

SPRINGER BRIEFS IN LAW

Christoph Kleineberg

# Vertical Integration and Regulation

An Analysis of Vertical  
Unbundling from a  
Competition Law and  
Competition Economics  
Perspective



Springer

# **SpringerBriefs in Law**

More information about this series at <http://www.springer.com/series/10164>

Christoph Kleineberg

# Vertical Integration and Regulation

An Analysis of Vertical Unbundling  
from a Competition Law and Competition  
Economics Perspective

 Springer

Christoph Kleineberg  
Competition & Regulation Institute  
Leuphana University of Lüneburg  
Lüneburg, Germany

ISSN 2192-855X

ISSN 2192-8568 (electronic)

SpringerBriefs in Law

ISBN 978-3-030-11357-5

ISBN 978-3-030-11358-2 (eBook)

<https://doi.org/10.1007/978-3-030-11358-2>

Library of Congress Control Number: 2018967414

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2019

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

# Acknowledgements

I would like to express my gratitude for a number of people who have supported me in the writing process of this book. First and foremost, I want to thank my wife Annika Melles who has supported me throughout the writing process, made helpful remarks, motivated me to finish the work and proofread all drafts.

In addition, I would like to thank my supervisors Prof. Dr. Jörg Philipp Terhechte and Prof. Dr. Thomas Wein for the good and fruitful supervision and the comprehensive advice I received.

Finally, I would like to thank Callee Anne Davis for the support by proofreading several drafts.

# Contents

<b>1</b>	<b>Introduction</b> . . . . .	1
1.1	Subject of Investigation . . . . .	2
1.2	Aim of the Investigation . . . . .	2
1.3	Objections to the Investigation . . . . .	3
1.4	Course of Investigation . . . . .	3
	References . . . . .	4
<b>2</b>	<b>Theoretical Discussion of Vertical Integration and Regulation</b> . . . . .	7
2.1	General Concept of Regulation . . . . .	7
2.1.1	General Regulation Law . . . . .	8
2.1.2	General Regulation Economics . . . . .	9
2.1.3	Sector Specific Regulation . . . . .	13
2.1.4	Constitutional Limits and Obligations of Regulation . . . . .	17
2.2	Legal Aspects of Vertical Integration . . . . .	23
2.2.1	General Regulation . . . . .	23
2.2.2	Unbundling Regulations/Disintegration Regulations . . . . .	24
2.2.3	Net Access . . . . .	25
2.2.4	Regulation of Capacity Shortages . . . . .	27
2.2.5	Transparency Regulations . . . . .	27
2.2.6	Market Entry Regulation . . . . .	27
2.2.7	Market Behaviour Regulation . . . . .	28
2.3	Economic Aspects of Vertical Integration . . . . .	29
2.3.1	Collusive Conduct . . . . .	30
2.3.2	Double Marginalization . . . . .	31
2.3.3	Efficiency Effects . . . . .	31
2.3.4	Elimination of Competitors . . . . .	32
2.3.5	Circumvention of Regulation . . . . .	34
2.3.6	Additional Market Effects . . . . .	35
	References . . . . .	35

<b>3</b>	<b>Evaluation of Vertical Integration</b> .....	41
3.1	General Concerns and Positive Aspects .....	42
3.2	Foreclosure of Inputs .....	43
3.3	Foreclosure of Costumers .....	45
3.4	Other Possible Effects .....	46
3.5	Assessment of Positive and Negative Aspects .....	47
3.6	Preliminary Conclusion .....	47
	References .....	48
<b>4</b>	<b>Legal Implications and Suggested Amendments</b> .....	49
4.1	Vertically Integrated Enterprises Shall Be Obligated to Forward Their Price Development Rationale to the Federal German Cartel Office to Have It Investigated in Order to Determine Whether or not They Violate the Prohibition of Margin-Squeezes .....	49
4.1.1	Current Legal Obligations .....	49
4.1.2	Legal Shortcomings .....	50
4.1.3	Legal and Constitutional Restraints .....	50
4.1.4	Suggested Legal Amendment .....	51
4.2	Refusal to Supply Shall Become an Element of Offence in German Competition Law .....	51
4.2.1	Current Legal Obligation .....	51
4.2.2	Legal Shortcoming .....	51
4.2.3	Legal and Constitutional Restraints .....	51
4.2.4	Suggested Legal Amendment .....	52
4.3	Price Discrimination on Highly Concentrated Markets Must Be Subject to Strict Regulation .....	52
4.3.1	Current Legal Obligation .....	52
4.3.2	Legal Shortcoming .....	52
4.3.3	Legal and Constitutional Restraints .....	53
4.3.4	Suggested Legal Amendment .....	53
4.4	A Complaint Structure Is Needed to Detect Lacking Competition in Individual Sectors .....	53
4.4.1	Current Legal Obligation .....	53
4.4.2	Legal Shortcoming .....	53
4.4.3	Legal and Constitutional Restraints .....	53
4.4.4	Suggested Legal Amendment .....	54
4.5	There Needs to Be a Regulation on How to Deal with Capacity Shortages .....	54
4.5.1	Current Legal Obligation .....	54
4.5.2	Legal Shortcoming .....	54
4.5.3	Legal and Constitutional Restraints .....	54
4.5.4	Suggested Legal Amendment .....	55