

Vertical Restraints in a Digital World

*Remarks as a discussant of
David Evans' presentation*

„More Pros and Cons for Vertical Restraints”
Konkurrensverket's seminar
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Csaba KOVÁCS
GVH (the Hungarian CA)

Perspective

- Remarks triggered by the presentation/subject
- Forward looking
 - (asked to be)
 - Future of competition policy towards vertical restraints?
 - But caution needed
- Practical one
- That of a smaller EU NCA

The views presented here are not necessarily identical with the official position of the GVH (Gazdasági Versenyhivatal - the Hungarian competition authority).

Vertical Restraints

- Controversial
 - Non-horizontal
 - one monopoly profit argument, vertical externalities / efficiencies
 - But can be anticompetitive (market power – abuse?)
- Ever-evolving policy
 - Less transatlantic convergence
 - Time to time debates on proper policy/enforcement
 - Who should prove effect / efficiency (and how?)
 - Involved by object vs. effect debate (and much else)
 - Case by case (eg. free riding: Is market prone to free riding? How prevalent free riding can be? Does free riding harm investment?)
 - Intra brand vs. Inter brand competition

Eg. Cafarra
& Kühn

Eg. Sagers

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Challenging features, like

- Network effects
 - Not new - But may be stronger/quicker
 - Natural monopolies? First mover takes most?
- Zero pricing
 - Not new – But more prevalent
 - Kills cases – directly ((?)) or indirectly)?
 - Kills SSNIP, kills price effect. Market definition? Market shares?
- Two-sided markets/platforms
 - Not new – But more prevalent
 - Interactions between the two sides of the market/platform
 - Traditional analysis not sufficient / may be misleading

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Challenging features, like (cont.)

- Big Data
Not quite new (Magill) - But more prevalent
- Personalized pricing
Price discrimination relying on personal data
Price discrimination not new – But very close to perfect price discrimination (welfare standards issue)
- Algorithms (which surely will rise – i.e. collude) – not vertical
- Buying up startups (that later could compete) – merger specific
- Dynamic and innovative
Innovations/technological change undermines existing market positions

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Solutions/proposals

- Network effects

Case by case – countervailing factors (product differentiation)

- Zero pricing

Market definition / competitive effects - quality instead of price

Eg. SSNDQ: small-but-significant non-transitory decrease in quality

privacy and data acquisition as an important quality aspect (or a sort of price)

Market shares – based on other meaningful measures

Eg. number of transactions, number of clicks

- Two-sided markets/platforms

Recently developed/enhanced theories

Not so fundamentally different,

rather a few additional anticompetitive effects / efficiencies

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Solutions/proposals (cont.)

- Big Data
Taken as an important asset/input, vertical foreclosure theories
- Personalized pricing
Treatment and remedies focus on the privacy aspect
transparency, consumer consent
If at all (not exclusionary conduct)
- Dynamic and innovative
Emphasis on dynamic effects and theories of harm, dynamic efficiencies

Caution – do not harm, stronger self-correction of markets
More activism – important field, substantial consumer welfare at stake,
tipping (weaker self-correction of markets)

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OK, but

- Judging the strength of network effects
How to do it in advance? How to recognise tipping points?
- Measuring quality (zero pricing)
Measuring quality may not be straightforward
What if there are several relevant quality aspects
which are not moving together?
- Two-sided markets/platforms
New theories too complex to apply
Simplified approaches proposed
Skip two-sidedness if indirect vertical externalities are not strong
Taking two-sidedness in mind and taking it into account in a qualitative way

Eg. Collyer
et al

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et al.

Forward
looking

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OK, but (cont.)

- Big Data taken as an important input
May be elusive – eg. identification of future use of data, like innovation markets
- Personalized pricing
CA competent? Involves data protection authorities expertise?
Is in line with their agenda?

Exploitative abuse?
- Dynamic and innovative
Dynamic approach less confident?

How to balance between caution and activism?

Conclusions

- Vertical restraints will not go away
Important role in the digital economy
Either procompetitive or anticompetitive
And might remain a moving target, surrounded by general debates
- Standard analytical framework / basic doctrines OK,
challenge at the level of practical application
Eg. measurement issues

Eg. Cafarra
& Kühn

Eg. Cafarra
& Khn

Competition policy pushed out of comfort-zone
dynamic effects and efficiencies, quality assessment,
(including privacy and data acquisition), personalised
pricing and welfare standards, privacy remedies

Conclusions (cont.)

Speculations on CAs adjustment:

- More research needed. Really.
Including ex-post evaluations.
- Learning by doing?
There will be mistakes (type one, type two). And debates.
- Reasonably and newly structured rule of reason approach?
Instead of a rigid object vs. effect split
Effects based approach with well-based presumptions?
- Digital world brings new/enhanced opportunities for empirical testing/research?
Data rich environment in general
Controlled random trials (Google Shopping)?

The End

to be continued