



# E-COMMERCE AND COMPETITION LAW

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# Agenda

1. The Importance of E-Commerce
2. Market Definition and Market Power for E-Commerce
3. Pricing Structures and Algorithms and Competition Law
4. Anti-Competitive Vertical Arrangements
5. Outlook for E-Commerce and Competition Law

# Why Does E-Commerce Matter

- Increasingly important after COVID-19
- United States: Retail and food service sales between February and April 2020
  - Traditional: **Decreased** by 7.7%
  - E-Commerce: **Increased** by 16% and 14.8% respectively
- European Union: Retail sales
  - Total: **Decreased** by 17.9%
  - E-Commerce: **Increased** by 30%

(Source: E-commerce in the time of COVID-19, OECD, 2020)


# Why Does E-Commerce Matter

- Increasingly competition law awareness
  - OECD Roundtable Discussion (2018)
  - Competition and Consumer Commission Singapore Market Study (2019)
  - Hong Kong Competition Commission Investigation (2022)

# Changes Brought by E-Commerce

- Intermediaries (e.g. marketplaces, portals, services)
- Delivery Mechanisms (e.g. websites, c.f. brick-and-mortar stores)
- Transcending Geographical Boundaries
- Increased Information Transparency
- Innovation

# Market Definition for E-Commerce



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# Overview of Market Definition

- Market Definition is important in relation to the following principles of competition law
  - Second Conduct Rule
  - Mergers
- Two types of Market Definition
  - Product
  - Geographic

# Test for Market Definition: Hypothetical Monopolist Test

1. Identify the narrowest plausible market
2. Assume hypothetical firm with monopoly in that market
3. Ask if profitable to impose a Small but Significant Non-transitory Increase in Price (SSNIP) (typically between 5% to 10%)
4. Broaden hypothetical market until the answer is yes



# Test for Market Definition: Hypothetical Monopolist Test

- Case 6-72: *Europemballage Continental Can v Commission*
  - **Demand-side substitutes**: Products that customers could be expected to purchase instead because they are sufficiently close substitutes.
  - **Supply-side substitutes**: Suppliers capable of entering the market if price increases

# Difficulties with Market Definition

- Creation of new markets
  - Online vs Offline Channels
- Changes in costs structure
  - Higher fixed costs relative to marginal costs
  - Increased market substitutability
- Multi-sided platforms
  - Network effects have to be considered

# Market Power

- Section 21(3) *Competition Ordinance* (Cap. 619)
  - Market Shares
    - e.g. Sales revenue, sales volume
  - Barriers to entry and expansion
  - Power to make pricing and other decisions
  - Any other relevant matters
    - Financial Resources
    - Vertical Integration
    - Product Range

# Changes to Market Definition

- Market shares less important
  - Significantly volatile
- Barriers to entry and expansion
  - May be low due to low costs
  - May be high because of network effects and technical knowhow

# Experience in Other Jurisdictions (UK)

- Just Eat and Hungryhouse Merger
  - Combined 80% share in online food platforms
  - CMA approved merger due to fierce competition in the online food market (e.g. by Deliveroo and UberEats)
    - *'We therefore conclude that both Just Eat and Hungryhouse have been actively monitoring and attempting to respond to the entry of ordering and logistics specialists, particularly Deliveroo. Based on our econometric analysis, in areas in which Deliveroo is present, it does appear to exert a stronger constraint on Just Eat than Hungryhouse does when we look at the period since April 2015, while the constraint on just Eat from Hungryhouse appears to fall over time.'*
  - Offline market through direct ordering considered relevant
    - *'direct ordering may impose a significant competitive constraint on both Parties'*

# Experience in Other Jurisdictions (US)

- *United States v. Apple Inc.*, 925 F. Supp. 2d 638 (S.D.N.Y. 2013)
  - Entry by Apple into E-Book market
  - Amazon had kept low prices
  - Horizontal conspiracy to raise E-Book prices
  - The relevant market was considered to be the E-Book market, with no party arguing that traditional textbooks were relevant.

# Experience in Other Jurisdictions (US)

- *Office Depot/Staples merger (2016)*
  - Merger concerning office supplies
  - FTC refused to consider online retailers such as Amazon as competitors on the evidence
    - *'Amazon Business also has several weaknesses with regard to its entry into the B-to-B space. One weakness is that Amazon Business is inexperienced in the RFP process. Amazon Business has not bid on many RFPs and has yet to win a primary vendor contract ... Amazon Business' marketplace model is also at odds with the B-to-B industry because half of the sales made through the marketplace are from independent third-party sellers over whom Amazon Business has no control.'*
    - *'...despite entering the office supply business fourteen years ago, large B-to-B customers still do not view Amazon Business as a viable alternatives to Staples and Office Depot.'*

# Experience in Other Jurisdictions (Italy)

- *Booking.com and Expedia case*
  - Price parity clauses in contracts
    - Hotel partners could not offer their services at lower prices or with better conditions than on Booking.com or Expedia
  - Definition of the relevant market did not take into account offline booking services (e.g. travel agents)



# Experience in Other Jurisdictions (Italy)

- Case involving taxi companies in Rome and Milan
  - Prohibition from joining innovative online tax reservation systems
  - Taxi-hailing apps not separate market but part of market for reservation and dispatch services

# Experience in Other Jurisdictions (India)

- *Ashish Ahuja v. Snapdeal*
  - Case concerned the market for USBs
  - Online and Offline Markets substitutable in nature
  - *'If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa.'*

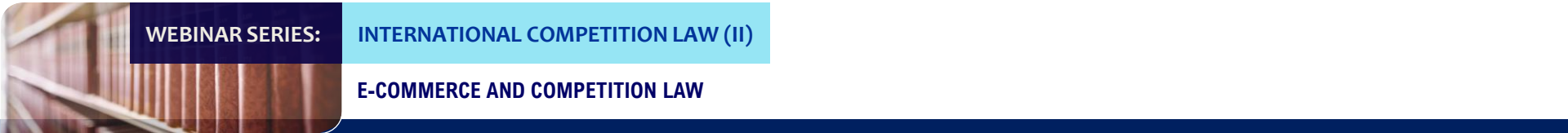
# Experience in Other Jurisdictions (India)

- *All India Online Vendors Association v Flipkart Inc*
  - Wholesale trading of books, mobiles, computers and related accessories
  - Flipkart provided features different from an offline market
  - Relevant market was the 'online platform market'
    - *'No doubt, to the end consumers, the distinction line between online and offline sellers is sometimes blurry, yet it cannot be denied that online marketplaces offer convenience for sellers as well as the buyers. For the sellers, they save costs in terms of setting up of a store, sales staff, electricity and other maintenance charges. The benefits afforded to buyers includes comfort of shopping from their homes thus saving time, commuting charges and at the same time they can compare multiple goods. Be that as it may, nothing significant turns upon such convergence on the outcome of this case as even if the market is confined to online space, the present market construct, as detailed later, would not indicate any player with such a market power so as to confer a dominant position upon it.'*

# Key Takeaways

- Market Definition Highly Context Specific
  - No clear-cut answer to whether online and offline markets overlap
  - Relevant Factors:
    - Product nature
    - Consumer behaviour
    - Business models
- Changes may be required to factors governing Market Power
  - Barriers to entry may be increasingly important
  - Reduced emphasis on market share due to volatility

# Pricing Structures and Algorithms



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# Overview of Algorithmic Pricing

- Tool to guide pricing decisions by undertakings
- Made by processing input variables to determine ideal price
- Historically used in certain sectors
  - Airlines
  - Hospitality
  - Finance

# Pro-Competitive Benefits of Algorithmic Pricing

- OECD: *‘Dynamic pricing algorithms have been recognized to improve market efficiency, by allowing companies to react instantaneously to changes in supply conditions – such as stock availability, capacity constraints or competitors’ prices – as well as to fluctuations in market demand’*

# Competition Law Issues with Algorithmic Pricing

- Reinforcing exclusionary practices
- Coordinated outcomes due to adoption of identical pricing algorithms
- Difficulty in enforcement



# Four Categories of Algorithmic Pricing

(Ezrachi & Stucke, 2017)

- Messenger
- Hub and Spoke
- Predictable Agent
- Digital Eye

# Messenger

- Algorithms merely used as a tool to implement a pre-existing anti-competitive agreement
- Often accompanied with direct incriminating evidence of the anti-competitive agreement
- Liability often found
- The most common category

# Experience in Other Jurisdictions (UK)

- *Trod Limited and GB eye Limited*
  - Agreement not to undercut pricing for sport and entertainment posters and frames
  - Anti-competitive agreement implemented through distinct software *‘automatically adjusting the prices of their products in response to the live prices of competitors’ products’*
    - *“Prices are adjusted based on the settings determined by the seller, known as the ‘compete rules’. Users set the compete rules by creating ‘repricing profiles’. Once the settings are in place, the software works to adjust the user’s prices automatically (every 15 minutes) in response to the competitors’ prices, according to the compete rules configured by the user.”*
- CMA concluded there was hardcore cartel activity perpetrated through the algorithm

# Experience in Other Jurisdictions (EU)

- *Philips, Pioneer, Asus, Denon & Marantz* (Decision of 24 July 2018)
  - Hardware developers restricted ability of online retailers to independently determine retail prices
  - Algorithm used to monitor compliance with the exclusion
    - *‘Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products.’*
    - *Manufacturers used ‘sophisticated monitoring tools’ to ‘effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases’*

# Experience in Other Jurisdictions (UK)

- *Casio Investigation (1 August 2018)*
  - Resale price maintenance agreement between Casio UK and resellers
  - Algorithms and automated price-monitoring software used to monitor agreement
    - *'Price2Spy generated the Daily Reports detailing, for a range of products, any reseller whose prices breached the Casio Pricing Policy. These Daily Reports were set up to track webpages, the links to which were identified for Price2Spy by Casio UK staff ... Subsequently, [Employee] updated PPrice2Spy when necessary to change the products and/or resellers whose prices were being monitored.'*

# Experience in Other Jurisdictions (US)

- *Topkins* (2015)
  - E-commerce seller of posters, prints and framed art.
  - Price fixing of certain posters sold through Amazon Marketplace adopting specific pricing algorithms
    - *“Company A and other poster-selling firms used commercially available algorithm-based pricing software to set the prices of posters sold on Amazon Marketplace. This software operates by collecting competitor pricing information for a specific product sold on Amazon Marketplace and applying pricing rules set by the seller.”*

# Hub and Spoke

- Algorithms or software used as the ‘hub’ for coordinating price information
- Individual downstream undertakings considered the ‘spoke’ that feed price information into the hub and make pricing decisions accordingly

# Experience in Other Jurisdictions (EU)

- Case C-74/14 *Eturas*
  - Commercial online booking platform for licensed travel agents
  - Administrator capped discounts on products sold
  - Cap implemented through technical restriction
  - Unclear if travel agents liable:
    - *'if it cannot be established that a travel agency was aware of that message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the system at issue in the main proceedings, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action'*



# Experience in Other Jurisdictions (India)

- *Samir Agrawal v Ani Technologies Pvt. Ltd* (Case No. 37 of 2018)
  - Pricing algorithm through Ola/Uber
  - Alleged to be a ‘hub and spoke’ arrangement for exchange of sensitive information
  - Held lack of agreement between all drivers to set prices through the platform
  - Fare estimated through algorithm based on large data sets with several factors
  - No violation of the Indian Competition Act (2002)

# Experience in Other Jurisdictions (India)

- '15. In the conventional sense, hub and spoke arrangement refers to exchange of sensitive information between 3 competitors through a third party that facilitates the cartelistic behaviour of such competitors. The same does not seem to apply to the facts of the present case. **In case of Cab Aggregators model, the estimation of fare through App is done by the algorithm on the basis of large data sets, popularly referred to as “big data”.** Such algorithm seemingly takes into account personalised information of riders along with other factors e.g. time of the day, traffic situation, special conditions/events, festival, weekday/weekend which all determine the demand-supply situation etc. Resultantly, the algorithmically determined pricing for each rider and each trip tends to be different owing to the interplay of large data sets. **Such pricing does not appear to be similar to the “hub and spoke” arrangement as understood in the traditional competition parlance. A hub and spoke arrangement generally requires the spokes to use a third party platform (hub) for exchange of sensitive information, including information on prices which can facilitate price fixing. For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place.** In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers. In the case of ride-sourcing and ridesharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission finds no substance in the first allegation raised by the Informant.'

# Experience in Other Jurisdictions (India)

- *IndiGo, SpiceJet, Air India and Go Air Investigation (2021)*
  - Alleged algorithmic price collusion
  - Analysis of pricing information of airline flights
  - Found lack of pricing patterns indicative of pricing parallelism or collusive behaviour
  - No direct incriminating emails or communications

# Experience in Other Jurisdictions (Spain)

- Investigation into real estate agencies (2022)
  - Spanish competition authority investigated a ‘Multiple Listing Service’ system for real estate agencies
  - Real estate brokers able to share information regarding properties they had exclusive access to with other brokers
  - Found to be ‘hub and spoke’ price-fixing cartel implemented through algorithmic system
  - Fines imposed

# Predictable Agent and Digital Eye

- **Predictable Agent:**
  - Algorithm deployed to foreseeably restrict competition through pricing decisions
  - Unilateral conduct done by individual undertakings
  - What if all undertakings adopt the same or a similar algorithm?
- **Digital Eye:**
  - Algorithm itself learns an optimal pricing strategy that restricts competition

# Competition Law Issues with Algorithmic Pricing

- Distinction between anti-competitive agreement and parallel conduct
- Case 48/69 *Imperial Chemical Industries v. Commission*
  - *'Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of undertakings, and the volume of the said market'*

# Competition Law Issues with Algorithmic Pricing

- Difficulties with detection
  - Absence of a natural market without an algorithm
  - Machine learning and trial-and-error
  - Complexity especially with neural networks
    - Libratus: Poker AI program
  - Interaction with the standard of proof of competition law: beyond reasonable doubt in Hong Kong (*Competition Commission v Nutanix Hong Kong Ltd* [2019] 3 HKC 307)

# Potential Solutions

- European Commission, 'Commission Staff Working Documents on the free flow of data and emerging issues of the European data economy Brussels'
  - Autonomous decision making may *'conflict with the current regulatory framework which was designed in the context of a more predictable, more manageable and controllable technology'*
  - Alternatives?
    - Strict liability
    - Risk generating
    - Risk management
    - Shifting of Burden of Proof
  - Human Rights Issues?



# Experience in Hong Kong

- Anti-competition practices of some Internet search-engine services providers (Legislative Council) (12 July 2017)
  - *‘On the Google Inc. case, the Commission indicated that it is aware of the European Commission’s recent decision and the response of Google Inc., as well as the development of the relevant issue in other jurisdictions. The Commission will keep abreast of the development, and continue to monitor the situation in Hong Kong with a view to promoting competition for enhancing the long term benefit of the community.’*
  - *‘As seen from the above, the matter is complicated and there is no consistent view across jurisdictions. As an independent statutory body which enforces the Competition Ordinance, the Commission will continue to liaise with other competition authorities, closely monitor the development of the Google Inc. case and continue to monitor the situation in Hong Kong.’*

# Key Takeaways

- Legal position on algorithmic pricing not settled
- First two categories of ‘Messenger’ and ‘Hub and Spoke’ likely follow the traditional legal principles governing such arrangements
  - Less legal controversy
- The categories of ‘Predictable Agent’ and ‘Digital Eye’ may give rise to difficult questions on liability
- Potential reform may be necessary to ensure effective enforcement in these cases

# Anti-Competitive Vertical Arrangements



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# Overview of Vertical Arrangements

- Second Conduct Rule: section 21(1) *Competition Ordinance* (Cap. 619)
  - *‘An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong’*

# Overview of Vertical Arrangements

- Examples of Anti-Competitive Vertical Arrangements: section 21(2) *Competition Ordinance* (Cap. 619)
  - Predatory behaviour towards competitors
  - Limiting production, markets or technical development to the prejudice of consumers

# E-Commerce Vertical Arrangements

- ‘Most Favoured Nation’ Clauses
- Retail Price Maintenance and Dual Pricing
- Exclusive & Selective Distribution Agreements
- Exclusive Customer Allocation Agreements
- Network effects

# 'Most Favoured Nation' Clauses

- Contractual promise to treat parties favourably
- Reduces competition by enabling certain parties to be prioritised

# Experience in Other Jurisdictions (Italy)

- *Booking.com and Expedia case*
  - Price parity clauses in contracts
    - Hotel partners could not offer their services at lower prices or with better conditions than on Booking.com or Expedia
  - Pricing parity clauses found to be an unlawful vertical restraint



# Retail Price Maintenance

- An agreement by a supplier to a retailer to maintain price at a certain level
- Can also take place as dual pricing
  - The maintenance of different prices for online and offline sales
  - Puts retailers who focus on online sales at a disadvantage

# Experience in Other Jurisdictions (UK)

- *Roma* (2013)
  - Agreements between manufacturers and suppliers prohibiting the supplier from advertising online prices below the Recommended Retail Price of the manufacturer
    - *‘The advertising of price information allows consumers to easily access price information in order to compare the various offers available in the market and to determine which retailer, “bricks and mortar” or otherwise, offers the best price. **Where retailers are able to signal to consumers (through advertising) that their prices are lower than their competitors’, they can win the custom of consumers who would otherwise have made a purchase from a higher-priced competitor. The prospect of increased sales will incentivise them to lower prices, thereby promoting price competition in the sector.** Such price competition in the supply of products serves as an incentive for retailers to act efficiently and ensures that lower prices are passed on to consumers.’*

# Experience in Other Jurisdictions (UK)

- *Roma* (2013)
  - *'By prohibiting retailers from advertising retail prices online, retailers who would otherwise advertise at a lower price are unable (or at least significantly less able) to signal to consumers that they are offering better value. For example, bricks and mortar stores will be unable to advertise prices online in order to attract in store sales. **Therefore, such a prohibition prevents consumers from easily shopping around for lower-priced retailers (for example, through the use of "Google shopping"). As a consequence, by reducing price transparency between retailers, a prohibition on price advertising over the internet is likely significantly to eliminate incentives on the part of retailers to engage in price competition with other retailers selling, whether online or otherwise, Roma-branded Scooters and is thereby liable to lead to consumers paying higher prices.** Therefore, the prohibition on online price advertising is liable to prevent, restrict or distort competition between retailers.'*

# Experience in Other Jurisdictions (Australia)

- *Narta International Pty Ltd (2014)*
  - Minimum advertising price on a wide range of electronics goods found to be anti-competitive
  - *'The process of quick and convenient online price comparison means that if there is a lower online price than in bricks and mortar stores for a particular product consumers can easily use this online price as a point of leverage in negotiating selling prices with bricks and mortar retailers, even if little or no price negotiation occurs online. That is, the online advertising price may be used as a Reference Price for sales at bricks and mortar retailers.'*

# Experience in Other Jurisdictions (Germany)

- *Bosch Siemens Hausgeräte GmbH (2013)*
  - Bosch applied a rebate system for dealers
  - An increase in online turnover would decrease total rebates received
  - Had the effect of reducing competition through online sales

# Exclusive Agreements

- Agreements to exclusively deal with a vertical online platform
- Agreements to allocate customers exclusively to certain downstream undertakings
- Agreements for retailers to only sell products in a certain geographical area

# Experience in Other Jurisdictions (EU)

- *Guess* (2018)
  - Guess prohibited its retailers from:
    - Using Guess' brand names and trademarks for online advertising
    - Selling online without Guess' prior authorization
    - Selling to consumer outside of the retailers' allocated territories online
    - Independently deciding retail prices
  - Found to be an infringement

# Experience in Other Jurisdictions (Australia)

- *Games Workshop OZ Pty Ltd (GWOP) (2014)*
  - Geographical restriction on the supply of products
  - Prohibition on online sales
  - *'However, the ACCC considers that GWOP products are complex and some customers are likely to value pre and post sales retail services so as to enhance their overall gaming experience. GWOP is able to provide some of these retail services itself but also relies on independent Trade Account holders. GWOP submits that the notified conduct, and in particular the introduction of the VASP model, is designed to reduce the risk of some retailers free-riding on the investment made by other shop front channel outlets (and online retailers that offer a high level of service). This free-riding is a problem if customers are able to obtain the retail services from one retailer and then obtain the GWOP product at a lower price from a retailer that does not offer these retail services, thereby undermining the incentive to provide those services despite their value to consumers. The ACCC considers that the notified conduct is one way for GWOP to address this free-rider problem by providing greater incentives for independent retailers to invest in the provision of retail services to customers.'*

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# Experience in Other Jurisdictions (Malaysia)

- *Dagang Net Technologies Sdn. Bhd. (10/7/2018)*
  - Dagang refused to supply electronic mailbox software to end users unless they were willing to exclusively use its software
  - Proprietary nature of software gives rise to potential for abuse
  - *'If all the software providers were to sign the MCPA with Dagang Net during the tenure of NSW-SMK system, other service providers would not have any access to any software providers in the uCustoms system. Without the exclusivity arrangement, other service providers would have had the ability to compete in the market for the provision of trade facilitation services.'*

# Experience in Other Jurisdictions (India)

- Investigation into exclusive agreements by e-commerce portals (2015)
  - Arrangements did not create any entry barrier for new entrants
  - E-commerce portals provided opportunity for consumers to compare prices as well as pros and cons of the product
  - No appreciable adverse effect on competition found
  - *'The bare perusal of the agreement on the touchstone of the factors laid out above suggests that such agreements do not result into AAEC. It does not seem that such arrangements create any entry barrier for new entrants. It seems very unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products which are illustrated in the information to be sold through exclusive e-partners (OPs) face competitive constraints. For example, mobile phones, tablets, books, camera etc., are neither alleged nor seem to be trodden by monopoly or dominance. Further, it does not appear that because of these exclusive agreements any of the existing players in the retail market are getting adversely affected, rather with new e-portals entering into the market, competition seems to be growing'*

# Experience in Other Jurisdictions (India)

- Investigation into exclusive agreements by e-commerce portals (2015)
  - *‘Further, the Commission observes that online distribution channel by the OPs provide an opportunity to the consumers to compare the prices as well as the pros and cons of the product. Furthermore, through the option of delivery right at their door steps consumers have the opportunity to accept the purchase at their convenience and do not need to set aside a couple of hours at a stretch to make the purchase through a brick-and-mortar retail outlet. Therefore, at this stage, it does not appear that the exclusive arrangement between manufacturers and OPs lead to AAEC in the market.’*

# Experience in Hong Kong

- Investigation into Deliveroo and Foodpanda
  - Accused of imposing restraints on restaurant partners, including:
    - Exclusive dealership with their platform
    - Menu items priced at equal or lower prices than in eateries

# Network Effects?

- Subscribing to a certain digital platform creates network effects that disincentivize subscription to other platforms
  - Apple
  - Facebook

# Experience in Other Jurisdictions (EU)

- Investigation in distribution of apps via App Store (2020)
  - Mandatory use of Apple's own proprietary in-app purchase system with 30% commission
  - Prohibition of alternative purchasing possibilities
  - Justified as a network effect?

# Key Takeaways

- E-commerce provides additional opportunities to implement existing vertical restraints
  - General legal principles apply
- Proprietary nature of software and network effects give much greater room for potential abuse

# Outlook for E-Commerce and Competition Law



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# Outlook

- No unified way of treating novel issues that arise with e-commerce amongst different jurisdictions
- Traditional competition law principles (with suitable modifications) still largely apply
  - Especially in situations where other evidence of anti-competitive intent is plainly present
  - Largely a matter of fact and context
- Interaction of technology with burdens of proof and human rights unclear



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