

JOHANNES PERSCH

# Consumer Autonomy and Vertical Agreements

*Beiträge zum Kartellrecht*

32

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**Mohr Siebeck**

# Beiträge zum Kartellrecht

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Michael Kling und Stefan Thomas

32





Johannes Persch

# Consumer Autonomy and Vertical Agreements

An Additional Pathway to Understanding EU  
Competition Law on Vertical Agreements,  
in Particular Online Sales Restrictions

Mohr Siebeck

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## Preface

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## List of abbreviations

Art.	Article
BGH	Bundesgerichtshof
CMA	Competition and Markets Authority
DMA	Digital Markets Act
DoJ	Department of Justice
E.g.	For example
Ed(s).	Editor(s)
Et al.	And others
f.	Following
FTC	Federal Trade Commission
GDP	Gross Domestic Product
I.e.	That is
MAP	Minimum Advertised Prices
OECD	Organization for Economic Co-operation and Development
OEM(s)	Original Equipment Manufacturer(s)
P(p).	Page(s)
Para(s)	Paragraphs(s)
RPM	Resale Price Maintenance
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VBER	Vertical Block Exemption Regulation
Vol.	Volume



# Introduction

## § 1 Research questions

Online sales have become an increasingly important sales channel for a wide range of products.<sup>1</sup> The Covid-19 pandemic has further accelerated this trend.<sup>2</sup> Price is undoubtedly a factor that plays a role in consumers' decisions about which channel to choose, but other aspects are also important.<sup>3</sup> While offline purchases allow consumers to touch the product, online shopping comes with the opportunity to easily access detailed information and reviews about the product.<sup>4</sup> With the rise of online shopping, manufacturers have tried to restrict the availability of their products online. For example, the French garden, forestry, and agricultural equipment manufacturer STIHL allowed its authorized dealers to sell certain products only in the case of "personalized delivery" and thus de facto excluded internet sales.<sup>5</sup> Pierre Fabre, a manufacturer of cosmetic products, allowed its dealers to sell its products only in a physical room and in the presence of a qualified pharmacist.<sup>6</sup> In Germany, the sporting goods manufacturer ASICS prohibited its dealers from supporting the functionality of price comparison websites and from using ASICS trademarks on the websites of third parties, e.g., Amazon or eBay.<sup>7</sup> As these examples show, manufacturers often try to influence the distribution of their products. They want to have a say in how customers perceive the product and the context and environment in which it is sold.

Manufacturers, therefore, enter into agreements with their dealers on how they may distribute the product. Such agreements can range from stipulations on the product's price to its display (e.g., display in a shop window) or regulations on what other products it may be displayed with on the shelf. With the growing importance of online retail, specifications for sales via the internet have also become relevant. In some cases, manufacturers have attempted to prohibit the sale of their products over the internet altogether ("total bans"). In others, manu-

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<sup>1</sup> *European Commission*, Study on Consumer Purchasing Behaviour in Europe, p. 18.

<sup>2</sup> *Eurostat*, 11/04/2022, Online Sales Efforts on the Rise due to the Pandemic, available at <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220411-1>.

<sup>3</sup> *European Commission*, Study on Consumer Purchasing Behaviour in Europe, p. 39.

<sup>4</sup> *European Commission*, Study on Consumer Purchasing Behaviour in Europe, p. 36.

<sup>5</sup> Autorité de la Concurrence, 24/10/2018, Décision n° 18-D-23 STIHL.

<sup>6</sup> Autorité de la Concurrence, 29/10/2008, Décision n° 08-D-25 Pierre Fabre.

<sup>7</sup> Bundeskartellamt, 26/08/2015, B2-98/11 ASICS.wif

facturers restricted at least sales on platforms such as Amazon or eBay ('platform bans'). For consumers, such restrictions on distribution channels can be frustrating, as they make the products harder to find or more expensive. If you want to buy a product only sold at a specialist retailer, you may have to accept longer travel distances or shorter opening hours than, for example, with online shopping. Such restrictions can also mean a higher price for the product. However, the image created by these sales restrictions can also be the very reason why a customer considers buying certain goods at all. Particularly with products that are perceived as luxurious, the lifestyle associated with the product image plays an essential role in the purchase decision. The sales environment, reference prices, or consultation also suggests to the consumer a particular product value and benefit, whether true or false. There are many factors that influence the consumer's purchase decision. Many of them are predictable and can be strategically used by whoever is able to control the purchasing context and environment. For example, the music played in a retail store<sup>8</sup> or the design of the sales environment<sup>9</sup>, although there is no direct link to product value, can impact consumers' purchase decisions. Controlling the purchasing context and environment is hence a valuable asset.

The division of control in this regard takes place between manufacturer and retailer through vertical agreements. These agreements stipulate, on the one hand, the retailer's obligations; for example, regarding the presentation, the advice to provide to customers, the location of their store, the quantity to be bought, or the retail price. On the other hand, they also govern the manufacturer's obligations, for example, a commitment by the manufacturer not to deliver to competing retailers in a territory reserved for the retailer. Obligations regarding the sale through the internet have recently become an important topic of vertical agreements. Manufacturers have imposed various obligations on retailers, ranging from total bans (prohibiting online sales altogether) to qualitative criteria on such sales or the prohibition of pure online retailers. The Court of Justice initially expressed a rather hostile view towards restrictions on online sales.<sup>10</sup> Later, it softened its earlier stance and acknowledged that online sales restrictions can be permissible in certain cases.<sup>11</sup> It maintained, however, that at least total online bans typically restrict competition and are prohibited under Art. 101 TFEU.<sup>12</sup> The topic has recently been included in the revision of the Vertical Block Exemp-

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<sup>8</sup> *North et al.*, *Nature* 1997, 132.

<sup>9</sup> *Künzler*, *Oxford Journal of Legal Studies* 2017, 75 (90).

<sup>10</sup> Court of Justice, 13/10/2011, Case C-439/09 *Pierre Fabre*, ECLI:EU:C:2011:649.

<sup>11</sup> Court of Justice, 06/12/2017, Case C-230/16 *Coty*, ECLI:EU:C:2017:941.

<sup>12</sup> Court of Justice, 06/12/2017, Case C-230/16 *Coty*, ECLI:EU:C:2017:941, paras. 32–36.

tion Regulation ('VBER')<sup>13</sup> and the accompanying Vertical Guidelines<sup>14</sup>. The new VBER (in force since June 2022) now qualifies as a hardcore restriction, "the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services".<sup>15</sup> Other restrictions of online sales can now, in principle, fall under the VBER where they do "not have the object of preventing the use of an entire online advertising channel."<sup>16</sup> Despite these developments, there are still voices that criticize the EU approach, specifically on internet sales restrictions, but also on vertical agreements in general.<sup>17</sup> They argue that vertical agreements, including online sales restrictions, are mostly benign and typically benefit consumers. Vergé, for example, criticizes the strict approach towards internet sales restrictions as follows:

"The main question is not whether Internet sales can be prohibited or not, but simply whether we believe that the nature of the product justify that suppliers may be allowed to prevent some retailers – pure-internet players but also 'click-and-mortar' stores, and even discount brick and mortar store – from reselling the product."<sup>18</sup>

At the same time, for example, the German Federal Cartel Office ('Bundeskartellamt') appears more sceptical towards the benefits of online sales restrictions. In a 2018 note, it emphasized that a blanket marketplace ban is not necessary for the protection of branded products' images and that "the importance of different sales channels depends on the specific market conditions and consumer preferences in the respective Member States and can therefore lead to regionally different assessments".<sup>19</sup> The Bundeskartellamt's president, Andreas Mundt, also published a rather sceptical editorial on the updated VBER, stating that "it remains to be seen to what extent [the new rules on online sales restrictions] are practicable" and "will prove their worth".<sup>20</sup> The debate on vertical agreements and internet sales restrictions is not limited to their economic implications. Recently, another argument has gained prominence: the potential impact of online sales restrictions on consumer decision-making. The Bundeskartellamt, for example, in a background note, argues that online sales are important as they can

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<sup>13</sup> Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, pp. 4–13.

<sup>14</sup> Communication from the Commission, Guidelines on vertical restraints 2022, OJ C 248, 30.06.2022, p. 1, C/2022/4238 ('Vertical Guidelines'), para. 203.

<sup>15</sup> Art. 4 point (e) VBER.

<sup>16</sup> Art. 4 point (e)(ii) VBER.

<sup>17</sup> *Buccirosi*, Vertical Restraints for Online Sales, p. 32; *de la Mano et al.*, Competition Law & Policy Debate 2022, 12; *Vogel*, JECLAP 2013, 277 (281); *Waelbroeck/Davies*, JECLAP 2018, 431 (438).

<sup>18</sup> *Vergé*, in: Vertical Restraints, 31 (47).

<sup>19</sup> *Bundeskartellamt*, Wettbewerbsbeschränkungen im Internetvertrieb, p. 5.

<sup>20</sup> *Mundt*, ZVertriebsR 2022, 205 (207).

contribute to making consumer decisions more rational and less biased.<sup>21</sup> Even more explicitly, Künzler contends that

“[i]ntrate competition may [...] be a precondition for consumers to search and may mitigate a product manufacturer’s effort to manipulate consumer preferences based on subconscious appeal and affect-driven emotions.”<sup>22</sup>

Schwaderer has also explored the idea that vertical agreements may negatively affect consumers’ decision-making: she argues that manufacturers and retailers can use minimum resale price maintenance to influence consumers by creating an artificially high initial anchor through a uniform and elevated retail price.<sup>23</sup> However, it remains unclear whether these concerns fall within the normative scope of competition law and, if so, how restrictions on competition could be concretely identified on this basis.

Against this background, this thesis aims to address the following research question:

Can the treatment of vertical agreements under EU competition law, particularly concerning online sales restrictions, be justified based on a) economic considerations, and/or b) considerations of consumer autonomy?

This can be broken down into the following sub-questions:

- (1) Are the current rules on vertical agreements concerning online sales restrictions aligned with economic theory?
- (2) If not, can they be explained instead by a desire by courts and competition authorities to protect consumers’ autonomous decision-making?
- (3) Is consumer autonomy a valid normative concern that can be considered in the application of EU competition law?
- (4) How can consumer autonomy, as a goal of competition law, be operationalized in the context of vertical agreements?
- (5) Can the rules on internet sales restrictions be justified when taking into account consumer autonomy in the analysis?

## §2 Outline

Chapter 1 will first provide an overview of the current rules on vertical agreements. The focus will be on the treatment of online sales restrictions. The Chapter will explain the structure of the assessment, in particular the interplay between Art. 101 TFEU and the VBER. Second, it will evaluate the current framework from an economic perspective. Third, it will compare the European approach to the treatment of vertical agreements in the United States. Chapter 1 will show

<sup>21</sup> *Bundeskartellamt*, Wettbewerb und Verbraucherverhalten, pp. 11–14.

<sup>22</sup> *Künzler*, Restoring Consumer Sovereignty, p. 166.

<sup>23</sup> *Schwaderer*, Resale Price Maintenance, pp. 172–203.

that the EU's approach to vertical agreements remains, to some extent, categorical, focusing on the type of agreement rather than its effects on competition. This contrasts with economic theory, which advocates for a case-by-case assessment and considers EU law as overly strict. Online sales restrictions, in particular, are treated rather rigidly, with a quasi-blanket prohibition of total bans, regardless of their likely effects on the market. Compared to the United States, which applies a more economically driven, case-by-case approach, the EU's stance appears less aligned with economic theory.

Chapter 2 first examines how consumer autonomy considerations can help explain certain aspects of how vertical agreements are treated under EU law. Again, a particular focus will be on online sales restrictions. Second, it will show that protecting consumer autonomy may be a legitimate objective of EU competition law, alongside other goals such as consumer welfare.

Chapter 3 examines how the admittedly vague concept of consumer autonomy can be operationalized in the application of competition law. It explores the various ways in which vertical agreements influence consumer decision-making – sometimes enhancing it, sometimes distorting it. The chapter argues that competition law cannot protect individual consumer's autonomy for its own sake but may, in principle, safeguard consumers' role in the competitive process. In this context, it develops a potential theory of harm to identify anticompetitive vertical agreements that affect consumer decision-making. Finally, it demonstrates that while consumer autonomy may be a valid normative concern, it does not provide a justification for the current treatment of online sales restrictions under EU competition law.

## § 3 Terminology

### *I. Who is the relevant consumer?*

There is ongoing debate about the definition of the relevant consumer in competition law, as the term is used with varying meanings across different legal texts.<sup>24</sup> For the purposes of this thesis, 'consumer' refers to the final consumer – i.e., the ultimate purchaser of a product or service for private use. This focus is justified because the final consumer differs from intermediate consumers – i.e., those who purchase a product or service for further processing or value creation – in two key ways.

First, the final consumer, as a general matter, is not able to exit the market. At least for essential goods and services, such as food or basic hygiene products, consumer demand cannot drop to zero.<sup>25</sup> In contrast, commercial consumers

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<sup>24</sup> For a thorough analysis of the different usages of the term 'consumer' in competition law, see *Endler*, *Verbraucher im Kartellrecht*.

<sup>25</sup> *Endler*, *Verbraucher im Kartellrecht*, p. 155.

purchase products or services for resale or production. In response to unfavorable market conditions, they can not only switch to different intermediate products but also change their business entirely. For example, a clothing manufacturer could respond to a rise in cotton prices (e.g., due to a cartel) by using more synthetic materials like polyester. Alternatively, they could leave the clothing industry altogether and shift to furniture production. Consumers, however, do not have the same flexibility; they cannot simply stop being consumers. A consumer will not (entirely) stop buying clothes and buy only furniture instead. As a result, consumers are more vulnerable than other market participants.

Second, and more importantly, intermediate commercial consumers do not play the same role in the competitive process as final consumers. While their preferences may be relevant at the upstream market level, they are ultimately shaped by end consumers either directly or indirectly through downstream demand in a competitive market. This can be illustrated by revisiting the earlier example of a clothing manufacturer. They do not choose to buy and use cotton simply because they personally prefer it over other materials but because consumers are willing to purchase cotton-based clothing. Similarly, if consumer preferences shift, for instance, due to a study revealing that cotton causes cancer, the manufacturer would likely replace cotton with an alternative material. This substitution would not reflect a personal change in preference but rather a response to consumer demand. Ultimately, only the preferences of final consumers drive the market.

## *II. From consumer choice to consumer autonomy*

The term *consumer choice* was introduced by Averitt and Lande<sup>26</sup> as part of a broader critique of the consumer welfare standard<sup>27</sup>, which some commentators argue is overly focused on price while neglecting other factors important to consumers, such as quality, safety, variety, and innovation.<sup>28</sup> According to Averitt and Lande, consumer choice should be understood within the broader concept of consumer sovereignty, which highlights the consumer's active role in the competitive process. In this view, consumer sovereignty means that economic actors "act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual business."<sup>29</sup> Consumers are 'sovereign' because they have "the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in

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<sup>26</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713; *Averitt/Lande*, *Antitrust Law Journal* 2007, 175.

<sup>27</sup> See for the consumer welfare standard below p. 162.

<sup>28</sup> *Foer/Durst*, *Antitrust Bulletin* 2018, 494; *Grimes*, *GRUR International* 2020, 3; *Steinbaum/Stucke*, *University of Chicago Law Review* 2020, 595; *Wu*, *CPI* 2018.

<sup>29</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (715).

excess of the costs borne by the providers of the relevant goods and services.”<sup>30</sup> In a competitive marketplace, consumers have a meaningful range of options, whereas anticompetitive practices such as price fixing or (harmful) mergers can reduce this range of options. According to the consumer choice approach, competition law’s task is to prevent such practices and thereby ensure the benefits that competition brings to consumers in terms of choice.<sup>31</sup> In the view of Averitt and Lande, competition law is accompanied by consumer protection laws that

“ensure that consumers can choose effectively from among these options, with their critical faculties unimpaired by such violations as deception or withholding of material information.”<sup>32</sup>

The core principle of a consumer sovereignty standard is that consumers, through their choices, provide the necessary signals to guide the economy. This can only work when two conditions are fulfilled: (1) sufficient options are available, and (2) consumers can freely choose among those options.<sup>33</sup> Averitt and Lande argue that competition and consumer protection laws must address market failures that may impair consumer sovereignty. They divide such failures into two categories, those taking place “outside the head” of the consumer and those “inside the consumer’s head”.<sup>34</sup> The first category includes what is generally perceived as antitrust problems, e.g., reduced choices due to cartels or monopolies.<sup>35</sup> The second category concerns the consumer’s ability to properly “process information and distinguish the true from the false.”<sup>36</sup> Consumer protection law generally deals with this kind of market failure. Discussing US law, Averitt and Lande refer to the laws against coercion, undue influence, deception, incomplete information, or confusing information.<sup>37</sup> The distinction also seems to generally apply to EU law that deals with the latter kind of problems through consumer protection law and the law on unfair commercial practices. These laws identify settings where the consumer’s ability to make an informed decision is threatened due to information asymmetries or undue business behaviour rather than behaviour affecting the structure of markets. The identified market failures “in the consumer’s head” are then remedied through measures like mandatory disclosure rules or prohibiting certain business practices. Although Averitt and Lande propose this dichotomy, they point out that effects may interact in complex ways and that market failures in one category can lead to market failures in

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<sup>30</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (715–716).

<sup>31</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (713)

<sup>32</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (713–714)

<sup>33</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (716).

<sup>34</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (729).

<sup>35</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (729).

<sup>36</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (729).

<sup>37</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (733).

the other.<sup>38</sup> They give three examples where such overlap is possible. The first one is horizontal agreements that increase consumers' search costs.

Not only do these impair decision quality by limiting information about a product's relative price and value but they may also, in the long run, reduce the number of available options.<sup>39</sup> A second example is resale price maintenance which can be used as an incentive for dealers to push for the sale of a manufacturer's product irrespective of whether it best fits the needs and preferences of the consumer.<sup>40</sup> The last example they offer is tying of products, which reduces the consumers' options (only one combined product instead of two separate products) as well as their ability to evaluate the product's characteristics.<sup>41</sup> While Averitt and Lande primarily frame their discussion around consumer choice in terms of variety and market options, they also suggest that competition law may, in some cases, encompass broader consumer sovereignty concerns beyond the mere availability of options.

Consumer choice is also a topic of debate in the EU. There are meaningful contributions arguing for a consumer choice approach as an essential factor in the competitive analysis. In particular, Paul Nihoul, a judge at the EU General Court, has voiced strong support for this idea.<sup>42</sup> Even more explicitly than Averitt/Lande, Nihoul follows a broad definition of choice. He defines consumer choice as

“the possibility, and the right, for customers to choose freely the products/services best corresponding to their needs, and the economic partners they want to deal with.”<sup>43</sup>

This definition conveys an underlying concept that extends beyond merely the number and variety of options, emphasizing that choice must also be free. This broader perspective allows for the examination not only of the existence and outcomes of consumer choices but also of the very process of choosing. This is best expressed through adopting a broader view, which this thesis tries to offer with the concept of ‘consumer autonomy’. Consumer autonomy<sup>44</sup> for the purpose of this thesis is understood as entailing:

- (1) the (mental) capacities to form intentions and plan their execution, including some level of rationality; this includes factors such as sufficient information and time to make an informed choice; and
- (2) independence of decision-making, in particular, freedom from coercion and manipulation.

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<sup>38</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (734–735)

<sup>39</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (736–737)

<sup>40</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (737–738)

<sup>41</sup> *Averitt/Lande*, *Antitrust Law Journal* 1997, 713 (738–740)

<sup>42</sup> *Nihoul*, in: *Consumer Choice*, 9.

<sup>43</sup> *Nihoul*, in: *Consumer Choice*, 9.

<sup>44</sup> For an overview of different conceptions of autonomy, see *Hacker*, *Verhaltensökonomik und Normativität*, pp. 223–232; see also *Raz*, *The Morality of Freedom*, pp. 372–373.

While the range of options as emphasized by proponents of the consumer choice approach is also important, this thesis will focus on the process of choosing rather than on the range of options. As will become apparent, the question of what constitutes an ‘adequate’ range of options can only be answered through the operation of a functioning competitive market. This, however, presupposes that consumers can make autonomous decisions.<sup>45</sup>

### *III. Vertical agreements or vertical restraints?*

This thesis will primarily use the term ‘vertical agreement’ rather than ‘vertical restraint’ because the second already implies that the agreement is restrictive of competition. Whether this is the case or not, however, is often still to be determined. One would also not speak of a ‘horizontal restraint’ to describe a horizontal agreement before one has determined whether it restricts competition. Nonetheless, courts and scholars sometimes use the terms ‘vertical agreement’ and ‘vertical restraint’ interchangeably without intending to imply that a certain agreement is restrictive of competition. Throughout the thesis, it may therefore occur in citations that the term ‘vertical restraint’ is also used. To avoid confusion, a vertical agreement that restricts competition in the sense of Art. 101(1) TFEU will typically be labelled a ‘vertical restriction’.

## § 4 Basics of behavioural economics

This section will explain how behavioural economics has reshaped our understanding of human behaviour, particularly in a market context. It will first provide an overview of the traditional rational choice theory and the concept of homo oeconomicus (I.) to describe then how behavioural economics offers an alternative perspective on human decision-making (II.–III.). The section introduces behavioural economics briefly, as the thesis will build on some of its findings later. Readers already familiar with behavioural economics may wish to proceed directly to Chapter 1.

### *I. Traditional economic assumptions about market participants’ behaviour: the homo oeconomicus*

Economic sciences have traditionally characterized human behavior under the assumption of rationality. According to rational choice theory, individuals make rational choices to best satisfy their wants.<sup>46</sup> The factors influencing an individ-

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<sup>45</sup> See, in particular, below from p. 208.

<sup>46</sup> *Kirchgässner*, *Homo Oeconomicus*, pp. 1–2.

ual's decision are their preferences and constraints.<sup>47</sup> Rational choice theory is rooted in the neoclassical model, which portrays the human as homo oeconomicus.<sup>48</sup> Its underlying assumptions are the following:<sup>49</sup>

- The individual's goal is to maximize their (subjective) utility.
- The individual's preferences are known, stable, and non-contradictory.
- The individual's decision is not influenced by how the alternatives are presented (invariance), nor do individuals consider features common to all options (independence).

Neumann and Morgenstern developed expected utility theory to describe decisions under conditions of uncertainty.<sup>50</sup> The core idea of this theory is that the decision-maker seeks to maximize their *expected* utility. A simplified example illustrates this<sup>51</sup>: A decision-maker has the choice between options A and B. Option A has a 10% chance of resulting in a gain of \$100, while Option B offers a 25% chance of the same gain. The expected utility of Option A is \$10 ( $100 \times 0.1$ ), while the expected utility of Option B is \$25 ( $100 \times 0.25$ ). Therefore, Option B is the better choice.

## II. Behavioural economics' critique of the conventional model

The rational choice and expected utility theory have long been criticized for relying on unrealistic assumptions.<sup>52</sup> Another point of critique is that the question "where [...] preferences come from, how they are formed and how they are (or can be) influenced" traditionally plays no role in these theories.<sup>53</sup> Rather than the process of choice, the results have been the centre of attention. The idea that 'real people' behave differently from homo oeconomicus has been further explored by the field of behavioral economics. Behavioural economics examines the extent to which people systematically differ from the homo oeconomicus.<sup>54</sup> Drawing from

<sup>47</sup> *Towfigh*, in: *Ökonomische Methoden im Recht*, 23 (28).

<sup>48</sup> *Albert*, in: *Behavioral Economics und Wirtschaftspolitik*, 3 (5); *Latzel*, *Verhaltenssteuerung, Recht und Privatautonomie*, p. 54; *Thaler*, *American Economic Review* 2016, 1577 (1578) who uses the term 'econ'; *Towfigh*, in: *Ökonomische Methoden im Recht*, 23 (32).

<sup>49</sup> *Varian*, *Intermediate Microeconomics*, pp. 223–226; *Towfigh*, in: *Ökonomische Methoden im Recht*, 23 (28–31); *Morell*, in: *Ökonomische Methoden im Recht*, 41 (42–56).

<sup>50</sup> *von Neumann/Morgenstern*, *Theory of Games and Economic Behavior*.

<sup>51</sup> After *Hanson/Kysar*, *NYU Law Review* 2000, 630 (641).

<sup>52</sup> *Hanson/Kysar*, *NYU Law Review* 2000, 630 (643); *Kirchgässner*, *Homo Oeconomicus*, p. 25; *Latzel*, *Verhaltenssteuerung, Recht und Privatautonomie*, p. 57; *Thaler*, *American Economic Review* 2016, 1577 (1579).

<sup>53</sup> Compare *Kirchgässner*, *Homo Oeconomicus*, pp. 24, 35; *Künzler*, *Restoring Consumer Sovereignty*, p. 138.

<sup>54</sup> For a very detailed description of behavioural economics, including criticism, see *Hacker*, *Verhaltensökonomik und Normativität*, pp. 71–141; see also *Latzel*, *Verhaltenssteuerung, Recht und Privatautonomie*, p. 52.

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