain conditions as economic grounds of efficiency, listed as follows: (1) *the protection, for a limited period of time, of investments which aim to open up new products and/or geographical markets*, (2) *the necessity to insure the uniformity and quality of products* (3) *the protection of investments linked to a contractual relationship (the hold-up issue) and the (4) free-riding by third entities*.

⁵³ *Re Queensland Co-operative Milling Association Ltd., Defiance Holdings Ltd. (Proposed Mergers with Barnes Milling Ltd.)*, (1976) ATPR ¶40-012.

⁵⁴ *Re Queensland Co-operative Milling Association Ltd., Defiance Holdings Ltd. (Proposed Mergers with Barnes Milling Ltd.)*, (1976) ATPR ¶40-012, at 17,242 (emphasis added).

⁵⁵ *Re 7-Eleven* (1994), ATPR 41-357 at [42,777].

⁵⁶ Swiss Report. See Article 5 para. 2 CartA.

The national competition authorities of the EU countries reflect the same core position from the European Competition (e.g., Belgium, Sweden) about restrictive competition practices, mergers and private enforcement.

2.1.2.2. The Efficiency as Justification to Exempt the Repression Against Unfair Competition or Free Rider Conduct

Some of the respondents analysed the question of preventing free riding as an economic and legal justification of a prohibition on online sales.

The issue arises in particular because brick-and-mortar businesses *have a physical presence, as a retail shop in a building, and offer face-to-face customer experiences*. The concern is that on-line businesses “free ride” on the information provided by those physical shops, which offer a place to view and sample the product and to obtain detailed advice and information about it: if enough customers then go home (or use their smartphones to) order the products from on-line retailers that do not have to bear the cost of staff and premises borne by their bricks-and-mortar competitors, then in the long run the bricks-and-mortar businesses will cease to be viable.

Some respondents referred to decisions that have specifically analysed this hypothesis in relation to brick and mortar shops. In those cases, the free rider issue was not a decisive justification. There are some reasons for that conclusion, such as the fact that in many cases buyers are professional and need no professional advice, so that there is no necessary justification for protecting retailers that give that advice. However, plainly some consumers are not professionals and may not have other access to information. In general, the buyer may have access to the stores or physical showroom of the supplier before making the purchase decision.

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2.1.3. The Approach to the Online Sales Raised from Traditional Economy

All of the respondents in this comparative study consider online sales to be procompetitive. The internet increases transparency for the consumer and reduces research (or “shoe leather” costs). At the end it increases static competition in the sense of fostering price competition among competitors.

The Swiss Competition Commission views online sales as positive for competition as well. It first considers that it is a well-known fact that the Internet increases transparency for consumers. Moreover, the Swiss Commission considers that *online sales may have somewhat of a disciplinary effect on the prices set by brick and mortar shops and it therefore puts pressure on the manufacturer’s margins and prices.*⁵⁷

According to the Italian report, 95% of Italians between the age of 25 and 44 use smart phones to surf online, and year by year the use of e-commerce has had a steady growth. However, the Italian report notes that online sales may have a potential negative impact for example on luxury brands, due to the fact that indiscriminate access to the sales network of virtual operators can disturb the orders and the traditional dynamics, with undue forms of unfair competition against the traditional physical distributors.

⁵⁷ DPC/RPW 2011/3 Behinderung des Online-Handels, para. 111

2.1.4. The Major Decisions

The respondents indicate that there have been some antitrust cases related to online sales platforms, especially in connection with hotel and real estate sectors, and there is a growing trend of such cases. The respondents considered that the current legal framework (designed for more traditional industries) is sufficient to handle these new cases. In this sense, the respondents indicate there are no cases in which the court has recognised the existence of a gap or suggested modification of the existing competition law in the field of online sales platforms. Restrictions related to a total ban on online sales, e.g. have paradigmatic cases such as Amazon and e-bay [indicate].

In some jurisdictions, like Brazil, there are more cases of mergers in the online sales sector than of infringements in that sector. That may be the reason why the national competition authorities are more likely to deal with market definition in that scenario (mergers) rather than undertake an analysis of individual infringements such as, for example, unilateral conduct consisting of exclusionary practices. For most of the respondents, some of the major decisions are related to the general competition issues in the field of vertical restrictions and abuse of dominant position.

Not all countries provide that all vertical restraints are subject to a rule of reason or effects analysis. Swiss case law treats certain categories of vertical restriction as *per se* prohibition, i.e., such hard-core restrictions are considered as illegal, regardless of the intensity or scope of the impact on competition. This is the Swiss Federal Case 2C_180/2014 dated 28 June 2016, *Gaba/Gebro*. In this decision, the Federal Tribunal considered that absolute territorial protection (i.e. a prohibition on passive as well as active sales across territories) in vertical agreements is considered a hard-core restriction that is presumed to lead to the elimination of effective competition.

In Belgium, we highlight the *Immoweb* case⁵⁸ decided by the national competition authority in November 2016. This case involved the conduct of the leading real estate platform of the country and its potential abuse of dominant position. The authority did not impose any restriction, since Immoweb⁵⁹ offered commitments and adjusted its commercial practice. A similar case was also handled in Germany involving Immowelt / Immonet.

The restrictions to competition by the real estate platform involved clauses in the agreements between the platform and developers of software for real estate agencies offering better financial conditions to Immoweb in comparison to its competitors. Due to the network effects related to such business (real estate platform), better prices as the result of reduced charges by software developers to estate agencies would increase the number of visitors (potential buyers or lessees) and attract more sellers or lessors, diminishing the relevance of other platforms.

On online sales antitrust cases, the Hungary report cited the case VJ/55/2013 in which HCA found that the undertakings concerned restricted competition by creating and operating a rebate system to the detriment of the online retailers of CIBA contact lenses and care products. The

⁵⁸ Belgian Competition Authority (BCA), Case MEDE-I/0-15/0002, Immoweb, 7 November 2016

⁵⁹ According to the Belgian report, “BCA, Case MEDE-I/0-15/0002, Immoweb, 7 November 2016, §13-14. In this decision, the BCA’s Investigation and Prosecution Service stated that ‘Most Favoured Customer clauses’ inserted in the contracts between Immoweb and developers of software for real estate agencies could be at odds with the prohibition laid down in Article 101 and 102 TFEU and Articles IV.1 and IV.2 of the CEL. However, Immoweb offered commitments and therefore the BCA did not definitively rule on the question of whether the MFC clauses in the contracts between Immoweb and the developers of real estate software infringed Article 101 and 102 TFEU (and their Belgian equivalents, Articles IV.1 and IV.2 of the CEL).”

HCA imposed a fine on Alcon Services AG Hungarian Branch (HUF 51,356,000 ~ EUR 165,670) and Alcon Hungária Gyógyszerkereskedelmi Kft. (HUF 52,343,000 ~ EUR 168,850).

In Sweden, three recent cases are worth mentioning: (i) Booking.com in 2015⁶⁰; (ii) Expedia in 2015⁶¹; and (iii) Onlinepizza in 2016⁶².

The cases involving Booking.com and Expedia are similar, since both relate to online travel agencies that operate through their online platforms. Materially their potentially anticompetitive practices concerned the restriction imposed on hotels not to offer lower prices on other platforms (including on hotels' own websites). In Sweden, the cases were resolved by the parties, since they offered a set of voluntary commitments to mitigate the negative effects on competition.

The Onlinepizza case was initiated by the Swedish authority based on the potential market foreclosure caused by this platform against its competitor Pizzahero. However, the situation was clarified by Onlinepizza, which confirmed the absence of exclusivity clause in the agreements with restaurants.

Even though, among the most relevant precedents related to abuse of dominant position (and related to market definition) in the new economy, the latest key issue is the Google case in the EU related to Google Shopping, issued late June 17th, 2017 (see sec. 2.5. below).

2.2. Market Definition

The relevant product market is defined by assessing the possibility of substitution between products or services provided to consumers and by actual or potential suppliers. Respondents to the survey confirmed that this approach to market definition in the traditional competition law framework is also applicable to the online sales platforms. This is a fundamental criterion for the competition analysis related to identifying anticompetitive agreements, abuse of dominant position or misuse of market power and to mergers.

In this sense, the general provisions about market structures are central to this issue, mainly in cases which have been prohibited based on a substantial lessening or reduction in competition and this is 'assessed looking at both market structure and the strategic behaviour of market participants.'⁶³

To all of the respondents, market definition remains essential to an assessment. The notion of the relevant market is defined separately in relation to mergers as a market for goods or services (product) which is geographically limited. For all of the respondents, temporal factors and the price relevant markets can both be taken into account in the product market definition analysis on the basis of the substitution possibilities from the consumer's point of view.

The antitrust analysis requires the concept of relevant market in both categories of conduct, i.e., restrictive agreements and abuse of dominant position. The determination of relevant geographic and product markets is a condition (necessary precondition⁶⁴) not only for merger control analysis but also for an analysis of restrictive agreements, exclusionary practices and

⁶⁰ Decision of the Swedish Competition Authority of 15 April 2015, file ref. 596/2013.

⁶¹ Decision of the Swedish Competition Authority of 5 October 2015, file ref. 595/2013.

⁶² Decision of the Swedish Competition Authority of 4 April 2016, file ref. 658/2015.

⁶³ *MMP Framework*, para 4.4.

⁶⁴ SHWARTZ, FLYNN and FIRST, *Free Enterprise and Economic Organization: Antitrust*, Foundation Press, New York, 1983, page 284.

abuse of dominant position. The respondents recognise the relevant market as a condition for the antitrust analysis.

In the Swiss jurisdiction and the EU Member States, the authorities take into account market shares to determine the impact of a specific agreement in which there are restrictions. In line with the thresholds established by the European Block exemption system, such agreements or contracts are not considered to have the effect of appreciably restricting competition, as long as the market share of the parties does not exceed 10%. In the case of vertical agreements, the threshold is 15%. If there is a network of agreements that have a cumulative effect in the market, the relevant threshold falls to 5%. These *de minimis* provisions do not apply where the agreement has the object of restricting competition (as opposed to the effect of restricting competition). Finally, in some countries the cartel is not *per se illegal* if undertaken by a SME (see Australia).

2.3. Criterion for Market Power or Dominant Position

Alongside (vertical and horizontal) agreements that restrict free competition, a specific group of unilateral conduct features in various competition laws, namely abuse of a dominant position. A dominant position is inferred on a case-by-case analysis based not only on market structure (market share) but also on other meaningful determinants like barriers to entry, the market share of the competitors and evolution of the structure concentration in the relevant market.

A dominant position is a “de facto” situation in which its holder can take decisions (about price and commercial conditions) independently of the market. This category of restrictions on free competition relates to the concept of market power.

Legislation in some countries indicates a presumption of market share of 20% (twenty percent) for the characterisation of a dominant position, as occurs in the case of Brazilian competition law. Notwithstanding, this presumption may be displaced on the grounds of an efficiency justification. This option coincides to some extent with the 2,000 points of the Herfindahl Hirschman Index – HHI criterion (which may be found, e.g., in a relevant market with five competitors with 20% quotas each). But, this is a relative presumption (*juris tantum*) and in this sense the Brazilian authority may consider the existence of dominant positions in case in which the investigated undertaking may possess a share below this level or instead, not be held to enjoy a dominant position even above this presumed limit.

Based on the literature, some other systems consider that a share of over 50% can be used as an indication of existence of a dominant position (see the Swiss National Report, sec. 4.1.). Even though, some jurisdictions (like Australia and Switzerland) adopt different criteria to delimit the market for the merger cases and abuse of dominant position or misuse of market power.

Most of the national competition legislation does not prohibit a dominant position or the existence of market power, but rather its abuse or misuse. On the other hand, a dominant position acquired by efficiency may not be considered anticompetitive. For instance, the Australian policy maker adopts the notion of misuse of market power. This situation occurs when an enterprise with “substantial market power” *takes advantage of that power for a prohibited anti-competitive purpose*.

According to most of the policy makers in this survey, there are categories of conducts that may be considered unlawful restrictions of competition. These categories include some classical restrictions like refusal to deal, price and trade conditions fixing, production limitations and

imposition of restrictions on contractual conditions which are unacceptable in most circumstances.

According to the Australian Report, the misuse of market power may not be further authorized on the ground of public benefits.

Some systems may consider that a market player holding a dominant position or market power may justify restrictive conducts on legitimate business grounds. See, e.g., the Swiss National Report (sec. 4.1.). Meanwhile other respondents (see Australian report, Sec. 4) consider competition law should have an economy wide application and not driven to any specific sector and according to this approach there is no possibility of exemption of presumption of legality (safe harbour) to such unilateral conducts (misuse of market power).

2.4.Types of Infringement

2.4.1. General Approach of the Competition Law

According to the results of this survey, there are three main types of infringement in this area: (1) vertical restraints, (2) the protection (or overprotection) of IP rights in connection with competition law, (3) a wide range of potentially anti-competitive behaviour involving online sales platforms.

For instance, Australian competition law *prohibits* through a general provision *mergers or acquisitions which have the effect or likely effect of substantially lessening competition and certain other conduct, including exclusive dealing (s 47) and horizontal agreements (s 45),⁶⁵ where it has the purpose, effect, or likely effect of substantially lessen competition. The types are Cartels;⁶⁶ Primary boycotts,⁶⁷ Third line forcing (form of exclusive dealing);⁶⁸ and Minimum resale price maintenance (including vertical price fixing). All forms of prohibited anti-competitive conduct, with the exception of misuse of market power (s 46), may be authorised in advance⁶⁹ on public benefit grounds, rather than a direct assessment of whether the conduct will substantially lessen competition.*

In many countries influenced more directly by the common law, vertical restrictions are to be considered at first pro-competitive as a result of scale benefits. Even though, in the EU Member States it is possible to consider some restrictions in vertical agreements as hardcore restrictions and for this reason unlawful prohibitions.

⁶⁵ Accordingly to the Australian Report: *In theory, s 45 also covers vertical agreements which do not contravene s 47 (“exclusive dealing”) and/or s 48 (“resale price maintenance”).* See below.

⁶⁶ Part IV, Division 1 of the *Competition and Consumer Act 2010* (Cth). This incorporates price-fixing, output restrictions, allocation of customers, suppliers or territories and bid rigging. This conduct is both a criminal offence and subject to civil penalties. Certain joint venture activity is excluded from the scope of the *per se* prohibition, but remains subject to the general prohibition against anticompetitive agreements in s 45.

⁶⁷ The section 2.2. of the Australian National Report indicates that [I]f Bill 2017 is passed, third line forcing and primary boycotts will no longer be *per se* prohibited but will be evaluated under the substantial lessening of competition requirement.

⁶⁸ Unlike other forms of exclusive dealing, it is *per se* prohibited, but it is possible for the conduct to be ‘notified’ and receive immunity on public benefit grounds. This occurs when supply is made on the condition that goods or services are purchased from an unrelated third party (or there is a refusal to supply because of failure to agree to such a condition).

⁶⁹ It is not possible for conduct to be retrospectively authorised; approval must be provided in advance of the conduct occurring or it will contravene the Act notwithstanding any demonstrated public benefits.

2.4.2. Retail Price Maintenance (RPM) and Refusal to Deal or Supply

An important aspect of the application of the competition rules to online platforms is resale price maintenance, which is prohibited conduct (*per se* illegal) in most of the countries surveyed and considered as a hard-core competition restriction or violation in some countries. Nevertheless, in the Brazilian competition system (perhaps influenced by the US) the policy makers are not persuaded by the conception in which RPM should be one of the major competition law violations. Most other jurisdictions would consider RPM a significant restriction.

The Australian report brings a concept from the economic studies about online platforms, in which it is recognised that *there are incentives for vertical restraints to be applied in connection with online platforms and the sharing economy*.⁷⁰ This situation includes hypothesis in which a particular online platform does not have significant market power.

For instance, in the Safeway case, involving the largest supermarket chain and the largest bread retailer in Victoria (Australia's 2nd most populous state), Safeway's ceased purchasing bread from producers whose bread was available locally at a discounted price. This refusal to deal was held to constitute a misuse of market power (in this case, also related to RPM and the MFN clauses).

2.4.3. IPR Restrictions

The use of Intellectual Property is one of the main grounds of the business methods created upon a software-based online platform. The net externality effect is an important asset to online platforms and the intellectual property is the centre of these business models. So that, the interface between Intellectual Property Rights and competition law is also relevant to the online sales platforms. Among these rights are not only copyright but also patents and trademarks and all kinds of protection of IP addressed to innovative goods and services enable to be commercialized through online platforms.

The exhaustion of IPR (and parallel imports) is important to the analysis of conduct as international price discrimination (so-called Geo-blocking). Respondents (like Australia), point out that international price discrimination can also be facilitated by restricting parallel imports, which can negatively impact, for instance, online sales platforms such as Amazon and local online retailers.

To some respondents (see Australia⁷¹), the use of intellectual property prevents the characterisation of the platform as a "service", and for this reason affects some antitrust criteria created originally for traditional markets, mainly that related to the "essential facilities"⁷²

⁷⁰ Australian report, sec.7.

⁷¹ See Australia report, sec. 5.4. "Australia does not apply the essential facility doctrine in the same way as, for instance, the United States of America. In general, s 46 (misuse of market power) deals with situations where a natural monopolist and/or an owner of a bottleneck in a bottleneck industry misuses its market power; for example, in the form of a refusal to supply or provide access. This section has been used successfully in such situations in the past."

⁷² Ibidem. "the Australian specific law dealing with essential facilities, the national access regime law, will not apply to this example for a number of reasons, including the fact that duplication of an online platform is both possible and not 'uneconomical'." And, in this sense, the report states the following consideration "[I]n the context of online sales platforms, it will be difficult to obtain access via this regime. The primary mechanism for obtaining such access is to have a service 'declared', after which negotiation for access can take place. The first hurdle is to establish that there is a service. Although the definition of service in s 44B includes 'a communications service or similar service', which could capture online sales platforms, the 'supply of goods', 'the use of intellectual property' and 'the use of a production process' are expressly excluded from the definition of 'service' for the purposes of the access regime. As online sales platforms frequently involve the supply

doctrine. This aspect may create difficulties to authorities related to the antitrust control of the “bottle necks” (an issue more related to market structures). Some national legislations restrict somehow the parallel imports, e.g. the Australian Trade Marks Act (1995) and the Copyright Act (1968).

Generally speaking, there are no static exemptions to the appropriation of IPR itself capable to confer an absolute antitrust immunity, as it is a “patrimonial” asset like any other. On another hand, there are jurisdictions where the local legislation exempts intellectual property rights (IPR) including copyrights, trademarks and licensing from certain provisions of the competition law, other than hard-core restrictions like misuse of market power or abuse of dominant position and resale price maintenance (RPM)⁷³. Policymakers widely criticise such kind of legal exemption and many have proposed its repeal⁷⁴ because it may seriously restrict competition mainly in a field in which there are multiple and competing IPRs. Likely, for this reason, the Australian report says its legislation lead to IPR overprotection.

2.4.4. Other Restraints

The emerging markets generated from the features of the new economy (because of the multi-sided market possibilities) are subject to new restrictions related to the market power of some sales platforms. Even though some of these restrictions come from traditional markets, other vertical restraints like exclusive dealing (non-price vertical restraints), bargaining power (monopsony power⁷⁵) or abuse of buying power may be relevant.

In many countries, such conducts or practices are likely to be prohibited under certain circumstances, like the anticompetitive effect (Brazil) or the effect of “substantially lessening competition” (Australia). In this sense, some competition laws also consider situations including third parties participation, e.g. the prohibition on “third line forcing” in which a supplier imposes the acquisition of another good or services from a third party to a purchaser. This practice may have relevance to the online sales markets.

2.5. Precedents Regarding Abuse of Dominant Position in the Area of Online Sales Platforms

The major cases were referenced in section 2.1.4 above and some relevant aspects will be addressed in this section. There is usually no specific guideline for misuse of market power, but it is widely recognized by the respondents that the meaningful growth of the online platforms may give rise to structural concentration, i.e. players holding substantial market power or dominant position. Considering this hypothesis, there is a list of general principles that can be derived from other cases in order to envisage how competition law might be applied to online platforms.

of goods, and this is excluded from the scope of the access regime, the circumstances in which the regime will apply are quite limited.

⁷³ See Australian National Report, sec. 9.

⁷⁴ See the Australian National Report, sec. 9.

⁷⁵ Australia report, sec. 6.1. “A corporation with significant bargaining power can contravene s 46 by demanding a most favoured nation clause from suppliers. This was demonstrated in the case of *Safeway*.⁷⁵ Safeway was the largest supermarket chain and the largest bread retailer in Victoria (the second most populous state in Australia). The relevant market was the market ‘for the sale and acquisition of bread by wholesale in Victoria’.⁷⁵ Safeway’s conduct, which involved refusing to acquire bread from a supplier if the supplier sold bread for less to another buyer, was held to constitute a misuse of market power. In order to find a contravention, the court was required to find that Safeway held substantial market power and that it had taken advantage of that power for an anticompetitive purpose.”

In Australia, the first task of authorities carrying out an antitrust investigation is to verify if the investigated firm holds “substantial market power” and after that to demonstrate the connection between the conduct and that extraordinary power (“take advantage element”). In addition, it is necessary to identify the purpose of restricting the competition.

In Belgium, the *Immoweb* case⁷⁶ offers some insight into the competition authority’s approach even though the investigation was concluded after the authority accepted commitments offered by the company. As for relevant market definition for online platforms, the authority decided that (i) the relevant product market was online real estate platforms, not competing with websites of real estate agencies, newspapers or street boards; and (ii) the relevant geographic market was national. Immoweb had a dominant position (leader player) and applied clauses in the agreements between the platform and developers of software for real estate agencies offering better financial conditions to Immoweb in comparison to its competitors. Such clause - called as Most Favoured Customer – MFC (to be addressed in the following section) - was questioned by the national competition authority and later modified by the platform.

In Sweden, the Booking.com⁷⁷ and Expedia⁷⁸ cases were related to the MFC issue as well. The type of price parity adopted by both players was similar and was considered as a potential barrier to entry of new and small platforms that would not have the economic strength to compete with low commission fees (level artificially created due to this practice). It is important to highlight that both companies offered voluntary commitments to change the price parity, and the Swedish authority concluded therefore that there was no threat to competition.

It is possible to identify a trend related to online platforms and competition in Europe, which can be illustrated by the recent Amazon case⁷⁹ (European Commission). This goal – fighting against abuse of dominant position by internet-based companies – was identified in the national cases of Belgium and Sweden, for example.

Among the most relevant precedents related to abuse of dominant position in the new economy, the latest issue is the Google case in the EU . Although this is not a case of online sales itself, this case may establish parameters for the antitrust analysis related the abuse of dominance in an on line sales environment.

The recent Decision from the European Commission was addressed to Google Inc. and Alphabet Inc., Google's parent company. In June 27th 2017,⁸⁰ the European Commission announced that it had fined Google €2.42 billion *for abusing dominance as search engine by giving illegal advantage to own comparison shopping service.*⁸¹

⁷⁶ Belgian Competition Authority (BCA), Case MEDE-I/0-15/0002, Immoweb, 7 November 2016.

⁷⁷ Decision of the Swedish Competition Authority of 15 April 2015, file ref. 596/2013.

⁷⁸ Decision of the Swedish Competition Authority of 5 October 2015, file ref. 595/2013.

⁷⁹ Decision of the European Commission of 4 May 2017. Case No. 40153 (E-book MFNs and related matters - Amazon).

⁸⁰ See the release of the EU Commission in http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

⁸¹ In the EU Commission release is possible to access the following Commissioner declaration. ‘*Commissioner Margrethe Vestager, in charge of competition policy, said: "Google has come up with many innovative products and services that have made a difference to our lives. That's a good thing. But Google's strategy for its comparison shopping service wasn't just about attracting customers by making its product better than those of its rivals. Instead, Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors.*

What Google has done is illegal under EU antitrust rules. It denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation.”

The EU Decision follows two prior Statements of Objections sent to Google in April 2015 and July 2016.

The EU authorities are investigating certain of Google's other practices relating to abuse of dominant position in two cases more. One of these cases relates to the Android operating system, in which Google allegedly *stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy on mobile devices to protect and expand its dominant position in general internet search*. The other case relates to AdSense, in which Google allegedly reduced user's choice by *preventing third-party websites from sourcing search ads from Google's competitors*⁸². The investigation of these two cases are still ongoing.

In the Google case related to the search engine, the European Commission indicated its criteria related to the abuse of dominant position in a multi-sided market. More specifically, it is an antitrust solution to the misuse of market power raised from the network externality effect. At the same time, there are parameters to so-called dynamic competition (what is pending in most of the jurisdictions).

In this case, the network externality effect⁸³ generated market power. As the EU decision states, *given Google's dominance in general internet search, its search engine is an important source of traffic for comparison shopping services*.

The European Commission found that Google had strategically used its dominance (in general internet search) to promote its search engine, instead of competing on the merits. This strategy was adopted by Google in 2008 for Europe constructed upon two pillars: 1) the prominent placing by Google of its own comparison shopping service and, 2) the demoting rival comparison shopping services in its search result. The visibility⁸⁴ of Google's own comparison-shopping service has grown as a direct result of such strategy in contrast with less visibility of rival comparison shopping services.

The European Commission found that Google is dominant in general internet search markets in all EEA countries. It found that Google engine search has a dominant position in the 13 countries of the European Economic Area (EEA). The very high market share exceeds 90% in most of the affected national markets. This network effect⁸⁵ creates barriers to entry.

⁸² http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

⁸³ To the Commission, “[C]omparison shopping services rely to a large extent on traffic to be competitive. More traffic leads to more clicks and generates revenue. Furthermore, more traffic also attracts more retailers that want to list their products with a comparison shopping service.”

⁸⁴ The evidence shows that consumers click far more often on results that are more visible, i.e. the results appearing higher up in Google's search results. Even on a desktop, the ten highest-ranking generic search results on page 1 together generally receive approximately 95% of all clicks on generic search results (with the top result receiving about 35% of all the clicks). The first result on page 2 of Google's generic search results receives only about 1% of all clicks. This cannot just be explained by the fact that the first result is more relevant, because evidence also shows that moving the first result to the third rank leads to a reduction in the number of clicks by about 50%. The effects on mobile devices are even more pronounced given the much smaller screen size.

⁸⁵ According to de Swiss report: “This effect occurs when the use of the platform of one group of users depends directly on the participation of the second group of users. For instance, for hotel online booking platforms, the more hotels and end-consumers use the platform, the more said platform becomes attractive for both group of users. This indirect network effect may create a high market concentration with only a few dominant undertakings sharing the market.”

Google's market power allowed it to misuse its position in the general market of search engine platforms, i.e. it has abused this market dominance by giving its own service (Google search engine) an anticompetitive advantage.

This platform introduced such practice in all of the 13 EEA countries where Google has launched its service, beginning in January 2008 in Germany and the United Kingdom. After that, it expanded the conduct to *France in October 2010, Italy, the Netherlands, and Spain in May 2011, the Czech Republic in February 2013 and Austria, Belgium, Denmark, Norway, Poland and Sweden in November 2013*. It reached seven countries of this survey.

Moreover, the abuse of dominant position deprived European consumers of genuine choice and innovation. The EU press release indicates that Google is also liable to face civil actions for damages before the courts of the EU Member States by any person or business affected by its anti-competitive conduct. In this sense, the EU Antitrust Damages Directive may facilitate damages actions for victims of the anti-competitive practices to obtain a tort or damage decision.

This decision is a binding precedent (at least as regards antitrust liability) for the national authorities of other EU Member States. The question now is if this approach and criteria may or may not spill over to other jurisdictions around the world.

2.6. Most Favoured Nation (MFN) Conditions in the Context of Online Sales Platforms

The following investigations raising the issue of the most favoured nation clause in France, Italy and Sweden have influenced the revision of this clause in European Union countries and non-European Union, e.g., Switzerland. In general, the approach has been based on a finding that this clause interferes directly in the distributor's price formation process.

In Switzerland, Sweden and Italy (amongst other jurisdictions), the competition authorities reviewed the clause applied by online travel booking services, namely the Booking.com, Expedia and HRS platforms.

Nevertheless, the platforms kept their "narrow MFN"⁸⁶ clauses prohibiting hotels from offering lower prices through online services in their own websites. This new narrow MFN clause seems to be less restrictive according to many of the respondents, even though its effect on the market must be reviewed by the policy makers as soon as meaningful empirical data is available. It is interesting to note that the Swiss competition authority refused to settle amicably (avoid a Consent decree) on the issue of narrow MFN clauses and is currently monitoring the market, competition law and political developments in Switzerland and abroad.⁸⁷

The first group of European countries (France, Italy and Sweden) through the results of their competition investigations regulated these practices by ordering the removal of the wide MFNs or price parity clauses. In such cases, even though the platforms keep the private prohibition barring hotels from announcing rooms with lower prices on their own websites, they may not

⁸⁶ "The online platforms however kept their "narrow MFN clauses" barring hotels from offering lower prices on their own website. With the new narrow MFN clauses, the hotels are however entitled to offer lower prices on their direct distribution channels if those prices are not public and to determine freely their prices, room capacities and other better conditions on competing online platforms.⁸⁶ The Swiss Competition Commission mentioned that those new narrow MFN clauses appeared to be less restrictive but considered that their effect on the market still had to be reviewed in the future." Swiss report, sec. 3.2.2.

⁸⁷DPC/RPW 2017/1 Annual Report 2016 of the Competition Commission p.62

prevent hotels from offering lower prices in the ordinary channels like travel agencies if these commercial conditions are undisclosed.

As addressed in the precedents related to hotel and real estate industries, this MFN clause can be also called Most Favoured Customer – MFC. It tends to restrict the ability of other platforms to compete by offering better deals to the consumer than the dominant platform. Since the other side of the network (e.g., hotels, landowners) must offer at least as good prices to the dominant platform (according to the MFC clause in their agreements), the other competing platforms cannot compete on price and are hindered from increasing their market share.

In this regard, similar to Sweden, according to the Italian report, in 2014 the Italian Competition Authority took action against the online travel agencies Booking and Expedia in order to examine whether the “Most Favoured Nation” (MFN) clauses of the contracts concluded by the two Online Travel Agencies (OTA) and their hotel partners in Italy may integrate a vertical restriction in violation of Art. 101 TFEU.

2.7. Compensatory Damages or Unfair Competition Damages in Cases of Antitrust Violations and of Non-compliance with a Consent Decree or Cease-and-desist Agreement

The respondents confirmed that private enforcement is possible in their jurisdictions, although practical problems still exist in order to make such claims popular.

The EU Damages Directive (Directive 2014/104) has clearly addressed the possibility of damages actions, whether individual or collective, to be proposed in the Member States. The goal of the referred directive was to remove practical obstacles to compensation for all victims of infringements of EU competition law.

An economic agent that intentionally or negligently causes damage by infringing Article 101 or Article 102 TFEU is liable for damages that arise from such conduct. The person harmed by the conduct has the right to full compensation for actual loss and for loss of profit, as well as the payment of interest. Companies taking part in an infringement are jointly and severally liable for the damages, and damages in cartel cases are presumed.

Considering that deadline for transposing the directive into Member States’ legal systems expired on 27 December 2016, several respondents are aligned with the European policy for such matter.

Not only the Europeans, but other countries (including Brazil, for example) have been influenced by the directive and are discussing how to facilitate private enforcement of competition law and force companies to compensate for the harm caused due to antitrust violations.

3. Common Market, Custom Union and Free Trade Market

The main political and economic integration blocks are the European Union - EU, North America Free Trade Area - NAFTA, South Common Market – MERCOSUR, the Andean Pact and Pacific Alliance.

The treaties, which gave rise to these political and economic integrations, have provisions relating to intellectual property rights and free competition, but none of them provides specific provisions or supply general principles about the commerce through online platform. In this survey, the respondents are members of the EU (most of them) and of Mercosur (only one of them).

The respondents indicate that the European Commission attaches great value to the internet as a sales channel for reaching a wide variety of customers in different countries. The policy maker in the EU recognises that online platform play a key role in innovation and growth of the digital single market. Through the Commission's communication from May 25th 2016, it stated, "*they have revolutionized access to information and have made many markets more efficient by better connecting buyers and sellers of services and goods*". The document was written as a Staff working paper accompanying the Communication which recognised the benefits of online platforms for consumers, businesses and their general economic and social benefits. This approach has been confirmed by the Final Report on the E-Commerce Sector Inquiry and its Staff Working Document from May 10th 2017.

The analysis of competition matters in the field of online sales platforms at an EU level is relevant for the national competition authorities of the EU Member States as it expected that the respective policy makers and courts *will follow the guidance offered at the EU level dealing with future cases.*⁸⁸

The discipline of online sales platforms is important to all integrated markets (and to agreements between supra-national markets, e.g. European Union – Mercosur Framework Cooperation Agreement⁸⁹) as it influences trade at a supra-national level and can prejudice the targets of the related integration treaties and the international trade as a whole. This issue should be object of further studies.

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4. The Competition Law in the Context of the New Economy

4.1. Application of General or Specific Criteria to the New Economy

As indicated in the section about substantive law (sec. 2), the respondents of this survey state that their national law does not have specific rules on online sales or related to internet platforms, which are subject to the general provisions of the competition law. Outside the European Union, this is also the case for Brazil and Switzerland.

4.2. Applicable Rules and Criteria to Restriction of Online Sales

In some jurisdictions, competition policy adopts a binary test. For example, the Swiss authorities (the Competition Commission), despite the general prohibition related to unlawful

⁸⁸ Belgian National Report, sec.2.

⁸⁹ See the Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part - Joint Declaration on political dialogue between the European Union and Mercosur. According to the UE, the sectors of cooperation include: *trade, standards, customs, statistics and intellectual property; economic cooperation, with the emphasis on industrial, energy, scientific and technological cooperation, telecommunications, the environment and investment promotion.* See the link address <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=405>

restraints on competition on both vertical and horizontal restraints on the relevant market of the statutory Swiss competition law, distinguishes two situations: (i) the restriction of passive sales and (ii) the general restriction of online sales.

Generally speaking, most of the competition policies of the EU countries consider sales through online platforms to be a sort of passive sale (unless the seller or distributor makes serious efforts to reach clients outside the authorized territory or geographical attribution of the distribution contract). In those cases, since restriction of passive sales is generally considered to be an unlawful hard-core restriction subject to penalties, the same treatment is applied to restriction of sales on online sales platforms (Switzerland).

Nevertheless, in some of the countries surveyed, a general ban on online sales is not a hard-core restriction under their competition policy, as long as it is not a tool to attain such objects as price control or a grant of absolute territorial protection (market sharing). In these competition systems, a restriction on online sales does not benefit from an automatic exemption, but is a situation subject to a rule of reason so that the authority can however still consider it to be unlawful after carrying out an effects analysis. This is the case for Switzerland.⁹⁰

In this case, the policy maker may issue guidance as to its antitrust analysis on a case-by-case basis indicating certain circumstances or features which are likely to amount to serious restrictions of competition. In the Swiss jurisdiction, the authorities have issued new guidance stating that to a general ban of online sales can exceptionally be a hard-core restriction when there are “qualified circumstances”, i.e., resale price maintenance and private penalties against the respective non-compliance.

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Most of the respondents consider so called “geo-blocking practices” as a competition restriction. These practices prevent the national consumer from accessing websites outside the national territory and employ logic devices processing personal data: these devices prevent the consumer from accessing a page outside of the attributed territory and re-route the consumer to the supplier or a distributor located in his territory. Another similar case is where the distributor is obliged to interrupt the purchase order if it identifies that the consumer is located outside the attributed territory.

4.2.1. Bans on Sales Through Third-party Internet Platforms in Selective Distribution Systems

4.2.1.1. General Aspects of Selective Distribution

Selective distribution agreements are a business method in which the supplier controls distribution by restricting the type of the distributor that can be supplied. This system is used in a wide range of markets, e.g., automobiles, luxury, cosmetics, technology and premium brands. In these agreements, the *supplier undertakes to sell its products only to authorised dealers on specific qualitative and quantitative criteria and in which those dealers undertake not to sell the products to unauthorised distributors.*⁹¹

⁹⁰ See the Swiss guidelines, DPC/PRW2011/3 Behinderung des Online-Handels, para 76 and ff.

⁹¹ See Swiss national report sec. 3.2.3.1. and Article 4 of the Notice on Treatment of Vertical Restraints.

Exemptions for this type of restriction are usually confined to cases where the nature of the product sold justifies the use of selective distribution system. Ordinary products (not a luxury or not a technical product) are not entitled to use this kind of distribution method. In this sense, high quality, technology or luxury products may justify the selective distribution system when the intrinsic characteristics of it and the modalities set by the manufacturer demand some kind of limitation of the distribution channels, e.g., obligation to have qualified staff, to respect the trademark identity and to offer after sales services.

4.2.1.2. Anticompetitive Restrictions related to Online Sales in Selective Distribution Systems

As is the case with the market for traditional newspapers (sale of newspapers/advertising in newspapers), online sales platforms can be characterised as two-sided markets. So, an important feature of policy analysis is the existence of network externalities or the “indirect network effect” as it is termed in the national reports. These indirect externalities arise because software is not priced at marginal cost and technological evolution of the new economy (including equipment and telecommunications services) creates new standards for consumption. In many cases it is common to infer these effects spilling over to markets downstream and upstream. As a result, this indirect network effect may under certain circumstances create market power or a dominant position.

In the specific case of the online platforms this indirect externality effect occurs because one group of users depend directly on a second one⁹². In the same way that a newspaper becomes attractive to advertisers because of its readership, the online platforms also become more attractive to new users as the interdependent user groups are made up of a larger number of people. The point is the fact that an online platform becomes more important to sellers if there are more buyers using it? So more buyers using a platform means more sellers and so more buyers – and there is a virtuous circle that is difficult to break.

This is the reason why the said indirect network effect may create a high concentration market structure with only a few dominant market players.

Most of the respondents indicate that the case law in relation to dominant position of online platforms or even e-companies in general is somewhat scarce.

Generally speaking, internet sales are considered as passive sales, i.e., a situation in which the buyer searches spontaneously for the supplier. Accordingly, the supplier has not made any commercial active efforts to sell his products beyond the originally attributed territory, as publicity or licensing local distributors. For most respondents (the European competition system) a ban on passive sales to distributors or users is considered a general restriction of competition. This is an important aspect of the phenomena. In many situations, these bans of online (passive) sales not only prohibit a distributor from selling the product to a consumer but also prohibit passive sales to the distributor or retailer. The existence of such extraordinary restriction can be the evidence of a market distortion when it is clear that an authorised dealer must be entitled to sell, both actively and passively, to consumers via online sales. It does not mean that the sales conditions must be the same in the both distribution channels (online and

⁹² “For instance, for hotel online booking platforms, the more hotels and end-consumers use the platform, the more said platform become attractive of both group of users”.

offline). Nevertheless, those conditions must have the same goals and produce comparable results. So that, the hypotheses of differences between both business methods must be justified upon its features (*different nature of those two modes of distribution*).

The exception to such consideration (anticompetitive character of the ban relating to passive sales) occurs when the seller makes *specific efforts to reach clients established outside the attributed territory*.⁹³

Consequently, the restrictions on a specific territory relating to passive internet sales are considered anticompetitive, i.e., as unlawful hard-core cartels and subject to fines.

Even though, in the Swiss competition system, e.g., a general ban of all on line sales is not itself a hard-core restriction of competition (applicable only in cases related to resale price fixing and the specific territory granting) and is subject to a so-called “rule of reason” criterion or a case-by-case scrutiny. However, in certain qualified circumstances, a prohibition or restriction of online sales can also be considered as a hard-core agreement. The conduct known as geo-blocking is a type of “qualified circumstances”.⁹⁴

4.2.1.2. Lawful or Accepted Restrictions related to the Selective Distribution System through Online Platform Sales

Some restrictions are generally accepted as long as they are an integral part or are directly related to the business model in which they are used. In this sense, some respondents indicate that authorities permit some manufacturers’ restrictions on the distributor. Some of these contractual restrictions are justified on the ground of business features (such as quality) control relevance, i.e., the manufacturers’ right to [search or guarantee] harmonization between the activities of the authorized distributor and their business methods.

Therefore, if a manufacturer has the right to set a criteria list to be applied to authorized dealers in the online sales, it may affect the characteristics of the respective selective distribution system. For the Swiss Commission, this is *particularly relevant*. The fixation of points-of-sale and standards must not spill over the product under contract and must be equally applied to all authorized dealers.

4.2.2. Trademarks and the Use of Third Party Platforms

There are criteria commonly set in the selective distribution system, but in the online platform, sales may have another meaning related to competition policy, particularly to other brands. In general, imposing any restriction on a dealer regarding the use of third party trademarks is a serious restriction of competition.

⁹³Article 2 of the Notice on the Treatment of Vertical Restraints, see also the Explanatory Statement on the Notice on the Treatment of Vertical Restraints para. 21.

⁹⁴ See Swiss Report, sec. 3.2. The *geo-blocking practices* are also considered as qualified circumstances. In this case, according to the Competition Commission, territorial agreements are considered to be qualified circumstances if they provide that (1) a distributor will prevent final consumers in Switzerland to have access to its website and/or which will re-route the client automatically towards the webpage of the manufacturer and/or of the Swiss distributors, or that (2) the distributor will stop the transaction if the client’s credit card reveals that the client is not from the attributed territory. Explanatory Statement on the Notice on the Treatment of Vertical Restraints para. 20, citing DPC/RPW 2011/3, Behinderung des Online-Handels, 381, Para. 74 and DPC 2014/1 Kosmetikprodukte (Dermalogica) 198 Para. 142, see also DPC 2014/2, Jura, 413 Para. 62.

It is important for the player to protect its own brands, as it is one of the main elements of the consumer research before any purchase decision. On the other hand, confusion among competitors leads to free riding and may cause liability issues to the manufacturer responsible for free riding.

One of the tools to keep the identification of the manufacturer clear and his authorized dealer dedicated to online sales, is the full disclosure of the respective dealers and of their points-of-sale, also clearly identified in their websites (clearly mentioned and visible in the dealers' websites). By the way, dealers are entitled to use their own domain names adopting signs that may differ from their trademarks or commercial names, provided that the association of these names is not disadvantageous to the manufacturer's brand.

In this sense, some of the respondents consider that the supplier may impose on the authorized dealer certain quality standards related to a third-party platform and the respective website presentation. So that it would be possible for a manufacturer to prohibit the distribution of his products on a third-party platform as, e.g., "Ebay".

There are cases in which branding is used to justify restrictions. Recently, in a German Court (the Higher Regional Court Düsseldorf) the "Asics" case ruled that a general prohibition on distributors using price comparison sites constitutes a competition restriction.⁹⁵ In that case, the prohibition is not justified by branding and advisory services. Consumers may not need or want to be advised, in the case of running shoes, or would also be able to get information on the internet.⁹⁶

This topic was discussed by the EU Member States and resulted in a solid report,⁹⁷ which shows the relevance of this matter in the near future of competition.

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5. A Criterion to Structure Definition of Online Platform Markets

None of the countries surveyed have a statutory definition of relevant markets in their respective laws.

As in other sectors, the competition authorities define relevant markets (of products or service) by analysing the substitutability for buyers and consumers (adopting the SSNIP test for that) and sometimes examining this "cross elasticity" in the supply side. It is true that the entry of online platforms affected traditional markets, and occasionally market structure analysis and the definition of relevant market.

Among the EU respondents, national authorities closely follow the guidelines and criteria established by the European Commission's notice related to relevant market definition. The policy makers in countries with meaningful national markets like Australia and Brazil also

⁹⁵ Higher Regional Court Düsseldorf, Decision of 5 April 2017, VI Kart 13/15 [V].

⁹⁶ Vide also the Austrian Report, sec. 2. "Interestingly, the question, whether the former distribution system of Asics was also in breach of core antitrust rules because of Asics' prohibition on its distributors to use Google AdWords and third party online marketplaces, was left open. The German Federal Cartel Authority (Bundeskartellamt) had ruled in first instance, and later argued before the Higher Regional Court Düsseldorf, that such a general ban on sales on third-party online sales platforms is a hardcore infringement for its own."

⁹⁷ Commission (2017) Final Report on the E-commerce Sector Inquiry, http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

apply a substitutability criterion to define the relevant market. Even though, the growth of online sales platforms induced improvements of the antitrust examination.

The Australian report indicates that through the support of an economic study (from Deloitte) there is a growing trend for online sale platforms to become vertically and horizontally integrated. And the respondent states that: *[t]his then 'raise[s] the prospect of any integrated platforms with market power using that market power to force or incentivise their suppliers and/or consumers to support the integrated business model, in order for the platforms to maximize revenues.*

This kind of integration might be considered under the merger rules. In this context, in some jurisdictions, online platforms have been considered new and “disruptive” technologies characterised at first by low barriers to entry and the respective mergers subject to approval. There was a relevant incidence of cases in the hotel reservation sector (accommodation booking services) related to mergers. See Australian Expedia/Wotif case that was considered to the competition authority to be unlikely to “*impede the degree of dynamic change in the market*”.⁹⁸

64. Consent Decrees and Cease-and-desist Agreements

The respondents have statutory provisions related to cease anti-competitive agreements. In many of the online platform cases, the investigations were interrupted or closed by a cessation agreement.

In many cases (see Australia), the cease agreement included not only the payment of a fine but the admission of a competition law infringement. As usual, the nature of the consent agreement between the authorities and the defendant does not enable us to determine the court’s approach to online sales platforms.

As presented in the cases from Australia, Belgium and Sweden, the main cases related to online platforms were solved after offering of commitments by the parties being investigated.

In 2016, the Australian competition authority investigated agreements on amending price and availability parity clauses, which Booking.com, Expedia, and other online sale platforms reached, or were trying to reach, with Australian hotels and other accommodation providers. The authority was concerned that this conduct restricted price and other competition. During the investigation, the online sales platforms involved agreed to change the parity clauses, which was sufficient to satisfy the authorities’ concern so that no further action was taken. It is not clear which provision(s) would have been used if this matter had been litigated;⁹⁹ however, sections 45 (anti-competitive agreements) and 48 (resale price maintenance) might have been argued.

Still in Australia, within a universe of 46 cases, only one of them involves online platform sales. In 2011 a consent decision was taken in the *Tiketek* case, in which the defendant admitted it had violated Australian competition law. In that case, Tiketek agreed it held a “large share” of the *Ticketing Related Services Market* that and its conduct operated as a barrier to enter somewhat

⁹⁸ *The ACCC observed that barriers for a new entrant to achieve sufficient scale to compete with Expedia, Wotif or Booking.com would be high and would include significant sunk costs in the form of advertising. However, the ACCC observed that recent changes to the market, which included consideration of significant global players, like Amazon, who might have the ability to overcome those barriers, combined with developments in adjacent markets, such as metasearch platforms like TripAdvisor and Google, would ensure the market remained dynamic and there would be significant competitive constraints on OTA incumbents.*

⁹⁹ For further information see, ACCC, ‘Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels’ (Media Release, 2 September 2016) (available at <https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels>).

like bundling practices (very common in integrated two sided markets). The “full service” provided by the defendant prevented Venue Operators and Promoters from competing. The fine imposed against TikeTek was reduced to reflect their cooperation with the competition authorities.

5. Conclusion

This overview of the eleven national reports leads to some significant conclusions.

Despite the convergence that has taken place in telecommunications, online platforms remain under the scope of the antitrust law. Moreover, even given the “new world” raised from the information highways in the late 1990s, and the subsequent “boom” of online navigation worldwide, most competition restrictions relating to online platforms seem to be within the scope of competition law.

In this area it is possible to find all categories of competition restrictions. This wide range of competition problems includes not only agreements between suppliers and distributors, but also agreements between competitors, unilateral conduct (e.g. abuse of dominant position) and even mergers. However, the main problems are in the scope of the vertical agreements provisions.

The typical conduct related to abuse of dominant position (or misuse of market power) in online sales platforms are to be assessed using the same provisions related to this same issue in scenario of the traditional economy.

For these reasons, most jurisdictions have competition laws drafted for situations more like that of the obvious competition markets (e.g. traditional brick and mortar shops) rather than the new businesses methods of the so-called new economy, but these broadly-drafted provisions are adaptable to the new situations created by the evolution of the market and on new distribution models.

The respondents indicate concerns about the role of online platforms. To Europeans, this issue became especially relevant to national policy makers after the disclosure of concerns related to online platforms by the European Commission (GDVI). For EU competition policy, it is a software-based facilities characterized by multi-sided markets. The platforms offer a meeting point to providers and users of content, goods and services enabling a several new business methods as a direct result of the respective externalities. Most of the Europeans national policy makers (as the UK) started up from the EU concern about online platforms to conduct internal studies and *research addressing the market issues around platforms and come to number of hypotheses about how dynamic competition affects online platforms*.¹⁰⁰

These approaches have influenced policy to a lower or higher degree depending on the features of the national competition system.

All of the countries in this survey considered that the provisions of their competition laws are able to handle competitive relations on the internet, including the specific challenges of the online sales platforms. This is also confirmed by the large number of reports that concluded there is no need for changes in the legislation. However, some countries expect changes in administrative guidelines or notice (e.g., Australia) on the interpretation of the law and application criteria or the result of new studies or at least the observation of more new and robust empirical data (e.g., Switzerland).

¹⁰⁰ See *Dynamic Competition in Online Platforms – evidence from five case study markets*, issue by the UK Department for Business, innovation and Skills in march of 2017.

Further thinking should be, however, refined on the criteria to be used in antitrust analysis concerning dynamic competition in concentrated markets (considering products, technology, multi-sided and innovation markets). In the Brazilian system, for example, there are some cases related to online platforms that address the relevance of dynamic competition. In many countries, there are no guidelines or notices dealing with restrictions relating to online platforms or any leading case proposing tests or criteria relating to the analysis of dynamic competition in this context. In many of the countries surveyed, there are no specific decisions on the merits concerning online sales platforms, but the policy makers have been gathering efforts to provide the adaptation of the general rules prior developed to the assessment of the anticompetitive restrictions raised in the traditional economy

So, it is possible to conclude that in general competition in online platforms seems to be functioning well in many aspects. For some respondents, mainly the UK, it is important to consider evidence that *network effects which might otherwise act as a barrier to entry, encourage dynamic competition*¹⁰¹. The UK report indicates there are three main aspects that may foster dynamic competition: (1) *entry is common and tends to materially affect the market*, (2) *effective entry does not appear to be less likely in more concentrated digital markets* and, (3) *concentration tend to increase over time in each sector, but competition from other sectors often intensifies*. Another question is how a policy maker should act to balance these features related to the dynamic competition.

Another question about online sales platforms is whether and to what extent dynamic competition can produce positive competitive outcomes, despite the lack of traditional or obvious competition. Certainly, it is widely understood that the effect of new business methods and respective practices (in many cases considered as restrictions to competition) can vary on the ground of market characteristics.

Some respondents consider that excessive regulatory control may affect innovation, even though overprotection may do the same.

Innovation itself brings new social demands. There are new issues that will rise and challenge competition as we know it. For example, there is a discussion about whether the value of big data should be taken into account, e.g., merger notification thresholds, due to the relevance of big data to internet-based businesses.

Of course, there are some difficulties. Most of them come from the fact that different countries have distinct cultures, history, political features and antitrust goals. These difficulties come from the fact that each national competition system pursues a wide range of distinct goals (occasionally even contradictory). For example, a number of countries have included in their competition law or in their unfair competition law a catalogue of per se prohibitions against various businesses models and practices. It is also possible to identify a close connection of competition law and consumer law in the case of some of the respondents (Australia, Brazil and Switzerland).

In any event, visiting an online sale platform has become a decisive step before making any purchase and this new consumer behaviour affects traditional markets in many ways, often promoting competition and helping consumers. Even though the authorities tend constantly to monitor - with special attention - the growth of online platforms, and the structure of these

¹⁰¹ UK *Dynamic Competition in Online Platforms*, page 6.

multi-sided markets, the existence of market power or dominant position and the possibility of its use, abuse or misuse are still an open matter subject to future scrutiny.

As a general conclusion, it may be considered that under regular conditions online sales are positive for competition.

Lastly, the changes brought by the so-called new economy raise challenges to the competition authorities across the world, which must keep following up the improvements of the internet-related business methods in order to secure free competition and consumer welfare.