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A Conceptual Perspective on Vertical Restraints: Resale Price Maintenance and Most-Favoured-Customer Clauses

Professor Pinar Akman

Director, Centre for Business Law and Practice

School of Law

p.akman@leeds.ac.uk

 [@drpinarakman](https://twitter.com/drpinarakman)

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- RPM involves the manufacturer: **fixing the price** for the retailer; **recommending a price** to the retailer; establishing a **minimum price**, or, a **maximum price** for the retailer.
- **Hard core restriction** under VBER where the agreement has the direct or indirect **object** of establishing a **fixed or minimum** resale price to be observed by the buyer (VBER Guidelines, [48]).
- VBER Guidelines recognise **efficiencies** from RPM for the first time (assessed under Art 101(3) TFEU).
- Introductory period of a **new product** to induce distributors to better promote the product and expand overall demand (VBER Guidelines, [225]).
- Even **fixed prices** may be necessary for a short term (2-6 weeks) **low price campaign** in a system with a uniform distribution format (eg franchise).

Online distribution models raise challenges for the assessment of VRs.



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- Economics literature incorporating specific features of online markets still nascent.
- **Data** provided by online retail can be used for competitive advantage by retailers (eg browsing history, etc) (Mallapragada et al, 2016).
- **Transparency** allows better monitoring by manufacturer of retail prices.
- Effect may be aggravated due to use of '**pricing software**' which automatically adapts retail prices to those of leading competitors ('algorithmic pricing').
- Internet exacerbates the **free-riding problem** ('showrooming') – online retail vs brick-and-mortar (Wu et al, 2015).

Internet also demonstrates that **formalistic distinctions** between different types of VRs is not appropriate for understanding **competitive effects** of conduct.

Online distribution models raise challenges for the assessment of VRs.



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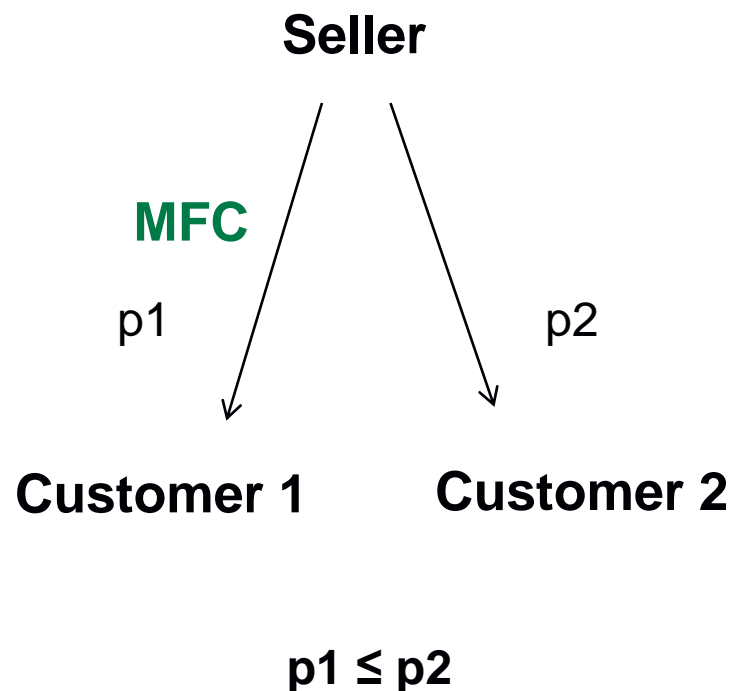
- **MFC (aka MFN) clause**: a promise by one party, eg supplier, that he will treat a given customer as well as the supplier treats his best customer.
- **Platform MFC clause**: seller will charge no higher price on Platform A than on Platform B, ie promise to Platform A that it will get the best price ***across platforms***.
- They may **soften competition** between platforms or **foreclose** new platforms and lead to higher prices. (No incentive for platform to lower commission to decrease price because price will be matched.)
- **But** may also **prevent free-riding** on platform investments, and, **enable remuneration** for transaction platforms (ie commission).

Platform MFCs blur the line between horizontal vs vertical restraints.



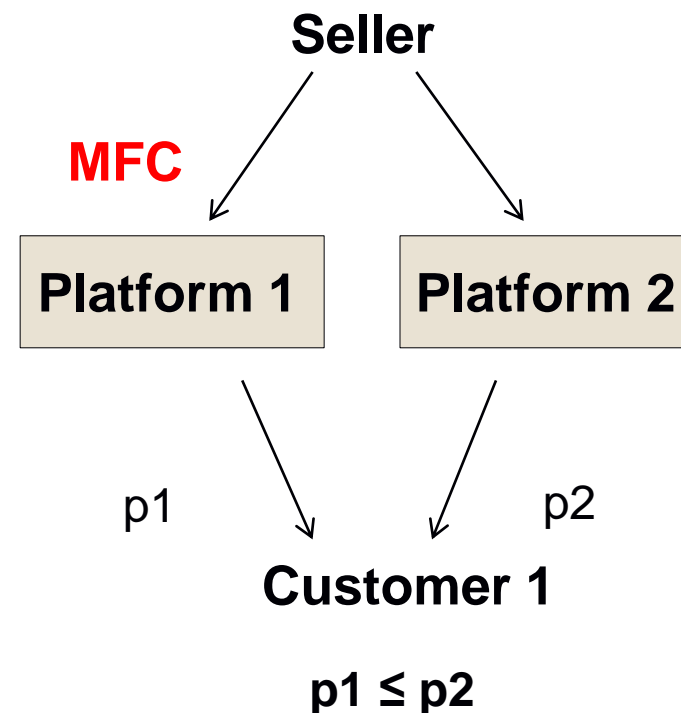
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Normal MFC



Links prices between different customers of the same seller.

Platform MFC



Links prices for the same customer buying from different (competing) outlets.

Decisional practice has not been consistent.



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	Horizontal	Vertical	Object	Effect	Prohibition	Commitments
<i>Apple</i> (US)	x		x		x	
<i>Apple</i> (EU)			x			x
<i>Booking/ Expedia/IHG</i> (UK)		x	x			x
<i>HRS & Booking</i> (DE)		x		x	x (all MFCs)	
<i>Booking</i> (FR, SE, IT)		x				x
<i>Booking /HRS/ Expedia</i> (CH)	x	x		x	x (wide MFCs)	
<i>PCW</i> (UK)		x			x (wide MFCs)	

In DE, FR, SE, IT and UK, authorities are all applying the same legal provision (Art 101 TFEU).

Features of e-commerce may require a rethink of the approach to VRs.



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- Question of the **legal position** of an online platform – **Agency**? Retailer? *Sui generis*?
- Who is imposing the restraint on whom (ie who is **downstream** and who is **upstream**)?
- What is a **vertical** restraint vs a **horizontal** restraint?
- **Theory of harm** – **horizontal** or **vertical** or **both**?
- Different contractual promises may have similar outcomes (eg Price-Matching-Guarantees).

Effect-based approach with specific attention to the features of the Internet essential in reaching the correct outcome.