

The Pros & Cons of Vertical Restraints

Vertical Restraints 10 Years on: The E-Commerce Earthquake

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*All views expressed are solely
those of the speaker.*

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Agenda

- Ten years of Vertical Block Exemption Regulation provides a broad spectrum of topics
- Few thoughts on
 - Online restrictions and dual distribution
 - National divergence in the application of the VBER – the online hotel booking cases
 - The categorisation of platforms

Online Restrictions and Dual Distribution

- Suppliers are increasingly in competition with their retailers – esp. in the internet
- Often strong online price competition due to increased transparency
- What are the implications of this development?
 - Increasing attempt of producers to take control of the online distribution of their product / service
- What are the reasons behind this development?

Online Restrictions and Dual Distribution

- (1) Producers might strive to be the only supplier in the internet
 - No need for retailers like in the “brick-and-mortar” world
 - Online intra-brand competition reduces the producers’ online profits
- (2) Interaction between online and offline sales – low online prices exert competitive pressure on stationary trading
 - Offline margins might be higher than online
 - Offline sales still larger than online sales in most sectors
 - Incentive to reduce online intra-brand competition in order to protect offline profits

Online Restrictions and Dual Distribution

- Result of these developments: Many cases on online restrictions in the past ten years in Germany
 - Online RPM
 - Dual pricing
 - Prohibition of online-sales
 - Provisions on the shares of online sales
 - Platform bans / price comparison website bans
 - Restrictions on online marketing

Online Restrictions and Dual Distribution

- Listed restrictions certainly differ regarding their effect on competition
 - Combination of restrictions in some cases
 - Furthermore: Competitive assessment strongly depends on additional factors such as the market structure, market shares, product attributes...
 - Efficiency defense has to be considered – however, in many cases not convincing
- Competitive assessment of online restraints cases turns out to be complex and time consuming
- Uncertainty on judgements does not help

National Divergence? – Online Hotel Booking Cases

- When speaking about national divergence – online hotel booking is the elephant in the room
- National divergence is certainly not desirable, but how much of a problem is it regarding the treatment of MFNs by the European NCAs?
- Firstly, “wide” MFNs constitute the bigger problem, “narrow” MFNs only played a prominent role in the online hotel booking cases
 - There was no diverging assessment regarding “wide” MFNs

National Divergence? – Online Hotel Booking Cases

- Diverging assessment only regarding the potential free-riding of hotels on the investments of the platforms
 - Is this a severe problem?
 - The potential of free-riding strongly depends on the ability of hotels to divert customers to their own homepage – this ability should differ between large hotel chains and smaller independent hotels
 - Therefore the scope of the free-riding problem might depend on the structure of the hotel market – which differs significantly within Europe

National Divergence? – Online Hotel Booking Cases

- The Bundeskartellamt investigated the scope of free-riding in the court proceedings of the Booking.com case – esp. detailed analysis of consumer behavior
- Hotel survey showed that Booking.com is economically indispensable for the hotels
- However, most hotels try to divert customers to their direct sales channel by choosing lower prices on their homepage
- Are they successful?
 - Depends on the consumer behavior!

National Divergence? – Online Hotel Booking Cases

- Results of the consumer survey:
 - Most consumers do not compare prices on different websites (2/3 of all consumers)
 - After finding a hotel on Booking.com, consumers book it on Booking.com and not on the homepage of the hotel (99% of all consumers who found their hotel on Booking.com)
 - Most consumers who booked on the homepage of the hotel, knew the hotel beforehand (2/3)

National Divergence? – Online Hotel Booking Cases

- BKartA finds that these results show that “free-riding” is unlikely to be a problem – the court was not convinced
- Proceedings are still pending since the BKartA appealed the decision

Follow up: Legality of MFNs?

- Broad agreement, that “wide” MFNs restrict competition, while it is unlikely that they create efficiencies countervailing the harm to competition
 - Seems appropriate to treat “wide” MFNs as hardcore restrictions in order to increase legal certainty and reduce the procedural costs
- Assessment of “narrow” MFNs diverges and depends on the scope of the efficiencies
 - Treatment as hardcore restriction seems too far-fetched

Categorisation of Platforms

- Platforms differ strongly regarding their business model, their market power / bargaining position or the relevant network effects
 - Standardized treatment of platforms seems inappropriate
- Risk allocation between principal and agent might be a key factor in the assessment
- Many platforms bear significant commercial risk due to advertisement costs, implausible that they can qualify as genuine agents
- Unlikely that the “prominent” platforms fall outside the scope of Art. 101

(1) TFEU

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Thank you for the attention!



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