

Effect of vertical restrains on e-commerce

Nowadays, online purchases are growing rapidly; people are choosing online shopping more often with the purpose to save time and even money. Furthermore, online platforms stimulate market development and increase competition. E-commerce is believed to have pro-competitive effects, and it enjoys a special protection in the European Union (EU) as it is consistent with the political goal of the Internal Market. In September 2016, DG Competition published the Preliminary Report which focussed on the online sale of goods and digital content. The report has highlighted some problems, such as concluding of vertical agreements and resort to vertical restrains, which can distort competition.¹ Vertical restraints also occur in e-commerce, as well as in traditional commerce, although they may have different implications.

The VBER² essentially defines vertical agreements as one between undertakings operating at different levels of the supply chain and relating to the conditions of purchase, sale or resale of goods or services. Vertical restrains³ - a term which defines certain methods used by producers or suppliers in relation to the resale of their products typically includes support for resale prices, participation in exclusive trading, and the limitation of market geography. In the conditions of exclusive trade and restrictions of market geography, the intermediary (distributor), which has no competitors, is the only person who receives from the manufacturer the right to offer products in the market. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.⁴ Usually, vertical restraints are defined in the negative way, but this question is debatable among scholars, which are voting for the beneficial aspects of vertical restraints. In this paper, I tried to analyse the effect, of vertical restrains on e-commerce in European Union competition market and mainly highlight the positive aspects of such.

Firstly, the scholars of Chicago law School, emphasised that it's usually easier to say that such practices as tying, exclusive dealing etc., is highly anticompetitive, but he sees there an economic consequences as coordination at supply chain can make a reasonable prices for

¹ http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf

² Vertical Block Exemption Regulation - Commission Regulation (EU) No 330/2010 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330>

³ *ie clauses that restrict competition in a number of ways, such as exclusive distribution clauses or non-competition obligations etc.*

⁴ http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

consumers.⁵ He describes the so-called “double marginalization”, in case when manufacturer and retailer coordinate their pricing (not to impose costs on both manufacturer and retailer level) they would lower the price, increasing their profits and benefiting consumers as well. In addition the other side of clauses included in vertical restraints, such as geo-blocking could be justified for the reason of economic welfare of consumers. It is believed that in this case, price discrimination will be based on purchasing power of buyers, that is, relative to the level of average wages and so on, which in consequence is intended not to harm the buyer, but rather to save his/her money.

It is important to say that many scholars “vote for” freedom to establish vertical restraints especially in cases branded products. From the point of view manufacturer of product vertical restraint can help to safeguard the brand image of the product. Brands are essential for competition and for the consumer. In order to preserve the image of the brand, manufacturers often include provisions in the vertical agreements that limit the ability of retailers to sell the goods on web-sites that do not safeguard the appropriate brand image. Vertical restraints aimed at selecting appropriate distributors would allow manufacturers to rely on a network of qualified retailers who ensure that their products are offered for sale in optimal conditions in order to protect investments in product innovation, build and maintain the prestige and reputation of brands and products, and, ultimately, ensure that consumers can purchase the product of their choice in the most appropriate retail environment.⁶ As for example, in December 2017, the European Court of Justice (CJEU) confirmed that the luxury cosmetic supplier Coty Germany GmbH (“Coty”) did not break competition law when it prohibited one of its authorized distributors, Parfümerie Akzente GmbH from selling Coty’s products in third-party platforms such as Amazon or E-bay, provided that this is necessary to preserve the luxury image of their goods.⁷

From abovementioned follows the second point, namely the restriction of counterfeiting of goods. The ability to limit sales through a network of qualified retailers is essential to prevent counterfeiting and to maintain consumer confidence in the brand.⁸

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https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2806&context=journal_articles

⁶ Competition Policy and E-Commerce after the EU Commission Sector Inquiry: What Comes Next? Marco Botta & Maria Luisa Stasi, ENTraNCE April 2017

⁷ Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH of 6 December 2017 <http://curia.europa.eu/juris/liste.jsf?num=C-230/16>

⁸ Gabriele Accardo, Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws

In addition, we can talk about free-riding issues. For example, in offline trading, the manufacturer invests in valuable retail outlets and may not want free-rider dealers to use these outlets, thus making investments becomes less attractive. In this case, the vertical restrains the ability of others to use a trading outlets is limited.⁹ For an online world it is particularly relevant, and can be illustrated by an example mead by OECD¹⁰ that vertical restrain can mitigate the problems associated with rendering services to free riders when, for example, an online TV store can freely free-ride on services provided by an autonomous store. Although the price paid by the client for the TV may be lower, this may result in the online store stopping storing this brand in the future or even closing the store. Vertical restrains can help solve this problem by providing incentives for retailers to engage in expensive demand-side measures such as maintenance or advertising.

Notwithstanding the above, there are many risks of negative effect on competition. As for example, that vertical restraint as obstacle to market entry and expansion or that vertical restraint can often lead to an increase in the retail price.

However, competition authorities in Europe aware that vertical enforcement is still necessary today, because distribution of goods is not always rational, nor is it always peaceful. And literature always describes that vertical restrains can have both positive and negative effect According to Jean Tirole: "Theoretically, the only defensible position on vertical restraints seems to be the rule of reason. Most vertical restraints can increase or decrease welfare, depending on the environment. Legality or illegality per se thus seems unwarranted."¹¹ It can be concluded, that there is no unequivocal answer to the fact whether the vertical restrains are positive or negative. According to the prevailing opinion in the legal doctrine, the effect of restrictions should be assessed in accordance with prevailing market conditions. It is not important the type of restrain, because a particular contract provision may have either beneficial or detrimental effects, depending on the context. However, it should be noted that vertical restrains should exist especially in cases where it is necessary to protect the brand, and in the same way protect the interests of consumers.

⁹ The Effects of Vertical Restraints: An Evidence Based Approach By Margaret E. Slade <http://www.konkurrensverket.se/globalassets/english/research/report-the-pros-and-cons-of-vertical-restraints-18mb.pdf>

¹⁰ <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>

¹¹ Tirole, Te Theoy of Industrial Organization Che MIT Press