

Regulating e-commerce through competition rules: a fairness agenda?

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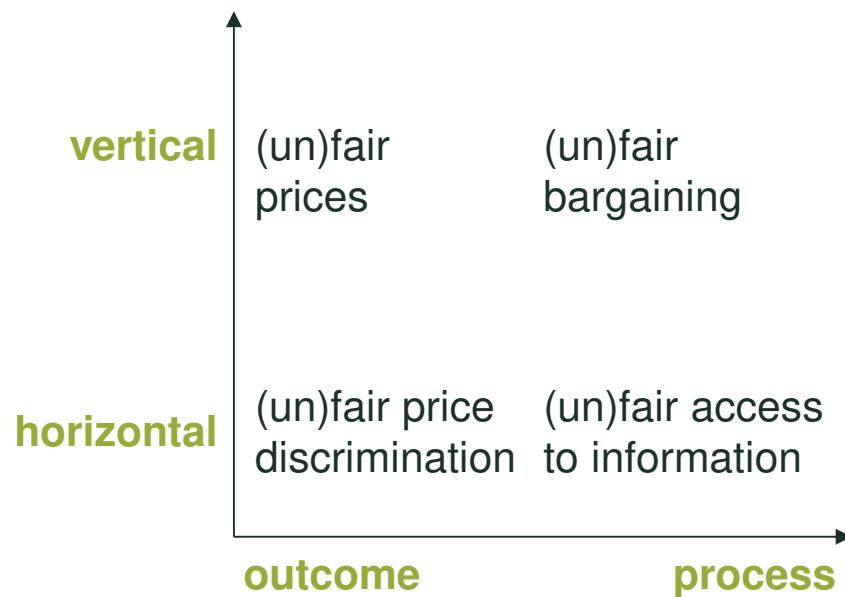
Fairness in e-commerce

- foundations for successful markets
 - trust and transparency: codified in regulations to correct market failures
 - ex ante consumer protection/fair trading rules
 - prohibition of anti-competitive behaviour (101/102)
 - ‘fairness’ concerns can be addressed through any one of these.
Be clear about:
 - what sort of unfair practice is of concern
 - the trigger and prevalence of these concerns
 - the same framework is relevant in e-commerce
 - first, discuss types of fairness and concerns that are raised in the e-commerce sector
 - focus on a few examples

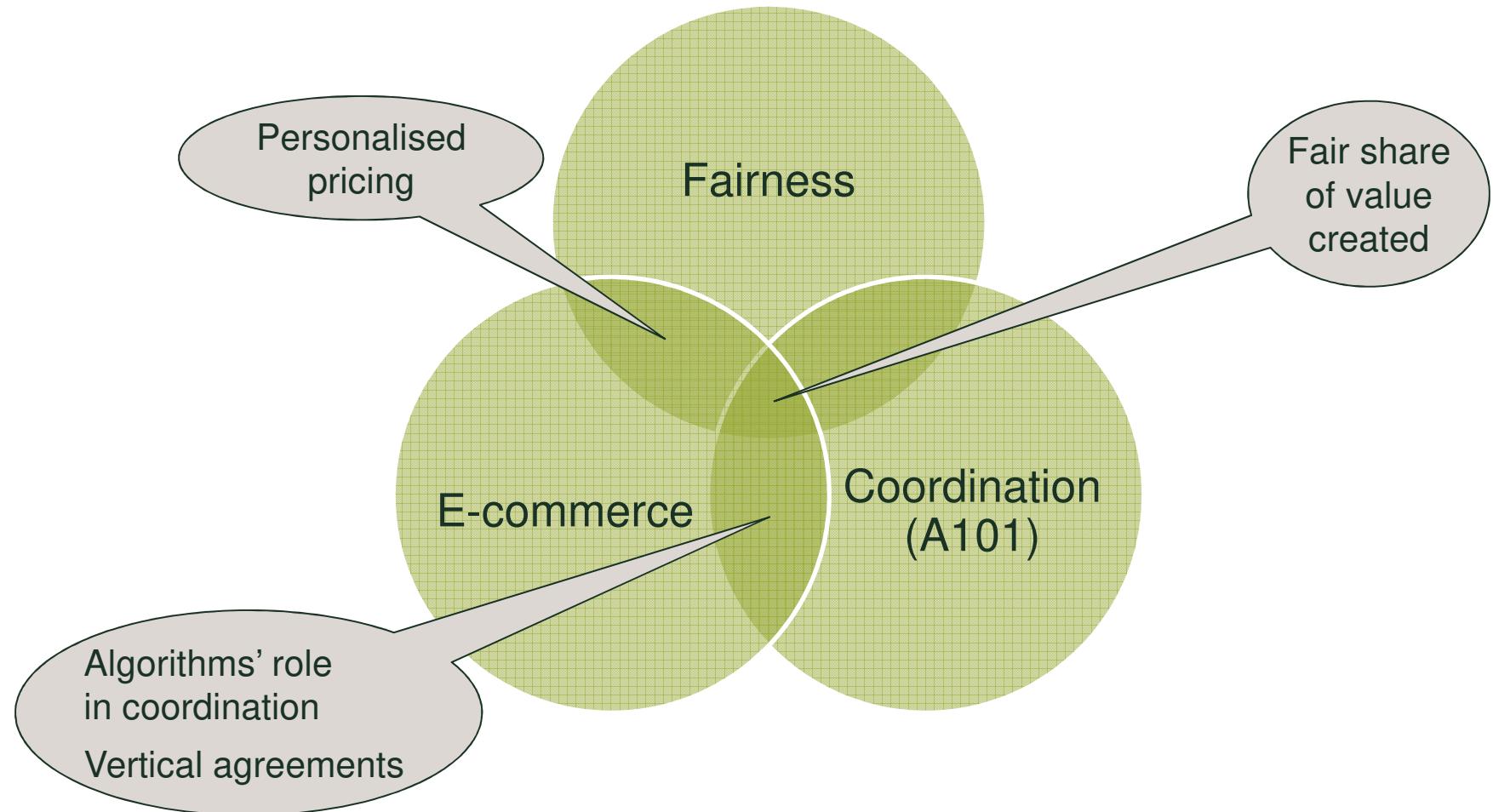
Is e-commerce different? When does a fairness aim conflict with an efficiency aim?

Fairness has different dimensions

- it's complex to define
 - there can be mutually incompatible definitions
 - equality? of what?
 - fairness perception often context-dependent
- fairness and efficiency are interrelated
 - often aligned
 - e.g. collusion
 - but potentially conflicting
 - choice of welfare standard
 - price discrimination
 - how to balance trade-offs?



Overview



Fairness prominent on the agenda in digital markets

Trust and transparency

- P2B fairness initiative
- German Facebook investigation
- Personalised pricing

Sharing gains fairly (A101 or A102)

- FRAND terms: IP rights: SEPs, copyright, other content
- Vertical agreements: Coty

Building trust and transparency (I)

E-commerce, combined with new technology

- issues for both consumers and suppliers

P2B fairness initiative by DG Connect

- terms and conditions (unilateral and frequent changes) and lack of access to/ portability of data
- lack of transparency of search, ranking and advertising placement
- favouring own products or services

German Facebook investigation

- privacy terms as form of 'exploitative abuse'

Personalised pricing

- high degree of personalised targeting and pricing becomes feasible based on personality, location, purchase or browsing history
- associated with perception of unfairness
 - depending on market context (e.g. airlines vs online marketplaces)
 - certain forms illegal (e.g. race, gender); if/when transparent, can undermine trust in supplier

Building trust and transparency (II)

Is e-commerce different?

- the feasibility of granular differentiation between customers is much greater, but can arbitrage be prevented or will it become a reason for switching?

Is it both unfair and inefficient?

- complex interaction with efficiency:
 - price discrimination can be efficiency-enhancing: increasing variety, choice and quality
 - perfect price discrimination is fully efficient, but benefits suppliers not consumers
 - to what extent do limitations on price discrimination reduce competition?

What interventions are appropriate?

- P2B intervention focuses on the ex ante framework
- privacy and data protection laws already exist
- using A102 implies either that a practice is only feasible (profitable) if undertaken by a dominant firm, or that the identified harm arises only when undertaken by a dominant firm
 - Are these likely to be true with respect to personalisation?

Fair distribution of value

Vertical fairness issues—related to bargaining power

- coordination at one level of the value chain to enhance bargaining

Interests relating to fairness and efficiency likely to be aligned here

- generally about rewarding investment and/or controlling distribution
- static vs dynamic efficiency
- 101(3) captures the balance: underutilised
- also can fall back to ex post excessive pricing prohibitions – will these be useful or sufficient?

Current tools likely to be fit-for-purpose

Fair distribution of value along the value chain

Using competition rules to balance remuneration in IP and copyright

Fair share for right holders

FRAND framework explicit reference to fairness

- concern in, for example, standard-essential patents and collecting societies
- balancing incentives to invest in innovation and in dissemination
- in practice, interpretation often circular
 - looking at existing royalty levels to determine 'fair and reasonable' price level
- need for cooperation between owners of complementary goods creates rationale

Creative works online

- concerns about platforms having too much bargaining power vis-à-vis creators
 - potentially reducing incentives to create high-quality content
- press publishing right aimed at creating a more balanced bargaining environment
- balancing incentives in multi-sided markets challenging
 - efficiently considerations important

Fair distribution of value along the value chain

Selective distribution

- Coty judgment confirms legality of marketplace bans for luxury goods
 - brand owner more control over distribution than retailer
 - ‘aura of luxury’ considered admissible commercial objective
 - how is the return on image shared between manufacturers and retailers?
- requirement of objective and proportionate criteria for channel selection
 - no exclusion of online channel as a whole
 - no dual-pricing for on-/offline sales
 - i.e. limits to price discrimination at wholesale level

Existing frameworks allow for the balance



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