

Digital Value Chains and Fairness

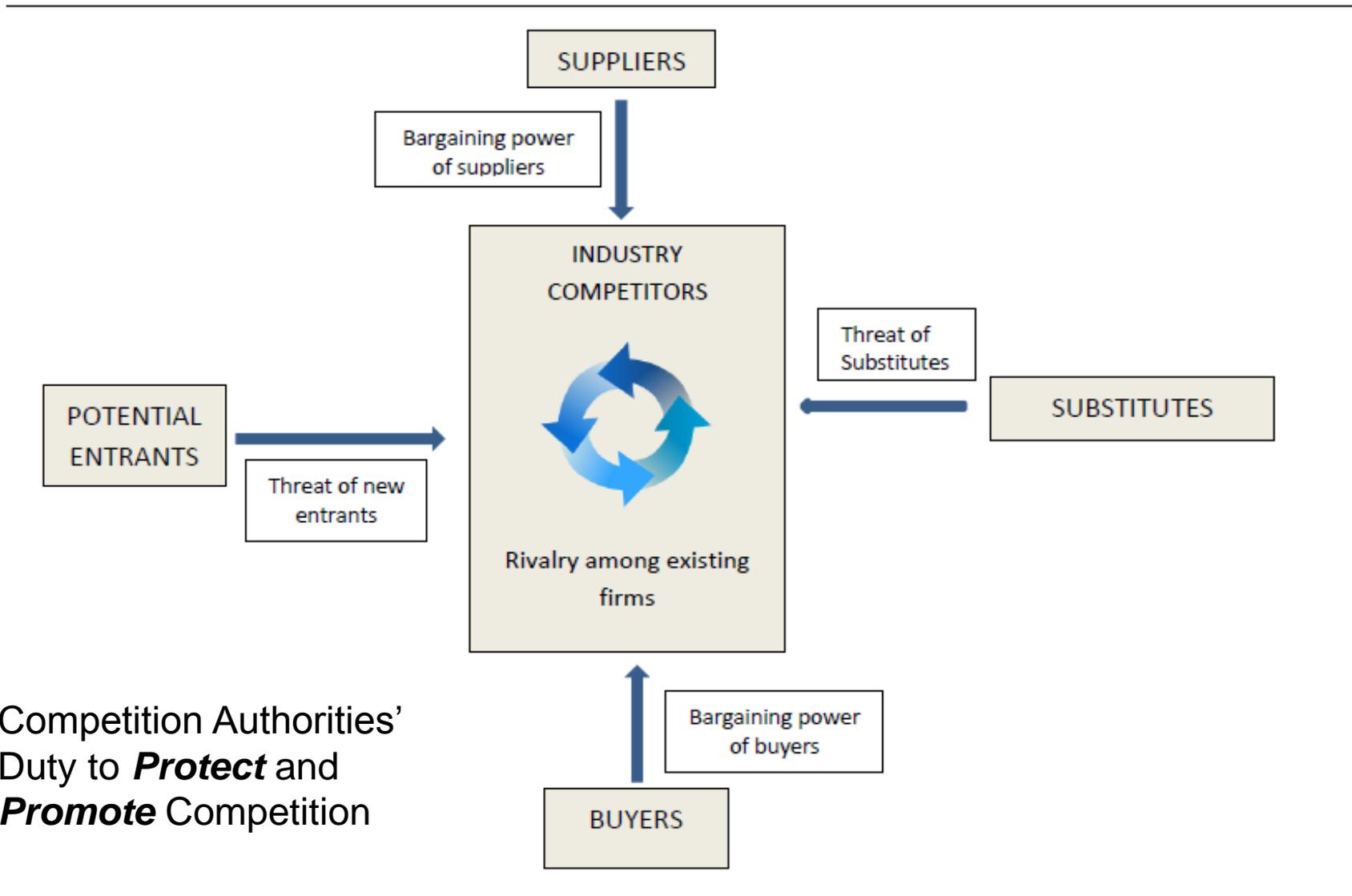
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Platforms as value chains – online intermediation

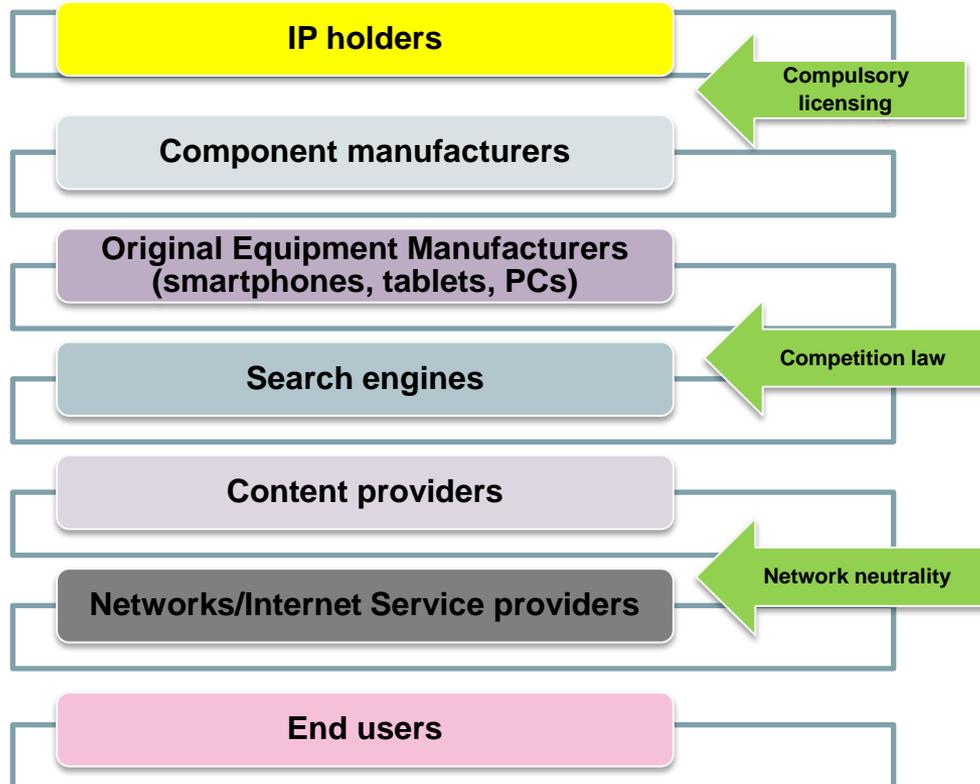
- The role of platform operator: the platform operator facilitates the transaction, which would carry much higher transaction costs (for example search costs) or wouldn't have happened at all
- Essentially transactional efficiencies, a less fancy word for multi-sided platforms
- Distinction between multi-sided platforms ("MSPs") and other types of markets as they involve direct interactions between sellers and buyers or between two or more distinct sides
- Distinction between MSPs and resellers (digitalisation also changing reselling)
 - E.g. Drop shipping
- Various business models (fee-for-content revenue model, Advertising-supported revenue models, Fee for transaction or fee-for service revenue models)



Digital Value Chains

An illustration

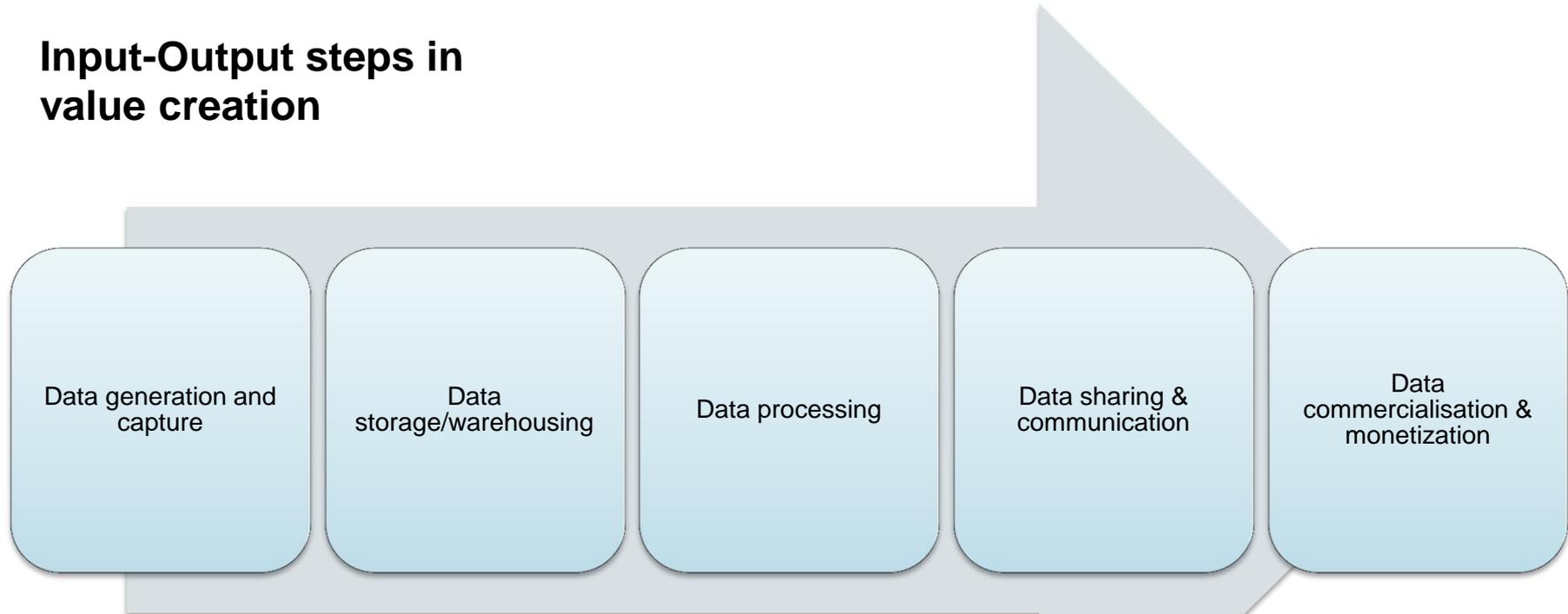
Eight of the world's most highly valued companies are technology businesses. The combined market capitalisation of these companies is US\$4.7 trillion. That is 30 per cent of the combined market capitalisation of the other 92 companies in the world's 100 most valuable firms.



- *Market power in multiple segments of the chain*
- *Co-opetition (frenemies)*
- *Allocation of the total **surplus value** of the value chain: vertical competition*
- *Extraction of revenue: limiting the market power of other segments of the value chain to increase your share*
- *Different ways of public action (competition law, net neutrality, compulsory licensing, regulation)*
- *Competition for financial capital as the main source of value in financial capitalism*

Is the consumer still at the end-point of the global data value chain?

Input-Output steps in value creation



As of September 30, the book value of Apple's equity was US\$134 billion, while its market valuation was close to US\$900 billion. The difference has to reflect the expectation of enduring "super-normal" profits.

Apple's total assets were US\$375 billion on September 30, but with fixed assets a mere US\$34 billion. The value of Apple's long-term investments was almost six times that of its fixed assets. Its net income in the year to September 30 was also more than 40 per cent higher than its total fixed assets.

This company evidently has no profitable way to invest its huge profits in its business. It is now an investment fund attached to an innovation machine and so a black hole for aggregate demand.

Follow the value

Financialisation & global markets

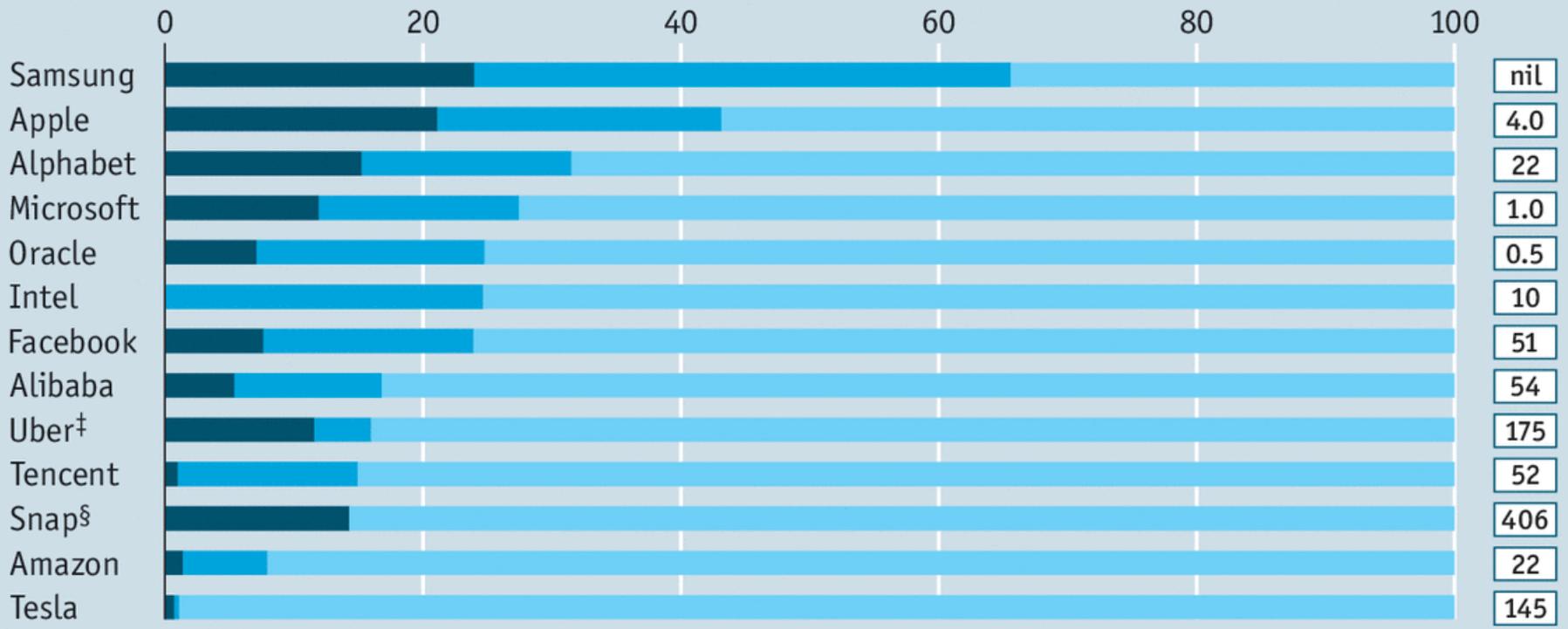
“Shares of technology firms trade on their highest ratio to sales since the turn of the century”

The good, the mad and the ugly

Market value of technology firms, %

Comprising: ■ net cash ■ profits*: ■ until 2020 ■ after 2020

Sales, % increase on a year earlier[†]



Sources: Bloomberg; company reports

*Present value †Latest ‡Implied by latest funding §Reported IPO value

Prior beliefs on competition law intervention



'Permissionless innovation'



Experimentalism



Principle of precaution



Data protection and competition law

- *Google/DoubleClick*: the Commission examined if mere combination of DoubleClick's assets with Google's assets, and in particular the combination of customer data (generated by the use of internet) obtained by both of them, would allow the merged entity to achieve an important competitive advantage 'that could not be replicated by its integrated competitors (mainly Yahoo! and Microsoft)' or competitors in the various segments of the product markets affected.
- *Microsoft/LinkedIn*:
 - '(177) As a preliminary remark, it should be noted that any such data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules. In this respect, the Commission notes that, today, Microsoft and LinkedIn are subject to relevant national data protection rules with respect to the collection, processing, storage and usage of personal data, which, subject to certain exceptions, limit their ability to process the dataset they maintain. Currently, the data protection rules of the EU Member State(s) where Microsoft and LinkedIn have their registered seat and/or where they have subsidiaries processing data apply. [...]'
- The EC also found that data privacy was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction. Microsoft offered a set of commitments to address the EC's concerns.

MERGERS

Jurisdiction and remedies

- Debates on different types of 'local nexus' requirement
 - Industry specific criteria? (digital services and pharma transactions)
 - data volumes (in the digital services sector)
 - patents issued or applied for (in the pharma sector).
 - Deal value
 - Germany (2017): 9th amendment to the German Act against Restraints of Competition
 - Under the new merger control regime (cf. section 35 (1a) ARC), a merger filing is required if (among other turnover-related criteria)
 - » the “value of the consideration paid in return for the transaction” is more than EUR 400 million; and
 - » the target is significantly active in Germany.
 - Austria (2017): new alternative transaction value threshold entered into force on November 1, 2017 - the “value of consideration paid in return for the transaction” exceeds EUR 200 million
 - EU: (October 2016 consultation)
 - Raises prospect of
 - » Deal size thresholds
 - » Local nexus criteria measured by 'measurable impact' test / industry specific criteria (e.g. user numbers) / value multiples
 - Concerns raised in response
 - » Proportionality (in particular given difficulties in identifying credible theories of harm in relation to such targets)
 - » Difficulties in designing appropriate test / likely over-inclusivity
 - Commission's next steps are unclear
- Impact on innovation and remedies
 - Access
 - Interoperability

DIGITAL VALUE CHAINS AND EXCLUSION

The “search neutrality” narrative

| Vertical | Most popular vertical sites ²³² | Example Query | Ranking of Google's own vertical site in search results ²³³ |
|-----------------|---|--|--|
| Finance | Yahoo Finance, MSN Money | “finance”, stock symbols | Google Finance: #1 |
| Music | iTunes, MySpace Music, MTV | Artists: “lady gaga” | Google Music: #1 |
| Health | EverydayHealth, WebMD, Wikipedia ²³⁴ | Major medial terms: “cancer” | Google Health: #1 |
| Patents | FreePatentsOnline: iBiblio.org | “patent” + patent number | Google Patents: #1 |
| Maps | MapQuest (Prior to Jan 2009) | Addresses: “420 west 25th street, new york, ny” | Google Maps: #1 |
| News | CNN, New York Times | Current news: “health care bill” | Google News: #1 |
| Scholar | FindArticles, SpringerLink | “legal journal articles” | Google Scholar: #1 |
| Movies | IMDB, Yahoo! Movies | Movies: “Alice in Wonderland” | Google Movies: #1 |
| Books | Amazon, Barnes & Noble | “the call of the wild” | Google Books: 2 of top 5; 4 of top 10 (Amazon #7) |
| Blogs | Blogger, Federated Media, Technorati | General search: “blogs” | Google Blog 3 of top 4 |
| Code | SourceForge, CodePlex | “Cloud computing code” | Google Code: #1 |
| Dictionary | Dictionary.com, Merriam Webster | Generic search term: “definition of homogeneous” | Google Dictionary: #1 |
| Travel | Expedia, TravelAdNetwork, Orbitz | Flight origin & destination: “Boston to Denver” | Google Flight Search Lead Generation: #1 |
| Video | YouTube, Break Media Network, Google Video Search | “Labrador puppy video” | Google YouTube and Google Video Search: #1 and #2 |
| Weather | The Weather Channel, Weatherbug | “Denver weather” | Google Weather Lead Generation: #1 |
| Images | Google Image Search, Photobucket, Flickr | “Iceland volcano image” | Google Images: #1 |
| Mortgage Quotes | Bankrate.com, Lendingtree.com | “California mortgage rates” | Google Mortgage Rate Quotes Lead Generation: #1 Ad |
| Products | Yahoo! Shopping, Google Product Search, Shopzilla.com | “Gucci heels” | Google Shopping/Products: #1 |

- “Search engines have become the Internet’s gatekeepers and are arguably as essential a component of its infrastructure as the network itself. Google’s overwhelming dominance of search and search advertising, coupled with its ability to arbitrarily penalise rivals and systematically favor its own services, makes the need for **search neutrality** particularly pressing “
- Google determines the exact placement of its own services independently of the ranking algorithms it uses to determine the relative placement of all other results

Relevant market

- Market for general Internet search
 - Limited demand substitutability with
 - Specialised search services
 - Social networks
 - Other online services
 - No distinction between mobile and static devices
- Market for comparison shopping services
 - Comparison shopping services are specialised search services that: (i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers (also referred to as online merchants) and merchant platforms (also referred to as online marketplaces); and (ii) provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms
 - Limited substitutability with online retailers as they do not offer users the possibility to purchase a product directly on their websites and online retailers do not offer the possibility to compare their own offers for the same or similar products on the websites of other online retailers
 - Limited substitutability with merchant platforms as they serve a different purpose: they are considered as business partners, not competitors
- No SSNIP test needed

Dominance? Market power?

| Search Engine | Desktop | Mobile |
|-----------------|---------|--------|
| Google - Global | 80.47% | 94.87% |
| Bing | 7.15% | 0.89% |
| Baidu | 5.59% | 0.37% |
| Yahoo - Global | 5.55% | 2.94% |
| Ask - Global | 0.20% | 0.05% |
| AOL - Global | 0.05% | 0.01% |
| Excite - Global | 0.02% | 0.00% |

- “A stable hierarchy”
- High market shares
- Barriers to entry and expansion
 - High capital expenditure
 - Relevance of scale
 - Direct network effects
 - Indirect network effects
- No countervailing buyer power
- **Comment: Need for a Strategic Perspective**

Which Antitrust theory of harm?

- **Refusal to grant equal access:** It is possible to conceive Google's universal search engine as an *indispensable distribution tool*, a sort of essential facility to which competing vertical search engines and websites should have access. As it was previously noted, the cost structure of Google's universal search engine is close to that of *natural monopolies* (important fixed costs and low marginal costs), thus making it theoretically possible for the plaintiff to prove that the creation of a universal search engine is not a realistic potential alternative and that access to the existing system is therefore indispensable
 - *Streetmap.EU Limited v Google Inc., Google Ireland Limited and Google UK Limited [2016] EWHC 253 (Ch)* : the effect on a related market must be serious or appreciable in order to constitute an abuse of dominance
 - *TeliaSonera (Case C-52/09)*, "(p)articularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market, in other words it requires action before the anti-competitive effects of that strategy are realized" (para. 108).
- **Discrimination**
- **Tying**
- **Leveraging**

Unequal treatment and leveraging

- Google positions and displays more favourably, in its general search results pages, its own comparison shopping service compared to competing comparison shopping services
- Single monopoly profit? NO
- (332) A system of undistorted competition can be guaranteed only if **equality of opportunity** is secured as between the various economic operators
- (334) Article 102 of the Treaty and Article 54 of the EEA Agreement prohibit not only practices by an undertaking in a dominant position which **tend to strengthen that position**, but also the conduct of an undertaking with a dominant position in a given market that **tends to extend that position to a neighbouring but separate market** by distorting competition.
- [Case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, EU:C:1985:394; Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436; Case T- 228/97, *Irish Sugar plc v Commission*, EU:T:1999:246; Case T-201/04, *Microsoft v Commission*, EU:T:2007:289.]
- (339) No need for actual effects

Commission decision: remedies

- Any measure chosen by Google and Alphabet should, ensure that Google treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages.
- any measure chosen by Google and Alphabet:
 - (a) should apply to all devices, irrespective of the type of device on which the search is performed;
 - (b) should apply to all users of Google situated in the thirteen EEA countries in which the Conduct takes place, irrespective of the Google domain that they use (including Google.com);
 - (c) should subject Google's own comparison shopping service to the same underlying processes and methods for the positioning and display in Google's general search results pages as those used for competing comparison shopping services. Such processes and methods should include all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result in Google's general search results pages, including:
 - processes and methods or relevance standards determining the triggering of comparison shopping services on the general search results pages in response to a query;
 - processes and methods determining the positioning and display of comparison shopping services in response to a query, including relevance standards, ranking algorithms, adjustment or demotion mechanisms and their respective conditions, parameters and signals;
 - type of landing pages for clicks on comparison shopping services;
 - visual appearance on comparison shopping services and branding possibilities;
 - type and granularity of information on the results of comparison shopping services available to users; and
 - the possibility of interaction with users.
 - (d) should not lead to competing comparison shopping services being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established by this Decision

Regulation?

- Prop. Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users and online search engines in the Digital Single Market (2018)
 - It ‘complements the Union competition rules, which inter alia target anti-competitive behavior of companies rather than the harmful, but not necessarily anti-competitive practices that are the subject of this initiative’
 - Regulation establishes obligations for principles-based mandatory transparency and improvements to redress for providers of online intermediation services
 - Online advertising intermediation services or online payment solutions are not covered by the prop. Regulation
 - Prop. Regulation refers to the ‘relative bargaining power of providers of online intermediation services’
 - Also includes ranking of product or services in search results and their presentation

BEHAVIOURAL PRICE DISCRIMINATION

Different types of price discrimination

- **First-degree price discrimination/personalised pricing**

- The producer is able to set individualized prices for each customer, relying on its knowledge of individual preferences

- **Second-degree price discrimination/versioning**

- The producer doesn't know the individual preferences and proposes a menu of options to consumers, letting the consumers choose their preferred one.

- **Third-degree price discrimination**

- The producer doesn't know the individual preferences, but charges different prices to groups of consumers with different characteristics

Welfare effect, the monopoly case

- In general, compared to the situation with a uniform price, the monopoly will set
 - higher prices for “low elasticity” groups of consumers
 - lower prices for “high elasticity” groups of consumers
- Thus some consumers benefit while others are penalized
 - Depending on the groups, this “redistribution” may be more or less desirable
- A classical result states that if price discrimination generates a reduction of total sales then it also reduces the total surplus (sum of the surplus of all the agents)
- Personalised pricing may not be detrimental to consumer surplus and to welfare in comparison to uniform pricing
 - Transparency of personalized pricing strategies
 - Monitoring of pricing strategies of online players?

“Discrimination” and Article 102(c)

- Article 102(c) does not prohibit “discrimination”
- Article 102(c) prohibits the application of
 - Dissimilar conditions
 - to
 - Equivalent transactions
 - **Placing customer at a competitive disadvantage**

ILLEGAL EXTRACTION OF PERSONAL DATA AS A NON- PRICE EXPLOITATION

The Facebook logo, consisting of the word 'facebook' in white lowercase letters on a dark blue rectangular background.

facebook

Bundeskartellamt: Facebook's dominant position

- Dominant position of Facebook
 - German market for social networks
 - High market shares
 - Direct network effects
 - Identity-based network effects
 - Professional networks such as LinkedIn and Xing, as well as messaging services such as WhatsApp and Snapchat or other social media such as YouTube or Twitter are not part of the relevant product market. Even though these services are in parts competitive substitutes for Facebook, from the users' perspective they serve a complementary need.
 - Indirect network effects: In the case of advertising-financed services (which can also be referred to as "audience providing platforms"), the advertising side profits from a large private user base (positive indirect network effects). A competitor has to have reached a critical number of private users to successfully enter the market with an ad-financed product. Without such a critical number the product will not be sufficiently attractive for the advertising side.
 - No multi-homing

Abuse of a dominant position through exploitation: “exploitative business terms”

- The dominant company makes the use of its service conditional upon the user granting the company extensive permission to use his or her personal data.
- On principle, any legal principle that aims to protect a contract party in an imbalanced negotiation position can be applied for this purpose.
- The damage for the users lies in a loss of control: they are no longer able to control how their personal data are used. Facebook's users are oblivious as to which data from which sources are being merged to develop a detailed profile of them and their online activities.
- Facebook's merging of the data thus also constitutes a violation of the users' constitutionally protected right to informational self-determination.
 - *Pechstein* : the Court left open whether the business terms used were exploitative under § 19(1) or (2) no. 2 GWB, but demanded an extensive balancing of interests taking also into account of constitutionally protected rights. To protect constitutional rights, § 19 GWB must be applied in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is *abolished*. If, the Court held, in such a case a dominant company disposed of constitutional rights of its contractual partners, the law had to intervene to uphold the protection of such rights.
- The Bundeskartellamt examined whether Facebook's data processing terms are admissible including in the assessment the principles of the harmonised European data protection rules (EU General Data Protection Regulation)

Degradation of quality



- “Italy’s competition authority is looking into charges that Apple and Samsung are surreptitiously slowing down old phones to push consumers into buying new products”
<https://guardian.ng/news/apple-samsung-investigated-in-italy-for-slowing-down-old-phones/>



ALGORITHMIC COLLUSION

Algorithmic pricing

- Firms' pricing decisions are increasingly delegated to software programs that incorporate the latest developments of artificial intelligence
- Not the first time: Pricing algorithms have been used by airline companies for decades, recent expansion in other sectors (financial markets and the hotels and insurance industries)
- AP has become affordable even for small businesses, as off-the-shelf machine learning solutions and computing capability are now being supplied by tech giants such as Amazon, Google and Microsoft
- Rely on buyer's entire past purchasing history
- AP may lead to consumer poaching, or to the use of exclusivity or market-share discounts, both of which may have anti-competitive effects. – price discrimination issue
- Digital cartels a new issue:
 - Wired Magazine and U.S. v. Topkins, 2015

Digital cartels

- Can “intelligent” pricing algorithms learn to collude? Is AP collusion any different from collusion among humans?
- Concept of collusion in law as ‘meeting of minds’ – communications-based approach
- Distinction between between two classes of algorithms for pricing (Calvano et al, 2018)
 - First-generation “adaptive” pricing algorithms: Humans set rules that dictate optimal responses to specific contingencies – rapid response may facilitate collusion and sustain it
 - Second-generation “learning” pricing algorithms: neural networks/machine learning/deep learning - Since collusion is profitable, algorithms that learn from experience “too well” may actually learn to collude, even if they have not been specifically designed to do so
 - Solutions?
 - Prohibition of algorithmic pricing
 - Regulate price algorithms *ex ante*
 - Regulate *ex post* with different antitrust standards – change the communications-based approach to ‘collusion’ (Harrington, 2017)

ONLINE VERTICAL RESTRAINTS

E-commerce trends

Main results of the E-Commerce Sector Inquiry:

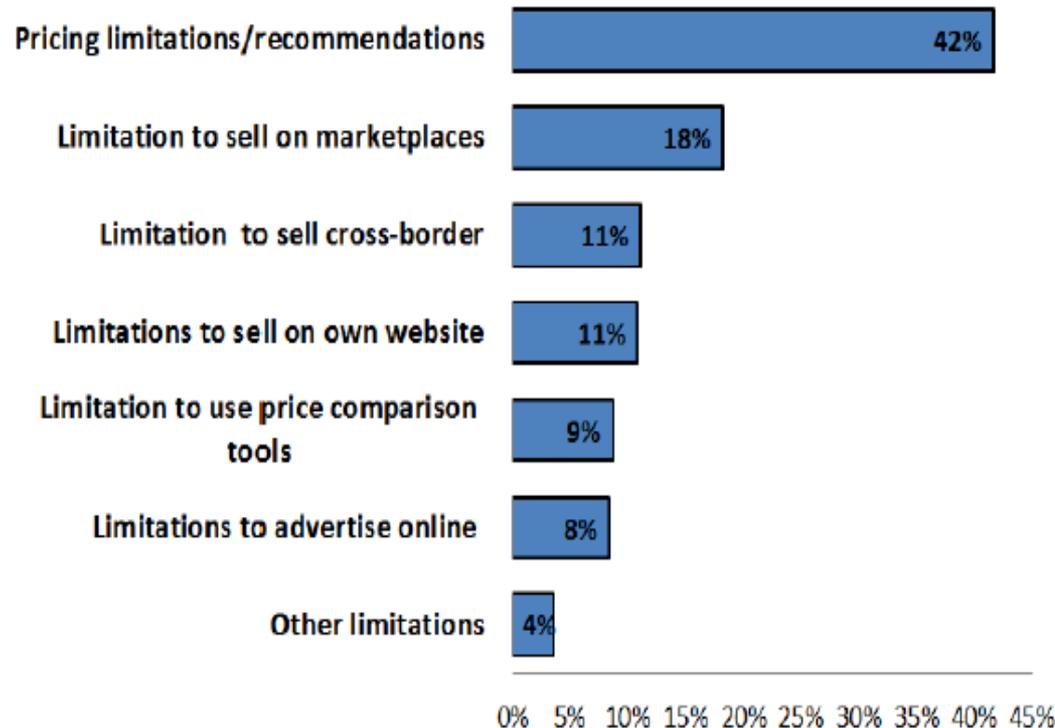
- A large proportion of manufacturers decided over the last ten years to sell their products directly to consumers through their own **online retail shops**, thereby competing increasingly with their distributors.
- Increased use of **selective distribution systems**, where the products can only be sold by preselected authorised sellers, allows manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price.
- Increased use of **contractual restrictions** to better control product distribution. Depending on the business model and strategy, such restrictions may take various forms, such as **pricing restrictions**, **marketplace (platform) bans**, **restrictions on the use of price comparison tools** and **exclusion of pure online players** from distribution networks.

Source: EC Press Release 10 May 2017

The importance of price restrictions in e-commerce

Picture 1:

Share of retailers having contractual restrictions, per type of restriction (retailers may have more than one type of restriction in place)



Geo-blocking, geo-filtering

- Geo-blocking “refers to practices used for commercial reasons by online sellers that result in the denial of access to websites based in other Member States”
- Geo-filtering consists of offering different terms and/or conditions depending on the location of the user, when situated in a different Member State than that of the online provider
- Geo-blocking or geo-filtering may be applied by various operators: retailers operating an online store, online marketplaces and price comparison websites
- Commission published Staff Working Document, Geo-blocking practices in e-commerce – Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, SWD(2016) 70 final
- Regulation (EU) 2018/302 (B2C context)

Geo-blocking

- One of the key findings of the sector inquiry was that almost 60% of digital content providers who participated in the inquiry have contractually agreed with right holders to “geo-block”, as online rights are to a large extent licensed on a national basis or for the territory of a limited number of Member States which share a common language. According to the Commission, “(g)eo-blocking is most prevalent in agreements for TV series (74 %), films (66 %) and sport events (63 %). It is less prevalent in agreements for other digital content categories such as music (57 %), children’s TV (55 %), non-fiction TV (51 %) and news (24 %)”



Between Internal market law, competition law and regulation

- Article 20(2) of Directive 2006/123/EC
- Competition Law (Art. 101 TFEU)
 - Geo-blocking affecting copyrighted works: Joined Cases C-403/08 & C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083
 - *Cross border access to Pay TV Content* (Case AT 40.023) Commission Decision of 26 July 2016, press release available at europa.eu/rapid/press-release_IP-16-2645_en.htm
- The Regulation moves nevertheless beyond competition law as it recognizes that this prohibition on discrimination may apply to agreements that may not be caught by Article 101 TFEU, but could still disrupt “the proper functioning of the Internal Market” and could be used to “circumvent” the provisions of the geo-blocking Regulation. If this proves to be the case, the Regulation on geo-blocking deems “automatically void” the relevant provisions of such agreements and of other agreements in respect of passive sales requiring the trader to act in violation of this Regulation

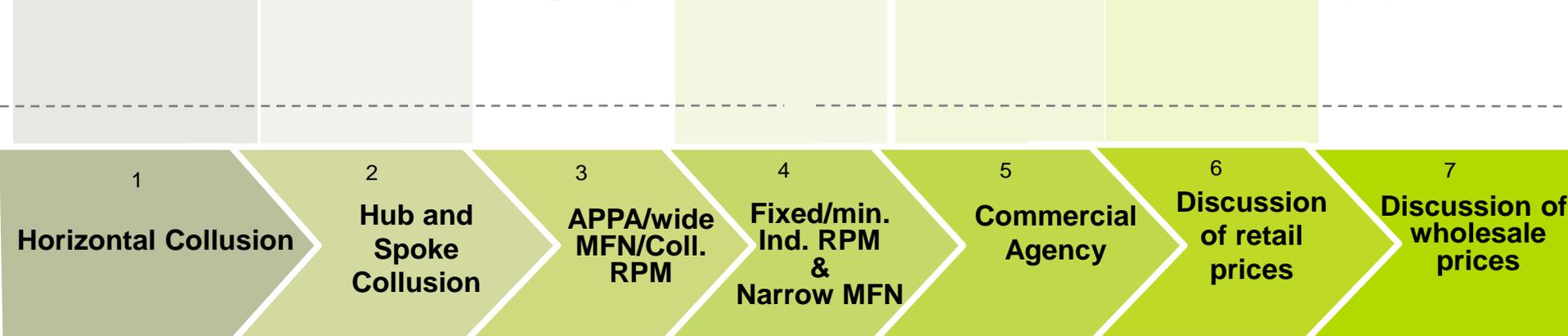
Geo-blocking regulation I

- Prohibits discrimination against customers based, directly or indirectly, on the nationality, place of residence or place of establishment of the customer in three specific cases:
 - (a) ‘buy goods from a trader and either those goods are delivered to a location in a Member State to which the trader offers delivery in the general conditions of access or those goods are collected at a location agreed upon between the trader and the customer in a Member State in which the trader offers such an option in the general conditions of access’
 - (b) ‘receive electronically supplied services from the trader’, such as cloud services, data warehousing services, website hosting and the provision of firewalls, use of search engines, and internet directories... -but the Regulation does not include online television, films, e-books, music, online games, and streamed sports
 - (c) ‘receive services from a trader, other than electronically supplied services, in a physical location within the territory of a Member State where the trader operates’ (for instance, hotel accommodation, sports events, car rental, and entrance tickets for music festivals or leisure parks)
- Indirect discrimination leading to similar results as the application of the forbidden criteria of nationality, residence and place of establishment
 - E.g. criteria that rely on information indicating the physical location of customers (IP address when assessing an online interface, the address submitted for the delivery of the goods, the choice of language made or the Member State where the customer’s payment instrument has been issued)
- The protection of customers from discrimination does not apply in a B2B (business-to-business) context, which is subject to competition law rules, in particular for selective and exclusive distribution agreements

Geo-blocking Regulation II

- Obligation on “traders” not to block or limit customers’ access to their online interface, such as websites and apps, for instance through the use of technological means, when this is done on the basis of the prohibited criteria of nationality, place of residence or place of establishment of the customer
 - These technological measures include any technologies used to determine the physical location of customers, including tracking their IP address, coordinates obtained through a global navigation satellite system or data related to a payment transaction
 - The prohibition applies to the re-routing of the customer to another online interface, unless the customer has provided consent
- The prohibition of discrimination with regard to access to online services “should not be understood as creating an obligation for the trader to engage in commercial transactions with customers”, as such an interpretation would have seemed disproportional and could have infringed rights protected by the Charter of Fundamental Rights (in particular the “freedom to conduct a business” under Article 16 and the “right to property” under Article 17)
- Specific rules prevent traders from applying different payment conditions on the basis of nationality, place of residence or place of establishment of the customer, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union

The horizontal/vertical restraints continuum



Article 101 TFEU

| | | | | | | |
|--|---|--|--|---|---|---|
| <p>E-books case</p> <p>MFN and Agency were not independently unlawful but they provided evidence that Apple had orchestrated a conspiracy among the publishers</p> <p>Unlikely to be justified</p> | <p>ABC cartel between retailers A & C, through mutual communications with their supplier B</p> <p>Distinguish from bilateral communications between a supplier and a retailer</p> <p>Unlikely to be justified</p> | <p>Collective RPM: widespread use of RPM schemes by various competing manufacturers</p> <p>APPA/Wide MFN: require a supplier to charge the same price across all platforms although the seller remains free to set whatever price it chooses,</p> <p>Justifications: unlikely or limited</p> | <p>Individual RPM: a single manufacturer stipulates the resale price for its own products</p> <p>APPA/Narrow MFN: the parties discipline the price of their own transactions, not applicable to all platforms</p> <p>Justifications: limited +</p> | <p>In a Genuine Commercial Agency agreement, the supplier is entitled to control the retail price</p> <p>They may however fall under Art. 101(1) TFEU if they lead to foreclosure or facilitate collusion</p> | <p>Distinction between normal retail price communications and RPM</p> <p>Wide implementation of RPM crucial (VRG, para. 25 & French CA test)</p> <p>If collusion and RPM, then see scenario 4</p> <p>If not collusion and RPM it does not fall under Article 101 TFEU</p> | <p>Bilateral discussions between suppliers and retailers are unlikely to be harmful and form integral part of the negotiation process</p> |
|--|---|--|--|---|---|---|

Restrictions on online sales

- Should manufacturers be able to refuse sales to internet retailers?
- **Manufacturers** argue
 - free-riding on investment by B&M retailers
 - damages **brand value**
 - greater susceptibility to counterfeit products
 - difficult for customers to complain

- Should manufacturers be able to refuse sales to internet retailers?
- **Internet retailers** argue
 - **lower prices**
 - increased cross-border trade
 - selective distribution works online
 - free-riding works both ways
 - other ways of compensating B&M retailers

EU Vertical restraints guidelines

- Starting point → **every** distributor must be allowed to use the internet to sell products
- See also the decision of the CJEU in **Case C-439/09 Pierre Fabre**

“The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU” (para 46)

- Limited circumstances where an outright ban on online sales may be **objectively necessary** and fall outside the scope of Article 101 TFEU
- Supplier can require **"quality standards"** for the use of a website to resell his
- Supplier can require distributors to have **one or more brick and mortar shops** as a condition for becoming a member of the distribution system, where the nature of the product requires it
- Supplier is allowed to impose restrictions on **active** sales by a distributor into an **exclusive** territory or to an exclusive customer group reserved to the supplier, or allocated to another distributor

Absolute ban on online sales

- Internet ban = restriction of passive sales
- Restriction of passive sales = hardcore restriction acc. to Art. 4 (c) of BER
- Case C-439/09, Pierre Fabre (2011)
 - A contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, **results in a ban on the use of the internet** for those sales
 - Amounts to a restriction by object - **Absolute bans on online are prohibited**

Partial Bans

- Can a supplier - in a selective distribution network prohibit resellers from making use of non-authorized third undertakings for their sales – electronic marketplaces or platforms?
- Can a supplier - in a selective distribution network prohibit resellers from making use of price comparison websites or prohibit the use of brand names as search terms, among other practices?

Bans on Marketplaces: Coty (Case C-230/16) (2017)

- A selective distribution system for luxury goods designed, primarily, to **preserve the luxury image of those goods does not violate Art.101 (1)**, if resellers are chosen on the basis of **objective, qualitative criteria, that apply uniformly and in a non-discriminatory fashion** and that these criteria **do not go beyond what is necessary**.

- A contractual clause in such a selective distribution system that **prohibits** authorised distributors from using, in a discernible manner, **third-party platforms for the internet sale** of the goods is **in line with Art. 101 (1)** if it
 - has the objective of **preserving the luxury image**,
 - it is laid down **uniformly and applied non-discriminatory** and
 - it is **proportionate in the light of the objective pursued**

- Such a platform prohibition does not violate Art. 4 VBER. It constitutes **neither a restriction of customers [Art 4 (b)] nor a restriction of passive sales to end users [Art. 4 (c)]**.

Bans on Price comparison websites

‘(m)arketplaces and price comparison tools [...] differ in a number of respects, including the fact that no transaction takes place on the price comparison tool's website/app. Instead interested customers are being directed to the website of the (authorised) distributor from which the product can be purchased and which generally fulfils all the quality criteria requested by the manufacturer of the product (within its selective distribution system). Absolute price comparison tool bans may make it more difficult for (potential) customers to find the retailers' website and may thereby limit the (authorised) distributor's ability to effectively promote its online offer and generate traffic to its website. Such bans may also make it more difficult to attract (potential) customers outside the physical trading area of the retailer via online promotion. Absolute price comparison tool bans which are not linked to quality criteria therefore potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction of passive sales under Article 4 b) and 4 c) of the VBER. Restrictions on the usage of price comparison tools based on objective qualitative criteria are generally covered by the VBER’

Price related online vertical restraints

| Online VR type | Regime |
|---|--|
| Online RPM | Hardcore restriction under Art. 4 Reg. 330/2010. Limited possibilities of justification (para. 225 VRG) |
| iMAP | Facilitate RPM (para. 48 VRG) <i>Mobility scooters (UK)</i> |
| Dual pricing | Facilitate RPM (para. 48 VRG) but also restricts passive sales (para. 52(d) VRG) <ul style="list-style-type: none"> • Netherlands accepts an added value differential between online and offline commerce • Germany considers it to be a restriction of competition by object (<i>Bosch</i>) • France considers it an object restriction but accepts that a remuneration based on the turnover realised exclusively in offline stores may be justified |
| APPAs/MFN | <ul style="list-style-type: none"> • UK distinguishes wide and narrow APPAs/MFN (<i>Private Motor Insurance market</i>) • Germany does not follow such distinction (<i>HRS</i>) • France seems to follow the German approach (<i>Booking.com</i> commitments) |
| Online Sales Bans or Limitations (?) | Hardcore restriction under Art. 4 Reg. 330/2010. See also Case C-439/09 (<i>Pierre Fabre</i>) <ul style="list-style-type: none"> • France: possible justification for complex products? (<i>Bang & Olufsen</i>); the supplier may also use para. 52 VRG (07-D-07, 14-D-07) • Belgium: possible justification because of the nature of the products marketed (<i>Makro v. Beauté Prestige</i>) • Germany: hardcore restrictions (<i>ASICS, Adidas, CIBA Vision, Casio</i>) |