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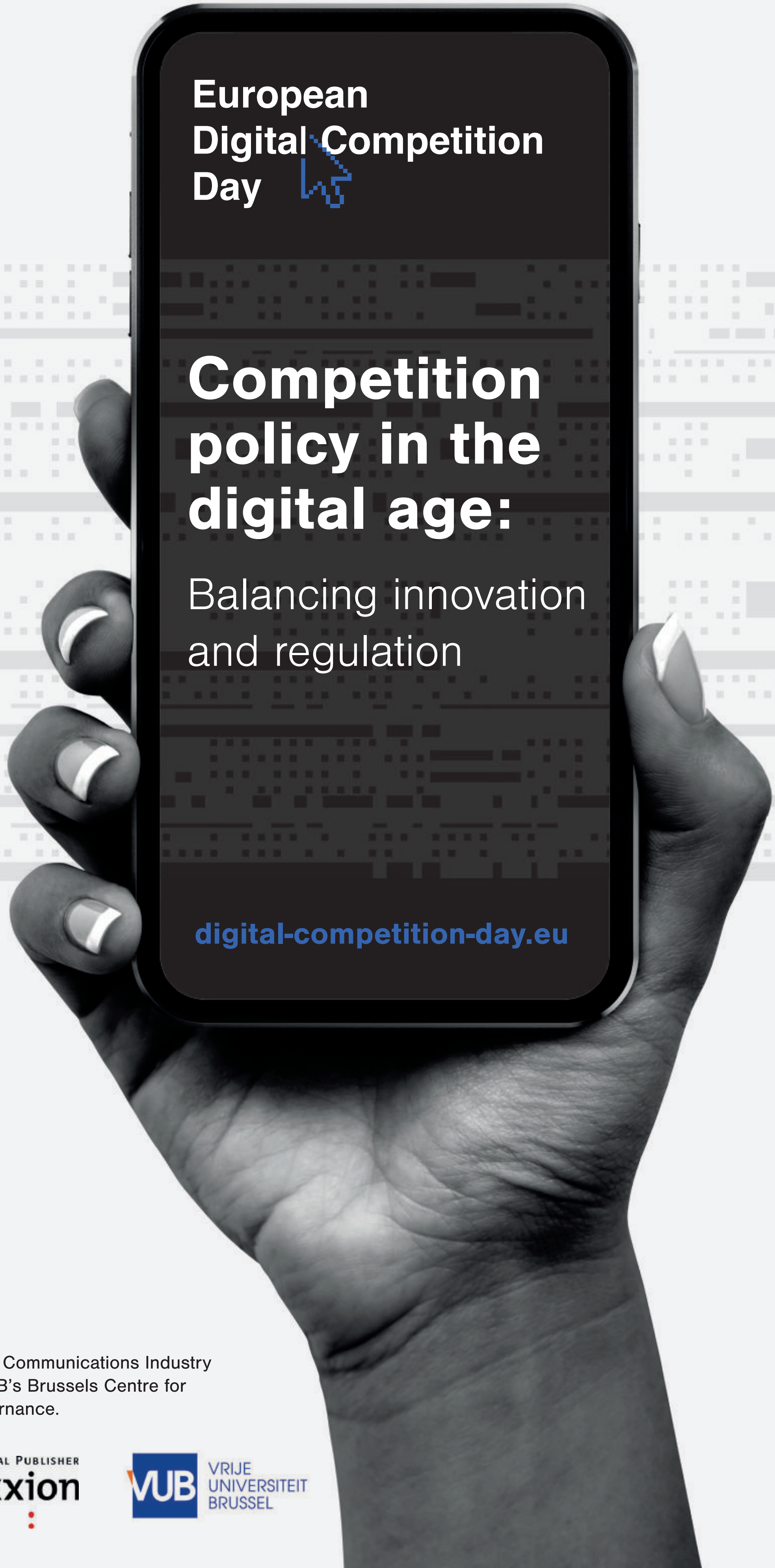

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For further information please contact
info@lexxion.eu
Tel.: +49 30/81 45 06-0 · Fax: +49 30/81 45 06-22

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Editorial

Territorial Supply Constraints: A Hidden Driver of Grocery Price Inflation?

The unprecedented surge in the prices of food and other daily essentials in Europe is finally showing signs of abating. But we are not out of the woods yet. The inflationary shocks unleashed by the COVID-19 pandemic and the invasion of Ukraine are likely to continue to linger. In fact, the EU recently lowered its forecast for economic growth, stressing that high prices are taking a heavier toll on consumer spending than expected.[1] On average, EU consumers currently pay almost 30% more for groceries than they did at the beginning of 2021. In some Member States, such as Hungary, prices even went up by more than 60%.[2] And while manufacturers and supermarkets signal that price levels have now reached their peak, major price drops, let alone a return to pre-pandemic levels, are not anticipated. In addition, there is also the practice of hiding rising costs by shrinking the packaging size of products. No, it is not your imagination: your bag of chips is getting smaller.

The stubbornly high prices in the grocery aisles, and the fact that they have far outpaced the inflation rate for other consumer products - a phenomenon known as 'foodflation' - have led to widespread accusations of price gouging. Initially, supermarket chains were blamed for profiteering from 'greedflation'. They are the most consumer-facing part of the supply chain, and the evidence in our weekly shopping carts seemed so obvious. The picture is not entirely clearcut, however. On the one hand, supermarkets are known for their narrow profit margins. Provided there is sufficient competition in the area, as the UK Competition and Markets Authority observed in a recent market study, they are limited in their ability to raise prices without losing business to lower-priced retailers.[3] On the other hand, there are indications that supermarket's own-label products have seen a much higher price increase than their branded counterparts (and in the same way discount stores have seen higher rates of inflation).[4] Nonetheless, the focus of scrutiny shifted to the top branded food manufacturers, as they are the protagonists that have been reaping record profits. The evidence of profiteering across the industry is still scant, but the perception is strong. This is further fuelled by the stark price disparities for branded products between countries. Now that

DOI: 10.21552/core/2023/3/3

1 European Commission, 'Summer 2023 Economic Forecast: Easing growth momentum amid declining inflation and robust labour market' (press release, 11 September 2023) at <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4408> accessed 6 October 2023.

2 Thijs Geijer, 'Food inflation finally cools in Europe after a long hot summer' (*ING Think*, 30 August 2023) <https://think.ing.com/articles/food-inflation-is-cooling-down-after-a-hot-summer/> accessed 6 October 2023.

3 Competition & Markets Authority, 'Competition, choice and rising prices in groceries' (July 2023) <https://www.gov.uk/government/publications/competition-choice-and-rising-prices-in-groceries> accessed 6 October 2023.

4 ibid. See also eg Vanessa Turner, 'Why competition authorities must act now against 'greedflation'' (*BEUC*, 17 July 2023) < https://www.beuc.eu/blog/why-competition-authorities-must-act-now-against-greedflation/> accessed 6 October 2023; Fátima Martins and Susana Pereira ,'Um ano de guerra: preço dos alimentos aumentou muito, mesmo quando inflação desceu' (*DECO Proteste*, 16 February 2023) < https://www.deco.proteste.pt/familia-consumo/orcamento-familiar/noticias/um-ano-guerra-preco-alimentos-aumentou-mesmo-quando-inflacao-desceu> accessed 6 October 2023.

everything is so expensive, the fact that a bottle of Coca-Cola costs 40% less across the border is becoming a major source of frustration.[5]

Foodflation affects everyone, but especially households on lower incomes and those who cannot search for and travel to access a full range of the lowest priced groceries. Politicians and consumer groups have therefore seized the issue. The former have resorted to retail price controls, and both have been inviting competition authorities to investigate market failure issues. For example, in Croatia, Greece, and Hungary, the government introduced price caps on several basic food items. Hungary recently ended its policy of price caps, but now orders supermarket chains to offer weekly discounts on certain food products. Following months of negotiations with retailers and manufacturers, the Italian government announced an 'anti-inflation pact' that urges them to freeze the price for a basket of food and non-food essential staples for three months.[6] In France, a similar agreement was announced: the prices of 5,000 products are only allowed to move downwards and retailers are obliged to pass on price cuts granted by suppliers without delay.[7] Other Member States, like Spain, reduced or even removed VAT on essential food items until price levels will go down.

The European Commission is understandably wary of these price control measures.[8] If adequate and proportionate, they would not breach the free movement rules, but they nonetheless affect an ecosystem that is already fragmented by a patchwork of restrictions – much more than other service sectors. Indeed, in addition to creating these new obstacles to the internal market, the challenges posed by foodflation have exacerbated the effects of existing barriers to cross-border trade, including private barriers imposed by companies.

Retailers and wholesalers have been complaining for many years about trading practices hindering their ability to source products outside their own market. These so-called territorial supply constraints (TSCs) "force" them to use the manufacturer's designated national distributor or subsidiary. According to a 2020 study carried out for the European Commission, TSCs are widespread across the EU, but most prevalent for well-known products with high levels of customer loyalty and in smaller and less competitive markets. TSCs are implemented through different practices, most commonly: refusals to supply; differentiation of products in terms of packaging and size; destination obligations; and limitations of quantities supplied.[9] Already in 2009, the Commis-

5 S Van Rompaey, 'Picnic tackles 'outrageous' international A-brand price differences', RetailDetail, 26 January 2023 <https://agriculture.ec.europa.eu/news/retail-alliances-agri-food-supply-chain-explained-and-their-potential-benefits-consumers-and-2020-05-13_en> accessed 6 October 2023.

6 A Kazmin and G Ricozzi, 'Italy agrees 'anti-inflation pact' to counter soaring cost of staple goods', *Financial Times* (8 September 2023) < https://www.ft.com/content/56293483-381f-4471-bfe6-2e12346be52e > accessed 6 October 2023.

7 A Klasa and M Arnold, 'Food producers agree to cut prices in France after government pressure' *Financial Times* (9 June 2023) < https://www.ft.com/content/f1678f64-2842-418d-b151-ac9f9909515e> accessed 6 October 2023.

8 European Commission, Staff Working Document, 'Co-creation of a transition pathway for a more resilient, digital and green retail ecosystem', SWD (2023) 283 final 12-14.

9 Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (European Commission), 'Entrepreneurship and SMEs, Study on territorial supply constraints in the EU retail sector' (2020) 19-41.

sion lamented their potential detrimental impact on cross-border trade. While TSCs may be justified on efficiency grounds, they can artificially maintain price differences between countries that cannot otherwise be explained by the usual factors affecting prices such as different tax rates or costs related to labour, raw material, production, and logistics. Foodflation has put the issue back on the radar. The European Commission is currently (again) seeking views from stakeholders on the matter, which it identifies as a key issue that "needs to be addressed" to make the retail and wholesale sector more resilient.[10] In the Netherlands, the government has commissioned a study to examine the precise extent to which TSCs are depriving Dutch supermarkets from taking advantage of existing price differences between EU Member States, and to explore appropriate measures.

TSCs are practices typically dealt with under the EU competition rules, but there is a gap. If they are part of an agreement or concerted practice with a distributor, parallel trade restrictions constitute infringements of Article 101 TFEU by object. The fact that the reseller itself prefers to limit its commercial operations to certain markets cannot justify the formal adoption of such TSCs.[11] Similarly, restrictions on passive sales are hardcore restrictions and fall outside the vertical block exemption regulation. Frequently, however, TSCs are unilaterally imposed by suppliers on their vertically integrated national subsidiaries. Article 101 TFEU does not apply to this scenario. If the supplier has a dominant position, the practices may be caught by Article 102 TFEU. For instance, in 2019, the European Commission fined Anheuser-Busch InBev (AB InBev), the world's largest brewer, 200 million EUR for restricting imports of lower-priced Jupiler beer from neighbouring countries into Belgium with the aim of maintaining higher prices and profits in that market.[12] AB InBev implemented direct TSCs (such as limitations on the supplies to wholesalers in the Netherlands) as well indirect TSCs (such as changing the design and size of beer cans or removing French from the label of products supplied to wholesalers and supermarkets in the Netherlands). An investigation into similar strategies implemented by Mondelēz, a dominant supplier of chocolate, biscuits, and coffee, is still ongoing. Most suppliers are not dominant, however, and their unilateral practices fall outside the scope of EU competition law.

To effectively address TSCs, legislative action is required. Trade associations representing the retail and wholesale sector have been suggesting that this could be based on the principles of the Geoblocking Regulation. In a recent staff working document, the Commission also hints in that direction.[13] The Geoblocking Regulation prohibits unjustified geo-blocking and geo-discrimination in respect of cross-border sales, but it

10 European Commission, 'Commission seeks views to make retail and wholesale sectors more resilient, digital and green', press release (27 July 2023) < https://single-market-economy.ec.europa.eu/news/commission-seeks-views-make-retail-and-wholesale-sectors-more-resilient-digital-and-green-2023-07-28_en > accessed 6 October 2023.

11 See eg Case C-19/77 *Miller International Schallplatten GmbH v Commission* ECLI:EU:C:1978:19, para 14.

12 *AB InBev Beer Trade Restrictions* (Case AT.40134) C(2019) 3465 final.

13 European Commission, Staff Working Document, 'Co-creation of a transition pathway for a more resilient, digital and green retail ecosystem', SWD (2023) 283 final 15.

only applies to business-to-business online transactions when the goods or services are purchased for end use. The application of the non-discrimination principle requires a case-by-case assessment, and in most situations, there is room to justify different treatment by objective reasons. A similar instrument prohibiting TSCs would also have to offer that flexibility. But given that resellers would be the target, this would create major challenges, especially when it comes to product differentiation. It would be difficult to distinguish legitimate marketing practices from those related to TSCs. Product differentiation is a prevalent practice, most often taking the form of small differences in packaging size. Who will scrutinize (and how?) whether the different graphic design of branded shampoo bottles genuinely responds to local consumer tastes and preferences? Furthermore, a ban on "unjustified" TSCs would only be effective for food products if many EU and national regulatory requirements were changed and harmonized. Food products have nutrition labelling requirements, and typically only a few languages can be included on the label, not all 24 official languages of the EU. The use of over-stickers, if approved, is costly and impractical. Some creative solutions have been proposed, but the rules are very strict. When the Dutch online supermarket PicNic proudly announced that it could sell cheaper products imported from Germany because the monolingual label is translated in the app or on the website, the relevant authority was quick to point out that the labelling requirements apply to both the webshop and the packaging.[14] And there are many other measures (such as national deposit and return schemes) that, absent private barriers, still would impede cross-border sales.

Meanwhile, supermarket chains have been pressuring large brand manufacturers for better trading terms by joining forces in international alliances. Some of these alliances are used for the joint purchasing of goods, while others negotiate "on-top" agreements that supplement the negotiations between the individual members and manufacturers at the national level. The alliances may benefit consumers by bringing down prices, but they also raise serious concerns about collusion. Several recent antitrust investigations into (international) retail alliances are a sign that authorities are alert to the risks. At the EU level, a probe into AgeCore and Coopernic was closed after finding no evidence of harm to competition, despite initial concerns.[15] Another investigation into the former buying alliance of Casino and Intermarché collapsed after the Court of Justice ruled the inspections were illegal.[16] But there have also been proceedings at the national level. In 2021, for example, the Belgian competition authority closed an investigation into a joint purchasing agreement between Carrefour and the purchasing unit of Louis Delhaize, but only after they offered commitments to address serious concerns about anti-competitive information exchanges. France's ex ante mechanism for monitoring retail alliances has also led to several commitments to reduce competition risks.

14 S Van Rompaey, 'Picnic tackles 'outrageous' international A-brand price differences' (*RetailDetail*, 26 January 2023) <https://agriculture.ec.europa.eu/news/retail-alliances-agri-food-supply-chain-explained-and-their-potential-benefits-consumers-and-2020-05-13_en> accessed 6 October 2023.

15 European Commission, 'Antitrust: Commission closes antitrust investigations into AgeCore and Coopernic' (press release, 13 July 2023).

16 Case C-693/20 P *Intermarché Casino Achats v Commission* ECLI:EU:C:2023:172.

In a recent speech, Director-General Olivier Guersent rightly stressed that competition policy "is not a tool to fight inflation" caused by supply shocks.[17] But competition authorities clearly do have a role to play. Groceries are now the frontline of a cost-of-living crisis, and foodflation has highlighted the need to tackle both public and private barriers that unnecessarily hinder cross-border sales and keep prices of daily essentials high in smaller and less competitive markets. Even as we mark the 30th anniversary of the single market, addressing practices that hinder its proper functioning should remain a top enforcement priority. This has historically been the core mission of EU competition law, and it is just as important today as it ever was before.

Given the importance of these issues, we would very much welcome original (empirical) contributions for CoRE on competition issues in the groceries and food wholesale and retail chain from the perspective of EU competition law or on the complex interplay between European regulation and competition in the (food) retail ecosystem.

In this issue of CoRe, Georgia Theodorakopoulou examines the current state of the as-efficient-competitor (AEC) principle in the jurisprudence of the Union Courts. In *From the As Efficient Competitor to the Potentially As Efficient Competitor*, she proposes an interpretation of the principle that encompasses nascent competitors and argues that a new implementation of the AEC test should put the focus on an elaborate effects-based analysis. In *Dawn Raids and Their Effect on the Stock Market*, Seppe Maes, Caroline Buts, and Marc Jegers use an event study methodology to quantify the effect of the European Commission's cartel decisions on the market value of companies involved. The article particularly examines whether that impact is greater when the Commission conducted a dawn raid on the companies' premises.

The reports section updates you on important national competition and regulatory law developments. It features contributions on: an important judgment from the Danish Eastern High Court on the legal requirements relating to the competition authority' investigations and market definitions (by Erik Kjær-Hansen); the Dutch Act on security screening of investments, mergers and acquisitions, which recently entered into force (by Tim Raats); the broadening of the scope of the Romanian competition authority's mandate (by Bogdan Marius Chirițoiu and Vlad Dan Roman); and the increased application of the foreign direct investment regime in Finland (by Satu-Anneli Kauranen).

Finally, this issue includes three case notes on recent competition law judgments of the Court of Justice of the EU: by Anton Gerber on Case T-235/18 *Qualcomm v Commission;* by Francesco Rizzuto on Case C-385/21, *Zenith Media Communications* and by Seppe Maes, Caroline Buts, and Marc Jegers on Case C-211/22 *Super Bock Bebidas*.

Adelaide McCluskey joins the CoRe editorial team as the executive editor. We are thrilled to have her on board and eagerly anticipate collaborating with her. We would

17 Oliver Guersent, 'Competition Policy, maintaining consistency in a changing world' (speech at the 27th International Conference of the IBA - Florence, 15 September 2023).

also like to express our heartfelt appreciation to Nelly Stratieva, the outgoing executive editor, for her tireless work, enthusiasm, and exceptional support during the last seven years. Nelly, you will be dearly missed!

Ben Van Rompuy
Managing Editor

CALL FOR PAPERS

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EUROPEAN COMPETITION AND REGULATORY LAW REVIEW (CORE)

The Journal provides a practical and intellectual forum to discuss, comment and review all issues raised by the development and implementation of the law and policy governing the area of general and sector-specific competition law in the EU Member States.

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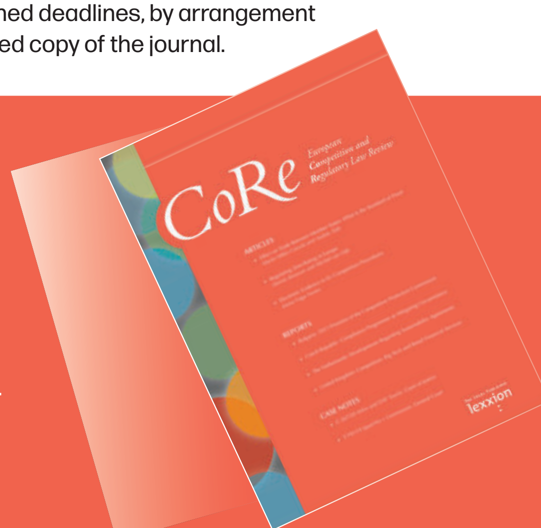
Adelaide McCluskey
Executive Editor
mccluskey@lexxion.eu
+49-30-81 45 06-10



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