

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

GCLC Annual Conference

Dr Helen Jenkins
Managing Partner

25 January 2018

oxera
compelling economics

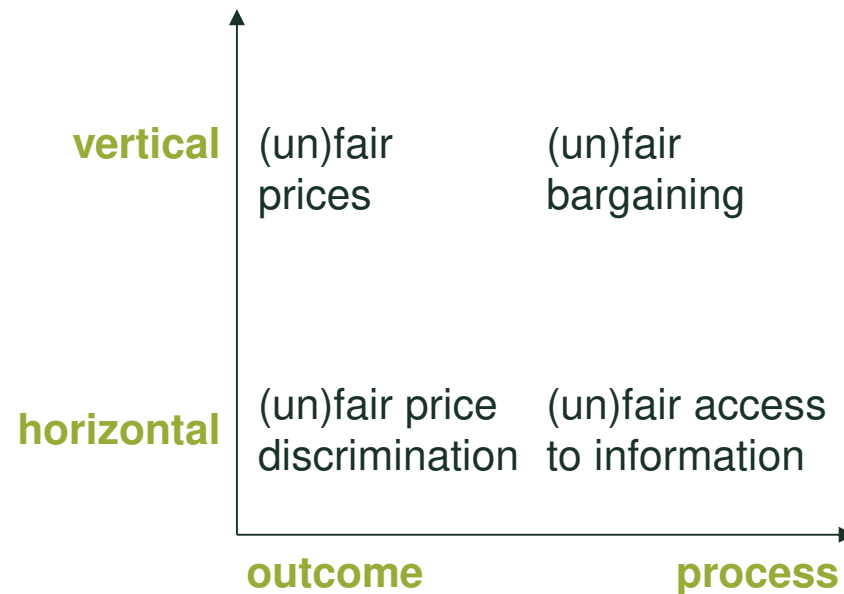
Fairness in e-commerce

- 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

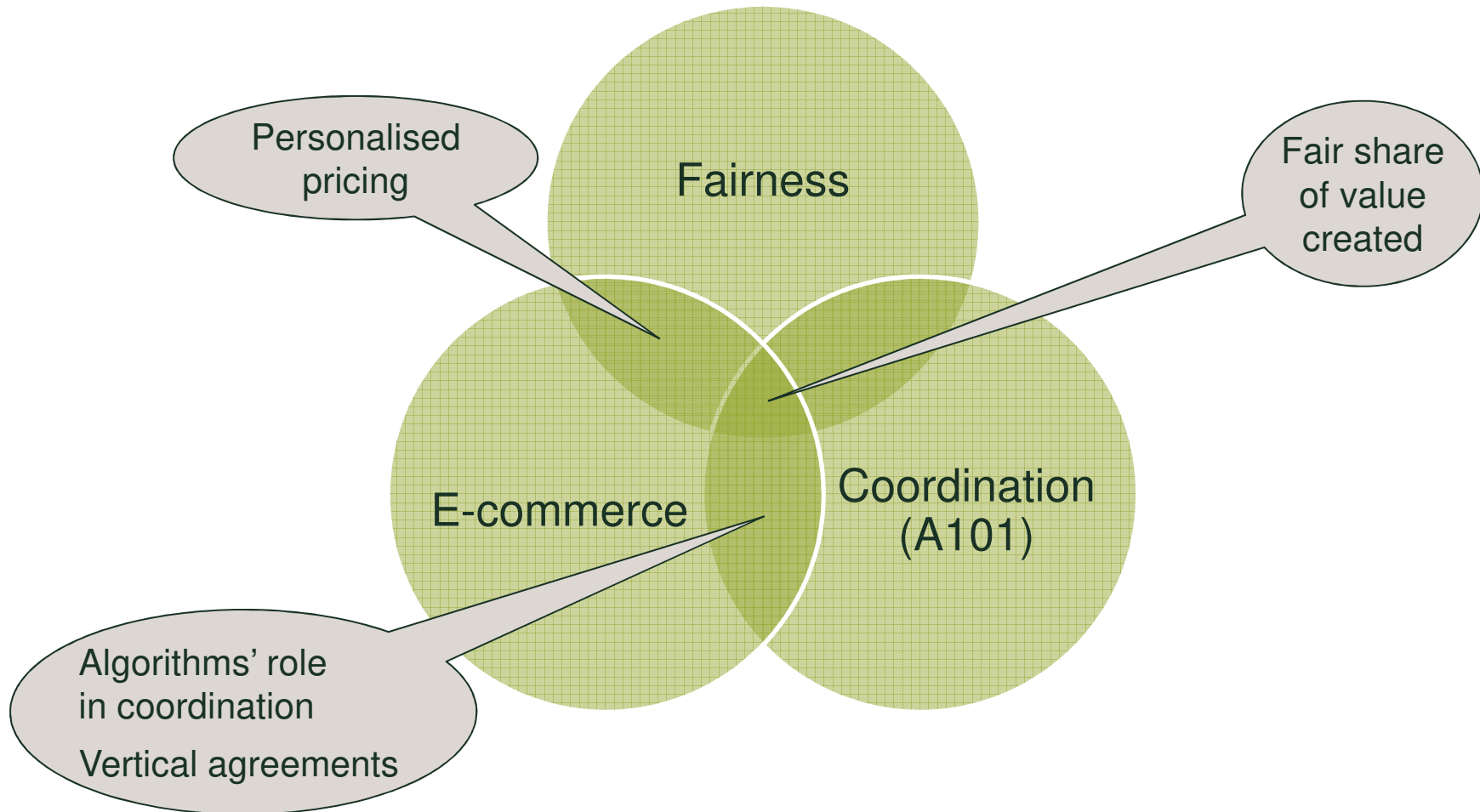
Is e-commerce different? When does a fairness aim conflict with an efficiency aim?

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

Contact:

Name: Helen Jenkins

Email: helen.Jenkins@oxera.com

Tel: +32 (0) 2 535 7878

www.oxera.com

Follow us on Twitter [@OxeraConsulting](https://twitter.com/OxeraConsulting)

Oxera Consulting LLP is a limited liability partnership registered in England no. OC392464, registered office: Park Central, 40/41 Park End Street, Oxford, OX1 1JD, UK; in Belgium, no. 0651 990 151, registered office: Avenue Louise 81, 1050 Brussels, Belgium; and in Rome, REA no. RM - 1530473, registered office: Via delle Quattro Fontane 15, 00184 Rome, Italy. Oxera Consulting GmbH is registered in Germany, no. HRB 148781 B (Local Court of Charlottenburg), registered office: Rahel-Hirsch-Straße 10, Berlin 10557, Germany.

Although every effort has been made to ensure the accuracy of the material and the integrity of the analysis presented herein, Oxera accepts no liability for any actions taken on the basis of its contents.

No Oxera entity is either authorised or regulated by the Financial Conduct Authority or the Prudential Regulation Authority within the UK or any other financial authority applicable in other countries. Anyone considering a specific investment should consult their own broker or other investment adviser. Oxera accepts no liability for any specific investment decision, which must be at the investor's own risk.

© Oxera 2018. All rights reserved. Except for the quotation of short passages for the purposes of criticism or review, no part may be used or reproduced without permission.

oxera
compelling economics