

Online distribution: an anti-age for vertical restraints?

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Overview

i. From brick and mortar distribution to online distribution

- *Competition online: new issues or the «same old story»?*
- *Free riding 2.0*
- *RPM 2.0 (?)*
- *Buyer power and vertical relationship*

ii. From vertical agreements to vertical restraints

- *Vertical agreements and the “obsession” with restrictive clauses*
- *Web vertical agreements and vertical agreements “imposed” by a dominant player*

iii. Concluding remarks



Online Markets and Vertical Restraints: the Same Old Story?

- The economic framework used to assess the competitive effects of vertical restraints in offline markets is fully appropriate for assessing vertical restraints in online markets
- **Vertical restraints in online markets may be pro-competitive** if they improve coordination through the distribution chain by addressing market failures and aligning incentives
- However, as in traditional offline markets, **the use of vertical restraints in online markets can also raise competition concerns** if they are used to protect incumbents' market positions



Online Markets and Vertical Restraints: the Same Old Story?

- The “story” is the same. The traditional economic framework for vertical restraints fits also vertical restraints in online markets. Only some factual novelties may be considered:
 1. the nature and of the real size of **free riding**
 2. the justifications for **RPM**
 3. the increasing role of **Price Parity Clauses (PPC, APPA, MFN...)**
 4. The role of **buyer power**



Online Markets and Vertical Restraints: the Same Old Story? *Free Riding 2.0*

- **4 potential market failures:**

1. **Free riding on the provision of retail services** (price discounting online sellers or low cost platforms...). It is unclear the extent to which developments in online markets have changed the potential for free-riding (ease and convenience of shopping vs quantity of information available online...). **You can find a lot of information on the internet distribution channel**
2. **Free riding on retailers' investments** in quality certification and protection of brand image (online retailers who do not have an established reputation...). If the main focus of online sellers is price-competition, online markets may raise new issues. **However online business models are increasingly focusing on non-price aspects, including reputation**
3. **Information asymmetries.** Online markets may create new sources of asymmetries particularly for experience and credence goods (lack of physical inspections, especially when sellers do not have also offline presence). **But if you buy online you have 14 days to try your clothes and give them back (if you do not like them)**
4. **Demand Uncertainty.** Potential for other sellers to free ride on the initial seller's promotions. On the other hand **developments of online markets may reduce the need to hold inventories, raise the awareness of a new product before the launch through social media...reducing the need of traditional promotional activity**

Online Markets and Vertical Restraints: the Same Old Story? *Free Riding 2.0*

Free riding is still the main justification for vertical restraints but a greater understanding of the likelihood of **the nature and of the real size of free riding in online markets** might be helpful for a better understanding of the implications of vertical restraints

Online Markets and Vertical Restraints: the Same Old Story? *RPM 2.0*

- The main theories of harm:
 1. **Foreclosure of rivals:** limitation of online sales and dual pricing; exclusive distribution agreements; rival platforms may be foreclosed if their ability to access costumers or suppliers is restricted...APPA may restrict the ability of a new platform to compete by offering sellers lower commissions/fees...
 2. **Softening of competition:** (RPM and the reduction in intra-brand competition...but also inter brand competition if it enables a supplier to commit to higher prices and rival suppliers respond by also competing less aggressively...
 3. **Facilitate collusion.** By making pricing more transparent RPM may facilitate collusion between suppliers; downstream RPM may represent a focal point for distributors; APPA may facilitate collusion among platforms by reducing the incentives to deviate from collusion by offering lower fees to sellers of the platform.



Online Markets and Vertical Restraints: the Same Old Story? *RPM 2.0*

RPM and sales bans/limitations raise the most serious concerns among CAs. **Nevertheless the potential efficiencies of RPM in online markets might be reconsidered and even its compatibility with art. 101 (1) should not be excluded *a priori*....**

On Line Markets and Vertical Restraints: the Same Old Story?

- Competition concerns are particularly high in those industries that are undergoing a process of **disintermediation**...direct competition between retailers and suppliers (**Vertical Competition and reactions of the incumbents?**)
- Vertical restraints that limit online sellers' ability to deal with consumers outside a given territory may hinder consumers' opportunity to benefit of the increased geographic scope for sales
- **Geographic Price Discrimination** (GPD): pros and cons...The Sector Inquiry on E-Commerce



Online Markets and Vertical Restraints: the Same Old Story? **The “Demand” Side of the Moon**

- The new life of vertical restraints in online markets proposes an old but not sufficiently investigated issue: **buyer power. In online markets buyer power plays a wider role than in offline markets** (e.g. Amazon...)
- Buying power is much less investigated than selling power and an appropriate and sound theory of buying power is still missing

To which extent is buying power a proper antitrust issue?

- Monopsony power and the “mirror image” of monopoly: effects comparable to those of monopoly power, though directed upstream at input suppliers rather than down-stream toward final consumers
- Countervailing power: a more mixed and less investigated story



On Line Markets and Vertical Restraints: the Same Old Story? The “Demand” Side of the Moon

- Though **in the short run buyer power is generally beneficial** for final consumers the harm to the competitive process generated by buyer power may be as serious as those generated by monopoly at least in the medium run...
- The peculiarities of the ‘*demand side of the moon*’ make the remedies to its anticompetitive effects quite problematic. **There may be a gap between art. 101 and art. 102 which should be filled...**

From Vertical Agreements to Vertical Restraints

- We should take advantage of the rejuvenation of vertical agreements to **rethink some of the mainstream views of the topic**
- **Hard Core Restriction** and formal “by object” assessment should be deeply reconsidered
- The “obsession” with restrictive clauses of a single agreement should be relaxed
- **A greater focus on vertical restraints** (agreements in violation of art. 102 and web of vertical restraints in violation of art. 101) rather than on restrictive aspects/clauses of single vertical agreement could represent an interesting evolution of the “*same old story*”...



From Vertical Agreements to Vertical Restraints

- R. Whish's proposal of rephrasing art. 102 as a mirror image of art. 101:

“art. 102 (1): conduct or inaction which has as its object or effect the abuse of a dominant position shall be prohibited

102 (2): agreements that violate art.102 shall be automatically void

102 (3) : the prohibition in art. 102 (1) may, however, be declared inapplicable in the case of conduct or inaction which is objectively justifiable or which produces net economic benefits”

- In particular with regard to paragraph 2 of these provision Whish's proposal may suggest a more flexible interpretation of art.102 closer to the monopolization or to the attempt to monopolize...



Summing up...

1. The development of online markets, platforms and disruptive innovations can be seen as a sort of **anti age** for one of the “most boring” topic of competition policy: vertical restraints
2. The traditional economic framework for vertical restraints fits also vertical restraints in online markets. **However some factual novelties may be considered. A greater understanding of the likelihood of the nature and of the real size of free riding in online markets might be helpful** for a better understanding of the implications of vertical restraints.
3. **We might take advantage of the rejuvenation of the topic in order to address some “old” still controversial issues**
4. The concern about vertical restraints varies between different types of vertical restraints. RPM and sales bans/limitations raise the most serious concerns. **However the potential efficiencies of RPM in online markets might be reconsidered and even its incompatibility with art. 101 (1) in some cases may be rethought.**
5. The pros and cons of **APPA** are not so clear-cut.



Summing up...

Existing tools are sufficient to deal with competition issues related with the use of vertical restraints in online markets but **a greater focus on vertical restraints** (agreements in violation of art. 102 and web of vertical restraints in violation of art. 101) **rather than on restrictive aspects/clauses of single vertical agreements** could provide an interesting evolution of the “same old story”....

...towards an antitrust 2.0 story?



Thanks for your attention!

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