POLICY ROUNDTABLES

Resale Price Maintenance

2008

Introduction

The OECD Competition Committee debated Resale Price Maintenance in October 2008. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Jeremy West for the OECD, written submissions from Austria, the Czech Republic, Finland, France, Germany, Hungary, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Russia, Spain, Switzerland, Chinese Taipei,Turkey, the United Kingdom, the United States, the European Commission and BIAC, as well as an aide-memoire of the discussion.

Overview

The term “resale price maintenance” refers to a practice in which suppliers and resellers come to an understanding that places restrictions on the prices that resellers may charge. While there are a number of different types of such agreements, the most common one involves a supplier agreeing with retailers that they will not charge less than a certain price for the supplier’s product. RPM may harm consumers by restricting intrabrand price competition, but RPM may also benefit consumers by promoting interbrand competition. Despite these mixed effects, most OECD countries treat RPM as a per se violation of their competition laws. The delegates heard from guest speakers Prof. Howard Marvel and Prof. Bruno Jullien, then discussed the positive and negative effects of RPM, as well as the reasons for and against treating it as a per se offence versus applying the rule of reason.

Related Topics

Competition Policy for Vertical Relations in Gasoline Retailing (2008)
Facilitating Practices in Oligopolies (2007)
Refusals to Deal (2007)
Resale Price Maintenance (1997)

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COMPETITION COMMITTEE

ROUNDTABLE ON RESALE PRICE MAINTENANCE

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Resale Price Maintenance held by the Competition Committee in October 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les prix de vent imposés qui s'est tenue en octobre 2007 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

-- by the Secretariat --

1. From the country submissions, the background paper, and the discussion at the roundtable in October 2008, the following points emerge:

(1). The term "resale price maintenance" (RPM) refers to a particular type of vertical agreement in which an upstream firm controls or restricts the price (or sometimes the terms and conditions) at which a downstream firm can on-sell its product or service, usually to final consumers.

Resale price maintenance arises when an upstream firm – usually the manufacturer, producer, or importer of a good or service – limits or restricts the ability of a downstream firm – usually a distributor or retailer – to set the prices at which it on-sells the products of the upstream firm.

Two different forms of RPM are usually distinguished: "Maximum RPM" places an upper limit or ceiling on the price the retailer can charge for the product. "Minimum" RPM, on the other hand, places a lower bound or floor on the price at which the retailer can on-sell the product. Some countries treat both of these forms in the same way in their competition law. Most countries treat maximum RPM as being the lesser competition concern; in some cases maximum RPM is not illegal at all.

Usually, for RPM to constitute a violation of competition law, the upstream firm must actively seek to penalise deviations from the prescribed prices – perhaps by threatening to cut-off supply to the retailer. In most cases, manufacturer "recommended" retail prices do not raise competition concerns, provided departures from these recommended prices are not penalized.

In some cases, the upstream firm may impose other, related conditions, such as a requirement to not advertise or promote a price which deviates from the minimum or maximum price. In some instances these practices will also constitute a violation of laws prohibiting RPM.

(2). Resale Price Maintenance remains one of the most controversial areas of competition law and policy. Despite arguments from economists and complaints from the business community, most countries' competition laws have historically taken a hostile approach to RPM.

There remain significant differences of opinion within and across countries on the approach that competition policy should take to resale price maintenance. Economists, together with the business community, have tended to oppose a strict or "per se" approach to RPM. Economists recognise that RPM may, in certain circumstances, facilitate collusion. But, at the same time, they have for many years argued that resale price maintenance is, in many cases, benign and often pro-competitive. As a result, most economists argue that RPM should not be *per se* illegal, but should be analysed under a "rule of reason" approach which allows weighing of potential anti-competitive effects with potential efficiency benefits.

Historically, the competition laws of most OECD countries have taken a relatively hostile attitude to RPM. In the EU, RPM is considered to be a "hard core restriction", which is presumed to be anti-competitive. Most European countries allow this presumption to be rebutted with proof of offsetting efficiency benefits. In the US, until recently, RPM was *per se* illegal, so it was not possible to claim offsetting efficiencies as a defence. In a recent US case, the Supreme Court ruled that the possible efficiency benefits of RPM must be taken into account in the analysis of RPM on a case by case basis, thereby bringing RPM under the "rule of reason". Under that approach, potential anticompetitive effects are balanced against potential efficiency benefits.

(3). Economists have long recognised that there are circumstances in which RPM offers efficiency benefits and therefore may be pro-competitive.

The potential efficiency benefits of RPM fall into three categories: spillover effects from service-level decisions, spillover effects from pricing decisions; and creating the right incentives for each retailer.

a. *Spillover effects of retailers' service-level decisions*. Retailers provide a range of complementary services that enhance the value of the manufacturer's product, such as the scope of products they offer, the level of inventory, the level of associated services (such as pre-sales advice, fitting rooms), and the geographic proximity of the retail outlet to the consumer. Some retailers also provide a quality-certification or quality-assurance service. Some of these services may be specific to individual products – such as the amount of shelf-space provided, the location of that shelf-space in the store, and the degree of promotional activities.

Neither the upstream supplier nor the final consumer may be able to contract directly for the provision of some of these complementary services. A retailer may therefore be concerned that if it incurs additional costs to provide such services, consumers will "free-ride" by consuming the services but then purchasing from a discount retailer who does not provide the same services. This possibility tends to deter retailers from incurring costs to provide the services, potentially resulting in an inefficiently low level of these services being provided.

RPM solves the free riding problem by making retail prices uniform, so that customers no longer have a reason to shop at one store but buy in another. With no possibility to compete with each other on the basis of price, retailers that operate under RPM conditions will focus on non-price factors, *i.e.*, services.

A related argument is that in some circumstances the first retailer in a new market has to incur costs to "open up the market". This investment is under threat from free-riding by the second and third retailers who enter the market. If the manufacturer cannot directly contract with the first retailer to make these investments, there is a risk that there will be too little investment in "opening up markets". RPM can help to protect the investment of the first retailer and thereby encourage investment in opening markets.

b. *Spillover effects from retailers' pricing decisions*. If one retailer chooses to discount a product or to use the product as a "loss leader", another retailer might find that its margins and sales of that product are too low to make it worthwhile keeping the product on the shelf. By preventing such discounting, the manufacturer can ensure a wider distribution of its products, which can raise its profits overall. More generally, when one retailer sets its prices it will typically not take into account the effect on the sales of its rivals. This lowers overall returns to the upstream manufacturer. By limiting intra-brand price competition, RPM can allow manufacturers to increase sales and revenue, thereby promoting entry and innovation.

A related argument is that for some products – especially luxury or "top end" brands – the perception that the product has a high price itself paradoxically enhances the demand (for example, by enhancing the exclusivity and status value of the product). For these products price discounting is a direct threat, which might be controlled through RPM.

c. *Retailers' incentives*. Even when free riding is not a concern, RPM may still be a sensible way for manufacturers to increase retailers' sales efforts. To the extent that retailers have the discretion to choose their sales promotion efforts on a product-by-product basis, they will focus their promotional activities on higher-margin products. Therefore, by raising retailers' margins, RPM can help to ensure that retailers are motivated to devote more of their promotional effort to the manufacturer's product, thereby improving inter-brand competition.

In addition, increasing the retailers' profit margin via RPM gives the manufacturer more leverage with which to discipline retailers who fail to provide the desired services. All the manufacturer needs to do is threaten to remove RPM or to cut off supply to those retailers. Either way, the retailers would lose their higher profit margins.

Critics of these three arguments assert that RPM is a very blunt and indirect way to achieve efficiency benefits such as an efficient level of pre-sales service, and that the same benefits could be achieved in other ways. They argue that merely increasing the retail margin and/or eliminating price competition between retailers does not and cannot guarantee that the retailer will provide the relevant complementary services – instead the retailer could simply keep the extra margins for itself. Others respond that these arguments are relevant only when determining whether a particular anti-competitive harm could be achieved in a manner that is less restrictive of competition. In cases where there is no market power and therefore no threat to competition, they say, competition law should not get involved in telling businesses how to organise their affairs.

Finally, the arguments above apply to minimum RPM. Maximum RPM, which places a ceiling on the price a retailer can charge, may be efficiency enhancing when there is limited competition at the retail level – in which case maximum RPM may control the problem of "double marginalisation".

(4). On the other hand, RPM may in certain circumstances facilitate collusion – either between manufacturers or between retailers.

It is widely accepted that it is possible for RPM to have an adverse effect on competition. In particular, RPM may, in certain circumstances, facilitate collusion upstream among producers or downstream among retailers.

RPM can facilitate upstream collusion by increasing price transparency. Manufacturers who can directly collude on their wholesale prices have no need to engage in RPM. Wholesale prices (which often form just one part of complex contracts between manufacturers and retailers) are often not very transparent, though. An upstream cartel may find it difficult, therefore, to detect and punish departures from the cartel agreement. RPM can serve as a coordinating device by stabilising retail prices, which are usually much more transparent than wholesale prices. In addition, under RPM retailers can act as the enforcers – informing manufacturers of potential breaches of the cartel. Research suggests this type of cartel enforcement is especially effective when there is an interlocking network of contracts between upstream manufacturers and downstream retailers.

In some cases, RPM may also be used to sustain a retail cartel. In this case the retailers must collectively have sufficient power to induce the upstream firms to enter into RPM agreements and to prevent discounted sales to potential rival retailers. In effect, the vertical RPM agreements between retailers and manufacturers are a substitute for horizontal collusive arrangements between retailers.

(5). Because RPM can be either pro-competitive or anti-competitive, depending on the circumstances, many commentators have argued that it should not be per se illegal but should instead be subject to a case-by-case rule-of-reason analysis.

A longstanding issue has been the appropriate treatment of RPM under competition law. As set out above, historically most countries have treated RPM as illegal in virtually every case, with little or no possibility for consideration of the overall effect on competition.

Some critics have argued that a *per se* prohibition for RPM makes sense only if the practice is anti-competitive in virtually every instance. However, in many instances RPM is carried out by firms which individually or collectively have very little market power. In these cases, even if the primary purpose of the RPM were anti-competitive, the effect on competition is likely to be negligible. Indeed, where the manufacturer has little or no market power, the interest of the manufacturer is aligned with the interests of consumers because it wants to ensure that retailers receive the smallest possible profit margin consistent with providing optimal services.

Moreover, RPM often has pro-competitive or efficiency benefits. The fact that even very small manufacturers with little or no market power sometimes use RPM suggests that it must have some efficiency benefits which cannot be easily achieved in other ways.

Another argument is that prohibiting RPM forces firms to seek alternative, and sometimes less effective, mechanisms to achieve the same results, thereby bringing about an overall drop in welfare. For example, in most countries the practices labelled "RPM" would not be illegal if the manufacturer and the retailer were vertically integrated. Critics ask if it makes sense to force a firm to incur the costs of vertical integration merely to avoid the prohibition on RPM. Furthermore, some of the alternative mechanisms for achieving the efficiency benefits may themselves have even more significant anti-competitive consequences. For example, exclusive territories eliminate both price and non-price intra-brand competition between retailers.

(6). There is an on-going debate over who should bear the burden of proof – should RPM be presumed illegal (subject to proof of offsetting benefits) or presumed legal (subject to proof of anti-competitive harm)?

Even where it is accepted that RPM should not always be illegal, there remains the question of where the burden of proof should lie. Should RPM be presumed to be illegal unless the firm can provide credible evidence of offsetting efficiency benefits? Or should RPM be presumed to be legal unless the competition authority can demonstrate anti-competitive harm?

Proponents of the former approach argue that (a) in practice RPM is almost always anti-competitive; (b) the presumption of illegality saves enforcement resources; (c) in practice, even when firms have strong incentives to demonstrate credible efficiency benefits from RPM, they have failed to do so; and (d) demonstrating anti-competitive harm is, in practice, so difficult that the latter approach would amount to assuming that RPM is *per se* legal.

Critics of this perspective argue that demonstrating anti-competitive harm is difficult, in part, because it often doesn't exist. Moreover, they argue that when the burden of proof for RPM is on defendants, agencies will attempt to categorise other practices as RPM in order to increase the likelihood of success in winning the case. Finally, critics argue that even if RPM occasionally facilitates collusion, that does not imply that the practice itself should be illegal, especially since there are potential offsetting benefits.

Proponents of the view that RPM should be presumed to be legal point out that the primary anti-competitive concerns arising from RPM are related to collusion, which, when it is present, could be prosecuted under the existing *per se* price-fixing rules. In any case, some argue that RPM has been explicitly linked with horizontal collusion in relatively few cases. Those in favour of a presumption of illegality respond that it is often easier to detect RPM than to detect price-fixing directly. The prohibition on RPM is therefore a tool or a lever by which enforcement authorities can prosecute more price-fixing.

In part, whether RPM should be presumed legal or illegal depends on how likely RPM is to be anti-competitive in practice. Empirical studies of the likely effect of RPM have been hampered by the fact that RPM has been largely illegal in most OECD countries. However the recent change in how RPM is treated in the US should eventually make it possible to conduct new empirical research that more clearly identifies the actual benefits and harms from RPM.

SYNTHÈSE

-- établi par le Secrétariat --

2. Les points suivants ressortent des communications des pays, du document de référence et des débats ayant eu lieu au cours de la table ronde d'octobre 2008 :

(1). Le terme « prix de vente imposés » fait référence à un type particulier d'accord vertical, dans le cadre duquel une entreprise située en amont contrôle le prix ou limite la liberté de fixation du prix (ou parfois des conditions et modalités) auquel une entreprise située en aval peut revendre le bien ou le service produit par la première entreprise, généralement aux consommateurs finaux.

On parle de prix de vente imposés lorsqu'une une entreprise située en amont – généralement le producteur ou l'importateur d'un bien ou service – limite la capacité d'une entreprise située en aval – généralement un distributeur ou un détaillant – de fixer le prix auquel elle revend les produits de la première entreprise.

On distingue en général deux types de prix de vente imposés : l'imposition d'un prix maximum consiste à plafonner le tarif que le détaillant peut facturer pour le produit considéré, tandis que l'imposition d'un prix minimum consiste à fixer un plancher pour le prix auquel le détaillant peut revendre le produit. Certains pays réservent le même traitement à ces deux types de pratiques dans le cadre de leur droit de la concurrence. La plupart des pays considèrent cependant l'imposition de prix maximums de vente comme un problème de concurrence de moindre gravité ; dans certains cas, l'imposition de prix maximums de vente n'a même rien d'illicite.

Généralement, pour que des prix de vente imposés constituent une infraction au droit de la concurrence, l'entreprise située en amont doit activement s'efforcer de pénaliser tout écart par rapport aux tarifs prescrits – éventuellement en menaçant de cesser d'approvisionner le détaillant concerné. Dans la plupart des cas, les prix de détail « recommandés » par le fabricant ne soulèvent pas de problème de concurrence, pourvu que la non-application de ces tarifs recommandés ne soit pas pénalisée.

Dans certains cas, l'entreprise située en amont peut imposer d'autres conditions connexes, telles qu'une obligation de ne pas se livrer à des opérations de promotion ou de publicité reposant sur un tarif qui s'écarte du prix minimum ou maximum. Il arrive également que ces pratiques constituent une violation des dispositions juridiques interdisant les prix de vente imposés.

(2). La question des prix de vente imposés reste une des plus controversées dans le domaine du droit et de la politique de la concurrence. Malgré les arguments avancés par les économistes et les plaintes des entreprises, une position hostile a été adoptée de longue date à l'égard des prix de vente imposés dans le droit de la concurrence de la plupart des pays.

Des divergences d'opinion sensibles subsistent dans chaque pays et au niveau international concernant la position à adopter à l'égard des prix de vente imposés dans le cadre de la politique de la concurrence. Les économistes, ainsi que les entreprises, tendent à s'opposer à une approche stricte fondée sur une interdiction a priori des prix de vente imposés. Les économistes reconnaissent que les prix de vente imposés peuvent, dans certaines circonstances, faciliter les comportements collusoires. Cela étant, ils font valoir depuis de nombreuses années que les prix de vente imposés constituent, dans bien des cas, une pratique anodine et souvent favorable à la concurrence. En conséquence, la plupart des économistes estiment que les prix de vente imposés ne devraient pas constituer une infraction *per se* au droit de la concurrence, et qu'ils devraient être analysés suivant une approche de type « règle de raison », permettant de mettre en balance leurs effets anticoncurrentiels potentiels et les gains d'efficience pouvant en découler.

Une position relativement hostile a été adoptée de longue date à l'égard des prix de vente imposés dans le droit de la concurrence de la plupart des pays de l'OCDE. Dans l'Union européenne (UE), les prix de vente imposés sont considérés comme des « restrictions caractérisées », ce qui signifie qu'ils sont présumés contraires au droit de la concurrence. Dans la plupart des pays européens, cette présomption est réfragable s'il peut être prouvé que les effets anticoncurrentiels de la pratique considérée sont compensés par des gains d'efficience. Aux États-Unis, il y a peu encore, les prix de vente imposés constituaient une infraction *per se*, si bien qu'il était impossible d'invoquer comme moyen de défense des gains d'efficience compensant les effets anticoncurrentiels de cette pratique. Dans une récente affaire, la Cour suprême des États-Unis a cependant statué que les gains d'efficience pouvant découler de prix de vente imposés devaient être pris en compte dans leur analyse au cas par cas, faisant ainsi basculer cette pratique dans le champ d'application de la « règle de raison ». Suivant cette approche, les effets anticoncurrentiels potentiels du comportement considéré sont mis en balance avec les gains d'efficience pouvant en résulter.

(3). Les économistes ont constaté depuis longtemps qu'il existe des circonstances dans lesquelles les prix de vente imposés se traduisent par des gains d'efficience et peuvent donc favoriser la concurrence.

Les gains d'efficience que peuvent engendrer des prix de vente imposés relèvent de trois catégories : les retombées des décisions prises en matière de services, les retombées des décisions prises en matière de prix, et la création d'incitations adaptées à chaque détaillant.

a. *Les retombées des décisions prises en matière de services par les détaillants*. Les détaillants offrent une palette de services complémentaires qui renforcent la valeur du produit du fabricant, tels que la gamme de produits proposée, le niveau de stock, le niveau de services associés (tels que des conseils avant-vente, ou des salons d'essayage) et la proximité géographique du point de vente par rapport au consommateur. Certains détaillants offrent également un service de certification

qualitative ou d'assurance-qualité. Certains de ces services peuvent être spécifiques à chaque produit – tels que le linéaire affecté au produit considéré, l'emplacement de ce linéaire dans le magasin, et l'importance des activités promotionnelles.

Il arrive que ni le fournisseur situé en amont, ni le consommateur final ne puissent contracter directement certains de ces services complémentaires. Un détaillant peut donc craindre, si la fourniture de ces services représente pour lui des coûts supplémentaires, que le consommateur ne joue les « parasites » en consommant ces services chez lui, puis en réalisant son achat auprès d'un détaillant meilleur marché qui ne propose pas les mêmes services. Cette possibilité tend à dissuader les détaillants d'assumer les coûts de fourniture de ces services, ce qui risque de déboucher sur un faible niveau de prestation de ces services, synonyme d'inefficience.

Les prix de vente imposés règlent ce problème de parasitisme en uniformisant les prix de détail, de sorte que les consommateurs n'ont plus de raison de faire leur choix dans un magasin pour acheter finalement dans un autre. Étant dans l'impossibilité de se livrer concurrence sur les prix, les détaillants auxquels sont imposés des prix de vente doivent se concentrer sur les facteurs non tarifaires, c'est-à-dire les services.

Dans le même ordre d'idées, le premier détaillant présent sur un nouveau marché doit assumer dans certaines circonstances les coûts d'« ouverture du marché ». Or, cet investissement risque d'être parasité par le deuxième et le troisième détaillants qui entrent sur ce marché. Si le fabricant ne peut passer contrat directement avec le premier détaillant en vue de la réalisation de ces investissements, les ressources consacrées à l'« ouverture du marché » risquent donc d'être insuffisantes. En l'occurrence, des prix de vente imposés peuvent contribuer à protéger l'investissement du premier détaillant, et encourager du même coup les investissements affectés à l'ouverture du marché.

b. *Les retombées des décisions prises en matière de prix par les détaillants*. Si un détaillant décide de faire une remise sur un produit ou de l'utiliser comme « produit d'appel », un autre détaillant peut être amené à constater que ses marges et ses ventes concernant le produit considéré sont trop faibles pour qu'il soit rentable de continuer à le proposer à la vente. En empêchant ce type de rabais, le fabricant peut donc assurer une distribution plus large de ses produits, ce qui peut déboucher sur une augmentation globale de ses bénéfices. De manière plus générale, lorsqu'un détaillant fixe ses prix, il ne prend normalement pas en compte l'effet induit sur les ventes de ses concurrents, ce qui réduit le niveau global des profits engrangés par le fabricant situé en amont. En limitant la concurrence intramarque par les prix, les prix de vente imposés peuvent permettre aux fabricants d'accroître leurs ventes et leur chiffre d'affaires, ce qui favorise l'entrée sur le marché considéré et l'innovation.

Dans le même ordre d'idées, pour certains produits – en particulier les marques de luxe ou « haut de gamme » – la perception du niveau élevé du prix du produit elle-même exerce paradoxalement un effet stimulant sur la demande (en renforçant, par exemple, les caractères d'exclusivité et de statut social attachés au produit). Pour ces produits, toute réduction du prix constitue une menace directe, qui peut être neutralisée par le biais de prix de vente imposés.

c. *La création d'incitations adaptées aux détaillants*. Même lorsque le parasitisme commercial n'est pas un problème, les prix de vente imposés peuvent être une manière appropriée pour les fabricants d'accroître les efforts de vente des détaillants. En supposant que les détaillants ont la possibilité de choisir leurs efforts de ventes promotionnelles, produit par produit, ils concentreront leurs activités promotionnelles sur des produits à marge élevée. Par conséquent, en augmentant les marges des détaillants, les prix de vente imposés peuvent servir à s'assurer que les détaillants seront motivés pour consacrer davantage d'effort promotionnel au produit du fabricant, améliorant ainsi la concurrence inter-marque.

De plus, augmenter la marge de profit des détaillants, procure au fabricant des moyens de pression supplémentaires pour discipliner les détaillants qui ne fournissent pas les services désirés. Il suffit au fabricant de menacer de supprimer les prix de vente imposés ou de cesser d'approvisionner ces détaillants, sachant que dans l'un ou l'autre cas, les détaillants verraient leurs confortables marges bénéficiaires remises en cause.

Ceux qui contestent ces trois arguments affirment que les prix de vente imposés constituent un moyen très grossier et indirect de réaliser des gains d'efficience, tels qu'un niveau efficient de service avant-vente, et que les mêmes gains pourraient être obtenus par d'autres voies. Ils estiment que le simple fait d'augmenter les marges des détaillants et/ou d'éliminer la concurrence par les prix entre détaillants ne garantit pas et ne peut garantir que ceux-ci fourniront les services complémentaires visés – les détaillants peuvent se contenter d'engranger ce surcroît de marge. D'autres répliquent que ces arguments ne sont pertinents que lorsqu'il s'agit de déterminer si les restrictions de concurrence découlant d'une pratique donnée pourraient être amoindries. En cas d'absence de pouvoir de marché, et donc de menace pour la concurrence, affirment-ils, le droit de la concurrence n'a pas à dicter aux entreprises la manière dont elles organisent leurs activités.

Enfin, les arguments susmentionnés s'appliquent à l'imposition de prix de vente minimums. L'imposition de prix de vente maximums, qui consiste à plafonner les tarifs que peuvent facturer les détaillants, peut être source de gains d'efficience lorsque la concurrence est limitée au niveau du commerce de détail – auquel cas l'imposition de prix de vente maximum peut régler le problème des phénomènes de « double marge ».

(4). Cela dit, les prix de vente imposés peuvent, dans certaines circonstances, faciliter les comportements collusoires, soit entre fabricants, soit entre détaillants.

Il est communément admis que des prix de vente imposés peuvent avoir un effet préjudiciable sur la concurrence. Ils peuvent notamment, dans certaines circonstances, favoriser une collusion parmi fabricants en amont, ou parmi détaillants en aval.

Des prix de vente imposés peuvent faciliter la collusion en amont en renforçant la transparence des tarifs. Les fabricants, qui peuvent s'entendre directement sur leurs prix de gros, n'ont a priori aucunement besoin de recourir à des prix de vente imposés. Toutefois, les prix de gros (qui ne constituent souvent qu'une des composantes des contrats complexes conclus entre fabricants et détaillants) ne sont souvent pas très transparents. En cas d'entente constituée en amont, il peut donc

se révéler difficile de déceler et sanctionner les éventuels manquements à l'accord considéré. Les prix de vente imposés peuvent alors constituer un instrument de coordination en stabilisant les prix de détail, qui sont généralement beaucoup plus transparents que les prix de gros. En outre, en cas de prix de vente imposés, les détaillants peuvent jouer un rôle de garants de l'application de l'accord, en informant les fabricants des manquements potentiels à l'entente considérée. Selon certains travaux de recherche, ce type de système garantissant l'application d'une entente est particulièrement efficace lorsqu'il existe des réseaux de contrats imbriqués les uns dans les autres entre les fabricants situés en amont et les détaillants situés en aval.

Dans certains cas, les droits de vente imposés peuvent être utilisés pour étayer une entente entre détaillants. Dans ce cas, ces derniers doivent disposer collectivement d'un pouvoir suffisant pour amener les entreprises d'amont à conclure des accords imposant des prix de vente et empêcher toute vente au rabais à des détaillants rivaux potentiels. En fait, ces accords verticaux imposant des prix de vente conclus entre détaillants et fabricants se substituent à des accords collusoires horizontaux entre détaillants.

(5). Étant donné que les prix de vente imposés peuvent être, suivant les circonstances, propices ou préjudiciables à la concurrence, nombre d'observateurs estiment qu'ils ne devraient pas constituer une infraction per se*, mais faire l'objet d'une analyse au cas par cas fondée sur la règle de raison.*

Le traitement à réserver aux prix de vente imposés dans le cadre du droit de la concurrence est une question qui fait débat depuis fort longtemps. Comme indiqué précédemment, la plupart des pays considèrent de longue date les prix de vente imposés comme une pratique illicite dans la quasi-totalité des cas, sachant que les possibilités de prise en compte de l'effet global induit sur la concurrence sont des plus limitées, voire inexistantes.

Certains adversaires de l'interdiction a priori des prix de vente imposés font valoir que celle-ci ne se justifie que si la pratique considérée est quasi systématiquement anticoncurrentielle. Or, dans de nombreux cas, les prix de vente imposés sont le fait d'entreprises qui, individuellement ou collectivement, ont un pouvoir de marché très modeste. Dans ce cas de figure, même si l'objectif fondamental des prix de vente imposés était anticoncurrentiel, leur effet sur la concurrence sera probablement négligeable. En fait, lorsque le fabricant n'a pas ou peu de pouvoir de marché, son intérêt rejoint celui des consommateurs, puisqu'il souhaite que les détaillants engrangent la marge bénéficiaire la plus faible possible qui soit compatible avec la fourniture de services optimaux.

De plus, les prix de vente imposés ont souvent des effets bénéfiques en termes de concurrence ou d'efficience. Le fait que même de très petits fabricants n'ayant pas ou peu de pouvoir de marché imposent parfois des prix de vente laisse à penser que cette pratique doit permettre des gains d'efficience qui ne peuvent aisément être réalisés par d'autres moyens.

Par ailleurs, une interdiction des prix de vente imposés contraint les entreprises à rechercher d'autres mécanismes, parfois moins efficaces, pour parvenir aux mêmes résultats, ce qui entraîne une perte globale de bien-être. Ainsi, dans la plupart des pays, les pratiques considérées comme des « prix de vente imposés » ne seraient pas illégales si le fabricant et le détaillant concernés

étaient intégrés verticalement. Les adversaires de l'interdiction des prix de vente imposés demandent s'il est logique de contraindre une entreprise à assumer les coûts d'une intégration verticale simplement pour échapper à cette interdiction. En outre, certains des mécanismes de substitution utilisés pour obtenir les gains d'efficience recherchés peuvent eux-mêmes avoir des conséquences encore plus préjudiciables pour la concurrence. Ainsi, les accords d'exclusivité territoriale éliminent à la fois la concurrence intramarque par les prix et la concurrence intramarque hors prix entre les détaillants.

(6). La question de savoir à qui doit incomber la charge de la preuve fait toujours débat. Les prix de vente imposés doivent-ils être présumés illicites et sanctionnés en tant que tels (sauf s'il est prouvé que les gains d'efficience qui en découlent compensent leurs effets anticoncurrentiels), ou présumés licites et non sanctionnés (sauf s'il est prouvé qu'ils portent préjudice à la concurrence) ?

Même lorsqu'il est admis que les prix de vente ne doivent pas être systématiquement considérés comme illicites, la question de savoir à qui doit incomber la charge de la preuve demeure posée. Les prix de vente imposés doivent-ils être présumés illicites et sanctionnés en tant que tels, à moins que l'entreprise concernée ne puisse apporter la preuve crédible que les gains d'efficience qui en découlent compensent leurs effets anticoncurrentiels ? Ou bien les prix de vente imposés doivent-ils être présumés licites et non sanctionnés, à moins que l'autorité de la concurrence ne puisse démontrer qu'ils portent atteinte à la concurrence ?

Les partisans de la première approche font valoir que (a) en pratique, les prix de vente imposés sont presque toujours préjudiciables à la concurrence ; (b) la présomption d'illégalité permet d'économiser les ressources consacrées à l'application des lois ; (c) concrètement, même lorsque les entreprises ont tout intérêt à apporter la preuve crédible que les prix de vente imposés entraînent des gains d'efficience, elles n'y parviennent pas ; et (d) il est en pratique si difficile de démontrer l'existence d'atteintes à la concurrence que la seconde approche reviendrait à autoriser sans réserve les prix de vente imposés.

Ceux qui s'opposent à la première approche affirment au contraire que, s'il est difficile de démontrer l'existence d'atteintes à la concurrence, c'est en partie parce qu'elles font fréquemment défaut. En outre, ils font valoir que lorsque la charge de la preuve incombe aux entreprises mises en cause en matière de prix de vente imposés, les autorités s'efforcent de faire entrer dans cette catégorie d'autres pratiques, afin d'accroître leurs chances de succès dans le cadre des procédures engagées. Enfin, les détracteurs de la première approche estiment que, même si les prix de vente imposés peuvent faciliter à l'occasion des comportements collusoires, cela ne signifie pas pour autant que cette pratique elle-même doit être interdite par la loi, notamment dans la mesure où elle est susceptible de se traduire par des gains d'efficience pouvant compenser ses effets anticoncurrentiels.

Ceux qui défendent l'idée que les prix de vente imposés doivent être présumés licites soulignent que les principaux problèmes d'effets anticoncurrentiels soulevés par les prix de vente imposés sont liés aux phénomènes de collusion, qui, lorsqu'ils existent, pourraient faire l'objet de poursuites

en vertu des dispositions en vigueur relatives aux ententes sur les prix (qui constituent des infractions *per se*). Quoi qu'il en soit, certains soulignent le nombre relativement limité d'affaires dans lesquelles un lien été explicitement établi entre des prix de vente imposés et des accords collusoires horizontaux. Les partisans de la présomption d'illégalité répliquent qu'il est souvent plus aisé de déceler des prix de vente imposés que de mettre au jour directement une entente sur les prix. L'interdiction des prix de vente imposés constitue donc un outil ou un levier permettant aux organismes responsables de l'application des lois de poursuivre davantage de responsables présumés d'entente sur les prix.

La réponse à la question de savoir si les prix de vente imposés doivent être présumés légaux ou illicites dépend en partie de la probabilité qu'ils aient des effets anticoncurrentiels en pratique. La réalisation d'études empiriques sur les effets probables des prix de vente imposés a été entravée par le fait qu'ils sont dans une large mesure interdits par la législation de la plupart des pays de l'OCDE. Néanmoins, le récent changement de position à l'égard des prix de vente imposés intervenu aux États-Unis devrait offrir à terme la possibilité de réaliser de nouveaux travaux de recherche empiriques, qui permettront de cerner plus clairement leurs retombées positives et négatives effectives.

RESALE PRICE MAINTENANCE

1. Introduction

The Competition Committee last held a roundtable on resale price maintenance ("RPM") in 1997, when it discussed the practice in the context of cultural and published products. Some important developments have taken place since then, and more are coming up in the near future. First, economists have continued to study and debate RPM and its effects, adding to the substantial literature that already existed in the mid-1990s. Second, the treatment of RPM as a per se antitrust violation in the United States came to an end when the Supreme Court endorsed a rule of reason approach instead. [1] Third, RPM continues to be a favourite target of enforcement agencies in many other OECD member countries, where it remains a per se offence. Consequently, there is now a significant policy divergence between the US and many other member countries. Finally, the treatment of RPM in the European Union will likely be considered when the next revision of the Block Exemption on Vertical Agreements is drafted (the current one expires in 2010).

The predominant issue in the academic literature related to RPM has long been whether it should be unlawful per se or subject to the rule of reason. For at least the past 20 years, a substantial majority of commentators has been arguing against the per se approach, yet it persists in nearly every OECD country.[2] There are some new voices on the other side of the argument, however, so this note takes a fresh look at the per se/rule of reason debate. A closely related and controversial topic is what a good rule of reason approach to RPM cases would look like. All of those subjects are addressed in Part 2 after an overview of the pros and cons of RPM from a consumer welfare perspective.

Part 3 examines RPM in practice by reviewing the approaches used in a selection of jurisdictions. Some countries in which RPM is generally unlawful per se have defended the idea of making exceptions that allow it – and in one case that actually requires it – in certain industries. Some of those exemptions have been withdrawn in recent years, creating an opportunity to compare how consumers fared with RPM versus without RPM.

2. RPM in Economic Theory

2.1 What Is RPM?

The term "resale price maintenance" encompasses a number of price-related understandings between upstream and downstream firms. The most common variety involves retailers agreeing with a supplier that they will not charge customers less than a certain price for the supplier's product, leaving the retailers free to charge any price above that level ("minimum RPM"). Sometimes a specific price is mandated (the retailer must charge no more and no less than that price). Alternatively, the firms may agree to a price

1 The rule of reason approach is to examine the reasonableness of a firm's conduct in light of all the relevant facts and circumstances in each case.

2 *See, e.g.*, Denis Waelbroeck, "Vertical Agreements: 4 Years of Liberalisation by Regulation n. 2790/99 After 40 Years of Legal (Block) Regulation," in Hanns Ullrich (ed.), The Evolution of European Competition Law 85, 93 (2004) (citing S. Bishop & M. Walker, The Economics of EC Competition Law 167 (2002) and J. Tirole, The Theory of Industrial Organisation 188 (1988)).

ceiling, leaving the retailers free to charge any price below that level ("maximum RPM").[3] Unless stated otherwise, the term "RPM" in this Note refers to minimum RPM.

Under RPM, resellers are *required* to comply with certain price conditions. In contrast, non-binding price recommendations by upstream firms are generally not considered to be RPM and are permitted. Even when upstream firms advertise recommended prices or print them directly on a product's packaging, that is typically not deemed to be RPM so long as the resellers remain free to charge whatever prices they wish.

2.2 The Pros and Cons of RPM

Manufacturers have imposed RPM for a wide variety of reasons. Some of them are pro-competitive and some are not. This section examines the objectives that manufacturers may aim to achieve with RPM. It also considers the associated effects on consumer welfare.

On the surface, it may seem like RPM is obviously harmful to consumers. After all, the essence of RPM is to keep retail prices higher than they would be otherwise. RPM may also seem like a puzzling practice since it is ordinarily in a manufacturer's interest to minimise dealer profits, not enhance them. That is, a manufacturer should prefer the lowest possible retail prices because they will correspond to consumer demand that is as large as possible. Greater demand at the retail level translates into greater demand at the wholesale level. One would therefore expect manufacturers to encourage low prices and competition among their distributors, and that is indeed what manufacturers usually do.

That reasoning, however, takes into account only price effects on demand. Other factors influence demand, too, and they do not necessarily correspond well with perfectly competitive retail prices. In fact, there are sometimes powerful reasons for manufacturers to limit competition among their resellers, and many of them are pro-competitive.

2.2.1 Welfare-Enhancing (or at least welfare-neutral) Uses and Effects

The most common arguments that RPM has pro-competitive effects revolve around the idea that RPM improves interbrand competition by enhancing distribution efficiency. It can do that by encouraging retailers to provide more of the pre-sale services that customers are willing to pay for in the form of higher prices for the relevant product. Those services could be things like attractive shopping environments, brochures, and attentive, knowledgeable salespeople. There are other potentially welfare-enhancing effects of RPM, as well, and they are also discussed in this section.

Encourage retailers to provide efficient pre-sale services.

By guaranteeing retailers a certain profit margin on each unit sold, manufacturers can better motivate the retailers to provide services that customers want or need. First, the margins guaranteed by RPM should

[3] Many other variations are possible, such as those contained in guidelines issued by Japan's Fair Trade Commission: prices that must be within a fixed percentage discount from the manufacturer's suggested retail price; prices that must be in a specified range; prices that must be approved in advance by the manufacturer; and prices that must not be less than those charged by nearby stores. *See* JFTC, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act (11 July, 1991), Chapter 1, Section 2.(4); *see also* European Commission, Guidelines on Vertical Restrictions (2000/C 291/01) para. 47 (also mentioning agreements that fix the distribution margin and extending the definition of RPM to include cooperation achieved indirectly by means such as threats, intimidation, warnings, penalties, delays, suspensions of deliveries and terminations in connection with following – or not following – a given price level).

allow retailers to afford to provide customers with more of such services. Thus, even though it prevents retailers from competing on the basis of price, RPM enhances their ability to engage in other types of competition. In fact, given that they cannot compete on price, they have to find other ways to attract customers if they are going to remain competitive with other dealers.[4] Furthermore, that competition will be directed not only toward rival brands, but toward other retailers who sell the same brand. In other words, RPM can boost both interbrand and intrabrand non-price competition. Theoretically, in competitive markets, the retailers' investment in that heightened non-price competition should increase to the point at which their extra revenues from RPM are entirely competed away.[5]

Second, if competition itself does not provide enough motivation for resellers to invest their enhanced profits from RPM in greater services, then the looming threat that the manufacturer could terminate them or dismantle the RPM program altogether may do so. Higher retail prices without greater service could be a desirable state of affairs for the retailer, but for the manufacturer it would be unquestionably harmful since sales would be driven down, not up, despite the fact that wholesale prices did not increase.

So how do the extra services engendered by RPM translate into greater consumer welfare? Some customers will buy the product if those extra services are provided but would not buy it if the services are not provided. If the higher demand due to the services promoted by RPM more than compensates for the dampening effect on demand due to the (presumed) higher retail price associated with RPM, then total demand and sales will rise and, typically, so will consumer welfare. This possibility is shown in Figure 1.[6]

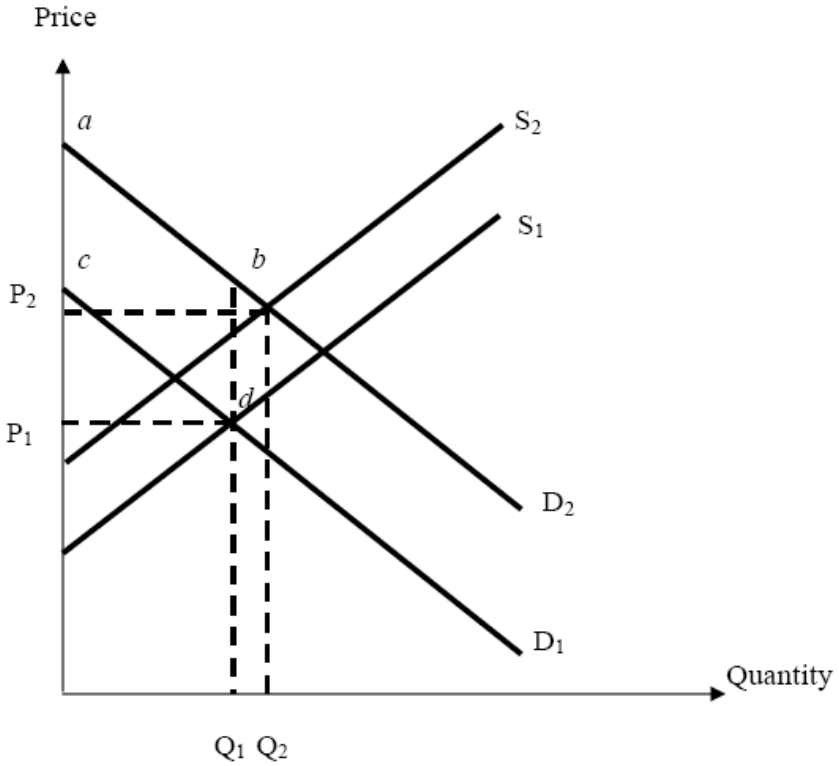
In Figure 1, the pre-RPM equilibrium is at point d (Q_1, P_1). After RPM begins, the demand curve shifts outward in parallel fashion from D_1 to D_2 because greater services are assumed to increase the product's value to all consumers equally. (A different assumption will be made later.) Consumers are now willing to buy more of the product at any given price. Those extra services cost something to provide, however, so the supply curve moves higher, too (from S_1 to S_2). The new equilibrium is at point b (Q_2, P_2). Notice that the quantity sold has increased (Q_1 to Q_2) despite the fact that price has risen from P_1 to P_2.

4 Mart Kneepkens, "Resale Price Maintenance: Economics Call for a More Balanced Approach," 28 European Competition Law Review 656, 658 (2007).

5 Richard Posner, Antitrust Law 173 (2d ed. 2001).

6 This diagram appears in Roger Blair, "The Demise of *Dr. Miles*: Some Troubling Consequences," 53 Antitrust Bulletin 133 (2008), 143.

Figure 1. Welfare-Enhancing RPM.



Under these conditions, consumer welfare (technically, consumer surplus) clearly increases because of RPM. Prior to RPM, it is represented by area cdP_1. After RPM, it becomes area abP_2.

Combat free riding.

RPM can also stimulate greater pre-sale services by discouraging free riding. Free riding occurs when customers benefit from pre-sale services offered by full-service retailers but then buy from discounters. The former bear the costs, but the latter get the revenue. If the problem is serious, full-service retailers will eventually curtail or even eliminate the affected services, which may result in an inefficient under-provision of such services in the market. Manufacturers will find it difficult to persuade retailers to offer the services unless free riding can be prevented. RPM does that by stopping discounters from discounting. Because all retailers have to charge the same price under RPM, customers will have no incentive to shop at one store and buy from another. With price competition and free riding no longer possible, retailers will (presumably) be more inclined to engage in non-price competition by offering more of the pre-sale services that could be free-ridden in the absence of RPM.

What types of services are included in that group? The most frequently mentioned include things like expert information and advice from trained specialists, product demonstrations, and consumer trials. Intuitively, the products that would seem most likely to be affected by free riding are differentiated, complex and feature-rich products. Certain consumer electronics items such as mobile smartphones and high-definition video cameras are good examples because they may sell better when a salesperson is available to explain their functionality and to highlight their advantages in comparison with competing products. The problem for full-service retailers is that they may not be the ones making the actual sales, as

it is often fairly easy for consumers to find discounters who sell such products without providing sales advice.

The need for RPM's free-rider-killing effect has been exaggerated, according to some commentators. Areeda and Hovenkamp, for instance, state that unrestricted intrabrand competition does not cause much harmful free riding in a large number of situations. These include markets where "dealers provide no significant services (such as drugstores selling toothpaste), the services they do provide cannot be utilised by customers who patronise other dealers (luxurious ambience), the services are paid for separately (post-sale repair), the services provided are not brand specific . . . (high quality department store), the services can be provided efficiently by the manufacturer (advertising), or a sufficient number of customers patronise the dealers from whom they receive the service."[7] Scherer and Ross add that enhanced services are irrelevant for customers who already know what they want and how to use it, as well as for customers who are shopping for inexpensive items.[8]

But there is another service that is susceptible to free riding and it can apply to many types of products. It is known as "certification" or "signalling," and its wide applicability means that the free riding phenomenon may not be as limited as was once believed.[9] Certain retailers invest considerable resources in screening the products they carry, ensuring that only the most high-quality and/or stylish products appear on their sales floors. They may also cultivate a trustworthy and upscale reputation through spending on advertising, store furnishings, store locations, etc. Over time, customers may come to trust that retailer's product choices and automatically associate the brands and models it sells with excellence and prestige. In the absence of a strategy such as RPM, discounters could simply mimic the trusted retailer's inventory without having to invest any resources of their own in determining which products are the best or acquiring an upscale reputation themselves. Consumers could save money by doing their research at high-end stores but buying at discount stores. RPM helps to preserve the certification effect by giving customers no reason to buy from discounters, thereby directing purchases back to the sellers who do the certifying.

Areeda and Hovenkamp are unmoved by the certification theory. They contend that upscale dealers are unlikely to discontinue their certification services, which are not brand specific, just because they are being free ridden with respect to a few individual products.[10] This criticism is not especially persuasive, though, because even if the certification services are not brand specific, the free riding is. In other words, dealers can easily put a stop to the free riding by refusing to continue carrying the affected products – and only those products. That is the result RPM would be intended to prevent. Furthermore, the rise of internet shopping has strengthened the certification hypothesis by making the process of shopping itself cheaper and easier. It is now more believable than ever that customers will shop for certain items in

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7 8 Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1601e, at 13 (2d ed. 2004); *see also* Kneepkens, *supra* n.4 at 657.

8 F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 552 (3d ed. 1990). As the authors put it, "[t]he consumer who secures from her friendly local hardware store a ten-minute demonstration of a $1.79 potato peeler's merits and then makes a special trip to the discount house to buy one is a candidate for something other than center stage in the economic theory of shopping behavior." *Id.*

9 Howard Marvel, "The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom," 63 Antitrust Law Journal 59 (1994); Howard Marvel & Stephen McCafferty, "Resale Price Maintenance and Quality Certification," 15 Rand Journal of Economics 346 (1984); Thomas Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence, USFTC Bureau of Economics Staff Report, pp. 56-62 (1983).

10 Areeda & Hovenkamp, *supra* n.7 ¶ 1613d-g, at 156-165.

reputable, full-service stores and then go online to see if they can find the same items at a discount. In fact, customers can now do both types of shopping online.

Some manufacturers may make improbable claims about supposedly necessary services that are vulnerable to free riding. This is somewhat subjective territory, especially outside the context of any particular case, but a degree of scepticism seems appropriate for services like convenient hours, large store size, and pleasant salespersons. One may reasonably doubt that customers will intentionally shop at a full-service store during hours when a discounter is closed, for instance, but then go to the discounter when it opens to make the purchase.

Protect brand image: prevent dealers from using the product as a loss leader.

This argument is sometimes offered as a justification for limiting price competition among distributors. Essentially, it holds that when a manufacturer invests in giving its product an image of quality or sophistication, price reductions may actually reduce sales volume. It is rare, however, that demand can be raised by keeping prices high.

Manage demand uncertainty.

If demand for a product turns out to be unexpectedly low after retailers have bought a substantial supply of it, retail prices may decline dramatically as the dealers try to unload their stock. As a result, they will experience substantial losses. The higher the risk that demand may be low and prices will plummet, the less willing retailers will be to carry a product (or at least to carry enough of it should demand turn out to be normal or high). Furthermore, retailers tend to perceive a higher risk of that happening for new, unproven products. Because RPM assures retailers that prices will not decline even if demand is low, they may be more likely to carry a product that they otherwise would not have carried (or to place larger orders for it than they would have done otherwise). That, in turn, would benefit consumers because stores will be more likely to maintain adequate inventory levels.[11]

Those who are unfamiliar with this hypothesis may be wondering why RPM in the presence of low demand would give retailers any comfort at all. Wouldn't RPM in this situation simply mean that instead of liquidating all their inventory at rock-bottom prices, retailers would sell just a portion of it at the normal RPM price and receive nothing at all for the rest, since it would never be sold? Yes, it would, but the idea that retailers can rely on selling at least a portion of their inventory at the RPM price turns out to be the key point.

The demand uncertainty theory requires the classification of retailers into several groups, from discounters that always sell at low prices to high-end stores that always sell at high prices. When demand is low, only the discounters will be able to sell anything. Even if demand is high, competition among discounters is assumed to keep their prices low, but in either demand state the discounters have a relatively high probability of selling their stock. Upscale stores, however, will sell only when demand is high enough to support their high prices. There is a chance, therefore, that they may wind up selling nothing. Accordingly, they may be unwilling to carry sufficient quantities of the product to satisfy demand if it turns out to be high. RPM at least partially remedies that problem by making it more likely that each

[11] Raymond Deneckere, Howard Marvel & James Peck, "Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition," 87 American Economic Review 619 (1997); Raymond Deneckere, Howard Marvel & James Peck, "Demand Uncertainty, Inventories, and Resale Price Maintenance," 111 Quarterly Journal of Economics 885 (1996). Note that if retailers would have carried enough of the product to satisfy a high demand state even without RPM, then RPM may not enhance consumer welfare. Marvel, *supra* n. 9 at 75-76.

retailer – whether it is a discounter or not –will sell a portion of overall consumer demand even if that demand turns out to be low, and that it will do so at the high-margin RPM price. Consequently, on the whole, retailers will hold larger inventories under RPM because the higher exposure to losses involved in doing so is offset by the higher probability that they will earn higher profits on at least part of their stock. [12]

Encourage preferred treatment by multi-brand dealers.

This idea is simply that retailers will put extra effort into selling a product if its price is kept high. It works especially well when consumers need a dealer's advice on which product to buy. This behaviour has ambiguous effects on consumer welfare, though.

Promote entry

New companies, and even established companies who are introducing new products, sometimes find it difficult to convince distributors to carry those new items. Without a means of distribution those new products will not be able to enter the market. In addition to being more reluctant to carry new, unproven items because of the risk that demand for them will be low, distributors may also be averse to stocking new products even if they turn out to be popular with customers. The problem arises when distributors need to make substantial investments in advertising and promotion for the new products to be profitable. If those investments are made and the distributors begin to earn profits, other distributors who never made those investments may start to carry the same products and compete away the original distributors' profits. RPM is a means of increasing the likelihood that "pioneer" distributors will recoup their investments and earn compensation for the risk they bore because it prevents price competition. RPM therefore can ease the entry of new products and/or new competitors at the upstream level by helping to persuade distributors to accept the risk of carrying and investing in the success of new products. Note that RPM may promote entry at the distributor level, as well.

Eliminate double marginalisation

Manufacturers sometimes impose maximum RPM when both they and their resellers have some market power. Without maximum RPM in such situations, both the upstream and downstream firms will set prices that maximise their own profit. Those prices will tend to be higher than marginal cost since the firms have market power. The resulting "double mark-up" leads to a retail price above the level that would maximise the aggregate profits of the upstream and downstream firms together. More specifically, the downstream firm will make any price increase that raises its own profits, ignoring the fact that those increases decrease the quantity sold to consumers. That decline in quantity decreases the manufacturer's profits. Imposing maximum RPM enables the manufacturer to recalibrate retail pricing to avoid the profit loss associated with double marginalisation.

The use of maximum RPM to eliminate double marginalisation enhances consumer welfare. Maximum RPM prevents the uncoordinated exercise of market power when such power exists at both the wholesale and retail levels. That lack of coordination results in retail prices that are above the level that would maximise profits for the aggregate chain of production. By giving manufacturers control over retail prices, maximum RPM enables them to correct an externality that causes needless reductions in both the profits and the economic efficiency of both upstream and downstream firms. With maximum RPM,

[12] RPM is not the only strategy that can motivate retailers to keep higher inventory levels. For example, manufacturers might also agree to buy back unsold goods. Presumably, if manufacturers choose RPM instead, it is because it is more efficient for some reason. Manufacturers should therefore be able to explain why that is the case.

manufacturer can dictate a retail price that takes into account its effects on the whole chain of production.[13] Because correcting the double marginalisation externality lowers retail prices to (aggregate) profit maximising levels, economic efficiency improves and consumers benefit.

Prevent price gouging by dealers with market power.

This is different from the double marginalisation issue because downstream price gouging will be a concern to manufacturers regardless of whether they have market power themselves. When dealers have some localised market power, manufacturers may find it beneficial to impose maximum RPM to restrict the dealers' ability to charge supracompetitive retail prices. Such prices would not be in the best interests of either the manufacturer or consumers. Thus, for example, a manufacturer might impose maximum RPM when it has granted exclusive territories to its dealers.

2.2.2 Welfare-reducing Uses and Effects

Concerns that RPM may reduce welfare focus on its potential to facilitate collusive behaviour. That could happen at either the manufacturer or the reseller level. While both types of RPM schemes are vertical in form, they are horizontal in substance. Other potentially harmful effects are also discussed in this section.

Facilitate price fixing among dealers.

A cartel of retailers may want to instigate RPM because it can serve as both camouflage and an enforcement mechanism. Because RPM has the appearance of being imposed by manufacturers, it could help to disguise what is really a retailer-initiated cartel agreement. In addition, knowing that the manufacturer will punish retailers who cheat provides a level of confidence for all of the cartel members, especially in markets where they might find it difficult to do the punishing themselves.

The idea of a retailer cartel being enforced by a manufacturer should cause some consternation. Ordinarily, manufacturers want retail prices to be as low as possible so as to encourage consumer demand. More consumer demand means more demand at the wholesale level, which increases manufacturers' profits. Higher retail prices, in contrast, reduce consumer demand. That leads to lower manufacturing profits. Therefore, one of the last things we might expect a manufacturer to do is to help its retailers maintain artificially high prices. To do so, it would likely have to be coerced, which will require a sufficiently powerful group of retailers.

Moreover, there are a number of other reasons why we might expect retailer-induced RPM schemes to be uncommon. First, of course, is the fact that cartels themselves are considered to be criminal activities in some jurisdictions and can at least draw heavy fines in others. Second, market conditions do not always favour cartel formation. The well-known group of factors that affect the plausibility of a successful cartel in general (such as the number of firms in the market, the homogeneity of their products, the ease of entry, etc.) will make cartels too difficult to maintain in some markets, even with the assistance of RPM.[14] Third, retailers may be able to implement and monitor their cartel well enough without RPM, in which case they would not need it. Although that may not be a very comforting thought for enforcers, the point here is simply that it reduces the likelihood that RPM will be used to maintain a retailing cartel.

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13 Minimum RPM cannot help in this situation because the double marginalisation problem causes reseller prices to be too high, not too low.

14 *See, e.g.*, OECD, Public Procurement, The Role of Competition Authorities in Promoting Competition, DAF/COMP(2007)34, Background Note at 21-23.

Finally, RPM will not work very well as a cartel device for retailers if they fail to persuade an adequate portion of manufacturers to implement it. If enough of the industry's capacity remains uncovered by RPM agreements, then consumers will simply switch to brands that are RPM-free. In general, however, the more market power any individual manufacturer has, the harder it will be for the retailers to coerce it. Conversely, markets with manufacturers that have little or no market power may present the retailers with easier targets, but there are likely to be more of them. Either way, conspiring retailers will sometimes face an uphill battle.

For all of those reasons, some commentators consider it improbable that RPM could ever serve as a facilitating device for a retailer cartel. In fact, Marvel has called that situation "clearly implausible."[15] As we will see in Part 3.3., however, it is likely that some enforcers consider the risk to be not only plausible, but substantial.

Facilitate price fixing among manufacturers.

RPM can be used as a facilitating device for manufacturer cartels, too. Retail prices, being more observable than wholesale prices, are easier to monitor. It is therefore easier to detect price deviations at the retail level than at the manufacturing level. Manufacturers, however, sell at the wholesale level. Therefore, if they form a cartel they will be concerned about the possibility of cheating on wholesale prices. By imposing RPM, they may be able not only to detect cheating more easily, but to deter it more effectively, as well.

This is why that strategy might work: Normally, members of a manufacturing cartel who wish to cheat would lower their wholesale prices. That would enable their retailers to reduce prices to end users, as well, which would increase demand at both the retail and wholesale levels. That demand increase is what the cheating manufacturers would count on to make their secret price cuts profitable. Meanwhile, the cheater could keep the true reason for the decline in retail prices hidden from other cartel members by attributing it to any of a variety of plausible reasons other than cheating. It could blame normal fluctuations in market prices, for example, which could be due to anything from variations in the retailer's overhead costs to localised changes in demand. But RPM prevents retailers from lowering their prices for any reason, including a decline in wholesale prices. Because retail prices must not change even if wholesale prices decline, retail demand will not change, either. Consequently, demand at the wholesale level cannot change, either. That would seem to remove the manufacturers' incentive to make secret price cuts. With that temptation eliminated, the manufacturers' cartel would be more stable.

Marvel recently stated that, at least in the US, "[t]he number of cases in which RPM can plausibly be alleged to have facilitated a manufacturer cartel can be counted on one's fingers."[16] A number of factors may be responsible for that. To begin with, some of the same reasons that make retailer-induced RPM cartels less likely also militate against RPM as a device for manufacturing cartels. For example, manufacturing cartels are just as illegal as retailer cartels, market conditions can also be unfavourable for cartel formation in manufacturing markets, and manufacturers will not always need RPM to facilitate a cartel.

Another reason that RPM-facilitated manufacturers' cartels may be rare is that they have an inherent, destabilising characteristic. Both the incentive to gain market share at the other cartel members' expense and a means to do it will remain even if all cartel members have imposed RPM on their dealers. Even though a manufacturer is not likely to get away with cheating for long by lowering its wholesale price and

15 Marvel, *supra* n. 9 at 59.

16 Howard Marvel, "Resale Price Maintenance and the Rule of Reason," The Antitrust Source (June 2008), p. 1.

letting its dealers pass those savings on to consumers, it still might benefit by lowering its wholesale price. Rather than expecting its dealers to pass that lower price on, though, the manufacturer could stimulate demand by allowing its dealers to continue pricing at the RPM level if they agree to engage in more intense non-price competition with the other cartel members' products.

A dealer that carried the products of several colluding manufacturers could, for example, begin to promote more heavily the brand on which it is receiving secret discounts. Sales people could push that brand harder than others, there might be more prominent in-store advertising, better positioning on shelves, etc. For this reason, RPM alone might not be enough to ensure the stability of a manufacturing cartel. It might be necessary to impose other vertical restraints, as well, such as exclusive dealing. But while that would partially alleviate the problem, it would not solve it entirely. Even if each dealer were permitted to carry the brand of only one of the colluding manufacturers, the manufacturers would still have an incentive to try to take sales away from their rivals by encouraging their own dealers to engage in greater non-price interbrand competition. Consequently, all of the potential gains from the cartel might be competed away.

This is a very plausible problem for manufacturing cartels.[17] After all, one of the main arguments in favour of RPM is that it can be effective in stimulating non-price competition by retailers. A manufacturer therefore might find it profitable to cut its wholesale price while technically adhering to its commitment to impose RPM, provided its dealers respond with the type and level of pre-sale services that take away enough sales from other cartel members to recoup the secret price cut. This strategy is likely to work best with products for which customers are relatively more responsive to extra pre-sale services. In contrast, uncomplicated, inexpensive, commodity goods that are sold widely and in many different types of stores will not be as susceptible to this kind of cheating. Therefore, we should expect to see a higher incidence of manufacturer-RPM cartels involving such products than of manufacturer-RPM cartels involving more complex or higher-profile products.

Finally, even if no cartel members cheat, another kind of destabilising force may make RPM-based cartels more trouble than they are worth to manufacturers, especially in markets where pre-sale services are not very important. The essence of the problem is that RPM will be an expensive way for the cartel to maintain discipline. Ordinarily, even if there is a cartel at the manufacturing level, retailers are free to choose the prices they wish to charge their customers. Some retailers will be more efficient than others and thus will have the ability to charge relatively low prices, which will probably result in a higher sales volume. That helps to offset the effect of the monopolistic input price set by the cartel, which is good for the manufacturers. RPM, however, inhibits the ability of the relatively efficient retailers to pass along cost savings to customers. Consequently, total industry sales are likely to decline, which hurts the manufacturers. If sales decline by enough, the cartel members may be worse off even though they are receiving a higher price per unit.[18]

So does all this mean that enforcers may as well not worry about RPM as a device for facilitating cartels? No. Even if cartel members do cheat, it will not necessarily happen often enough or to a large enough extent to make the cartels collapse. Meanwhile, there would be no guarantee that harm to consumers from the cartel's higher prices would be outweighed by the added services provided by the cheater(s). Furthermore, the sacrifice of relatively efficient retailers that can occur under RPM would be less pronounced in markets where consumers respond strongly to pre-sale services. The efficient retailers could use their cost advantage to fund such services rather than lowering their prices, thereby boosting

17 *See* Blair, *supra* n.6 at 137 n.16 (noting that RPM is unlikely to eliminate all cheating in manufacturing cartels because of the temptation manufacturers will still have to reward their dealers for greater non-price competition against other cartelists); *see also* Stanley Ornstein, "Resale Price Maintenance and Cartels," 30 Antitrust Bulletin 401, 406-08 (1985).

18 Ornstein, *supra* n.17 at 409.

demand (and the cartel's profits). Nevertheless, the sources of instability just described do provide some theoretical support for the view that RPM-facilitated manufacturing cartels are uncommon. Consequently, these observations tend to weaken the case for keeping RPM illegal per se.

RPM harms all consumers simply by raising prices

This is a flawed argument. Putting cartel-inspired RPM schemes aside, manufacturers implement RPM because it induces activity and effects to which consumers respond by buying more, not less, in spite of the resulting higher prices. In other words, RPM is a means of making customers in the aggregate better off, not worse off, as we saw in Part 2.2.1.1. Therefore, by itself, the fact that retail prices tend to rise because of RPM is not meaningful because such price increases will typically occur under RPM regardless of whether it is used to maintain a cartel or to encourage pro-competitive customer services.

Marvel adds that RPM is no different from certain other promotional investments that do not draw nearly as much scrutiny as RPM. Advertising, for example, can stimulate demand even though it also raises costs and (usually) prices. The same is true of investments in R&D.[19] Those strategies are rarely questioned, though.

Moreover, RPM does not have to result in a supra-competitive price. In fact, interbrand competition might prevent manufacturers from setting the retail price any higher than the competitive level.[20] In any event, manufacturers will rarely have a rational interest in simply padding resellers' profits by requiring them to charge supra-competitive prices to consumers.

RPM may benefit marginal consumers, but it harms inframarginal consumers

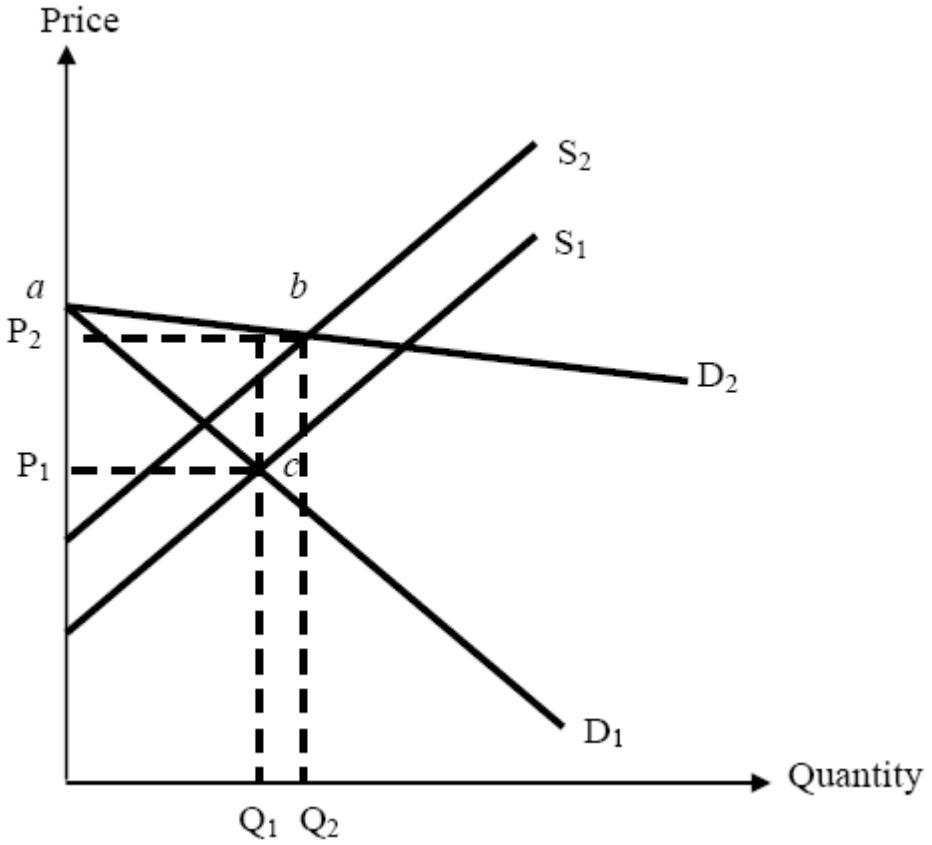
The price-raising debate does not end there, though. While acknowledging that RPM can stimulate pre-sale services, leading to increases in demand and consumer welfare, some commentators have pointed out that not all consumers share those benefits. Suppose that, instead of the demand shift depicted in Figure 1, the imposition of RPM caused a demand shift like the one in Figure 2.[21]

19 That is, at least until those investments result in actual innovation, which can reduce costs and prices.

20 This argument appears, for example, in William Baumol, et al., Amicus Brief in *Leegin Creative Leather Products v. PSKS, Inc.*, 2006 U.S. Briefs 480 (22 January 2007), p. 3. The "competitive" level, though, should take into account the cost of providing efficient pre-sale services.

21 Like Figure 1, Figure 2 appears in Blair, *supra* n.6 at 145. The ideas behind these diagrams were developed much earlier in F.M. Scherer, "The Economics of Vertical Restraints," 52 Antitrust Law Journal 687 (1983) and William Comanor, "Vertical Price Fixing, Market Restrictions and the New Antitrust Policy," 98 Harvard Law Review 990 (1985).

Figure 2. Welfare-Reducing RPM.



Why would the demand shift look like this instead of the way it looked in Figure 1? Comanor and Scherer's answer is that the customers who gain the most consumer surplus from a product are already likely to know about its positive qualities. They are also more likely to know how to use it already. Therefore, such infra-marginal consumers are harmed by the higher prices RPM tends to cause – regardless of any extra pre-sale services those prices stimulate – because most of those consumers would have bought the product anyway, even without the extra services. In contrast, the initially less informed, marginal consumers are the ones who buy substantially more because they are the ones who get most of the benefits from the extra services. "This is a plausible situation," Comanor and Scherer state, "as it is recognised that the consumers most likely to be influenced by additional pre-sale services are those 'who are indifferent between purchasing or not.'"[22]

In Figure 2, the pre-RPM equilibrium is at point c (Q_1, P_1). After RPM begins, the demand curve swings outward as if on a hinge, from D_1 to D_2, because greater services are assumed to increase the product's value to all consumers, but in varying degrees. Inframarginal customers (that is, customers who are on the part of D_1 that is above point c) value the additional pre-sale services relatively less while marginal customers (those on the part of D_1 that is below point c) value the services relatively more.

[22] William Comanor & F.M. Scherer, Amicus Brief in *Leegin Creative Leather Products v. PSKS, Inc.*, 2006 U.S. Briefs 480 (22 January 2007), p. 5 (quoting James Cooper, Luke Froeb, Daniel O'Brien & Michael Vita, "Vertical Restrictions and Antitrust Policy: What About the Evidence?" 1 Competition Policy International 45, 49, 51 (2005)).

Consumers are still willing to buy more of the product at any given price, but some consumers have a stronger response than others. Once again, the extra services induced by RPM have a cost, so the supply curve moves from S_1 to S_2. The new equilibrium is at point b (Q_2, P_2). This time, however, consumer surplus actually shrinks. Before RPM, it is represented by area acP_1. With RPM, it contracts to area abP_2.

Generally speaking, the larger the group of inframarginal customers is in comparison to marginal customers, the more likely it will be that the harm to their welfare will outweigh the increase in the marginal customers' welfare. In addition, the less price-sensitive inframarginal customers are, the more they may be harmed because manufacturers will be able to set higher prices without suffering so much of a loss in demand that overall profitability is reduced. Higher prices will, of course, also reduce the gains in consumer welfare experienced by the marginal customers. On the other hand, the more responsive customers are to greater services, the more the demand curve will shift and the more likely it will be that RPM will generate a net increase in consumer welfare.

Consequently, it is not clear that RPM always increases total consumer welfare even in situations where cartels do not initiate it, but rather it is being used strictly to boost demand. Figures 1 and 2 show that the net welfare consequences of RPM depend on how demand shifts – and on how much it shifts – in response to greater pre-sale services. As Blair points out, "[f]or all practical purposes . . . estimating the effect of RPM on consumer surplus while controlling for all other influences is problematic at best."[23] But Comanor and Scherer's point is a powerful one even if it must remain theoretical.[24] In any case, Figure 1 is purely theoretical, as well.

Still, the main point is that RPM *may* enhance total consumer welfare. Sometimes it does, and sometimes it does not. The plain fact that RPM may reduce consumer welfare in some situations is not, by itself, a strong basis for banning it in every situation.

RPM protects inefficient retailers by preventing efficient ones from competing on price

This argument is straightforward. By forcing all retailers to charge the same price, RPM prevents customers from benefitting from the lower prices that more efficient retailers would otherwise charge. Efficiency also suffers because retailers with higher cost structures are able to continue operating even though they would have been driven out of the market under more competitive conditions.

This concern is somewhat undermined by the points made in the previous section, though. While RPM may weaken price competition, the whole point of implementing it (aside from situations in which it serves as a cartel device) is to strengthen non-price competition. As a result, although it is true that inefficient retailers would have an easier time surviving with respect to pricing pressures under RPM, they would face more intense non-price competition from their rivals. Given that those rivals are more efficient, they would have higher profit margins with which to fund the pre-sale services they provide. That kind of competition could be just as effective in eliminating the inefficient retailers as low prices would have been. Furthermore, customers would benefit from those enhanced services even though they would be paying higher prices.

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23 Blair, *supra* n.6 at 146; *see also* Kneepkens, *supra* n.4 at 659 ("it may not be possible to determine whether the welfare loss for infra-marginal consumers is larger than the gain for marginal consumers").

24 Norbert Schulz recently devised an econometric model with certain assumptions that neither Comanor nor Scherer made, yet he still found that "[s]imple indications such as an increased demand due to higher service are found to provide neither a necessary nor a sufficient condition for RPM to enhance efficiency." Norbert Schulz, "Does the Service Argument Justify Resale Price Maintenance?" 163 Journal of Institutional and Theoretical Economics 236, 247 (2007).

Maximum RPM deters dealer services.

It has been said that maximum RPM should not be permitted because it may result in prices that are so low that retailers will be unable to provide the services that customers need or are willing to pay for.[25] This reasoning does not make sense, however, because if the prices were set so low as to bring about an inefficiently low level of dealer services, manufacturers would be foregoing some profit. They would therefore have an incentive to solve the problem themselves by raising the maximum price.

2.3 The Debate over Enforcement Approaches to RPM

Over the years, many economists have questioned the wisdom of making RPM illegal per se, arguing that it should be governed by the rule of reason instead. This section of the note first examines the general strengths and weaknesses of these two approaches. It then considers the arguments for and against applying each of them in the RPM context.

2.3.1 The Per Se Rule Versus the Rule of Reason: General Advantages and Disadvantages of Each

Under the approach that holds RPM to be illegal per se, whenever it can be shown that a manufacturer has agreed (or come to an understanding) with one or more resellers to control the price that the reseller(s) charge, a competition law violation will be presumed without any proof of anticompetitive effects.

The per se approach offers clarity, speed and savings in decision-making costs. There should be no doubt in anyone's mind about what is permitted and what is not under the per se approach. There is a reduced need for an agency or court to delve into intricate factual evidence and make judgments about it. Unfortunately, the per se approach is much like a sledgehammer: it has quick results, is relatively inexpensive and predictable, but it is not very careful. The per se rule will condemn some conduct that is actually pro-competitive.

Under the rule of reason approach, competition authorities and courts strive to determine whether RPM in a particular case is likely to cause net harm to consumer welfare. All the facts and circumstances of each case may be taken into account, so simply showing that a vertical price agreement exists is insufficient. There must be some proof of competitive harm. Positive effects on consumer welfare from the RPM agreement will also be considered and weighed in some fashion against any negative effects that are shown.

The strength of the rule of reason is that it can take into account a great deal of information related to the conduct. Its weaknesses are that it can take a long time and much money to perform, it is often impossible to collect the necessary data or difficult to interpret them correctly, and it is hard to predict what result the rule will yield in any particular case. It may wind up exonerating some conduct that should have been condemned, and vice-versa.

2.3.2 Which Approach Is Best for RPM?

One way to determine the answer to that question is to use the method adopted by the US Supreme Court, which presumes that the rule of reason will apply unless experience shows that the practice is always or almost always anticompetitive, in which case the practice will be deemed illegal per se. Another way is based on decision theory, which says that the best rule is the one for which the probability of error multiplied by the magnitude of harm caused by that error is lowest. There are solid reasons both for and

[25] *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

against each of those approaches, just as there are solid reasons for and against both the rule of reason and the per se rule themselves.

The US Supreme Court has held that "[t]here is a presumption in favour of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as facilitation of cartelising, rather than formalistic distinctions; [and] that interbrand competition is the primary concern of the antitrust laws[.]"[26] Per se treatment is appropriate only for conduct that "almost always tends to restrict competition and reduce output"[27] or is, in other words, "manifestly anticompetitive."[28] All of those factors point in favour of a rule of reason approach toward both maximum and minimum RPM.

Indeed, those factors set up an especially strong case for applying the rule of reason to maximum RPM. In terms of the economics literature, it is widely agreed that maximum RPM comes nowhere near the category of "manifestly anticompetitive." Posner sums up what is now the conventional wisdom: "[U]nless the supplier is a monopsonist he cannot squeeze his dealers' margins below a competitive level; the attempt to do so would just drive the dealers into the arms of a competing supplier. A supplier might, however, fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position. . . . It would do this not out of disinterested malice, but in its commercial self-interest."[29] The latter use of RPM would, as discussed earlier, be beneficial to consumers, as well. Of course, it is still possible that the maximum price might really serve as a signal for what is actually a de facto minimum price, which would certainly not be beneficial to consumers. That possibility alone, however, does not seem to be enough to warrant a per se prohibition of maximum RPM in light of the positive effects it may have.

Regarding minimum RPM, the Supreme Court's paradigm still favours the rule of reason. Economic theory indicates a number of possible negative effects on competition and welfare. But economic theory also indicates a number of pro-competitive effects. To sum up the conclusions of Part 2, theoretical work on RPM shows that it can facilitate cartels and/or raise prices. With respect to cartels, there is poor theoretical support for the conclusion that RPM frequently serves as a facilitating device. Concerning the fear that RPM causes price increases, it has been shown that such increases can strengthen interbrand competition by encouraging resellers to provide more pre-sale services that stimulate demand for a product. Therefore, the bottom line from the abstract perspective is that RPM does not go hand in hand with cartels and even if it does tend to cause prices to rise, one cannot conclude that there is necessarily a net anticompetitive effect.

As a group of eminent economists recently stated, "In the theoretical literature, it is essentially undisputed that minimum RPM can have pro-competitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects. . . . The position absent from the literature is that minimum RPM is most often, much less almost invariably, anticompetitive."[30] They concluded, therefore, that the economics literature provides no support for applying the per se rule. Some European commentators agree: "[E]conomically speaking, the prohibition of resale price maintenance in European

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26 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988).

27 *Id*. at 726-27.

28 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977).

29 *State Oil Co. v. Khan*, 93 F.3d 1358 (7th Cir. 1996), *reversed*, 522 U.S. 3 (1997). Posner wrote his decision (in which he followed but criticised then-binding Supreme Court precedent holding that maximum RPM was illegal per se) in the hope that it would be reversed.

30 Baumol, et al., *supra* n.20 at 16. Although the Comanor/Scherer point about inframarginal customers remains valid, even they do not view it as a reason to continue treating all RPM as per se illegal. *See* Comanor & Scherer, *supra* n.22 (endorsing a hybrid approach in which manufacturer-initiated RPM is subject to a rule of reason approach and retailer initiated RPM is illegal per se).

law is incomprehensible. . . . [A] general ban, in other words a prohibition per se, cannot optimise the market results from an economic point of view, because it means that all positive effects which are achievable through the application of price maintenance would be prohibited or only realisable in another way at greater cost."[31] "[T]he current per se ban on RPM should be relaxed, since RPM may have pro-competitive as well as anti-competitive effects."[32]

With respect to RPM's demonstrable effects, it seems to be generally accepted that RPM does raise prices.[33] Beyond that, the available empirical evidence is scant and dated, and it does not show that RPM almost always tends to restrict competition and reduce output. On the contrary, it points in the other direction. Perhaps most importantly, it indicates that RPM is not commonly used to facilitate cartels. Therefore, it refutes a major argument for applying the per se rule. For example, one study found that only ten percent of the RPM cases brought by the USFTC between 1942 and 1983 concerned cartels.[34] Another study focused on the 153 reported RPM cases at the USFTC during the period 1976 to 1982. The author, Pauline Ippolito, found that cartels were alleged in only 5.9 percent of the cases. She concluded that there was little evidence to support the idea that collusion is a key motive for manufacturers when they impose RPM.[35] Looking at allegations in litigated cases is not necessarily the ideal approach, but these studies are among the very few that have been done so there is not much choice available.

Turning to the retailer cartel theory of RPM, there is some evidence – again decades old – indicating that dealers have occasionally been able to persuade manufacturers to impose RPM and play the role of a cartel enforcer. But the same study also found that in over 91 percent of the RPM cases for which information on the retail market structure was available, at least 100 retailers were in the relevant market. That fact suggested that widespread collusion among retailers was unlikely, leading to the conclusion that RPM probably was not motivated by colluding dealers in most cases.[36] Furthermore, Ippolito found that only about seven percent of the RPM cases in her sample involved allegations of dealer collusion. She therefore concluded that "this evidence suggests that, on the margin, a relaxation of the *per se* rule against RPM would primarily affect non-collusive uses of RPM."[37] Regardless of whether such evidence is viewed as merely inconclusive or as sufficient to establish that RPM does not have harmful economic effects overall, it cannot support application of the per se rule under the US Supreme Court's standards.

Another problem with using the per se rule is that it encourages companies to look for other ways to achieve the same or similar results. Firms may decide to use methods that are more harmful to competition and/or less efficient than RPM unless those methods are per se illegal, too. For many years in the US, for example, the practice of granting exclusive territories to retailers was evaluated under the rule of reason

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31 Rainer Olbrich & Carl-Christian Buhr, "Who Benefits from the Prohibition of Resale Price Maintenance in European Competition Law?" 26 European Competition Law Review 705, 712 (2005) (translating quotations from other authors).

32 Kneepkens, *supra* n.4 at 656.

33 *See, e.g.*, Areeda & Hovenkamp, *supra* n.7 ¶ 1604b, at 40.

34 Stanley Ornstein, "Resale Price Maintenance and Cartels," 30 Antitrust Bulletin 401, 423 (1985).

35 Pauline Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation," 34 Journal of Law & Economics 263, 281 (1991).

36 Thomas Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence, USFTC Bureau of Economics Staff Report, pp. 80, 133, 145 (1983) (survey of RPM cases litigated by the FTC between 1965 and 1982). For a critical view of the value of the Ippolito and Overstreet studies, see Richard Brunell, "Overruling *Dr. Miles*: The Supreme Trade Commission in Action," 52 Antitrust Bulletin 475, 508-511 (2007).

37 Ippolito, *supra* n.35 at 282.

while RPM was per se illegal. That, as many commentators noticed, was an odd antitrust policy. Exclusive territories eliminate *all* intrabrand competition within a given geographic market, whereas RPM eliminates only price-based intrabrand competition and allows several intrabrand rivals to exist within a given geographic market. The same inconsistency existed with respect to vertical integration and exclusive dealing, both of which may eliminate intrabrand competition entirely but are evaluated with the rule of reason. US antitrust policy finally came around to a consistent position on vertical restraints with 2007's Supreme Court decision *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, which swept RPM into the rule of reason fold.[38] This is not necessarily to say that the rule of reason approach is best, but only that there is some economic logic to the idea that vertical restraints should be treated in a symmetrical manner.[39]

Discussing *Leegin* at this point is anticlimactic. Its outcome is already well known and we have already reviewed its main analytical underpinnings, for the Court considered most if not all of the ideas that have been discussed in this paper. Nevertheless, *Leegin* is a landmark decision. It is also a good backdrop for discussing the merits of the per se approach versus the rule of reason approach to RPM.

In *Leegin*, a majority of the Supreme Court ruled that RPM is no longer subject to the per se rule in the US. Instead, RPM will be evaluated under the rule of reason. The facts are typical for an RPM case. Leegin, the defendant, supplied leather goods to retailers under an RPM program. Leegin argued that it imposed RPM to give its retailers the profit margins that were necessary for them to provide certain services to customers, and to protect its brand image and reputation from the harm that would be done to it by discounting. The plaintiff, a retailer, nevertheless sold Leegin's products at a discount. After the plaintiff refused to stop discounting, Leegin stopped supplying the plaintiff, who responded by filing an antitrust lawsuit alleging that Leegin's RPM program was illegal per se. The trial court, following then-valid precedent, refused to hear the testimony of Leegin's expert economist, who would have testified that Leegin's RPM policy had procompetitive effects. Such testimony would have been irrelevant under the per se rule. The jury eventually sided with the plaintiff and awarded damages.

On appeal, Leegin argued that the per se rule is inappropriate for RPM cases and that they should be governed by the rule of reason. The Supreme Court reviewed its standards for using the per se rule instead of the rule of reason, mentioned the results of the "few recent [empirical] studies documenting the competitive effects of resale price maintenance," and went over the main theoretical arguments both for and against RPM.[40] All of those factors have already been discussed above. Finding no support for the conclusions that RPM always or almost always tends to restrict competition and decrease output or that RPM is manifestly anticompetitive, the Court decided that the per se rule is inappropriate.

That would seem to be the end of the matter. There simply are not enough theoretical or empirical reasons to justify treating RPM as a per se violation. So it appears to be clear that the better approach is to use the rule of reason.

Or does it? Not everyone thinks so, and some of the dissidents' arguments merit attention.

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38 127 S. Ct. 2705 (2007). Maximum RPM had already been moved into the rule of reason category in *State Oil v. Khan*, 522 U.S. 3 (1997).

39 "[I]t is important to bring the law governing non-price and price restraints into congruence. From an economics perspective, vertical price and non-price restraints are substantially identical in effect. . . . [T]here is no justification for treating the two types of restrictions [differently] where sound economic analysis fails to support the distinction[.]" Baumol, et al., *supra* n.20 at at 3.

40 *Leegin*, 127 S. Ct. at 2715.

Before examining those in detail, though, consider the broad objectives that should be achieved in selecting a rule for evaluating RPM. What general characteristics would an excellent policy toward RPM have? The basic features of a desirable approach to RPM are no different from the basic features of a desirable approach to the abuse of a dominant position. The latter have been identified in a previous Note as:

- *Accuracy* – the approach should be based on widely accepted economic principles and yield minimal costs from false positives and false negatives
- *Administrability* – it should be relatively easy to apply
- *Applicability* – the wider the scope of conduct the approach can cover well, the better
- *Consistency* – it should yield predictable results
- *Objectivity* – it should leave no room for subjective input from the decision-maker
- *Transparency* – the approach and its objectives should be understandable[41]

Keeping those characteristics in mind, consider one of Maurice Stucke's observations. He points out that the US Supreme Court's recent rejection of the per se rule for RPM looks puzzling from at least one vantage point.[42] While the Court reasoned that the per se rule might be responsible for increasing litigation costs by promoting "frivolous" lawsuits,[43] it has also recently fretted over the high risk of inconsistent results by antitrust courts.[44] Yet that risk is much higher under the rule of reason than under the per se rule, and a considerable portion of the blame for that fact lies with the Court itself. Indeed, the Court's totality-of-economic-circumstances rule of reason has drawn criticism from many sources, again including the Court itself.[45] While progressively constricting the applicability of the per se rule to vertical restraints over the past century, the Court also enlarged the domain of a rule of reason approach that leaves much to be desired in terms of the six characteristics above.[46] Stucke argues, for example, that the rule of reason provides little predictability to market participants. It also subjects litigants and courts to "sprawling, costly, and hugely time-consuming" litigation.[47]

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41 OECD, *Competition on the Merits*, DAF/COMP(2005)27 at 23.

42 Maurice Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 University of California, Davis Law Review 1375 (2009), available at http://ssrn.com/abstract=1267359.

43 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007).

44 *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2395 (2007).

45 Stucke, *supra* note 42 (citing *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958)).

46 This trajectory began in 1919 with *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (limiting per se treatment for RPM to cases in which there is an actual agreement between a manufacturer and a reseller to fix prices, as opposed to recommended prices, and permitting manufacturers to refuse to deal with resellers who don't follow the recommended prices) and continued through the years with decisions that applied the rule of reason instead of the per se rule, such as *White Motor Co. v. United States*, 372 U.S. 253 (1963) (exclusive territories), *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977) (other vertical, non-price restraints), *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum RPM), and *Leegin*, 127 S. Ct. at 2712 (minimum RPM).

47 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560 n.6. (2007).

In Stucke's view, *Leegin* is a trade-off in which the Supreme Court definitely sacrificed some intra-brand competition in exchange for a possibility of greater inter-brand competition.[48] While acknowledging that RPM often increases retail prices, the Court reasoned that "prices can be increased in the course of promoting pro-competitive effects."[49] But consumers pay more while waiting for these pro-competitive benefits, Stucke argues. Moreover, the more differentiated the brands are, the less significant inter-brand competition is relative to intra-brand competition.

Stucke's perspective on this aspect of the case could be criticised as an exaggeration. When reading the arguments in *Leegin* and the literature it cites regarding whether RPM is pro- or anti-competitive, one can lose sight of the fact that the issue in the case was not whether to take the major step of exonerating RPM altogether. Instead, the issue was whether to take the smaller step of moving RPM into the sphere of the rule of reason. Consequently, to say that the Court sacrificed one type of competition for another gives an impression of certainty that might be too strong. Whether such a sacrifice would be in consumers' best interests in a given case is what the rule of reason should (ideally) determine, taking into account factors such as the probability and magnitude of higher prices and the effects of brand differentiation. In any event, Stucke is right that the need to take such considerations into account adds to the unpredictability of the rule of reason, and his view that *Leegin* was a trade-off may turn out to be accurate in practice.

Another critic, Richard Brunell, takes aim at the Court's logic with several arguments designed to establish that "abandoning the *per se* rule is bad policy and that the Court's policy analysis was woefully inadequate[.]"[50] Brunell does not take issue with the consensus view that RPM can be used to affect competition both positively and negatively. What he objects to, in the main, is the idea that RPM should be illegal per se only if it always or almost always tends to restrict competition and decrease output. That, in his view, is an overly simplistic test because it hinges on frequency alone. The correct test, he asserts, would take into account the probabilities and magnitudes of the harms and benefits that RPM could cause, as well as the cost of conducting the test. Stated another way, the best approach is the one that minimises the sum of the expected values of the costs of false positives, false negatives, and decisionmaking. The "almost or almost always anticompetitive" standard does not do that because it ignores the magnitude component of the expected values of false negatives and false positives. Instead, it considers only the probability component. Furthermore, it ignores the high administrative cost of using the rule of reason (and the relatively low administrative cost of using the per se rule).

Brunell's criticism does have some force. It is perfectly sensible to multiply the probabilities of harm and benefit to competition by their magnitudes, and to take into account the decisionmaking costs. But in the end, his attack is undermined by its own implications. The root of the problem is that, as Brunell himself points out, there is insufficient data on the probabilities, harms, benefits, and decisionmaking costs to prove – using his decision theory method – that the rule of reason is superior to the per se rule for evaluating RPM. It is asking quite a lot to expect that there would be such data. Furthermore, there is also insufficient data to prove that the per se rule is superior to the rule of reason. Brunell's response to this data shortage is to default to the per se rule.

But if per se illegality is the correct default rule when there is insufficient data to satisfy his test, then per se rules should be in force for virtually every area of competition law enforcement, as the problem of inadequate data is not unique to RPM. That would mean that, having finally arrived at the generally held view that economics-based, effects-oriented approaches to enforcement are best, the competition community would find itself right back in a form-based world if it followed Brunell's reasoning.

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48 Stucke, *supra* note 42.

49 *Leegin*, 127 S. Ct. at 2718.

50 Brunell, *supra* n.36 at 476.

Of course it is possible that if all the necessary data were available, Brunell's test would yield the result that a per se rule is superior to the rule of reason. But it is unclear why he is sure that the best per se rule would be a prohibition. What if the optimal policy is to make RPM per se *legal*? Brunell does not even address that outcome, but it is possible. At the very least, it would generate even more administrative cost savings than a per se ban, as there would be no need for any investigation or court proceedings whatsoever concerning RPM. Implementation could not be any easier, more predictable or more transparent.

Brunell does find a flaw in *Leegin* when he points out that the Court not only gave little guidance on what issues to consider under the rule of reason in RPM cases, but gave no guidance at all on how to evaluate arguments and evidence that a defendant's RPM program is pro-competitive. The decision is likewise silent regarding how important it is, if at all, to consider whether less restrictive alternatives were available. Finally, the decision contains no guidance on whether and how courts should weigh RPM's harms and benefits to competition against each other. That lack of direction heightens the uncertainty inherent in the rule of reason and Brunell predicts that as a result, public and private parties will be reluctant to bring RPM cases. In fact, he asserts, the legal status of RPM in the US under the rule of reason will probably become the same as non-price vertical restraints: de facto legal per se.[51] That, in turn, is likely to lead to greater boldness on the part of business – perhaps too much boldness.[52]

Some European commentators have voiced similar misgivings about the practical feasibility of a rule of reason approach to RPM, even though they are not necessarily in favour of the per se approach, either. Waelbroeck, for example, observes that "it is fair to say that there is no conclusive view today as to how to deal with resale price maintenance . . . . Taking into consideration that the economic criteria to assess [vertical] restraints 'are still either too crude or too costly to apply to allow for efficient rules and a structured rule of reason,' it is difficult to argue that fixed or minimum prices should not be [illegal per se]."[53] The fact that the US Department of Justice issued and then withdrew guidelines on vertical restraints supports Waelbrock's point.[54]

Obviously, there can be differences between theoretical economics and practical realities, and the reality is that the rule of reason in practice has some drawbacks. This is not to say that the per se approach does not have its practical problems, as well – it does. As is so often the case in competition policy, there is no perfect solution to the question of how to treat RPM.

2.3.3 What Should A Rule of Reason Approach to RPM Look Like?

But if a jurisdiction does adopt a rule of reason approach to RPM, as the US has just done, what would a sensible approach be? The objective is to determine whether RPM is likely to have net anti-

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51 *Id*. at 518 & n.188 (citing Douglas Ginsburg, "Vertical Restraints: De Facto Legality Under the Rule of Reason, 60 Antitrust Law Journal 67 (1991)).

52 That prediction inexplicably ignores a fact that Brunell points out immediately thereafter in his article: RPM is still unlawful under the laws of many U.S. states, and they will not necessarily follow *Leegin*. Brunell, *supra* n.36 at 518-19. But that, in any event, is an idiosyncrasy of the American legal system. Brunell's point could be pertinent in some other jurisdiction if it adopted an approach like the one in *Leegin*.

53 Waelbroeck, *supra* n.2 at 98 (quoting R. Boscheck, "The EU Policy Reform on Vertical Restraints – An Economic Perspective," 23 World Competition 3, 22 (2000).

54 US Department of Justice, Vertical Restraints Guidelines (1985); (Anne Bingaman, Assistant Attorney General, "Antitrust Enforcement, Some Initial Thoughts and Actions," speech before the Antitrust Section of the American Bar Association (10 August, 1993) (withdrawing the Guidelines)).

competitive effects in individual cases. Ideally, it will permit welfare-enhancing and welfare-neutral applications of RPM while disallowing those that reduce welfare. Based on the points made in Part 2, some factors to consider under this approach are:

How much market power the defendant manufacturer has, if any

The less market power a manufacturer has, the less likely it is to harm competition by implementing an RPM program, provided it does so on its own, independent initiative (*i.e.*, it does not impose RPM to join a cartel of manufacturers or to facilitate a cartel of retailers). When a manufacturer has little or no market power, all else being equal, there will be more rivals, or at least stronger rivals, available to preserve interbrand price competition. A manufacturer that does have market power, though, might use RPM as a device to raise entry barriers by cutting off distribution outlets for competing products. The manufacturer, in other words, could offer RPM as an enticement to retailers in exchange for their agreement not to sell rival goods.

The collective share of all manufacturers in the market who use RPM

This factor is easiest to evaluate when the defendant is a monopolist. In that situation, it clearly points in the direction of not permitting the RPM, as was just explained. The analysis becomes more difficult in oligopolistic markets where there are several defendants who have begun, or may begin, to engage in RPM one after the other as soon as one of them decides to do it, even though there may be no reason to believe they have actually agreed to do that. The other manufacturers might not initially want to use RPM but could implement it anyway because they fear losing their distributors to rival manufacturers who use RPM. Interbrand price competition may suffer as a consequence. Therefore, if the manufacturing market is oligopolistic, it will be necessary to investigate the likelihood of this domino effect. An important factor in that inquiry will be how closely the firms have followed each other's behaviour in the past.

Furthermore, the higher this collective share, the more plausible the concern that RPM is being used to facilitate a cartel.[55] Widespread use of RPM in a market is a necessary, but not sufficient, condition for both manufacturer and retailer cartelisation schemes that rely on RPM. A large percentage of the market being covered by RPM agreements is consistent with a scenario in which manufacturers have agreed to fix their prices via RPM. Likewise, it is consistent with strong dealers coercing manufacturers into enforcing their retail-level cartel. A significant complication is that substantial RPM coverage is also consistent with strong, healthy interbrand competition in a market where unilaterally imposed RPM makes distribution more efficient.

Finally, the more of a market that is operating under RPM, the more likely it is that consumers are being deprived of a meaningful choice with respect to prices.

Whether RPM was initiated by a manufacturer or dealer(s)

This should be a major consideration. When RPM is initiated by a manufacturer, horizontal collusion is much less likely to be the motive than when RPM is initiated by a dealer or a group of dealers. Furthermore, there is substantial support in the economics literature for the proposition that manufacturer-

[55] In determining the portion of the market covered by RPM, vertically integrated firms should be counted as manufacturers who impose RPM. Areeda & Hovenkamp, *supra* n.7 ¶ 1606g6, at 96.

initiated RPM is welfare-enhancing. There seems to be little or no support of that kind, however, for retailer-initiated RPM.[56]

The standard checklist of general factors that affect the plausibility of a successful cartel

The more these factors point toward the likelihood that a cartel could be maintained in the market, the more of a concern RPM is, all else being equal.[57]

The reasons given by the defendant(s) for imposing RPM

Are they pro-competitive? Are they plausible? For example, is the defendant a new or small firm that is using RPM simply to help it establish (or re-establish) a foothold in the market?

How well the relevant product matches the profile of a product for which overall consumer welfare is likely to be enhanced by RPM

Products with that profile include, for example, complex goods that need to be demonstrated or that otherwise require substantial sales assistance and customer education; goods likely to benefit substantially from certification by highly reputable retailers; and goods for which customers desire other associated services that can be free-ridden. The more of these traits the product market has, the less likely it is that a cartel is responsible for imposing RPM. On the other hand, when RPM is imposed on goods for which extra pre-sale services are not likely to sway many customers, it becomes more likely that a cartel is behind it, especially if much of the market is covered by RPM.

Whether pre-sale services increased after RPM began (or, if no before-and-after comparison is possible, whether pre-sale services have increased while RPM has been in effect)

Neither manufacturer cartels nor retailer cartels aim to increase profits by providing better service to customers. Instead, they increase profits by giving customers no alternatives and raising prices. Pre-sale services are destabilising for cartels because colluders can offer more of them as a means of steering extra business to themselves while still technically complying with their commitment to charge a certain price. Therefore, one may expect cartel agreements not only to set price levels, but to impose some kind of restriction on services, as well. That suggests it is less likely that a cartel is present when services are significant and increasing in a market.[58]

Whether any other vertical restrictions, such as territorial restraints, are used in tandem with RPM

If they are, a manufacturer cartel – if there is one – would be more stable. It was mentioned above that RPM may have to be combined with other vertical restraints to combat cheating in manufacturer cartels. Even in the absence of a cartel, multiple vertical restraints can severely curtail intrabrand competition.[59]

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56 Comanor & Scherer, *supra* n.22 at 2; *see also* Richard Posner, Antitrust Law 177 (2d ed. 2001) (advocating the use of this factor in a rule of reason test for RPM).

57 *See, e.g.*, OECD, Public Procurement, The Role of Competition Authorities in Promoting Competition, DAF/COMP(2007)34, Background Note at 21-23.

58 Kneepkens, *supra* n.4 at 661.

59 *See* Robert Steiner, "The Nature of Vertical Restraints," 30 Antitrust Bulletin 143 (1985) (noting that RPM combined with exclusive dealing is particularly harmful to intrabrand competition).

How output changed in response to RPM

It has been proposed that welfare-reducing RPM can be distinguished from welfare-enhancing RPM by examining the practice's effect on output.[60] A decline in output after RPM is implemented suggests that a cartel may be responsible. Cartels use RPM as a device to stifle competition and keep prices at supra-competitive levels, not to win more business by enhancing retail services. Higher prices with no additional services rarely stimulate demand; they are far more likely to bring about lower demand and lower output. Of course, it is also possible that output will decline simply because RPM was a failure, not because it is part of a cartel scheme. Customers' demand response to the additional services RPM promotes may be too small in comparison to the customers' response to the higher price. If so, that will cause demand and output to fall. When that happens, however, the manufacturer should be willing to discontinue its RPM program without any prompting from the legal system because it would be selling less without receiving a higher wholesale price.[61]

In contrast, RPM that is used to promote more efficient distribution (usually through greater pre-sale services) should increase output. In principle, therefore, a good rule of reason test is simple to design: If output shrinks when RPM is introduced then manufacturers should either voluntarily stop using it or face possible legal consequences; if output increases then RPM passes the test. Marvel acknowledges that applying the test to real cases would be difficult, mainly because before and after data will probably be unavailable. He therefore views the output test as a desirable component, not the entirety, of a rule of reason test for RPM.

Comanor and Scherer, however, have raised theoretical qualms about exonerating defendants based on increased output alone. They point out that, as illustrated in Figure 2 above, even if output expands after RPM is imposed, it is still possible for consumer welfare to decline. In fact, they contend that "[t]he assertion that output-expanding resale price maintenance enhances consumer welfare . . . should be recognised as a special case not applicable under plausible conditions."[62]

Taking their point into account, we might derive this guidance from the output test:

1. If output decreased then either RPM was a failure and rational manufacturers should voluntarily abandon it or RPM is the work of a cartel that fully intends to impose higher prices without providing greater services (though defendants should be given an opportunity to explain why they are maintaining a financially irrational program).

2. If output remained steady or increased then cartel explanations can be rejected, but the welfare implications are still indeterminate due to the Comanor/Scherer point.

The burden of proof

An important aspect of any rule of reason approach is where it places the burden of proof. Would RPM be given a presumption of lawfulness, forcing the plaintiff to establish its harmful effect on competition in every case? Or would RPM be presumed illegal unless the firms wishing to use it could demonstrate its net benefit to consumers? How that question is answered is probably the most important

60 This idea stems from various works by Robert Bork, including "A Reply to Professors Gould and Yamey," 76 Yale Law Journal 731 (1967) and "Resale Price Maintenance and Consumer Welfare," 77 Yale Law Journal 950 (1968), as well as Howard Marvel & Stephen McCafferty, "The Welfare Effects of Resale Price Maintenance," 28 Journal of Law & Economics 363 (1985).

61 Kneepkens, *supra* n.4 at 658 & n.9.

62 Comanor & Scherer, *supra* n.22 at 2.

feature of the rule of reason in RPM cases because whoever bears the burden of proof is much less likely to prevail. In fact, Blair considers the assignment of the burden of proof to be a "dispositive" issue in RPM cases that are evaluated according to the rule of reason.[63]

Evidence will be hard to find in most industries because there will usually be no "before and after" data with which to determine RPM's actual effect on output and on customers. Furthermore, even in a market where there is before and after data on RPM, how can anyone prove that – all else being equal – RPM does or does not generate greater sales by promoting services like certification? All else will rarely, if ever, be equal. What if output declined but it would have declined even more if not for RPM? The challenge of sorting out RPM's effects from those of other forces is likely to be a formidable one.

Consequently, putting the burden on defendants to show that their RPM enhances efficiency may not turn out to be much different from per se illegality. Without any experience with which to compare their particular market with and without RPM, defendants' efficiency claims will be all too easy to reject as mere pretext. By the same token, putting the burden on governments and private plaintiffs to prove an anticompetitive effect may wind up closely resembling per se legality.

2.3.4 Short Cuts to the Full Rule of Reason Approach

Rather than performing a full evaluation of the facts and circumstances in each RPM case, the agency or court might adopt a modified approach that quickly eliminates cases in which it is especially unlikely that RPM is harming competition. This "safe harbour" approach has been used with a number of other types of conduct, such as mergers and non-price vertical restraints. A safe harbour, for example, might automatically allow the conduct in question if the defendant's market share does not exceed a certain level. Thresholds based on overall market concentration might also be used. At one time, market share-based approaches were used by both the EC and the US agencies for evaluating certain vertical restraints. The American agencies abandoned that method, though, and the EC's safe harbour expressly omits RPM.[64]

One objection to the use of market share-based safe harbours for RPM is that they are poorly suited to RPM instigated by retailers. More precisely, the objection is that retailer-initiated RPM is rarely if ever justified; therefore, it should never be given a safe harbour. Market-share based thresholds, however, would do exactly that in cases where the thresholds are not exceeded, without any consideration of who was actually responsible for starting the RPM program.

Another approach offers the possibility of abbreviating the analysis in quite a different way. Instead of quickly identifying cases in which RPM will be allowed, this screen would speed matters up by imposing rebuttable presumptions of illegality in certain cases. It was suggested by Professors Comanor and Scherer in their amicus brief in the *Leegin* case. Although the Supreme Court chose not to adopt it, it

63 Blair, *supra* n.6 at 149.

64 Commission Regulation (EC) 2790/99 (22 December 1999) para. 10; US Department of Justice, Vertical Restraints Guidelines (1985); *see also* (Anne Bingaman, Assistant Attorney General, "Antitrust Enforcement, Some Initial Thoughts and Actions," speech before the Antitrust Section of the American Bar Association (10 August, 1993) (withdrawing the Guidelines and noting that they "unduly elevate theory at the expense of factual analysis")). The EC's block exemption applies to firms with a market share below 30 percent, though the Commission may still impose regulatory restraints when parallel networks of similar vertical restraints collectively cover more than 50% of the relevant market. When those safe harbors do not apply, the EC uses a rule-of-reason approach. Under the former US guidelines, the vertical restraint would not be challenged if, among other things, the percentage of the overall market being supplied by firms that had adopted the practice was below 60 and the market share of the firm being challenged was below ten percent.

is worth discussing. Their idea is this: When RPM is induced by manufacturers, use a rule of reason analysis. When RPM is induced by retailers, consider it to be unlawful unless the defendant(s) can prove that the RPM is not anticompetitive. This short cut, as far as it goes, has the advantages of being objective, predictable, easy to understand and easy to implement. (The analysis may not be very easy in the manufacturer-induced RPM cases, but Comanor and Scherer have a short cut for those, as well. It will be discussed shortly.)

In addition to their approach's objectivity, predictability, transparency and administrability, Scherer and Comanor add that it would also be accurate, correctly identifying the cases that deserve per se treatment. They emphasise that economic theory offers no support for the idea that reseller-initiated RPM enhances competition or consumer welfare. "In such circumstances," they add, "RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values, unless one subscribes to the notion that protecting small retailers is desirable in its own right."[65] To illustrate the significance of what is at stake, the authors note that when a legal loophole allowing retail pharmacies in the US to push for and benefit from RPM was closed, their profit margins slowly fell from an average of 40 percent to about 20 percent, translating into a savings for consumers and insurers of US$40 billion.[66] Note that the authors are referring to profit margins, not price levels. That blunts the pro-RPM argument that higher prices due to RPM were probably not detrimental to consumers, who allegedly would have benefited from the greater pre-sale services that RPM stimulated. At least, the figures do not suggest that the pharmacies were competing away their financial gains from RPM by spending them on greater investments in non-price competition.

What about Comanor and Scherer's plan for the cases in which manufacturers are the source of RPM? Their suggested short cut for those cases is based on the premise that RPM is most likely to harm consumers when it is used widely in the relevant market. "In such circumstances, consumer choice is restricted to goods bearing high distribution margins in the absence of possible lengthy and energy-guzzling shopping trips. And if under the umbrella of high margins, most retailers engage in substantial pre-sale promotion, their efforts will largely cancel each other out in the aggregate, leading to a high-price, high-margin, high promotional cost equilibrium with relatively little if any expansion of demand."[67] With that in mind, the authors suggest a structural approach in which the per se rule is invoked if the volume of resale-price-maintained sales in the relevant market exceeds a given threshold (they suggest 50 percent, or alternatively a Herfindahl-Hirschman Index above 1800) and the defendant's RPM sales add at least another given amount of volume (they suggest ten percent, or an HHI increase of at least 100). When both thresholds are exceeded there would be a presumption of illegality, which the defendant(s) could rebut by showing that RPM was needed to ensure that efficient services were provided by retailers, that the market definition was too narrow, that consumers actually had plenty of other (non-RPM) choices left, etc.

Although Comanor and Scherer do not specifically say so, one may presume that in manufacturer-induced RPM cases where at least one of the thresholds above is not met, their recommendation would be to apply a presumption of legality that could be rebutted by the plaintiff. Regardless of whether the structural thresholds are crossed, though, one party or the other will benefit from a presumption under the Comanor/Scherer approach, which is equivalent to assigning the burden of proof to the other party. Because carrying that burden is likely to be so difficult, this approach is indeed likely to result in significant judicial economy. Plaintiffs would be much less likely to bring cases with structural features that would not result in a presumption of illegality, and defendants would be much less likely to litigate cases in which that presumption applied. Whether that is a desirable outcome, given that in most cases it

65 Comanor & Scherer, *supra* n.22 at 8.

66 *Id*.

67 *Id*. at 9.

would probably come at the expense of ignoring the non-structural factors discussed in Part 2.3.3., is open to debate. Then again, the whole point of the approach is to be able to ignore those factors. They are the source of most of the uncertainty and subjectivity that would affect the rule of reason approach, making it slower and more expensive. The Comanor/Scherer approach is a calculated risk. It does not aim for a perfectly accurate outcome in every case, but for a compromise between procedural efficiency and accuracy across all cases.

3. RPM in Practice: Approaches and Recent Events in a Selection of OECD Jurisdictions

3.1 European Union

In the EU, most restraints in agreements concerning supply and distribution are permitted unless there is market power. The 1999 block exemption regulation for vertical cooperation agreements recognises that parties may make such agreements to manage the distribution chain so as to improve efficiency. It also recognises that smaller-scale agreements are unlikely to affect competition either upstream or downstream. Therefore, the regulation applies a market share screen that exempts most agreements from Article 81 as long as they involve a supplier with a market share under 30 percent.[68]

When a vertical agreement involves a supplier with a share over 30 percent, there is still no presumption that the agreement is a violation of Article 81. But with increasing market power come increasing concerns that vertical agreements might impair competition by foreclosing other suppliers, raising barriers to entry or reducing interbrand competition and facilitating collusion. Therefore, a rule of reason standard applies.

Setting minimum resale prices, however, is a practice that remains prohibited regardless of market share. In effect, RPM is treated as a *per se* infringement, at least with respect to minimum prices.[69] Article 4(a) of the block exemption regulation excludes agreements that cause a "restriction of the buyer's ability to determine its sale price" from the regulation's purview. That leaves such agreements vulnerable to Article 81 (1) of the EC Treaty, which prohibits agreements that "directly or indirectly fix purchase or selling prices". Recommending a resale price or requiring resellers to respect a maximum resale price is sometimes permitted, though. Specifically, maximum RPM is allowed up to the 30 percent market share threshold, provided that the result is not a fixed or minimum sale price due to pressure or incentives from the supplier.[70] Beyond that market share level, the rule of reason applies, with most attention focused on how much (if any) market power the supplier has and on the market position of its competitors. Interestingly, some territorial restraints on resale are permitted, such as those that protect exclusive dealership systems, preserve functional distinctions between wholesalers and retailers or prevent resale of components leading to competition with the supplier.[71]

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68 Commission Regulation (EC) 2790/99 (22 December 1999).

69 Technically, even minimum RPM could be permitted if no appreciable effect on the market can be expected. In practice, however, European courts have never held that an RPM agreement fits that description. Kneepkens, *supra* n.4 at 656 n.3.

70 *See Volkswagen AG v Commission*, Court of First Instance Case T-208/01 (3 December 2003) (manufacturer who issued circulars and warnings to dealers urging them not to deviate from non-binding recommended resale prices was not liable for fixing prices); *but see* Commission decision *Nathan-Bricolux*, OJ[2001] L 54/1, paras. 86-90 (finding that setting maximum prices in conjunction with prohibiting discounts and rebates was equivalent to fixing resale prices).

71 OECD, European Commission – Peer Review of Competition Law and Policy (2005), p. 24.

3.2 United States

The per se treatment of RPM died a slow death in the US. First declared to be unlawful in 1911, RPM's legal status followed a labyrinthine legal history at the federal level throughout the rest of the 20th century. The Supreme Court started chipping away at the contours of the per se rule against RPM as early as 1919. By the 1980s the complete removal of RPM from the per se rule's domain was inevitable. The Court finally made the change in 2007's *Leegin*.

The 1911 decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, rested in part on the belief that RPM's effects were no different from those of horizontal price fixing among retailers.[72] Although from today's perspective it is easy to criticise the Court for drawing that parallel, it is not too difficult to excuse it, either. Nearly 50 years would pass before Lester Telser explained why manufacturers may impose RPM even though they do not benefit when retailers form cartels.[73]

The 1919 decision *United States v. Colgate & Co.* and a line of cases that interpreted it guaranteed manufacturers the right to announce suggested retail prices and to refuse to deal with resellers that do not follow those suggestions, provided the manufacturer acts unilaterally and any decision by a dealer to comply is an independent one.[74] In other words, RPM is not a violation unless there is an agreement, express or tacit, between the manufacturer and the cooperating dealers. *Colgate* was the beginning of the end for the per se rule's applicability to RPM in the US. In theory, at least, any manufacturer that wanted to skirt the per se ban could still impose RPM as long as it avoided actual RPM agreements and was willing to terminate uncooperative resellers.[75] *Colgate* also set up an inconsistency in US antitrust policy toward RPM, for it meant that what a manufacturer was absolutely not permitted to achieve directly through RPM it might achieve indirectly through refusals to deal. Most if not all other jurisdictions have no exception like the *Colgate* doctrine. In the EU, for example, such indirect methods for achieving RPM-like results are specifically not tolerated.[76]

Beginning in 1937, Congress passed certain laws that amended the Sherman Act to make RPM legal in many circumstances.[77] Those amendments were repealed in 1975. In the late 1970s and the 1980s, the Court narrowed the range of conduct covered by *Dr. Miles* and overturned the per se rule against vertical non-price restraints, replacing it with a rule of reason approach.[78] This created an awkward situation in which the Court was willing to take into account the possibility that vertical, non-price restraints on intrabrand competition can have positive welfare effects that outweigh the harm such restraints might do to

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72 *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

73 Lester Telser, "Why Should Manufacturers Want Fair Trade?" 3 Journal of Law & Economics 86 (1960).

74 250 U.S. 300 (1919).

75 In practice, the *Colgate* doctrine has not been altogether useful to businesses. *See* Frank Mathewson & Ralph Winter, "The Law and Economics of Resale Price Maintenance," 13 Review of Industrial Organization 57, 62 & n.11 (1998) (noting that during some of the doctrine's history it was considered that "the normal business relationship between a manufacturer and a retailer includes communication that precludes the doctrine").

76 *See* EC, Guidelines on Vertical Restraints ¶ 47, 2000 O.J. (C 291) 1, 11 (specifically banning RPM via indirect methods such as "threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations"); *see also* Waelbroeck, *supra* n.2 at 96 n.42 ("it is clear that there is no equivalent of the *Colgate* doctrine in EC Competition law").

77 These laws were the Miller-Tydings Resale Price Maintenance Act (1937) and the McGuire Act (1952).

78 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

interbrand competition. But vertical price restraints, which economists had been arguing could balance out the same way, were still illegal per se.

There was a partial resolution in 1997, when maximum RPM lost its status as a per se violation of the Sherman Act. Having been ruled illegal per se in a widely criticized 1968 decision,[79] maximum RPM was moved within the rule of reason's domain for the reasons discussed in Part 2.3.2.[80] Based on the outcomes so far, it appears that maximum RPM may as well have been made per se legal.[81]

In 2007's *Leegin*, the Court adopted the rule of reason for all vertical restraints. But in doing so, it might have replaced one convoluted approach with another one. The desirable features of a good rule of reason test have already been discussed. If *Leegin* had described such a test thoroughly and clearly, then the shift away from *per se* liability might have been less controversial. But it did not. The Court left it to lower courts to do the hard work of figuring out how to distinguish "good" RPM from "bad" RPM, cautioning them to "ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[82] One commentator has already declared that what the lower courts have been asked to do is something that cannot be done. "The implication of the economic analysis is plain: there is no way to conduct a rule of reason test that will resolve the issue of whether the promotional use of RPM is unreasonable."[83]

Leegin offers only three suggestions to lower courts regarding what factors to consider in future RPM cases. First, the number of manufacturers using RPM is relevant because the more of a market that is operating under RPM the easier it is to maintain a cartel and the more likely it is that consumers are being deprived of a meaningful choice. Second, whether RPM was initiated by manufacturers or resellers matters because when it is the latter, cartel facilitation is more likely to be the real motive behind the RPM.[84] Finally, the Court stated that lower courts should consider whether the manufacturer or retailer(s) involved in the RPM agreement have market power. If the manufacturer has market power, then it might be using RPM essentially to bribe resellers not to carry competitors' products. The more market power a retailer has, the harder it is for a manufacturer to avoid its request for RPM by switching to other distributors.

Either more information than that should be considered in a rule of reason inquiry into RPM or some kind of short cut along the lines of the EU's or the ones suggested by Scherer and Comanor should be built into it. *Leegin* offers no clues about how much RPM coverage in a market is too much, how much market power is too much, or whether and how to use the output test. Consequently, lower courts may encounter some difficulty when looking toward *Leegin* for guidance.

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79 *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

80 *State Oil v. Khan*, 522 U.S. 3 (1997).

81 *See, e.g., Mathias v. Daily News*, 152 F.Supp. 2d 465 (S.D.N.Y. 2001) (summary judgment against maximum RPM claim) (cited in Marvel, *supra* n.16 at 4).

82 *Leegin*, 127 S. Ct. at 2720.

83 Blair, *supra* n.6 at 150-51. Blair contends that the Court was well aware of the impossibility of its assignment. He therefore infers that the Court intended to confer de facto per se legality on RPM. *Id.*

84 The Court also reasoned that retailer-initiated RPM might serve to shield a dominant, inefficient retailer from more efficient or innovative competitors. While that is true with respect to price competition, the Court's reasoning breaks down when non-price competition is considered. A more efficient retailer would have higher profit margins and could use them to fund a greater level of service than the inefficient dominant retailer offers. It might also take market share by offering "free" goods together with the item covered by RPM, thereby technically complying with the RPM policy but offering the customer a better deal nonetheless.

An example of this occurred in June 2008 when a federal appeals court issued a decision that relied on *Leegin.* Plaintiff Toledo Mack Sales & Service, Inc. ("Toledo") was an authorised dealer of heavy-duty trucks supplied by defendant Mack Trucks, Inc. ("Mack"). Mack required its dealers to sign agreements giving each of them an area of responsibility ("AOR") – a geographic territory that the agreements did not describe as exclusive. In fact, Mack's stated policy is that its dealers are free to make sales wherever they wish. Acting on that policy, Toledo aggressively sought to sell Mack trucks throughout the US by undercutting other dealers' prices. Mack, however, warned Toledo to stop competing on price with other Mack dealers. Eventually, Mack terminated Toledo as an authorised dealer.[85]

Toledo then brought a lawsuit, alleging that Mack had violated Section 1 of the Sherman Act, among other things. At trial, Toledo introduced evidence that there was an unwritten, horizontal agreement among Mack dealers according to which dealers would not engage in price competition with each other. Toledo also submitted evidence that Mack had a vertical agreement with its dealers under which they were deterred from selling outside their own AORs (despite official policy). As part of that agreement, Mack announced that it would delay or deny wholesale price discounts to dealers who sold outside their AORs. Finally, Toledo introduced evidence indicating that Mack's vertical agreements with its dealers came about largely as a result of pressure from the dealers.

The district court granted judgment as a matter of law against Toledo's claim that Mack had violated Section 1 of the Sherman Act. "Judgment as a matter of law" means that even if all the evidence presented at trial by a party is assumed to be true and every reasonable inference from it is drawn in that party's favour, the court still cannot grant judgment for that party because the evidence is legally insufficient. On appeal, therefore, the ultimate merit of Toledo's claim was not at stake; instead, the issue was only whether the claim was supported by evidence sufficient to allow it to proceed to a jury. The appellate court determined that it was and therefore reversed the district court's decision.

It requires a very broad definition of RPM to view Mack's alleged agreement with its dealers as belonging in that category of conduct. The agreement said nothing about resale prices. Instead, it seems to be more aptly characterised as a territorial restriction. Nevertheless, the appellate court relied on *Leegin* for the principle that when "a vertical agreement setting minimum resale prices" is entered for the purpose of facilitating a horizontal cartel, the vertical agreement is evaluated under the rule of reason.[86] If that is an error by the appellate court, though, it could be considered an error without significance. Even if the vertical agreement had been characterised as a territorial restraint, after all, the rule of reason still would have been applicable.

But in light of the factors that the appellate court considered in its rule of reason analysis and the fact that the court looked to *Leegin* for guidance, it is clear that the court have benefited from more thorough instructions in *Leegin* – if they had been there. The appellate court listed four factors that, according to its own precedents, are relevant when evaluating restraints of trade under the rule of reason:

> (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.[87]

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85 *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008).

86 *Id*. at 225 (quoting *Leegin*, 127 S. Ct. at 2717).

87 *Id*. (quoting *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998)).

Those factors simply do not encompass enough information to enable a court to make an intelligent decision about whether a vertical restraint should be unlawful or not. In fact, they do not encompass *any* of the information necessary for such a decision. The first and fourth factors do not belong in the rule of reason analysis. The first one is a prerequisite for doing a rule of reason analysis in the first place. The fourth one concerns the narrow question of whether the particular party that brought the case is entitled to relief in the event that the defendant's conduct is deemed anti-competitive, not the larger question of whether the conduct harmed competition and consumers. The second and third factors, rather than shedding light on two crucial decisions that must be made, simply assume that those decisions have been made already. The whole point of going through the rule of reason process is to determine whether the restraint is anti-competitive and, ultimately, illegal. To say that those considerations are themselves part of the rule of reason analysis is to create a useless feedback loop.

Perhaps sensing that those four factors were not especially helpful, the court also discussed two of the three factors identified in *Leegin*, the source of the restraint and whether the manufacturer or retailer has any market power. The court then analysed whether Toledo's evidence on each factor was sufficient to go to the jury.

The evidence was deemed easily strong enough regarding whether Mack and its dealers contracted, combined or conspired among each other and whether the source of the restraint was pressure by retailers. But the court then referred to precedent holding that the "adverse, anti-competitive effects" factor could be satisfied simply by showing that the defendant has market power. Toledo's expert had testified that Mack had power in two markets; therefore, for purposes of reviewing a judgement as a matter of law ruling, the appeals court was satisfied with Toledo's evidence on anticompetitive effects. The equation of market power with anticompetitive effect is especially troubling in an RPM context, given that the court stated that market power "is the ability to raise prices above those that would prevail in a competitive market."[88] While helpful as an indicator of market power in other situations, the use of this condition as a proxy for anti-competitive effects in RPM cases has the potential to be unjust for defendants and consumers alike. RPM does, after all, often raise prices even when it increases consumer welfare. Granted, it is true that in markets where RPM increases consumer welfare, the concept of a "competitive market" should take into account that the RPM price itself should probably be deemed competitive, and that should exonerate the defendant. But it is difficult to have confidence that courts will correctly identify such situations when the reason they are looking into that issue in the first place is to try to decide whether RPM is pro- or anti-competitive. This is another useless feedback loop.

Leegin could have done away with such problems but it did not. Given that even the courts of appeal are still having difficulty articulating a reasonable rule of reason, it is hard not to agree with Stucke's conclusion that the rule of reason provides little predictability to market participants.

3.3 United Kingdom

When the Competition Committee last held a roundtable on RPM in February 1997, two types of products were still exempt from the general ban on RPM in the UK: books and branded, over-the-counter (OTC) medicaments. Since then, both exemptions have been revoked. The book exemption was struck down in March 1997.[89] Four years later the Restrictive Practices Court eliminated the exemption for medicaments – a decision that had almost immediate effects on pricing. Within hours of the Court's decision, some supermarkets announced price cuts of 25 to 50 percent on leading brands of products such

88 *Id*. at 226 (quoting *United States v. Brown University.*, 5 F.3d 658, 668 (3d Cir. 1993)).

89 Michael Utton, "Books Are Not Different After All: Observations on the Formal Ending of the Net Book Agreement in the UK," 7 International Journal of the Economics of Business, 115 (2000).

as painkillers, cough remedies and vitamins. Each percentage point off average prices was estimated to have saved consumers £16 million per year.[90]

Of more recent interest are two cases decided simultaneously by the Court of Appeal in 2006. The cases, joined because their facts and issues were so similar, involved agreements to fix the prices of replica football gear manufactured by Umbro Holdings Ltd and of toys and games manufactured by Hasbro UK Ltd. In each case, the Court affirmed decisions of the Competition Appeal Tribunal finding that the agreements had been made by a manufacturer and at least two retailers, that the agreements were both vertical and horizontal, and that they were unlawful.[91]

The football gear case primarily involved three retailers: JJB Sports, the largest sports retailer in the UK; Allsports, which was roughly half JJB's size; and Sports Soccer, a smaller discounter. Umbro, the manufacturer, had exclusive licences to produce the goods at issue: official England and Manchester United replica football gear. The driving forces behind the agreements in this case do not fit neatly into a pattern of either purely manufacturer-driven RPM or purely retailer-driven RPM. Instead, Umbro and the two larger, non-discounting retailers all wanted an agreement on minimum prices. Pressure flowed both from JJB and Allsports to Umbro and from Umbro to Sports Soccer.

The Competition Appeal Tribunal had found that JJB possessed both "considerable market power" based on its market share and "considerable bargaining power" due to the size of its orders from Umbro.[92] While it was true that Umbro had an exclusive licence to make the gear, which was considered essential for any sportswear dealer, it was also true that Umbro was dependent on JJB. In 2000, for example, the value of JJB's orders of Umbro-branded products was double the value of its orders of Umbro's replica gear. JJB "could have caused Umbro real difficulties by switching some or all of its branded product purchases to a rival such as Nike. Umbro therefore felt under pressure . . . to do whatever it could to assuage any commercial concerns expressed to it by JJB."[93] One of JJB's commercial concerns was putting a stop to Soccer Sports' discounting on replica gear. JJB therefore exerted pressure on Umbro to do something about it.

There are a few other crucial facts. First, Allsports also exerted pressure on Umbro to put a stop to retail discounting. Second, several retailers including JJB and Allsports communicated with each other through Umbro, signalling that they would not price below a certain level so long as none of the others (including Soccer Sports) did. Third, in response to the pressure from JJB and Allsports, Umbro procured discounter Sports Soccer's grudging consent not to price below that level by threatening it with supply cutbacks. But before agreeing, Sports Soccer demanded – and was given – assurances that the other retailers would not go below that price, either.[94]

Interestingly, Umbro was found to have been hostile to discounting even without pressure from JJB and Allsports. The company wanted to maintain a high price in order to preserve its exclusive, authentic

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90 OECD, Competition Law and Policy in 2001-2002 (Annual Report of the United Kingdom), available at www.oecd.org/dataoecd/33/29/2489084.pdf.

91 *Argos Ltd and another v Office of Fair Trading; JJB Sports plc v Office of Fair Trading*, Court of Appeal (Civil Division), [2006] EWCA Civ 1218.

92 *Id.*, para. 49.

93 *Id.*

94 *Id.*, paras. 55-57, 92.

image with customers. Nevertheless, Umbro had not taken action unilaterally to curtail discounting; it was the pressure from JJB and Allsports that actually caused Umbro to threaten Sports Soccer.[95]

That such a fact pattern led to a finding in the OFT's favour is not unexpected, given that both vertical and horizontal price-fixing agreements are illegal per se in the UK. But the fact that a vertical price fixing agreement came about at least substantially as a consequence of pressure from retailers who had effectively agreed among themselves to fix prices is noteworthy. At the least, it casts some suspicion on the idea that RPM never facilitates retailer cartels.

It would be easier to dismiss the football gear case as an aberration were it not for the fact that it was accompanied by another case that involved very similar conduct. The toys and games case primarily involved two retailers, Argos and Littlewoods, which are the two major catalogue retailers in the UK. Hasbro is one of the country's largest manufacturers of toys and games. As in the football gear case, the price-fixing agreements at issue were found to be both vertical and horizontal.

Some retailers (it is not clear which ones) put pressure on Hasbro because they were not content with the margins they were earning on certain Hasbro products. Hasbro was fearful that its products would be de-listed (*i.e.*, that retailers would stop carrying its products) if it could not help the retailers increase their margins on its products. Again, it is not clear precisely where the pressure was coming from, but it is known that Argos and Littlewoods are both much larger companies than Hasbro in the UK, and that each of them carried more Hasbro products than just the particular ones at issue in this case.[96]

Hasbro responded to the retailers' concerns by designing a "pricing initiative" that aimed to persuade retailers to follow Hasbro's recommended retail prices. It knew that the initiative was unlikely to be successful unless both Argos and Littlewoods participated in it. It also knew that each of those two retailers was especially worried about undercutting by the other. Hasbro therefore assumed the role of a central coordinator, much like Umbro did with respect to its dealers, procuring agreements from Argos, Littlewoods, and other retailers that they would follow the recommended prices as long as the other retailers did. Hasbro also communicated reassurances to the participants as it obtained agreements from more retailers.[97]

The Court of Appeal upheld the OFT's finding that there were unlawful bilateral, vertical agreements to fix prices between Argos and Hasbro, and between Littlewoods and Hasbro. It also upheld the finding that even though there was no evidence of direct communications between the two retailers, their respective agreements with Hasbro "were contingent on each other and . . . formed part of a pattern of continuous conduct with a common objective. The parallel bilateral agreements or concerted practices, thus linked, were to be read together as one agreement or concerted practice between the three companies."[98] In other words, Argos and Littlewoods could not escape liability for horizontal price fixing just because they used a middleman to collude with each other. They and their competitors had effectively formed a cartel that was facilitated by Hasbro's RPM program.

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95 *Id.*, paras. 41, 58.

96 *Argos Limited & another v Office of Fair Trading*, Competition Appeal Tribunal [2005] CAT 13, para. 130.

97 Office of Fair Trading Case CP/0480-01, "Agreements Between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd Fixing the Price of Hasbro Toys and Games" (21 November 2003), paras. 42-55.

98 *Argos Ltd and another v Office of Fair Trading; JJB Sports plc v Office of Fair Trading*, Court of Appeal (Civil Division), [2006] EWCA Civ 1218, para. 116.

Those who downplay or deny outright the significance of retailer cartel-inspired RPM may view these two cases as merely nettlesome anomalies. For others who believe that such arrangements are not so rare, the cases offer an affirmation that doubts grounded purely in theory do not necessarily stop anticompetitive conduct from happening.

3.4 Germany

In Germany, as in a number of countries, the bookselling industry is exempted from a general ban on RPM.[99] In fact, RPM is actually required by law in the bookselling industry.[100] The official reason for this has little to do with traditional economics or competition policy. The act's self-described purpose is to protect books as a cultural asset by ensuring that a broad selection of books are available to customers through a large number of points of sale.

Book publishers set the retail prices of their books, and the German Book Traders' Association oversees the enforcement of the RPM system. In setting the prices, publishers must take into account the contributions made by smaller booksellers toward the objective of supplying books on a broad basis, as well as the professional service they offer. Publishers are not permitted to supply non-traditional booksellers (*e.g.*, large supermarkets, variety stores) on better terms or at lower prices than they sell to traditional booksellers.

One of the concerns motivating this policy is that, without it, some retailers might engage in "cream skimming." Cream skimming in the context of the retail book market involves stocking only popular book titles and selling them at a discount rather than absorbing the expense of stocking a deep inventory of titles. This practice, it is feared, would take business away from traditional booksellers who rely on the profits from selling popular titles at full price to subsidise the cost of stocking less popular books.[101] The non-discounting booksellers would supposedly be forced either to go out of business or to pursue the same strategy as the cream skimmers. Both outcomes leave the public with poorer access to books, dampening the level and diffusion of culture in society.

In 1997, when the Committee last considered this topic, the Secretariat noted that the cream-skimming argument "seems to be belied by the experience in some countries where discounting of books is permitted."[102] The growth of national chains of medium-sized book shops advertising discounted best-sellers had been followed by the development of national chains of large-scale stores with extensive selections and services. Furthermore, although the internet was in a very early stage of development at that time, the background note observed that on-line booksellers raised the possibility "that all titles, even the most obscure, can be readily available to consumers without being carried in the local book shop. From this viewpoint, RPM, while it might be an aid to the preservation of particular merchants, could impede the development of new and more efficient distribution systems. Here, dealer-induced RPM could be seen as an attempt to prevent the emergence of new forms of competition."[103]

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99 France and Korea, for example, have such exemptions in place.

100 Buchpreisbindungsgesetz (Book Resale Price Maintenance Act), amended 14 July 2006.

101 *See* Jürgen Backhaus & Reginald Hansen, "Resale Price Maintenance for Books in Germany and the European Union: A Legal and Economic Analysis," 8 Current Issues in Competition Theory and Policy 299 (2002) (arguing that were it not for such cross-subsidisation, the "end result would be a smaller number of highly successful products with the downside that the large diversity of products would suffer.").

102 OECD, Resale Price Maintenance, OCDE/GD(97)229, p. 9.

103 *Id.*

Today, some internet-based booksellers that sell to customers in Germany do carry a deep inventory of titles that any traditional book shop would be hard-pressed to match, and their development does not seem to have been impeded by RPM. That may be because direct, cross-border sales of German-language books to customers in Germany are specifically exempted from the law requiring RPM, thanks to a settlement agreement with the European Commission.[104] In any event, the success of large internet booksellers undermines the cream-skimming argument. Not only are they able to sell at lower prices but in some ways they offer significantly better service than traditional bookshops. The internet sellers have a very large selection of titles as well as a wealth of information about each book, including professional and amateur reviews and suggestions for further reading. In addition, some of them have begun to include listings for used books on the same page that describes the new copies that are for sale, enabling customers to save even more if they choose to do so. Finally, these virtual bookstores are accessible to anyone, anywhere – in big cities and villages alike – provided one has access to a computer and an internet connection.

Could the main result of the continuation of Germany's RPM system for books therefore be the preservation of a retailer cartel, rather than the preservation of German culture? Some academics insist this is not so. Backhaus and Hansen note that a cartel would raise prices above the competitive level and reduce output. They then state:

> As has become apparent by now, the [RPM] agreements result in fixed prices but not in an output reduction. In addition, the agreements do not result in a uniform price; the individual publishers remain free to set their prices at whichever level they desire, and they compete among each other with both prices and the quality of their product or better, product lines. Hence, speaking of a cartel overextends the appropriate meaning of the economic term and does not add to clarity. In conclusion, we note that the . . . agreements do not eliminate price competition, but that they do have a cultural effect in that through cross subsidisation cultural diversity is being supported. This diversity implies that some books, the trend-driven publications may be priced higher, but that a large number of books will also be priced lower than otherwise they would be. The overall price effect is not an increase, and ending the agreements would therefore not result automatically in a decrease of the overall book price levels.[105]

This argument can be criticised on several grounds. First, it is not clear how the authors can be so confident that RPM has not resulted in output reduction. Because RPM has been in effect for a very long time in Germany's book industry, obtaining data for a before-and-after comparison would be rather difficult. Second, the point about publishers remaining free to set prices at whatever level they desire and to compete with each other is not very pertinent if the problem is a cartel at the retail level. Price competition *is* eliminated at that level (*i.e.*, the price that one retailer charges for a given book versus the price that some other retailer charges for the same book). Third, it is also unclear how the authors can be certain that the overall price effect of the RPM system is not an increase, but just a redistribution of revenues from some titles to others.

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104 Buchpreisbindungsgesetz, section 4; *Sammelbrevers und Einzelrevers*, [2002] 4 CMLR 1278.

105 Backhaus & Hansen, *supra* n.101.

3.5 Norway

Some empirical insights about the effect of RPM in the book industry are available in a study just released by Norway, which curtailed its exemption for RPM in the bookselling industry a few years ago. In July 2008, the Norwegian Competition Authority issued a report on the effects of a 2005 agreement that substantially limited the RPM system that had governed sales of books in Norway since 1998. Whereas the old system had prevented anyone other than book clubs from discounting the retail price of new books, the new agreement extends that right to every book retailer. Furthermore, the waiting period for new releases, during which no retailer may price below the RPM price, was shortened from 24 to 16 months.[106]

The reform of Norway's RPM system for books could have gone much farther than it did. For example, there is still a waiting period during which full RPM remains in effect for new titles. In addition, even when that period ends, retailers are permitted to discount only up to 12,5 percent off the publisher's fixed price. That might lead one to wonder whether the new agreement could possibly make any difference, as the recommended prices could simply be raised by 12,5 percent to begin with, so as to nullify the effect of subsequent discounting.

As it turns out, however, even these measures have had noticeable and positive effects. The report's main findings are that the new agreement has not only led to greater output, but to a greater variety of book titles sold and to lower prices, as well.[107] During the years 2004 through 2007, the average price of books in Norway fell by about four percent even though the consumer price index had risen by about five percent. Meanwhile, the total number of books sold as well as the total number of titles sold each increased by about 30 percent.[108] Norway's experience with RPM for books therefore casts some doubt on the need for exemptions such as Germany's, even on the basis of cultural preservation. It also suggests that eliminating RPM altogether in these markets might be the best policy choice.

3.6 Switzerland

Switzerland's Competition Commission initially examined RPM in the Swiss books market in 1999, finding it to be unlawful. After an appeal, the Federal Supreme Court sent the case back to the Commission, asking it to consider whether fixed book prices could be justified on the basis of economic efficiency. After investigating whether RPM led to an increase in choice, variety or sales due to an increase in the number of retail outlets or better sales advice, the Commission concluded that such positive effects could not be proven. RPM in the book market was therefore considered an unlawful restraint.[109] This sets up an interesting conflict with Switzerland's neighbor, Germany. An important fact to bear in mind, however, is that under Swiss law the Competition Commission could not consider whether RPM was desirable on the grounds of cultural policy.[110]

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106 The parties to these agreements were the Norwegian Booksellers Association and the Norwegian Publishers Association. Other aspects of their RPM system were eliminated, as well. For example, traditional booksellers no longer have the exclusive right to sell school books. For more details, see Norwegian Competition Authority, "The Development of Sales in the Book Industry 2004 to 2007," Report 1/2008 (July 2008).

107 *Id*. at 5.

108 *Id*. at 9.

109 See Competition Commission, Annual Report 2005, available at www.weko.admin.ch/publikationen/index.html?lang=en&PHPSESSID=7530f7afcd2ca73b980d00dffdb2cd4f

110 Cartels Act (RPW 2005/2, p. 269 et seq.).

4. Conclusion

Even though RPM reduces intrabrand price competition, it is not clear that it reduces consumer welfare. RPM does not always enhance consumer welfare, either, even if output increases. With such ambiguous welfare implications, it is not possible to know a priori whether RPM is generally helpful or harmful to consumers. Therefore, it cannot be deemed either purely pro-competitive or purely anti-competitive. That fact has led most commentators to oppose treating RPM as a per se violation.

The alternative of evaluating RPM under a rule of reason approach is not altogether satisfactory, either. The rule of reason is more time-consuming, more expensive, and less predictable than the per se rule. Safe harbours and other shortcuts may be helpful, but the more they are used the greater the likelihood of erroneous outcomes.

Most of the theoretical pros and cons of RPM have been well-known for at least 20 years. What is needed is more empirical work. Mathewson and Winter observed ten years ago that there was not a great deal of empirical evidence on RPM and their observation remains valid today.[111] There is a continuing need for further studies on the actual motivations for and effects of RPM.

[111] Mathewson & Winter, *supra* n.75 at 80.

NOTE DE RÉFÉRENCE

1. Introduction

C'est en 1997 que s'est tenue la dernière table ronde sur les prix de vente imposés du Comité de la concurrence qui a débattu de la pratique relative aux produits culturels et édités. Depuis lors, des développements importants ont eu lieu, et davantage encore interviendront dans un avenir proche. Tout d'abord, les économistes ont continué à étudier et à débattre des prix de vente imposés et de leurs effets, ajoutant aux nombreux écrits qui existaient déjà au milieu des années 90. En second lieu, la Cour Suprême des États-Unis a cessé de considérer les prix de vente imposés comme une violation de la concurrence per se, et a adopté l'application de la règle de raison. En troisième lieu, les prix imposés demeurent la cible préférée des agences d'exécution dans de nombreux autres pays membres de l'OCDE, où ils restent une infraction per se. Par conséquent, il y a aujourd'hui une divergence importante entre la politique des États-Unis et celle des autres pays membres. En dernier lieu, le traitement des prix imposés dans l'Union Européenne sera probablement considéré lors de la rédaction de la prochaine révision du Règlement d'exemption par catégorie des accords verticaux (l'actuel règlement expirera en 2010).

La principale question des ouvrages de doctrine sur les prix de vente imposés a longtemps été de savoir s'ils étaient illégaux per se ou soumis à la règle de raison.[1] Au cours des 20 dernières années au moins, la plus grande part des commentateurs a développé des arguments contre l'approche per se, et elle persiste dans presque tous les pays de l'OCDE.[2] Toutefois, quelques voix nouvelles s'élèvent en sens inverse, aussi cette note apporte-t-elle un nouveau regard sur le débat per se/règle de raison. La question de savoir à quoi ressemble une bonne approche de la règle de raison pour les affaires de prix de vente imposés constitue un sujet étroitement lié et controversé. Toutes ces questions sont traitées dans la 2ème partie après avoir exposé les thèses en faveur et contre les prix de vente imposés du point de vue du bien-être des consommateurs.

La troisième partie aborde les prix de vente imposés dans la pratique en étudiant les approches employées par certains pays dans les affaires de prix de vente imposés ainsi qu'une petite sélection de décisions judiciaires. Certains des pays où les prix de vente imposés sont illégaux per se ont défendu l'idée de les autoriser– et au moins dans l'un des cas de les imposer – dans certaines industries. Certaines de ces exemptions ont récemment été abandonnées, ce qui nous donne la possibilité de comparer comment les consommateurs s'en tirent sans prix de vente imposés.

1 L'approche de la règle de raison est d'examiner le caractère raisonnable du comportement d'une société à la lumière de tous les faits et circonstances pertinents de chaque cas.

2 *Voir par exemple*, Denis Waelbroeck, "Vertical Agreements: 4 Years of Liberalisation by Regulation n. 2790/99 After 40 Years of Legal (Block) Regulation," chez Hanns Ullrich (éd.), The Evolution of European Competition Law 85, 93 (2004) (citant S. Bishop & M. Walker, The Economics of EC Competition Law 167 (2002) et J. Tirole, The Theory of Industrial Organisation 188 (1988)).

2. Les prix de vente imposés dans la théorie économique

2.1 Qu'est-ce que les prix de vente imposés?

L'expression "prix de vente imposés" englobe un certain nombre d'engagements relatifs aux prix entre les sociétés amont et aval. La catégorie la plus répandue implique un fournisseur qui convient avec des revendeurs de ne pas facturer le produit du fournisseur aux clients en dessous d'un prix donné, laissant les revendeurs libres de vendre à n'importe quel prix au dessus de ce plancher ("prix de vente imposé minimum "). Parfois, un prix particulier est imposé (le revendeur ne doit pas vendre au-dessus ni en dessous de ce prix). Les sociétés peuvent aussi convenir d'un prix plafond, en laissant les revendeurs libres de vendre à n'importe quel prix en dessous de ce niveau ("prix de vente imposé maximum ").[3] Sauf définition contraire, l'expression "prix de vente imposé" dans la présente note fait référence au "prix de vente imposé minimum", dans la mesure où ils sont beaucoup plus répandus que les prix imposés particuliers et les prix de vente imposé maximum.

Les prix de vente imposés requièrent que les revendeurs se conforment à certaines conditions de prix. Au contraire, les recommandations de prix non contraignantes émanant des sociétés aval ne sont généralement pas considérées comme des prix imposés et sont autorisées. Même lorsque les sociétés aval ont recommandé des prix ou les ont imprimé directement sur l'emballage du produit, ceci n'est pas considéré comme un prix de vente imposé tant que les revendeurs restent libres de vendre les produits au prix qu'ils souhaitent.

2.2 Les défenseurs et les détracteurs des prix de vente imposés

Les fabricants ont imposé des prix de vente pour des raisons très variées. Certaines sont proconcurrentielles et d'autres non. Ce paragraphe examine les objectifs que les fabricants peuvent vouloir atteindre avec les prix de vente imposés. Il aborde également les effets bénéfiques associés pour les consommateurs.

De prime abord, il peut sembler que les prix de vente imposés sont évidemment nocifs pour les consommateurs. Après tout, l'essence des prix de vente imposés est de maintenir des prix au détail supérieurs à ce qu'ils seraient autrement. Si l'on poursuit à ce niveau superficiel, les prix de vente imposés peuvent également apparaître comme une pratique curieuse car il est d'ordinaire dans l'intérêt du fabricant de réduire les bénéfices des revendeurs, et non de les accroître. A savoir un fabricant devrait préférer des prix de revente aussi bas que possible car ils correspondraient à une demande des consommateurs aussi étendue que possible. Une demande plus importante au détail se traduit par une plus forte demande en gros. On s'attendrait donc à ce que les fabricants encouragent des prix bas et la concurrence entre leurs distributeurs, et c'est en fait ce que les fabricants font en général.

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3 De nombreuses autres variantes sont possibles, comme celles contenues dans les lignes directrices émises par la Fair Trade Commission au Japon : prix qui doivent suivre un pourcentage de remise fixé par rapport au prix de vente suggéré par le fabricant ; prix qui doivent se situer dans une certaine fourchette; prix qui doivent être approuvés à l'avance par le fabricant; et prix qui ne doivent pas être inférieures à ceux appliqués par les magasins des alentours. *Voir* JFTC, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act (11 juillet 1991), Chapitre 1, Section 2.(4); *voir également* Commission européenne, Lignes directrices sur les restrictions verticales (2000/C 291/01) para. 47 (mentionnant également les accords qui fixent la marge de distribution et étendant la définition des prix de vente imposés pour inclure la coopération atteinte indirectement par des méthodes comme les menaces, l'intimidation, les mises en garde, les amendes, les retards, suspensions des livraisons et les résiliations liés au respect ou– au non-respect– d'un niveau de prix donné).

Toutefois ce raisonnement ne prend en compte que les effets des prix sur la demande. D'autres facteurs influencent également la demande, et ils ne correspondent pas nécessairement bien avec les prix au détail parfaitement concurrentiels. En fait, les fabricants ont parfois de bonnes raisons de limiter la concurrence entre leurs revendeurs, et beaucoup sont proconcurrentielles

2.2.1 Utilisations et effets renforçant le bien-être (ou au moins dénués d'effet négatif)

Les arguments les plus fréquents selon lesquels les prix imposés ont des effets pro-concurrentiels tournent autour de l'idée qu'ils améliorent la concurrence entre les marques en renforçant l'efficacité de la distribution. Ils peuvent le faire en encourageant les revendeurs à fournir davantage de services pré-vente pour lesquels les clients sont prêts à payer sous la forme de prix plus élevés pour le produit concerné. Ces services pourraient, par exemple, se traduire par des espaces de vente plus attractifs, des brochures, et des vendeurs attentifs et compétents. Les prix imposés peuvent aussi potentiellement avoir d'autres effets qui renforcent le bien-être, qui sont également évoqués dans cette partie.

Encourager les revendeurs à fournir des services pré-vente efficaces.

En garantissant aux revendeurs une certaine marge bénéficiaire sur chaque unité vendue, les fabricants peuvent les motiver davantage pour qu'ils fournissent les services que les clients veulent ou dont ils ont besoin. Tout d'abord, les marges garanties par les prix de vente imposés devraient permettre aux revendeurs de fournir aux clients davantage de ces services. Ainsi, même s'ils empêchent les revendeurs de se faire concurrence sur les prix, les prix imposés renforcent leur capacité à s'engager dans d'autres types de concurrence. En fait, comme ils ne peuvent pas se faire concurrence par les prix, ils doivent trouver d'autres manières d'attirer les clients s'ils veulent rester compétitifs avec les autres revendeurs.[4] De plus, cette concurrence ne sera pas seulement tournée vers les marques concurrentes mais également vers les autres revendeurs qui vendent la même marque. En d'autres termes, les prix de vente imposés peuvent augmenter la concurrence non basée sur le prix à la fois entre les marques et au sein de la marque. En théorie, sur les marchés concurrentiels, l'investissement des revendeurs dans cette concurrence accrue non basée sur le prix devrait augmenter jusqu'à ce que les revenus supplémentaires qu'ils tirent des prix imposés disparaissent entièrement du fait de la concurrence.[5]

En second lieu, si la concurrence elle-même ne motive pas suffisamment les revendeurs pour qu'ils investissent leurs bénéfices supplémentaires tirés des prix de vente imposés dans des meilleurs services, alors la menace que le fabricant y mette fin ou démantèle le programme de prix imposés peut le faire. Ceci est en fait exactement ce qu'un fabricant sensé ferait si le revendeur ne fournissait pas des niveaux de services adaptés. Des prix de revente plus élevés sans services plus importants pourraient constituer une situation souhaitable pour le revendeur, mais pour le fabricant, c'est sans aucun doute une situation dangereuse car les ventes baisseraient, sans que les prix de gros augmentent.

Comment les services supplémentaires générés par les prix imposés se traduisent-ils par une augmentation du bien-être des consommateurs ? Certains clients achèteront le produit si ces services supplémentaires sont offerts mais ne le feraient pas s'ils ne l'étaient pas. Si l'augmentation de la demande due aux services, favorisés par les prix imposés, fait plus que compenser le ralentissement de la demande dû au prix de revente (supposé) plus élevé en raison des prix imposés, alors la demande globale et les

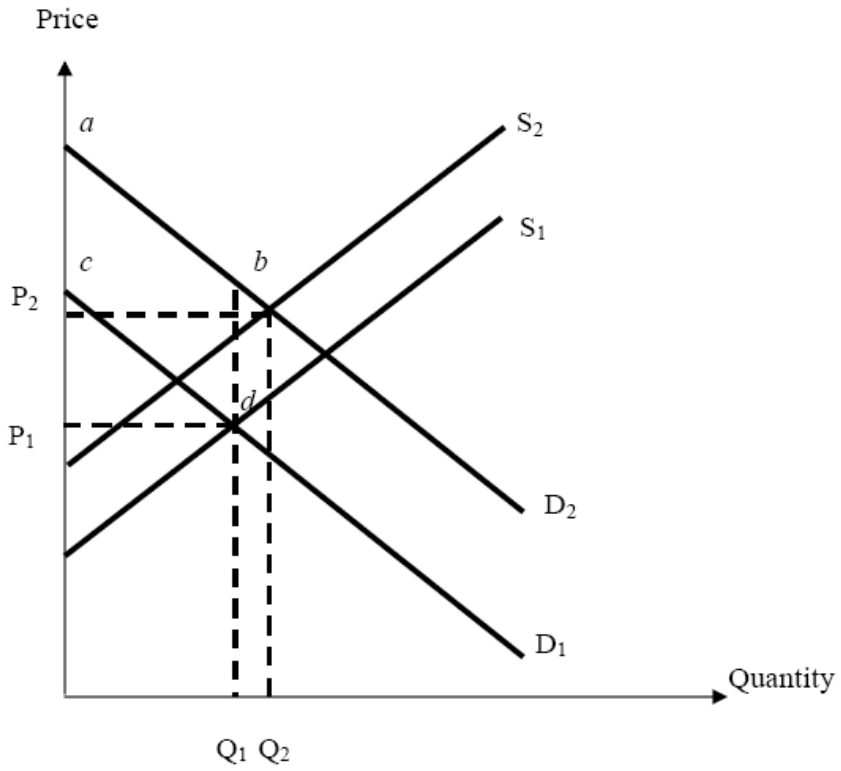
4 Mart Kneepkens, "Resale Price Maintenance: Economics Call for a More Balanced Approach," 28 European Competition Law Review 656, 658 (2007).

5 Richard Posner, Antitrust Law 173 (2ème éd. 2001).

ventes augmenteront et, généralement, il en sera de même pour le bien-être des consommateurs. Cette éventualité est représentée à la Figure 1.[6]

A la Figure 1, l'équilibre avant les prix de vente imposés se situe au point d (Q_1, P_1). Avec la mise en place des prix de vente imposés, la courbe de la demande se déplace vers l'extérieur parallèlement de D_1 à D_2 car les services supplémentaires sont sensés accroître la valeur du produit pour tous les consommateurs de manière égale. (Une hypothèse différente sera émise plus tard.) Les consommateurs veulent désormais acheter davantage de produit quelqu'en soit le prix. La fourniture de ces services supplémentaires représente un coût, toutefois, la courbe des approvisionnements se redresse aussi (de S_1 à S_2). Le nouvel équilibre se situe au point b (Q_2, P_2). Il convient de remarquer que la quantité vendue a également augmenté (Q_1 à Q_2) bien que le prix ait augmenté de P_1 à P_2.

Figure 3. Les prix imposés renforcent le bien-être.



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6 Cette courbe figure dans Roger Blair, "The Demise of *Dr. Miles*: Some Troubling Consequences," 53 Antitrust Bulletin 133 (2008), 143.

Dans ces conditions, le bien-être du consommateur (techniquement, les excédents du consommateur) augmente clairement grâce aux prix imposés. Avant l'imposition des prix, il est représenté par la zone cdP_1. Après, il devient la zone abP_2.

Combattre le parasitisme.

Les prix imposés peuvent également stimuler des services pré-vente plus importants en décourageant le parasitisme. Le parasitisme survient lorsque les clients bénéficient des services pré-vente offerts par des revendeurs qui proposent un service complet mais achètent ensuite auprès de discounteurs. Le premier supporte les coûts, mais le dernier a les revenus. Si le problème est sérieux, les revendeurs qui proposent un service complet réduiront finalement voire élimineront les services affectés, ce qui peut aboutir à une fourniture insuffisante et inefficace de ces services sur le marché. Les fabricants auront du mal à convaincre les revendeurs de proposer les services à moins que le parasitisme ne puisse être empêché. C'est que font les prix de vente imposés en mettant un terme à l'activité des discounteurs. Comme tous les revendeurs doivent vendre au même prix imposé, les clients n'auront aucun intérêt à acheter dans un magasin plutôt que dans un autre. Sans possibilité de concurrence par les prix ni de parasitisme, les revendeurs seront (sans doute) plus enclins à entamer une concurrence non basée sur le prix en offrant davantage les services pré-vente qui pouvaient être parasités en l'absence de prix imposés.

Quels types de services sont inclus dans ce groupe ? Ceux qui sont le plus souvent mentionnés comprennent des conseils d'expert et des informations de spécialistes formés, des démonstrations de produits, et des essais des consommateurs. Intuitivement, les produits qui sembleraient les plus affectés par le parasitisme sont des produits différenciés, complexes et ayant des caractéristiques spécifiques. Certains produits électroniques grand public comme les téléphones mobiles intelligents et les caméscopes haute définition en sont de bons exemples car ils peuvent se vendre mieux quand un vendeur est disponible pour expliquer leurs fonctionnalités et pour mettre en avant leurs avantages par rapport aux produits concurrents. Le problème des revendeurs qui proposent un service complet est qu'ils peuvent ne pas être ceux qui ont effectivement réalisé les ventes, car il est souvent assez facile pour les consommateurs de trouver des discounteurs qui vendent ces produits sans fournir le conseil.

Selon certains commentateurs, on a exagéré la nécessité de l'effet anti-parasitisme des prix imposés. Areeda et Hovenkamp indiquent, par exemple, que la concurrence non limitée au sein d'une marque ne cause pas beaucoup de parasitisme nuisible dans de nombreux cas. Notamment pour les marchés sur lesquels "les revendeurs ne fournissent pas de services importants (comme les drugstores qui vendent du dentifrice), les services qu'ils fournissent ne peuvent pas être utilisés par les clients qui fréquentent d'autres revendeurs (ambiance de luxe), les services sont payés séparément (réparation après-vente), les services fournis ne sont pas spécifiques à la marque. . . (grands magasins de haute qualité), les services peuvent être fournis efficacement par le fabricant (publicité), ou un nombre suffisant de clients fréquente les revendeurs qui leur fournissent le service."[7] Scherer et Ross ajoutent que les services développés sont inutiles pour les clients qui savent déjà ce qu'ils veulent et comment l'utiliser, ainsi que pour les clients qui achètent des objets bon marché.[8]

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7 8 Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1601e, au 13 (2ème éd. 2004); *voir également* Kneepkens, *supra* n.4 au 657.

8 F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 552 (3ème éd. 1990). Comme le disent les auteurs, "[le consommateur qui obtient à la petite quincaillerie près de chez lui une démonstration de dix minutes d'un couteau économe à $1.79 et qui se déplace ensuite spécialement au magasin discount pour en acheter un constitue plus qu'une exception dans la théorie économique des comportements en matière d'achat." *Id*.

Mais il y a un autre service qui est susceptible de parasitisme et il peut s'appliquer à de nombreux types de produits. Il est connu sous le nom de "certification" ou "signalisation," et sa large applicabilité signifie que le phénomène de parasitisme peut ne pas être aussi limité qu'on a bien voulu le croire.[9] Certains revendeurs investissent des sommes considérables pour sélectionner les produits qu'ils proposent en magasin, en s'assurant que seuls les produits de la plus haute qualité et/ou de style sont présents sur leur lieu de vente. Ils veulent également cultiver une réputation de fiabilité et haut de gamme en faisant des dépenses de publicité, d'ameublement du magasin, situation du magasin, etc. Avec le temps, les clients peuvent arriver à faire confiance aux choix de produits de ce revendeur et associer automatiquement les marques et les modèles qu'il vend à l'excellence et au prestige. Sans stratégie de prix imposés, les discounteurs pourraient simplement copier l'inventaire de ce revendeur sans avoir pour leur part déboursé un seul centime pour déterminer les produits qui sont les meilleurs ou acquérir eux-mêmes une réputation haut de gamme. Les consommateurs pourraient faire des économies en faisant des recherches dans les magasins chics et leurs achats dans les magasins discount. L'imposition de prix de vente aide à préserver l'effet de certification en ne donnant aucune raison aux clients d'acheter auprès de discounters, redirigeant ainsi les achats vers les vendeurs qui proposent la certification.

Areeda et Hovenkamp ne sont pas convaincus par la théorie de la certification. Ils soutiennent que les revendeurs haut de gamme sont peu susceptibles de poursuivre leurs services de certification, qui ne sont pas particulier à une marque, simplement parce qu'ils sont parasités pour quelques produits donnés.[10] La critique n'est pas très convaincante, malgré tout car même si les services de certification ne sont pas spécifiques à une marque, le parasitisme l'est. En d'autres termes, les revendeurs peuvent facilement arrêter le parasitisme en refusant de continuer à proposer les produits concernés– et seulement ces produits. C'est le résultat que l'imposition des prix voudrait empêcher. De plus, l'augmentation des achats sur Internet a renforcé l'hypothèse de la certification en rendant le processus d'achat plus facile et moins cher. Il est plus probable que jamais que les clients aillent voir les prix de certains objets dans des magasins qui offrent un service complet de bonne réputation et ensuite aillent sur Internet pour voir s'ils peuvent trouver les mêmes objets à prix discount. En fait, les clients font certainement les deux types d'achat en ligne au moins de manière occasionnelle.

Certains fabricants font des déclarations improbables sur les services soi-disant nécessaires qui sont sensibles au parasitisme. Ceci semble quelque peu subjectif, en particulier en dehors de tout contexte particulier, toutefois une certaine dose de scepticisme semble indiquée pour les services comme des heures d'ouverture pratiques, un magasin de grande taille et des vendeurs agréables. On peut raisonnablement douter que les clients se rendent effectivement dans un magasin qui offre un service complet pendant les heures où un discounteur est fermé, par exemple, puis se rendent ensuite chez le discounteur pour faire l'achat lorsque ce dernier ouvre.

Protéger l'image de la marque: empêcher les revendeurs d'utiliser le produit comme produit d'appel.

Cet argument est parfois avancé pour justifier une limitation de la concurrence par les prix entre distributeurs. Essentiellement, il soutient que lorsqu'un fabricant investit pour donner à son produit une image de qualité ou de sophistication, les réductions de prix peuvent en réalité réduire le volume des ventes. Il est rare, toutefois, que la demande puisse augmenter en maintenant des prix élevés.

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9 Howard Marvel, "The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom," 63 Antitrust Law Journal 59 (1994); Howard Marvel & Stephen McCafferty, "Resale Price Maintenance and Quality Certification," 15 Rand Journal of Economics 346 (1984); Thomas Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence, USFTC Bureau of Economics Staff Report, pp. 56-62 (1983).

10 Areeda & Hovenkamp, *supra* n.7 ¶ 1613d-g, au 156-165.

Gérer l'incertitude de la demande.

Si, contre toute attente, la demande pour un produit s'avère basse après que les revendeurs en ont acheté une grande quantité, les prix de vente au détail peuvent chuter considérablement, les revendeurs tentant de réduire leurs stocks. En conséquence, ils subissent des pertes importantes. Plus le risque que la demande soit basse et que les prix s'effondrent est élevé, moins les revendeurs seront disposés à offrir un produit (ou au moins à en offrir suffisamment s'il s'avérait que la demande soit normale ou élevée). De plus, les revendeurs tendent à percevoir une probabilité plus élevée que cela arrive avec les produits nouveaux qui n'ont pas fait leurs preuves. Puisque les prix de vente imposés assurent aux revendeurs que les prix ne baisseront pas même si la demande est faible, ces derniers peuvent être plus susceptibles d'offrir un produit qu'autrement ils n'auraient pas proposé (ou de le commander en plus grandes quantités qu'ils ne l'auraient fait autrement). Ceci, à son tour profiterait aux consommateurs car les magasins seraient plus susceptibles de maintenir des niveaux d'inventaire adaptés.[11]

Ceux qui ne sont coutumiers de cette hypothèse peuvent se demander pourquoi, en cas de faible demande, les prix de vente imposés apportent un réconfort aux revendeurs. Les prix de vente imposés dans une telle situation ne signifient-ils pas simplement qu'au lieu de liquider tous leurs stocks aux plus bas prix, les revendeurs n'en vendront qu'une partie au prix de vente imposé normal et ne recevront rien du tout pour le reste, puisqu'ils ne le vendront jamais ? Et bien oui, c'est le cas, mais l'idée que les revendeurs peuvent se reposer sur la vente d'au moins une partie de leur stock aux prix de vente imposés s'avère être le point clé.

La théorie de l'incertitude de la demande requiert la classification des revendeurs en plusieurs groupes, depuis les discounteurs qui vendent toujours à bas prix jusqu'aux magasins haut de gamme qui vendent toujours au prix fort. Lorsque la demande est faible, seuls les discounteurs seront en mesure de vendre. Même si la demande est élevée, la concurrence entre les discounteurs est sensée maintenir leurs prix bas, mais quelque soit l'état de la demande, les discounteurs ont une probabilité relativement forte de vendre leur stock. Les magasins haut de gamme, toutefois, ne vendront que lorsque la demande est suffisamment forte pour supporter leurs prix élevés. Par conséquent, il y a une probabilité pour qu'ils finissent par ne rien vendre du tout. Donc, ils peuvent ne pas vouloir proposer des quantités suffisantes du produit pour satisfaire la demande si elle s'avère forte. Les prix de vente imposés remédient au moins partiellement à ce problème en augmentant la probabilité que chaque revendeur –discounteur ou non– vende une partie de la demande globale des consommateurs même si cette demande est basse, et qu'il le fasse au prix de vente imposé avec une marge élevée. Par conséquent, globalement les revendeurs offriront des stocks plus grands avec des prix de vente imposés car s'ils s'exposent davantage aux pertes ce faisant, cette exposition est compensée par la plus grande probabilité de faire de plus gros profits sur au moins une partie de leur stock. [12]

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11 Raymond Deneckere, Howard Marvel & James Peck, "Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition," 87 American Economic Review 619 (1997); Raymond Deneckere, Howard Marvel & James Peck, "Demand Uncertainty, Inventories, and Resale Price Maintenance," 111 Quarterly Journal of Economics 885 (1996). Font remarquer que si les revendeurs avaient proposé assez de produits pour satisfaire une forte demande même en l'absence de prix de vente imposés, alors les prix de vente imposés peuvent ne pas augmenter le bien-être du consommateur. Marvel, *supra* n.9 au 75-76.

12 Les prix de vente imposés ne constituent pas la seule stratégie qui puisse motiver les revendeurs à maintenir de plus hauts niveaux d'inventaires. Par exemple, les fabricants peuvent également convenir de racheter les invendus. On suppose que si au lieu de cela les fabricants ont choisi d'imposer des prix de vente, c'est que cela est sans doute plus efficace. Par conséquent, les fabricants devraient être en mesure d'expliquer pour quelle raison.

Encourager le traitement préférentiel par les revendeurs multimarques.

Cette idée est simplement que les revendeurs déploieront davantage d'efforts pour vendre un produit si son prix reste élevé. Cela fonctionne particulièrement bien quand les consommateurs ont besoin des conseils du revendeur pour savoir quel produit acheter. Ce comportement a des effets ambigus pour le bien-être du consommateur, malgré tout.

Promouvoir l'entrée

Les nouvelles sociétés, et même les sociétés établies qui introduisent de nouveaux produits, trouvent parfois difficile de convaincre les distributeurs de proposer ces nouveaux articles. Sans moyen de distribution, ces nouveaux produits ne pourront bien sûr pas entrer sur le marché. Outre le fait d'être plus réticents à proposer des nouveaux articles qui n'ont pas fait leurs preuves en raison du risque que la demande pour ces produits soit faible, les distributeurs peuvent aussi répugner à stocker les nouveaux produits même s'ils s'avèrent être très en vogue auprès des clients. Le problème survient quand les distributeurs doivent faire des investissements substantiels en publicité et promotion pour que les nouveaux produits soient rentables. Si ces investissements sont faits et que les distributeurs commencent à faire des bénéfices, les autres distributeurs qui n'ont pas réalisé ces investissements peuvent commencer à proposer les mêmes produits et réduire à néant par la concurrence les bénéfices des distributeurs initiaux. Les prix de vente imposés constituent un moyen d'accroître la probabilité que les distributeurs "pionniers" récupèrent leurs investissements et reçoivent la compensation pour le risque supporté car ils empêchent la concurrence par les prix. Par conséquent, les prix de vente imposés peuvent faciliter l'entrée de nouveaux produits et/ou de nouveaux concurrents en amont en aidant à persuader les distributeurs d'accepter le risque de proposer et d'investir dans la réussite de nouveaux produits. Il faut noter que les prix de vente imposés peuvent également promouvoir les entrées au niveau du distributeur.

Éliminer la double marginalisation

Les fabricants imposent parfois un prix de vente maximum lorsqu'ils disposent avec leurs revendeurs d'un certain pouvoir sur le marché. Dans ces cas, sans prix de vente maximum imposé, les sociétés amont et aval fixeront les prix qui maximisent leur propre profit. Ces prix auront tendance à être plus élevés que les coûts marginaux dans la mesure où les sociétés sont puissantes sur le marché. La "double marge commerciale"qui en résulte conduit à des prix au détail supérieurs au niveau qui maximiserait les bénéfices globaux des sociétés amont et aval réunies. Plus précisément, la société aval fixera une augmentation de prix qui augmente ses propres profits, en ignorant le fait que ces augmentations diminuent la quantité vendue aux consommateurs. Cette baisse en quantité diminue les bénéfices du fabricant. Imposer un prix de vente maximum permet au fabricant de recadrer le prix de vente au détail en évitant la perte de profit associée à la double marginalisation.

L'utilisation d'un prix de vente maximum imposé pour éliminer la double marginalisation accroît le bien-être du consommateur. Les prix de vente maximum imposés empêchent l'exercice non coordonné du pouvoir de marché lorsqu'un tel pouvoir existe à la fois au niveau du détaillant et du grossiste. Ce manque de coordination aboutit à des prix au détail supérieurs au niveau qui maximiserait les bénéfices de l'ensemble de la chaîne de production. En donnant aux fabricants le contrôle sur les prix au détail, les prix de vente maximum imposés leur permettent de corriger une externalité qui cause des réductions inutiles à la fois des profits et de l'efficacité économique des sociétés amont et aval. Avec des prix de vente maximum imposés, le fabricant peut imposer un prix au détail qui prenne en compte ces effets sur l'ensemble de la chaîne de production.[13] Parce que la correction de l'externalité de la double

[13] Les prix de vente imposés minimum ne peuvent pas aider dans ce cas car le problème de la double marginalisation est de rendre les prix des revendeurs trop hauts, pas trop bas.

marginalisation réduit les prix au détail aux niveaux (globaux) qui maximisent les bénéfices, l'efficacité économique s'améliore et les consommateurs en tirent profit.

Prévenir les brusques augmentations de prix par les revendeurs qui ont un pouvoir de marché.

Ceci est différent de la question de la double marginalisation car la brusque augmentation des prix en aval est une préoccupation pour les fabricants, qu'ils bénéficient ou non eux-mêmes d'un pouvoir de marché. Lorsque les revendeurs ont un certain pouvoir de marché localisé, les fabricants peuvent trouver avantageux d'imposer des prix de vente maximum pour restreindre la capacité des revendeurs à revendre à des prix de détail supracompétitifs. De tels prix ne seraient ni dans l'intérêt du fabricant ni des consommateurs. Ainsi par exemple, un fabricant peut imposer un prix de vente maximum lorsqu'il a consenti une exclusivité sur des territoires à ses revendeurs.

2.2.2 Utilisations et effets réduisant le bien-être

La peur que les prix de vente imposés puissent réduire le bien-être repose sur leur capacité à faciliter des comportements collusifs. Ceci pourrait survenir à la fois au niveau du fabricant ou du revendeur. Lorsque les deux types de prix de vente imposés sont verticaux par la forme, ils sont horizontaux au fond. D'autres effets potentiellement négatifs seront également abordés dans cette partie.

Faciliter la fixation des prix entre revendeurs.

Une entente entre revendeurs peut vouloir mettre en place des prix de vente imposés car cela peut servir à la fois de mécanisme de camouflage et d'exécution. Parce que les prix de vente imposés ont l'air d'être imposés par les fabricants, ils pourraient permettre de dissimuler qu'il s'agit en fait d'un accord de cartel à l'instigation des revendeurs. De plus, le fait de savoir que le fabricant punira les revendeurs qui trichent apporte un niveau de confiance pour tous les membres du cartel, en particulier sur les marchés où ils peuvent avoir des difficultés à le faire eux-mêmes.

L'idée d'une entente entre revendeurs imposée par un fabricant suscite au moins intuitivement une certaine consternation. D'ordinaire, les fabricants veulent que les prix au détail soient aussi bas que possible pour encourager la demande des consommateurs. Plus forte est la demande du consommateur, plus importante est la demande de gros ce qui augmente les bénéfices du fabricant. Des prix au détail plus élevés, au contraire, réduisent la demande des consommateurs. Ceci conduit à des bénéfices plus bas pour le fabricant. Par conséquent, l'une des dernières choses à laquelle l'on puisse s'attendre de la part d'un fabricant est qu'il aide ses revendeurs à maintenir artificiellement des prix élevés. Pour ce faire, il faudrait qu'il y soit contraint ce qui supposerait un groupe de revendeurs suffisamment puissants.

De plus, il y un grand nombre d'autres raisons pour lesquelles des prix de vente imposés à l'initiative des revendeurs seraient improbables. Tout d'abord, bien sûr, il y a le fait que les ententes elles-mêmes sont considérées sont des activités criminelles, contraires à la loi dans certaines juridictions et peuvent pour le moins donner lieu à de fortes amendes dans d'autres. En second lieu, les conditions du marché ne favorisent pas toujours la formation d'ententes. L'ensemble des facteurs bien connus qui affectent la plausibilité d'une entente réussie en général (comme le nombre de sociétés sur le marché, l'homogénéité de leurs produits, la facilité pour y entrer, etc.) rendrait les ententes trop difficiles à maintenir sur certains marchés, même avec l'aide de prix de vente imposés.[14] En troisième lieu, les revendeurs peuvent être en mesure de mettre en œuvre et de contrôler leur cartel suffisamment bien sans prix de vente imposés, auquel cas ils n'en ont pas besoin. Bien que cela ne constitue pas une pensée très réconfortante pour les autorités,

[14] *Voir par exemple*, OCDE, Public Procurement, The Role of Competition Authorities in Promoting Competition, DAF/COMP(2007)34, Note de référence au 21-23.

la question est simplement qu'elle réduit l'éventualité d'avoir recours à des prix de vente imposés pour maintenir une entente de revente.

Pour finir, les prix de vente imposés ne fonctionneront pas très bien dans une entente entre revendeurs s'ils ne parviennent pas à persuader une bonne partie des fabricants de la mettre en oeuvre. Si une partie suffisante de la capacité industrielle demeure en dehors des accords de prix de vente imposés, alors les consommateurs se tourneront simplement vers des marques sans prix de vente imposés. En règle générale, toutefois, plus le pouvoir de marché d'un fabricant individuel est important, plus il est difficile pour les revendeurs de le contraindre. En sens inverse, les marchés où les fabricants ont peu ou pas de pouvoir de marché peuvent constituer des cibles faciles pour les revendeurs, mais elles sont susceptibles d'être plus nombreuses. D'une manière ou d'une autre, les revendeurs qui complotent feront parfois face à une bataille ardue.

Pour toutes ces raisons, certains commentateurs considèrent improbable que les prix de vente imposés constituent un outil qui facilite les ententes entre revendeurs. En fait, Marvel a qualifié cette situation de "clairement invraisemblable."[15] Comme nous le verrons toutefois dans la partie 3.3., il est probable que certaines autorités considèrent le risque non seulement comme vraisemblable voire important.

Faciliter la fixation des prix entre fabricants.

Les prix de vente imposés peuvent également être utilisés comme un outil pour faciliter les ententes entre fabricants. Les prix au détail, pouvant être plus facilement observés que les prix de gros, sont plus faciles à contrôler. Par conséquent, il est plus aisé de relever les variations de prix au détail qu'au niveau des fabricants. Toutefois, les fabricants vendent en gros. Donc s'ils constituent un cartel, ils seront préoccupés par la possibilité de tricher sur les prix de gros. En imposant des prix de vente, ils peuvent non seulement être en mesure de détecter la triche plus facilement mais également de la dissuader plus efficacement.

C'est la raison pour laquelle cette stratégie est susceptible de fonctionner : normalement, les membres d'une entente entre fabricants qui souhaitent tricher baisseraient leurs prix de gros. Ceci permettrait à leurs revendeurs de réduire les prix pour l'utilisateur final, et également augmenterait la demande à la fois au détail et en gros. Cette augmentation de la demande est ce sur quoi comptent les fabricants qui trichent pour que leur réduction de prix secrète soit profitable. Dans le même temps, le tricheur pourrait continuer à cacher la véritable raison de la baisse des prix au détail des autres membres du cartel en l'attribuant à une toute autre raison. Il pourrait, par exemple, en rendre responsables les fluctuations normales des prix du marché, dues aux variations des frais généraux du revendeur jusqu'aux changements localisés de la demande. Mais les prix de vente imposés empêchent les revendeurs de baisser leurs prix pour quelque raison que ce soit, y compris une baisse des prix de gros. Car les prix au détail ne doivent pas changer, ni la demande au détail. Par conséquent, la demande de gros ne peut pas changer, non plus. Ceci ôterait toute motivation aux fabricants pour procéder à des réductions de prix secrètes. Une fois cette tentation éliminée, le cartel de fabricants serait plus stable.

Marvel a récemment indiqué que, au moins aux États-Unis, "[le nombre de cas où les prix de vente imposés sont sensés avoir favorisé une entente entre fabricants se compte sur les doigts de la main."[16] Un certain nombre de facteurs peuvent en être responsables. Pour commencer, certaines des mêmes raisons qui font que les prix de vente imposés par les ententes entre revendeurs sont peu probables militent également contre les prix de vente imposés comme outil des ententes entre fabricants. Par exemple, les ententes entre

15 Marvel, *supra* n.9 au 59.

16 Howard Marvel, "Resale Price Maintenance and the Rule of Reason," The Antitrust Source (juin 2008), p. 1.

fabricants sont aussi illégales que celles entre revendeurs, les conditions du marché peuvent également être défavorables à la formation de ententes sur les marchés des fabricants, et les fabricants n'ont pas toujours besoin de prix de vente imposés pour faciliter un cartel.

Une autre raison pour laquelle les prix de vente imposés facilités par les ententes entre fabricants peuvent être rares est qu'ils ont une caractéristique inhérente, déstabilisatrice. A la fois, il y a toujours l'incitation à gagner des parts de marché au détriment des autres membres du cartel et il y aura toujours un moyen de ce faire même si tous les membres du cartel ont imposé des prix de vente à leurs revendeurs. Même si un fabricant n'est pas susceptible de s'en tirer longtemps en trichant en baissant ses prix de gros et en laissant ses revendeurs répercuter ces baisses de prix sur les consommateurs, il peut toujours tirer profit de la baisse de ses prix de gros. Plutôt que d'escompter que les revendeurs répercutent la baisse du prix, le fabricant pourrait stimuler la demande en permettant aux revendeurs de continuer à vendre au prix imposé s'ils sont d'accord pour se lancer dans une concurrence en dehors des prix plus vive avec les produits des autres membres du cartel.

Un revendeur qui propose les produits de plusieurs fabricants complices pourrait, par exemple, commencer à promouvoir plus fortement la marque pour laquelle il a reçu des remises secrètes. Les vendeurs pourraient pousser cette marque plus que les autres, il pourrait y avoir plus de publicité à l'intérieur du magasin, un meilleur positionnement sur les étagères, etc. Pour cette raison, les prix de vente imposés à eux seuls peuvent ne pas être suffisants pour assurer la stabilité d'une entente entre fabricants. Il pourrait être nécessaire d'imposer également d'autres restrictions verticales, comme des accords d'exclusivité. Mais si cela atténuait partiellement le problème, il ne le résoudrait pas entièrement. Même si chaque revendeur était autorisé à proposer la marque d'un seul des fabricants de l'entente, les fabricants auraient toujours un moyen incitatif pour essayer de prendre les ventes de leurs concurrents en encourageant leurs propres revendeurs à engager une concurrence inter marque plus forte non basée sur les prix. Par conséquent, tous les profits potentiels du cartel pourraient être perdus par l'effet de la concurrence.

Ceci constitue un problème possible pour les ententes entre fabricants.[17] Après tout, l'un des principaux arguments en faveur des prix de vente imposés est qu'ils peuvent être efficaces pour stimuler la concurrence non basée sur les prix des revendeurs. Par conséquent, un fabricant peut trouver bénéfique de réduire le prix de gros tout en adhérant techniquement à son engagement d'imposer des prix de vente, à condition que ses revendeurs répondent par le type et le niveau de services pré-vente qui détournera suffisamment de ventes des autres membres du cartel pour récupérer la réduction de prix secrète. Cette stratégie est susceptible de mieux fonctionner avec des produits pour lesquels les clients sont relativement plus sensibles aux services pré-vente supplémentaires. Au contraire des biens de commodité, peu compliqués et peu chers qui sont vendus largement et dans différents types de magasins qui ne sont pas susceptibles de ce type de tricherie. Par conséquent, on devrait s'attendre à voir une plus forte incidence des prix de vente imposés par des ententes entre fabricants sur ces produits que sur ceux impliquant des produits plus complexes ou plus en vue.

Pour finir, même si aucun des membres du cartel ne triche, une autre sorte de force déstabilisatrice peut rendre les prix de vente imposés par les ententes plus compliqués que rentables pour les fabricants, en particulier lorsque les services pré-vente ne sont pas très importants. Le cœur même du problème est que les prix de vente imposés constitueront une manière peu coûteuse pour le cartel de maintenir la discipline.

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17 *Voir* Blair, *supra* n.6 au 137 n.16 (remarquant que les prix de vente imposés sont peu susceptibles d'éliminer toutes les tricheries dans les ententes entre fabricants du fait que les fabricants sont toujours tentés de récompenser leurs revendeurs pour une plus forte concurrence non basée sur les prix contre les autres membres du cartel); *voir également* Stanley Ornstein, "Resale Price Maintenance and Cartels," 30 Antitrust Bulletin 401, 406-08 (1985).

D'ordinaire, même s'il existe une entente entre fabricants, les revendeurs sont libres de choisir les prix qu'ils souhaitent appliquer à leurs clients. Certains revendeurs seront plus efficaces que d'autres et auront ainsi la possibilité d'appliquer des prix relativement bas, ce qui se traduira probablement par un plus gros volume de ventes. Ceci aide à compenser l'effet du prix d'entrée monopolistique fixé par le cartel, ce qui est bon pour les fabricants. Les prix de vente imposés, toutefois, entrave la capacité des revendeurs relativement efficaces de répercuter les économies sur leurs clients. Par conséquent, les ventes totales de l'industrie sont susceptibles de chuter, ce qui frappe les fabricants. Si les ventes déclinent suffisamment, les membres du cartel peuvent être dans une plus mauvaise situation même s'ils perçoivent un prix plus élevé à l'unité.[18]

Ceci signifie-t-il que les autorités peuvent aussi bien ne pas s'inquiéter des prix de vente imposés comme outil favorisant les ententes? Certainement pas. Même si les membres du cartel trichent, cela n'arrivera pas nécessairement assez souvent ou dans une mesure suffisamment large pour faire s'effondrer les ententes. Dans l'intervalle, il n'y aurait aucune garantie que le dommage causé aux consommateurs par les prix plus élevés du cartel soit compensé par les services supplémentaires fournis par le(s) tricheur(s). De plus, la mévente des revendeurs relativement efficaces qui peut se produire avec les prix de vente imposés serait moins prononcée sur les marchés où les consommateurs réagissent fortement aux services pré-vente. Les revendeurs efficaces pourraient utiliser leur avantage en termes de coûts pour financer ces services plutôt que de baisser leurs prix, augmentant ainsi la demande (et les profits du cartel). Néanmoins, les sources d'instabilité décrites ci-dessus donnent une base théorique au point de vue selon lequel les prix de vente imposés facilités par les ententes entre fabricants sont peu courants. Par conséquent, ces observations tendent à affaiblir les raisons de continuer à considérer les prix de vente imposés illégaux per se.

Les prix de vente imposés affectent tous les consommateurs en augmentant simplement les prix

Cet argument prête le flanc à la critique. Si l'on met de côté les schémas de prix de vente imposés inspirés par des ententes, les fabricants mettent en œuvre des prix de vente imposés parce que cela induit une activité et des effets auxquels les consommateurs réagissent en achetant davantage, pas moins, malgré les prix plus élevés qui en résultent. En d'autres termes, les prix de vente imposés constituent un moyen de placer les clients globalement dans une meilleure situation, pas de l'aggraver, comme nous l'avons vu au paragraphe 2.2.1.1. Par conséquent, en lui-même, le fait que les prix au détail tendent à augmenter en raison des prix de vente imposés n'est pas significatif car ces augmentations de prix surviendront typiquement avec des prix de vente imposés qu'ils soient utilisés ou non pour maintenir une entente ou pour encourager des services au clients pro-concurrentiels.

Marvel ajoute que les prix de vente imposés ne diffèrent pas d'autres investissements promotionnels qui ne font pas l'objet d'un examen aussi attentif que les prix de vente imposés. La publicité, par exemple, peut stimuler la demande même si elle augmente également les coûts et (généralement) les prix. Il en est de même des investissements en matière de recherche et de développement.[19] Malgré tout, ces stratégies sont rarement remises en cause.

De plus, les prix de vente imposés ne doivent pas se traduire par des prix supra-concurrentiels. En fait, la concurrence entre les marques peut empêcher les fabricants de fixer un prix au détail supérieur au niveau

18 Ornstein, *supra* n.17 au 409.

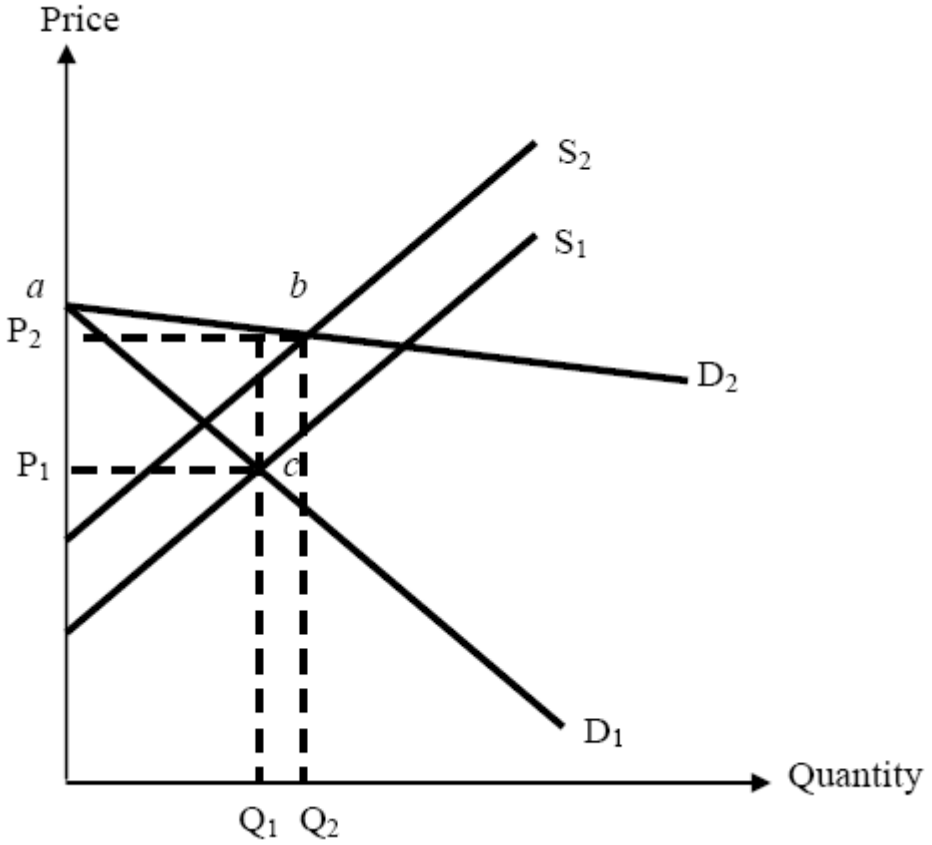
19 C'est-à-dire, du moins jusqu'à ce que ces investissements aboutissent à des innovations effectives, qui puissent réduire les coûts et les prix.

de la concurrence.[20] Dans tous les cas, les fabricants auront rarement un intérêt sensé à gonfler les bénéfices des revendeurs en leur imposant de facturer des prix supra-concurrentiels aux consommateurs.

Les prix de vente imposés peuvent profiter aux consommateurs marginaux, mais ils affectent les consommateurs inframarginaux

Le débat sur la hausse des prix ne s'arrête pas là. Tout en reconnaissant que les prix de vente imposés peuvent stimuler des services pré-vente, conduisant à une augmentation de la demande et du bien-être du consommateur, certains commentateurs ont fait remarquer que tous les consommateurs ne se partagent pas ces bénéfices. Supposons qu'au lieu d'une modification de la demande décrite à la Figure 1, l'imposition de prix de vente cause un changement de la demande comme celui représenté à la Figure 2.[21]

Figure 4. Prix de vente imposés réduisant le bien-être.



20 Cet argument apparaît, par exemple, dans William Baumol, et al., Amicus Brief dans *Leegin Creative Leather Products v. PSKS, Inc.*, 2006 U.S. Briefs 480 (22 janvier 2007), p. 3. Le niveau "concurrentiel" devrait malgré tout prendre en compte le coût de la fourniture des services pré-vente efficaces.

21 Comme la Figure 1, la Figure 2 se trouve dans Blair, *supra* n.6 au 145. Les idées derrière ces courbes ont été développées plus tôt dans F.M. Scherer, "The Economics of Vertical Restraints," 52 Antitrust Law Journal 687 (1983) et William Comanor, "Vertical Price Fixing, Market Restrictions and the New Antitrust Policy," 98 Harvard Law Review 990 (1985).

Pourquoi l'évolution de la demande ressemblerait-elle à ceci plutôt qu'à ce qui est représenté à la Figure 1? La réponse de Comanor et de Scherer est que les clients qui retirent le plus grand avantage du bas prix d'un produit sont déjà susceptibles d'en connaître ses qualités positives. Ils sont également davantage susceptibles de déjà savoir comment l'utiliser. Par conséquent, ces consommateurs infra-marginaux sont affectés par les prix plus élevés que les prix de vente imposés tendent à susciter– sans se soucier des quelconques services supplémentaires de pré-vente que ces prix stimulent – parce que la plupart de ces consommateurs aurait acheté le produit de toute façon, même sans les services supplémentaires. Au contraire, les consommateurs marginaux initialement moins informés sont ceux qui achètent substantiellement plus car ils sont ceux qui tirent le plus de profit des services supplémentaires. "Ceci est une situation vraisemblable," disent Comanor et Scherer, "de la même manière qu'il est reconnu que les consommateurs qui sont le plus susceptibles d'être influencés par les services supplémentaires de pré-vente sont ceux 'pour qui il est indifférent d'acheter ou pas.'"[22]

A la Figure 2, l'équilibre avant l'imposition des prix de vente se situe au point c (Q_1, P_1). Après la mise en place de prix de vente imposés, la courbe de la demande pivote de D_1 jusqu'à D_2, car des services plus importants sont sensés accroître la valeur du produit pour tous les consommateurs, mais à des degrés différents. Les clients inframarginaux (c'est-à-dire les clients qui se situent sur la partie de D_1 au dessus du point c) apprécient relativement moins la valeur des services supplémentaires de pré-vente tandis que les clients marginaux (ceux sur la partie de D_1 située en dessous du c) les apprécient davantage. Les consommateurs veulent toujours acheter plus du produit à n'importe quel prix, mais certains consommateurs ont une réaction plus forte que d'autres. Une fois encore, les services supplémentaires induits par les prix de vente imposés ont un coût, la courbe d'approvisionnement va de S_1 à S_2. Le nouvel équilibre se situe au point b (Q_2, P_2). Cette fois cependant, l'avantage du consommateur rétrécit en réalité. Avant l'imposition des prix de vente, il représentait la surface acP_1. Avec les prix de vente imposés, il se réduit à la zone abP_2.

En général, plus le groupe de clients inframarginaux est important par rapport aux clients marginaux, plus l'atteinte au bien-être dépassera l'augmentation du bien-être des clients marginaux. De surcroît, moins les clients inframarginaux sont sensibles au prix, plus ils sont susceptibles de pâtir car les fabricants pourront fixer des prix plus élevés sans subir beaucoup de perte de la demande que la rentabilité globale est réduite. Des prix plus élevés, bien sûr, réduiront également les augmentations de bien-être du consommateur ressentis par les clients marginaux. D'autre part, plus les clients sont sensibles à des services plus importants, plus la courbe de la demande change et plus les prix de vente imposés sont susceptibles de générer une augmentation nette du bien-être des consommateurs.

Par conséquent, il n'est pas évident que les prix de vente imposés augmentent toujours le bien-être total du consommateur même dans des cas où les ententes ne les ont pas mis en place, mais ils ont plutôt utilisés uniquement pour accroître la demande. Les Figures 1 et 2 montrent que les conséquences nettes en terme de bien-être des prix de vente imposés dépendent de l'évolution de la demande– et de la manière dont elle évolue– en réponse à de plus grands services de pré-vente. Comme Blair le fait remarquer, "[à toutes fins pratiques. . . estimer l'effet des prix de vente imposés sur l'avantage du consommateur tout en contrôlant toutes les autres influences est au mieux problématique."[23] Mais le point de vue de Comanor et

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22 William Comanor & F.M. Scherer, Amicus Brief dans *Leegin Creative Leather Produits v. PSKS, Inc.*, 2006 U.S. Briefs 480 (22 janvier 2007), p. 5 (citant James Cooper, Luke Froeb, Daniel O'Brien & Michael Vita, "Vertical Restrictions and Antitrust Policy: What About the Evidence?" 1 Competition Policy International 45, 49, 51 (2005)).

23 Blair, *supra* n.6 au 146; *voir également* Kneepkens, *supra* n. 4 au 659 ("il est possible qu'on ne puisse pas déterminer si la perte de bien-être pour les consommateurs infra-marginaux est ou non supérieure au gain pour les consommateurs marginaux ").

Scherer est fort même s'il doit demeurer théorique.[24] Dans tous les cas, la Figure 1 est également purement théorique.

Néanmoins, le point principal est que les prix de vente imposés *peuvent* augmenter le bien-être total du consommateur. Ils le font parfois et parfois non. Mais le seul fait que les prix de vente imposés puissent réduire le bien-être du consommateur dans certains cas ne constitue pas, en lui-même, un fondement suffisamment fort pour l'interdire dans tous les cas.

Les prix de vente imposés protègent les revendeurs inefficaces en empêchant les revendeurs efficaces de se concurrencer par les prix

Cet argument est sans détours. En forçant tous les revendeurs à appliquer le même prix, les prix de vente imposés empêchent les clients de bénéficier du prix plus bas que les revendeurs efficaces appliqueraient autrement. L'efficacité pâtit également car les revendeurs qui ont des structures dont les coûts sont plus élevés sont en mesure de continuer à fonctionner alors qu'ils auraient été écartés du marché dans des conditions plus concurrentielles.

Cette inquiétude est quelque peu sapée par les arguments développés dans la partie précédente, malgré tout. Tandis que les prix de vente imposés peuvent affaiblir la concurrence par les prix, tout l'objet de leur mise en œuvre (à part les cas où ils servent une entente) est de renforcer la concurrence non basée sur les prix. Il en résulte que même s'il est vrai que les revendeurs inefficaces survivent plus facilement en ce qui concerne la pression des prix avec des prix de vente imposés, ils sont confrontés à une concurrence non basée sur les prix plus intense de la part de leurs concurrents. Étant donné que ces concurrents sont plus efficaces, ils disposent de marges bénéficiaires plus importantes avec lesquelles ils peuvent financer les services pré-vente qu'ils fournissent. Ce type de concurrence pourrait s'avérer tout aussi efficace pour éliminer les revendeurs inefficaces que ne l'auraient fait les prix bas. De plus, les clients bénéficieraient de ces services supplémentaires même s'ils payaient un prix plus élevé.

Les prix de vente maximum imposés dissuadent les services des revendeurs.

Il a été dit que les prix de vente maximum imposés ne devraient pas être autorisés car ils pourraient aboutir à des prix si bas que les revendeurs seraient dans l'incapacité de fournir les services dont les clients ont besoin ou pour lesquels ils sont prêts à payer.[25] Toutefois, ce raisonnement n'a aucun sens, car si les prix étaient si bas qu'ils généraient un niveau de services des revendeurs trop bas pour être efficace, les fabricants renonceraient à des bénéfices. Par conséquent, ils auraient un moyen incitatif pour résoudre eux-mêmes le problème en augmentant le prix maximum.

2.3 Le débat sur les approches de l'application des prix de vente imposés

Au fil des années, de nombreux économistes ont remis en cause le bien-fondé de considérer l'imposition des prix de vente comme illégale per se, en soutenant qu'elle devrait plutôt être soumise à la règle de raison. Cette partie de la présente note examine tout d'abord les forces et les faiblesses générales

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24 Norbert Schulz a récemment imaginé un modèle économétrique avec certaines hypothèses que ni Comanor ni Scherer n'ont avancé, mais il a quand même trouvé que "de [s]imples indications comme une demande accrue de services plus importants ne constituent pas une condition nécessaire ni une condition suffisante pour que les prix de vente imposés en augmentent l'efficacité." Norbert Schulz, "Does the Service Argument Justify Resale Price Maintenance?" 163 Journal of Institutional and Theoretical Economics 236, 247 (2007).

25 *Voir par exemple, Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

de ces deux approches. Elle considère ensuite les arguments pour et contre l'application de chacune d'entre elles dans le contexte des prix de vente imposés.

2.3.1 La règle « per se » contre la règle de raison : avantages et inconvénients généraux de chacune des règles

En vertu de l'approche qui veut que les prix de vente imposés soient illégaux per se, à chaque fois qu'il peut être démontré qu'un fabricant a conclu (ou est parvenu à un engagement) avec un ou plusieurs revendeurs pour contrôler le prix appliqué par le(s) revendeur(s), il y a violation présumée de la législation sur la concurrence sans qu'il soit nécessaire de prouver des effets anti-concurrentiels.

L'approche per se offre la clarté et la rapidité et des économies de coût pour le processus décisionnel. Il ne devrait faire aucun doute dans l'esprit de quiconque de ce qui est permis et de ce qui ne l'est pas avec l'approche per se. La nécessité pour une agence ou un tribunal de fouiller dans des preuves factuelles compliquées et pour rendre des décisions est réduite. Malheureusement, l'approche per se est beaucoup moins subtile: rapide, relativement peu chère et prévisible mais pas très prudente. La règle per se peut condamner des conduites qui sont en fait pro-concurrentielles

Avec la règle de raison, les autorités et les tribunaux chargés de la concurrence s'efforcent de déterminer si les prix de vente imposés dans un cas particulier sont susceptibles de causer une atteinte nette au bien-être du consommateur. Tous les faits et les circonstances de chaque cas peuvent être pris en compte, le simple fait de démontrer l'existence d'un accord de prix vertical ne suffit pas. Il faut faire la preuve d'une atteinte à la concurrence. Les effets positifs sur le bien-être du consommateur de l'accord de prix de vente imposés sera également pris en considération et mis en balance avec les effets négatifs qui sont démontrés.

La force de la règle de raison est qu'elle peut prendre en compte un grand nombre d'informations liées à la conduite. Ses faiblesses sont qu'elle peut prendre très longtemps et coûter cher pour être mise en œuvre, il est souvent impossible de réunir les données nécessaires ou extrêmement difficile de les interpréter correctement, et il est difficile de prédire le résultat produit par la règle dans un cas donné. Elle peut aboutir à exonérer certaines conduites qui auraient été condamnées et vice-versa.

2.3.2 Quelle est la meilleure approche pour les prix de vente imposés?

Une manière de répondre à cette question est d'utiliser la méthode adoptée par la Cour suprême des États-Unis, qui suppose que la règle de raison s'applique à moins que l'expérience ne démontre que la pratique est toujours ou presque toujours anticoncurrentielle, auquel cas la pratique sera réputée illégale per se. Une autre voie est fondée sur la théorie de la décision, qui veut que la meilleure règle soit celle pour laquelle la probabilité d'erreur multipliée par l'étendue de l'atteinte causée par cette erreur est la plus faible. Il y a de solides raisons à la fois en faveur et à l'encontre de chacune de ces approches, de la même manière qu'il y a de solides raisons pour et contre la règle de raison et la règle per se elles-mêmes.

La Cour suprême des États-Unis a soutenu que "[il existe une présomption en faveur d'une norme de règle de raison; que s'écarter de cette norme doit être justifié par un effet économique démontrable, comme le fait de faciliter une entente, plutôt que par des distinctions d'ordre formel; [et] que la concurrence entre les marques est la préoccupation première des lois antitrust [.]"[26] Le traitement per se n'est approprié que pour les conduites qui "tendent presque toujours à porter atteinte à la concurrence et à réduire la production "[27] ou sont, en d'autres termes, "manifestement anticoncurrentielles."[28] L'ensemble de ces facteurs milite

[26] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988).

[27] *Id*. au 726-27.

en faveur d'une approche par la règle de raison, à la fois pour les prix de vente imposés maximum et minimum.

En effet, ces facteurs constituent particulièrement un bon fondement pour l'application de la règle de raison aux prix de vente maximum imposés. Il est largement admis dans la doctrine économique que les prix de vente maximum imposés sont loin de se rapprocher des catégories "manifestement anticoncurrentielles." Posner résume ce qui est désormais l'idée conventionnelle: "[A moins que le fournisseur ne soit un monopsone il ne peut réduire les marges de ses revendeurs en dessous d'un niveau concurrentiel; toute tentative en ce sens conduirait les revendeurs tout droit dans les bras d'un fournisseur concurrent. Un fournisseur peut toutefois fixer un prix de revente maximum pour empêcher ses revendeurs d'exploiter une situation de monopole. . . . Il ne le ferait pas sans intérêt mais dans son propre intérêt commercial."[29] Cette dernière utilisation des prix de vente imposés serait, comme indiqué précédemment, également bénéfique pour les consommateurs. Bien sur, il est toujours possible que le prix maximum puisse vraiment servir de signal pour ce qui est effectivement un prix minimum de facto, qui ne serait sans doute pas bénéfique pour les consommateurs. Cette seule possibilité toutefois ne semble pas suffisante pour garantir une interdiction per se des prix de vente maximum imposés à la lumière des effets positifs qu'ils peuvent avoir.

En ce qui concerne les prix de vente minimum imposés, le paradigme de la Cour suprême favorise toujours la règle de raison. La théorie économique indique un certain nombre d'effets négatifs possibles sur la concurrence et le bien-être. Mais la théorie économique indique également un certain nombre d'effets pro-concurrentiels. Pour résumer les conclusions de la 2ème partie, les travaux théoriques sur les prix de vente imposés montrent qu'ils peuvent faciliter les ententes et/ou les augmentations de prix. En ce qui concerne les ententes, la théorie ne soutient que faiblement la conclusion que les prix de vente imposés servent fréquemment d'outil. En ce qui concerne la crainte que les prix de vente imposés ne causent des augmentations de prix, il a été démontré que ces augmentations peuvent renforcer la concurrence entre les marques en encourageant les revendeurs à fournir davantage de services pré-vente ce qui stimule la demande pour un produit. Par conséquent, en résumé, la conclusion est que les prix de vente imposés ne vont pas de pair avec les ententes et même s'ils ont tendance à faire augmenter les prix, on ne peut pas conclure qu'il s'agisse nécessairement d'un effet anticoncurrentiel net.

Comme un groupe d'éminents économistes l'a récemment indiqué, "en doctrine, il n'est pas contesté que les prix de vente minimum imposés peuvent avoir des effets pro-concurrentiels et que dans un certain nombre de conditions du marché, ils sont peu susceptibles d'avoir des effets anticoncurrentiels. . . . La position contraire selon laquelle les prix de vente minimum imposés seraient le plus souvent, presque invariablement, anticoncurrentiel est absente de la doctrine."[30] Ils en concluent donc, que la doctrine économique ne soutient pas l'application de la règle per se. Certains commentateurs européens partagent ce point de vue : "[D'un point de vue économique, l'interdiction des prix de vente imposés en droit européen est incompréhensible. . . . [Une interdiction générale, en d'autres termes une interdiction per se, ne peut pas optimiser les résultats du marché d'un point de vue économique, car elle signifie que tous les effets

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28 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977).

29 *State Oil Co. v. Khan*, 93 F.3d 1358 (7ème Cir. 1996), *revirement*, 522 U.S. 3 (1997). Posner a rédigé sa décision (dans laquelle il a suivi mais a critiqué la jurisprudence alors applicable de la Cour suprême selon laquelle les prix de vente imposés maximum étaient illégaux per se) dans l'espoir d'un revirement.

30 Baumol, et al., *supra* n.20 au 16. Bien que le point de vue de Comanor/Scherer sur les clients inframarginaux demeure valable, même eux ne le considèrent pas comme une raison de continuer à considérer tous les prix de vente imposés comme illégaux per se. *Voir* Comanor & Scherer, *supra* n.22 (souscrivant une approche hybride dans laquelle les prix de vente imposés à l'initiative des fabricants sont soumis à une approche par la règle de raison et ceux qui le sont à l'initiative des revendeurs sont illégaux per se).

positifs qui peuvent être atteints par l'imposition de prix de vente seraient interdits ou ne pourraient être atteints que par d'autres manières à plus grands frais."[31] "[L'actuelle interdiction per se des prix de vente imposés devrait être assouplie, puisque l'imposition de prix de vente peut avoir des effets pro-concurrentiels ainsi que des effets anti-concurrentiels."[32]

En ce qui concerne les effets démontrables des prix de vente imposés, il semble être généralement accepté que les prix de vente imposés augmentent les prix.[33] Au-delà de cela, les preuves empiriques disponibles sont rares. Il n'y en a pas beaucoup, et la plupart datent de plusieurs dizaines d'années. Mais en l'état, les études existantes ne montrent pas que les prix de vente imposés tendent presque toujours à restreindre la concurrence et à réduire la production. Au contraire, ils vont en sens inverse. De manière presque plus importante, ils indiquent que les prix de vente imposés ne sont généralement pas utilisés pour faciliter les ententes. Ceci contredit directement le principal argument en faveur de l'application de la règle per se. Par exemple, une étude a relevé que seulement dix pour cent des affaires de prix de vente imposés portées devant la Federal Trade Commission américaine (USFTC) entre 1942 et 1983 concernaient des ententes.[34] Une autre étude s'est concentrée sur les 153 affaires relatives aux prix de vente imposés portés devant la USFTC au cours de la période qui va de 1976 à 1982. L'auteur, Pauline Ippolito, a relevé que les ententes étaient alléguées dans seulement 5,9 pour cent des cas. Elle en a conclu qu'il y avait peu d'éléments soutenant de l'idée que la collusion constitue la raison essentielle pour les fabricants lorsqu'ils imposent des prix de vente.[35] Regarder les prétentions dans les affaires objets de litige ne constitue pas nécessairement l'approche idéale, mais ces études sont parmi les rares études qui ont été réalisées, il n'y a donc guère d'autre choix possible.

Lorsqu'on se tourne vers la théorie des prix de vente par une entente entre revendeurs, il y a quelques éléments– encore une fois datant de plusieurs dizaines d'années– indiquant que les revendeurs ont parfois été en mesure de persuader les fabricants d'imposer des prix de vente et de jouer le rôle « d'autorité » du cartel. Mais la même étude a également trouvé que dans plus de 91 pourcent des affaires concernant des prix de vente imposés pour lesquelles la structure du marché de détail était disponible, au moins 100 revendeurs était sur le marché pertinent. Ce fait suggérait qu'une collusion étendue entre revendeurs était improbable, menant à la conclusion que les prix de vente imposés n'étaient probablement pas motivés par des revendeurs complices dans la plupart des cas.[36] De plus, Ippolito a découvert que seulement sept pour cent environ des affaires concernant les prix de vente imposés dans ses échantillons impliquaient des allégations de collusion entre revendeurs. Elle en a donc conclu que "cette preuve suggère que, à la marge, un assouplissement de la règle *per se* contre les prix de vente imposés affecterait d'abord les utilisations non collusives des prix de vente imposés."[37] Que l'on considère cette preuve simplement comme peu

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31 Rainer Olbrich & Carl-Christian Buhr, "Who Benefits from the Prohibition of Resale Price Maintenance in European Competition Law?" 26 European Competition Law Review 705, 712 (2005) (traduisant les citations d'autres auteurs).

32 Kneepkens, *supra* n.4 au 656.

33 *Voir par exemple*, Areeda & Hovenkamp, *supra* n.7 ¶ 1604b, au 40.

34 Stanley Ornstein, "Resale Price Maintenance and Cartels," 30 Antitrust Bulletin 401, 423 (1985).

35 Pauline Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation," 34 Journal of Law & Economics 263, 281 (1991).

36 Thomas Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence, USFTC Bureau of Economics Staff Report, pp. 80, 133, 145 (1983) (études des affaires de prix de vente imposés jugés par la FTC entre 1965 et 1982). Pour une approche critique de la valeur des études d'Ippolito et d'Overstreet, voir Richard Brunell, "Overruling *Dr. Miles*: The Supreme Trade Commission in Action," 52 Antitrust Bulletin 475, 508-511 (2007).

37 Ippolito, *supra* n.35 au 282.

concluante ou qu'on la tienne pour suffisante pour établir que les prix de vente imposés n'ont pas d'effets économique négatifs globaux, elle ne peut pas soutenir l'application de la règle per se selon les normes de la Cour suprême des États-Unis.

Un autre problème avec l'utilisation de la règle per se est qu'elle encourage les sociétés à trouver d'autres façons d'atteindre les mêmes résultats ou des résultats similaires. Elles peuvent décider d'employer des méthodes qui portent davantage atteinte à la concurrence et/ou moins efficace que les prix de vente imposés à moins que ces méthodes ne soient également illégales per se. Pendant de nombreuses années aux États-Unis, par exemple, la pratique qui consiste à concéder des territoires exclusifs aux revendeurs a été évaluée selon la règle de raison alors que les prix de vente imposés étaient illégaux per se. Ceci, comme l'ont remarqué de nombreux commentateurs, était une curieuse politique antitrust. Les territoires exclusifs éliminent *toute* concurrence entre les marques sur un marché géographique donné, tandis que les prix de vente imposés ne font qu'éliminer la concurrence entre les marques basée sur les prix et permettent à plusieurs concurrents intra-marques d'exister sur un marché géographique donné. La même incohérence existait pour l'intégration verticale et les concessions exclusives, les deux pouvant éliminer complètement la concurrence entre les marques mais sont évaluées par la règle de raison. La politique antitrust américaine a finalement dégagé une position cohérente sur les restrictions verticales avec la décision rendue en 2007 par la Cour suprême *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, qui a soumis les prix de vente imposés à la règle de raison.[38] Ceci ne revient pas nécessairement à dire que l'approche par la règle de raison est la meilleure, mais seulement qu'il y a une certaine logique économique dans l'idée que les restrictions verticales devraient être traitées de manière symétrique.[39]

Revenir sur la décision *Leegin* à ce stade est sans intérêt. Non seulement la solution est déjà bien connue, mais nous avons déjà passé en revue les principales bases analytiques de la décision, car la Cour a considéré que la plupart sinon toutes les idées que nous avons développées dans ce papier. Néanmoins, *Leegin* constitue une décision marquante car elle a fait avec les prix de vente imposés ce que peu d'autres tribunaux ou parlements avaient fait. Elle constitue également une toile de fond essentielle pour toute discussion au fond de l'approche per se contre l'approche de la règle de raison des prix de vente imposés.

Dans la décision *Leegin*, une majorité à la Cour suprême a décidé que les prix de vente imposés n'étaient plus soumis à la règle per se aux États-Unis. Au contraire, les prix de vente imposés seront évalués selon la règle de raison. Les faits sont classiques pour une affaire de prix de vente imposés. Leegin, le défendeur, a fourni des articles en cuir aux revendeurs selon un programme de prix de vente imposés. Leegin a fait valoir qu'il imposait des prix de vente pour offrir à ses revendeurs les marges bénéficiaires qui leur étaient nécessaires pour fournir certains services aux clients, et pour protéger son image de marque et sa réputation du tort que lui ferait des ventes à bas prix. Le demandeur, un revendeur, a quand même vendu les produits Leegin avec une remise. Après refus du demandeur de cesser de vendre à prix réduit, Leegin a arrêté d'approvisionner le revendeur, qui en réponse a introduit une procédure antitrust soutenant que le programme de prix de vente imposés de Leegin était illégal per se. La cour de jugement, suivant la jurisprudence alors en vigueur, a refusé d'entendre le témoignage de l'économiste expert de Leegin, qui aurait témoigné que la politique de prix de vente imposés de Leegin avait des effets pro-concurrentiels. Ce témoignage aurait été non pertinent avec la règle per se. Le jury a finalement fait droit à la demande du demandeur et lui a accordé des dommages et intérêts.

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38 127 S. Ct. 2705 (2007). Les prix de vente imposés Maximum avaient déjà été placés dans la catégorie de la règle de raison dans *State Oil v. Khan*, 522 U.S. 3 (1997).

39 "[I]l est important de mettre la loi régissant les restrictions non basées sur les prix et les restrictions basées sur les prix en conformité. D'un point de vue économique, les restrictions verticales par les prix et celles non basées sur les prix ont des effets sensiblement identiques. . . . [Il n'y a aucune raison de considérer [différemment] deux types de restrictions lorsqu'une juste analyse économique ne peut pas faire la différence [.]" Baumol, et al., *supra* n. 20 au 3.

En appel, Leegin a fait valoir que la règle per se était inappropriée pour les affaires de prix de vente imposés et qu'elles devraient être régies par la règle de raison. La Cour suprême a révisé ses normes concernant la règle per se à la place de la règle de raison, a mentionné les résultats de "quelques études [empiriques] récentes établissant les effets concurrentiels des prix de vente imposés," et a passé en revue les principaux arguments théoriques en faveur et contre les prix de vente imposés.[40] Nous avons déjà exposé tous ces facteurs ci-dessus. Ne trouvant aucun élément pour conclure que les prix de vente imposés tendent toujours ou presque toujours à restreindre la concurrence et à diminuer la production ou que les prix de vente imposés sont manifestement anticoncurrentiels, la Cour a décidé que la règle per se était en fait inappropriée.

Là semblerait s'arrêtait l'affaire. Il n'y a simplement pas assez de raisons théoriques ou empiriques pour justifier de traiter les prix de vente imposés comme une violation per se. Ainsi il semble clair que la meilleure approche consiste à utiliser la règle de raison.

Ou y en a-t-il ? Tout le monde ne le pense pas, et quelques arguments dissidents méritent que l'on y prête attention.

Avant de les examiner en détail, malgré tout, considérons les larges objectifs qui devraient être atteints par le choix d'une règle pour évaluer les prix de vente imposés. Quelles caractéristiques générales devrait avoir une excellente règle pour les prix de vente imposés? Avec un certain niveau d'abstraction, les traits caractéristiques d'une approche souhaitable des prix de vente imposés ne sont pas différents de ceux d'une approche souhaitable de l'abus de position dominante. Cette dernière a été identifiée dans un précédent article comme :

- *Exactitude* – l'approche devrait être fondée sur les principes économiques largement acceptés et générer un minimum de coûts à partir des faux positifs et des faux négatifs
- *Administrabilité* – elle devrait être relativement facile à appliquer
- *Applicabilité* – plus l'approche permet de couvrir largement la conduite, meilleure elle est
- *Cohérence* – elle devrait aboutir à des résultats prévisibles
- *Objectivité* – elle ne devrait pas laisser de place aux données subjectives du décideur
- *Transparence* – l'approche et ses objectifs devraient être compréhensibles[41]

Considérons l'une des remarques de Maurice Stucke, en conservant ces caractéristiques à l'esprit. Il fait remarquer que le rejet récent par la Cour suprême des États-unis de la règle per se pour les prix de vente imposés semble curieux au moins d'une position avantageuse.[42] Tandis que la Cour a considéré que la règle per se pourrait être responsable de l'augmentation des frais de procédure en développant les procès "futiles",[43] elle s'est également récemment inquiétée du risque important de décisions contradictoires émanant des juridictions antitrust.[44] Quoi que ce risque soit, bien sûr, plus important avec la règle de raison

40 *Leegin*, 127 S. Ct. au 2715.

41 OCDE, *Competition on the Merits*, DAF/COMP(2005)27 au 23.

42 Maurice Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 Université de Californie, Davis Law Review ___ (à paraître en mai 2009), disponible sur http://ssrn.com/abstract=1267359.

43 *Leegin Creative Leather Produits, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007).

44 *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2395 (2007).

qu'avec la règle per se, et qu'une grande part de la faute incombe au tribunal lui-même. En réalité, la règle de raison sur la totalité-des- circonstances-économiques-de la Cour a suscité des critiques de nombreuses sources, comprenant la Cour elle-même.[45] Tout en réduisant progressivement l'applicabilité de la règle per se aux restrictions verticales au cours du siècle dernier, la Cour a également élargi le domaine d'une approche par la règle de raison qui laisse beaucoup à désirer en ce qui concerne les six caractéristiques mentionnées ci-dessus.[46] Stucke soutient par exemple, que la règle de raison est peu prévisible pour les participants au marché. Elle soumet également les plaideurs et les tribunaux à des contentieux "énormes, coûteux et très longs".[47]

Selon Stucke, *Leegin* constitue un compromis dans lequel la Cour suprême a définitivement sacrifié un peu de concurrence intra-marques contre la possibilité d'avoir une plus grande concurrence entre les marques.[48] Tout en reconnaissant que les prix de vente imposés augmentent souvent les prix au détail, la Cour estime que "les prix peuvent être augmentés pour promouvoir les effets pro-concurrentiels."[49] Mais les consommateurs paient davantage en attendant ces bénéfices pro-concurrentiels, soutient Stucke. De plus, plus les marques sont différenciées, moins la concurrence entre les marques est importante par rapport à la concurrence intra-marques.

Le point de vue de Stucke sur cet aspect de la question pourrait être considéré comme exagéré. Lorsqu'on lit les arguments de *Leegin* et la doctrine citée concernant la question de savoir si les prix de vente imposés sont pro- ou anti-concurrentiels, on peut perdre de vue le fait que la question dont il s'agissait ne consistait pas à exonérer tous les prix de vente imposés. Au contraire, il ne s'agissait que de déplacer les prix de vente imposés dans la sphère de la règle de raison. Par conséquent, dire que la Cour a sacrifié un type de concurrence pour un autre donne une impression de certitude qui peut être trop forte. Que ce sacrifice soit dans l'intérêt des consommateurs dans un cas donné est ce que la règle de raison devrait (idéalement) définir, en prenant en compte les facteurs comme la probabilité et l'étendue de la hausse des prix et des effets de la différenciation des marques. Dans tous les cas, Stucke a raison sur le fait que le besoin de prendre en compte ces considérations ajoute à l'imprévisibilité de la règle de raison, et sa vision de *Leegin* comme un compromis peut s'avérer exacte en pratique.

Un autre critique, Richard Brunell, s'en prend à la logique de la Cour en développant plusieurs arguments conçus pour établir que "l'abandon de la règle *per se* est une mauvaise politique et que l'analyse de la politique de la Cour a été tout à fait inadaptée [.]"[50] Brunell ne conteste pas le point de vue de consensus selon lequel les prix de vente imposés peuvent être employés pour affecter la concurrence à la fois de manière positive et négative. Ce qu'il rejette essentiellement, c'est l'idée que les prix de vente imposés devraient être illégaux per se seulement s'ils tendent toujours ou presque toujours à restreindre la

45 Stucke, *supra* note 42 (citant *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958)).

46 Cette trajectoire débute en 1919 avec *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (limitant le traitement per se pour les prix de vente imposés aux affaires dans lesquelles il y a un accord effectif entre un fabricant et un revendeur pour fixer les prix, par opposition aux prix recommandés, et permettant aux fabricants de refuser de traiter avec les revendeurs qui ne suivent pas les prix recommandés) et se poursuit au fil des ans avec des décisions qui ont appliqué la règle de raison au lieu de la règle per se, comme *White Motor Co. v. United States*, 372 U.S. 253 (1963) (territoires exclusifs), *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977) (autre restriction verticale, non basée sur les prix), *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (prix de vente imposés maximum), et *Leegin*, 127 S. Ct. au 2712 (prix de vente imposés minimum).

47 *Twombly*, 127 S. Ct. 1955, 1967 n.6. (2007).

48 Stucke, *supra* note 42.

49 *Leegin*, 127 S. Ct. au 2718.

50 Brunell, *supra* n.36 au 476.

concurrence et à réduire la production. Ceci constitue, de son point de vue, un examen trop simpliste car il ne repose que sur la fréquence. L'examen adapté, selon lui, devrait prendre en compte les probabilités et l'amplitude des inconvénients et des avantages que peuvent produire les prix de vente imposés, ainsi que le coût de l'examen. En d'autres termes, la meilleure approche est celle qui minimise le montant des valeurs attendues des coûts de faux positifs, de faux négatifs, et du processus décisionnel. La norme "toujours ou presque toujours anticoncurrentiel" ne le fait pas car elle ignore la composante de l'amplitude des valeurs attendues des coûts de faux positifs, de faux négatifs. Au lieu de cela elle ne considère que la composante de la probabilité. De plus, elle ignore les frais administratifs élevés de l'utilisation de la règle de raison (et des frais administratifs relativement de l'utilisation de la règle per se).

La critique de Brunell a un certain poids. Il est tout à fait sensé de multiplier les probabilités des avantages et des atteintes à la concurrence par leurs valeurs, et de prendre en compte les frais de la prise de décision. Mais en fin de compte, sa critique tombe sous le poids de ses implications. La racine du problème est, comme Brunell l'indique lui-même, qu'il n'y a pas suffisamment de données sur les probabilités, les dommages, les avantages et les frais de la prise de décision pour prouver– en utilisant sa méthode sur la théorie de la décision– que la règle de raison est supérieure à la règle per se pour évaluer les prix de vente imposés. C'est demander beaucoup que d'espérer que de telles données existent. De plus, il n'y a pas suffisamment de données non plus pour prouver que la règle per se est supérieure à la règle de raison. La réponse de Brunell au manque de données consiste à sélectionner la règle per se par défaut. Au moins, nous savons que ses coûts administratifs seront inférieurs à ceux de la règle de raison.

Brunell a raison, nous pouvons en être certains, mais savoir comparer les frais administratifs des deux examens ne suffit pas pour mener le test qu'il propose. Toutefois, il sélectionne par défaut une interdiction per se. Mais si la règle de l'illégalité per se est la règle par défaut quand il n'y pas suffisamment de données pour procéder à son test, alors la règle per se devrait être en vigueur dans presque tous les domaines de l'exécution du droit de la concurrence, car le problème des données inadaptées n'est pas unique aux prix de vente imposés. Ceci signifierait qu'en étant finalement arrivé au point de vue généralement soutenu selon lequel les approches économiques de l'exécution sont les meilleures, la communauté de la concurrence se retrouverait dans un monde fondé sur la forme si elle suivait le raisonnement de Brunell.

Il est bien sûr possible que si toutes les données nécessaires étaient disponibles, le test de Brunell aboutisse au résultat selon lequel la règle per se est supérieure à la règle de raison. Mais il n'est pas certain de la raison pour laquelle il est convaincu que la meilleure règle per se serait une interdiction. Et si la politique optimale était que les prix de vente imposés per se soient *licites* ? Brunell ne considère même pas cette éventualité, mais elle est possible. Pour finir, elle générerait encore plus d'économie de coûts administratifs qu'une interdiction per se, car il ne serait pas nécessaire d'avoir recours à des enquêtes ou à quelque procédure judiciaire que ce soit en ce qui concerne les prix de vente imposés. La mise en œuvre ne pourrait pas être plus simple, plus prévisible ni plus transparente.

Brunell relève un vice dans *Leegin* lorsqu'il note que la Cour n'a donné que peu d'instructions sur les questions qui doivent être prises en considération avec la règle de raison dans les affaires de prix de vente imposés, mais n'en a donné aucune sur la manière d'évaluer les arguments et les preuves que le programme de prix de vente imposés d'un défendeur est pro-concurrentiel. De la même manière, la décision est muette sur l'importance, le cas échéant, de considérer si des solutions alternatives moins restrictives sont disponibles. Enfin, la décision ne contient aucune instruction sur la question de savoir et la manière dont les tribunaux pourraient mettre en balance les avantages et les inconvénients des prix de vente imposés sur la concurrence. Ce manque d'indication ne fait que renforcer l'incertitude inhérente à la règle de raison, et Brunell prédit qu'en conséquence, les parties publiques et privées seront peu disposées à porter les affaires de prix de vente imposés [en justice]. En fait, il soutient que, le statut juridique des prix de vente imposés aux États-Unis avec la règle de raison deviendra probablement le même que les

restrictions verticales non basées sur les prix: de facto licites per se.[51] Ceci, à son tour, est susceptible de conduire à une plus grande audace des affaires– peut-être trop d'audace.[52]

Certains commentateurs européens ont exprimé des doutes similaires au sujet de la faisabilité pratique de l'approche par la règle de raison des prix de vente imposés, même s'ils ne sont pas nécessairement en faveur de l'approche per se, non plus. Waelbroeck, par exemple, remarque qu'il"est juste de dire qu'il n'y a pas de point de vue probant aujourd'hui sur la manière de traiter les prix de vente imposés. . . . prendre en considération que les critères économiques pour évaluer les restrictions [verticales] 'est encore trop grossier ou trop coûteux à appliquer pour permettre des règles efficaces et une règle de raison structurée,' il est difficile de soutenir qu'un prix fixe ou minimum ne devrait pas être [illégal per se]."[53] Le fait que le Ministère de la justice américain ait émis et ensuite retiré des lignes directrices sur les restrictions verticales tend à soutenir le point de vue de Waelbrock.[54]

De toute évidence, il peut y avoir des différences entre le monde de la vérité ultime (économie théorique) et le monde des réalités pratiques, et la réalité est qu'en pratique, la règle de raison a quelques inconvénients. Cela ne veut pas dire que l'approche per se ne présente pas ses problèmes pratiques -elle en a aussi. Comme c'est souvent le cas avec les politiques en matière de concurrence, il n'y pas de solution parfaite à la question de savoir comment traiter les prix de vente imposés.

2.3.3 A quoi devrait ressembler une approche par la règle de raison des prix de vente imposés?

Mais si une juridiction décide d'adopter l'approche par la règle de raison pour les prix de vente imposés, comme les États-Unis viennent de le faire, que devrait être une approche sensée par la règle de raison ? Une fois encore, avec cette approche, l'objectif est de déterminer si les prix de vente imposés sont susceptibles d'avoir des effets anti-concurrentiels nets dans des cas particuliers. Idéalement, elle permettra l'application des prix de vente imposés qui accroissent le bien-être et de ceux dénués d'effet sur le bien-être tout en décourageant ceux qui diminuent le bien-être. Sur la base des points abordés dans la 2ème partie, voici quelques facteurs qui doivent être considérés avec cette approche :

<u>Quel est le pouvoir de marché du fabricant défendeur, s'il en a</u>

Moins le fabricant a de pouvoir de marché, moins il est susceptible de porter atteinte à la concurrence en mettant en oeuvre un programme de prix de vente imposés, à condition qu'il le fasse tout seul, à sa propre initiative (*i.e.*, il n'impose pas des prix de vente pour rejoindre une entente entre fabricants ou pour faciliter une entente entre revendeurs). Lorsqu'un fabricant a peu ou pas de pouvoir de marché, tout le reste étant identique, il y aura plus de concurrents, ou au moins des concurrents plus puissants, présents pour préserver la concurrence par les prix entre les marques. Un fabricant qu dispose d'un pouvoir de marché, peut malgré tout utiliser les prix de vente imposés comme un moyen d'augmenter les barrières à l'entrée en

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51 *Id.* au 518 et n.188 (citant Douglas Ginsburg, "Vertical Restraints: De Facto Legality Under the Rule of Reason, 60 Antitrust Law Journal 67 (1991)).

52 Cette prédiction de manière inexplicable ignore un fait que Brunell relève immédiatement dans son article ci-après : les prix de vente imposés sont toujours illégaux en vertu de la loi de nombreux états américains, et ils ne suivront pas nécessairement la jurisprudence *Leegin*. Brunell, *supra* n.36 au 518-19. Mais ceci constitue une particularité du système juridique américain. La remarque de Brunell serait facilement transposable dans une autre juridiction si elle adoptait une approche similaire à celle de *Leegin*.

53 Waelbroeck, *supra* n.2 au 98 (citant R. Boscheck, "The EU Policy Reform on Vertical Restraints – An Economic Perspective," 23 World Competition 3, 22 (2000).

54 Ministère de la justice américain, Vertical Restraints Guidelines (1985); (Anne Bingaman, Procureur général adjoint, "Antitrust Enforcement, Some Initial Thoughts and Actions," discours devant la Section Antitrust de l'Association du Barreau américain (10 août 1993) (revenant sur les lignes directrices)).

réduisant les points de distribution pour les produits concurrents. En d'autres termes, le fabricant, pourrait proposer des prix de vente imposés pour attirer les revendeurs en échange de leur accord de ne pas vendre d'articles concurrents.

La part collective de tous les fabricants sur le marché qui impose des prix de vente

Ce facteur est plus facile à évaluer lorsque que le défendeur est en situation de monopole. Dans ce cas, il va clairement dans le sens de ne pas autoriser les prix de vente imposés, comme nous venons de l'expliquer. L'analyse devient moins aisée sur les marchés oligopolistiques où il y a plusieurs défendeurs qui ont commencé ou peuvent commencer à mettre en place des prix de vente imposés les uns après les autres dès que l'un d'entre eux le décide, même s'il n'y pas de raison de penser qu'ils se sont entendus pour ce faire. Initialement, les autres fabricants peuvent ne pas vouloir recourir aux prix de vente imposés, mais pourraient quand même les mettre en place s'ils craignent de perdre leurs distributeurs au profit des fabricants concurrents qui y ont recours. La concurrence par les prix intermarque peut en pâtir en conséquence. Donc si le marché des fabricants est oligopolistique, il faudra rechercher cet éventuel effet domino. Un facteur important dans cette enquête sera de voir si par le passé les sociétés ont suivi de près le comportement les uns des autres.

En outre, plus la répartition collective est importante, plus il est possible que les prix de vente imposés soient utilisés pour favoriser une entente.[55] L'utilisation répandue des prix de vente imposés sur un marché constitue une condition nécessaire mais pas suffisante pour les programmes d'entente à la fois entre fabricants et entre revendeurs qui ont recours à des prix de vente imposés. Un fort pourcentage du marché couvert par des accords de prix de vente imposés est cohérent avec un scénario dans lequel les fabricants ont convenu de fixer leurs prix via des prix de vente imposés. De la même manière, il est cohérent avec des revendeurs puissants qui contraignent les fabricants de mettre en œuvre une entente au niveau du détail. Ce qui est compliqué, c'est qu'une importante couverture des prix de vente imposés va également de pair avec une concurrence intermarque forte et saine sur un marché où les prix de vente imposés unilatéralement rendent la distribution plus efficace.

Pour finir, plus un marché opère avec des prix de vente imposés, plus les consommateurs risquent d'être privés d'un choix significatif.

Que les prix de vente imposés aient été mis en oeuvre par un fabricant ou un/des revendeur(s).

Ceci devrait être un facteur important. Lorsque les prix de vente imposés le sont à l'initiative d'un fabricant, la collusion horizontale a moins de chance d'en être la raison que lorsque les prix de vente imposés le sont à l'initiative d'un revendeur ou d'un groupe de revendeurs. De plus, la doctrine économique soutient largement la proposition selon laquelle les prix de vente imposés à l'initiative du fabricant augmentent le bien-être. Il semble qu'il n'y ait que peu ou pas de soutien de ce type lorsque les prix de vente sont imposés à l'initiative du revendeur.[56]

55 Pour déterminer la part de marché couverte par les prix de vente imposés, les sociétés verticalement intégrées devraient être considérées comme des fabricants qui imposent des prix de vente imposés. Areeda & Hovenkamp, *supra* n.7 ¶ 1606g6, au 96.

56 Comanor & Scherer, *supra* n.22 au 2; *voir également* Richard Posner, Antitrust Law 177 (2ème éd. 2001) (soutenant l'utilisation de ce facteur dans un test par la règle de raison pour les prix de vente imposés).

La liste standard des facteurs généraux qui affectent l'éventualité d'une entente réussie

Plus ces facteurs vont dans le sens du maintien d'une entente sur le marché, plus les prix de vente constituent une inquiétude, tout le reste étant identique.[57]

Les raisons données par le(s) défendeur(s) pour imposer des prix de vente

Sont-ils pro-concurrentiels? Sont-ils plausibles? Par exemple, le défendeur est-il une nouvelle ou une petite société qui utilise les prix de vente imposés simplement pour prendre pied (ou se rétablir) sur le marché?

Les produits concernés ont-ils le profil des produits pour lesquels le bien-être général du consommateur est susceptible d'être accru par les prix de vente imposés

Les marchés ayant ce profil comprennent par exemple, les produits complexes qui nécessitent une démonstration ou qui autrement nécessitent une assistance importante pour la vente et l'éducation des clients; les marchandises susceptibles de bénéficier de manière substantielle de la certification par des revendeurs de haute réputation; et les biens pour lesquels les clients souhaitent d'autres services qui peuvent être parasités. Plus le marché répond à ce profil, moins il est susceptible qu'une entente soit responsable de l'imposition de prix de vente. D'autre part, lorsque les prix de vente sont imposés sur des marchandises pour lesquelles les services pré-vente supplémentaires ne sont pas susceptibles de faire hésiter beaucoup de clients, il est plus probable qu'une entente se trouve derrière, en particulier si une grande partie du marché est couverte par des prix de vente imposés.

Si les services pré-vente sont ou non augmentés après l'imposition des prix de vente (ou, dans le cas où la comparaison avant après n'est pas possible, si les services pré-vente ont augmenté avec les prix de vente imposés)

Ni les ententes entre fabricants, ni celles entre revendeurs ne visent à accroître leurs bénéfices en fournissant un meilleur service aux clients. Au contraire, elles augmentent leurs profits en privant les clients d'autres alternatives et en augmentant les prix. Les services pré-vente sont déstabilisants pour les ententes car les membres de l'entente peuvent en offrir davantage pour s'attirer plus d'activité tout en se conformant techniquement avec leur engagement d'appliquer un prix donné. Par conséquent, on peut s'attendre à ce que les ententes non seulement fixent le niveau des prix, mais imposent également une certaine restriction sur les services. Ceci laisse entendre qu'il est moins probable qu'une entente existe lorsque les services sont importants et se développent sur un marché.[58]

Si les autres restrictions verticales, comme les restrictions territoriales, sont ou non utilisées en tandem avec les prix de vente imposés

Si elles l'étaient, une entente entre fabricants– s'il y en a une– serait plus stable. Il a été indiqué ci-dessus que les prix de vente imposés peuvent avoir été combinés avec d'autres restrictions verticales pour

57 *Voir également*, OCDE, Public Procurement, The Role of Competition Authorities in Promoting Competition, DAF/COMP(2007)34, Note de référence au 21-23.

58 Kneepkens, *supra* n.4 au 661.

combattre la triche dans les ententes entre fabricants. Même en l'absence d'entente, de multiples restrictions verticales peuvent sévèrement restreindre la concurrence intramarques.[59]

Comment la production a changé en réponse aux prix de vente imposés

Il a été avancé que les prix de vente imposés qui réduisent le bien-être peuvent être distingués de ceux qui l'augmentent en considérant l'effet de la pratique sur la production.[60] Un déclin de la production après la mise en place des prix de vente imposés laisse entendre qu'une entente en est responsable. Les ententes utilisent les prix de vente imposés comme un moyen d'étouffer la concurrence et de conserver des prix à des niveaux supra-concurrentiels, non pour développer l'activité en augmentant les services au détail. Des prix plus élevés sans services supplémentaires stimulent rarement la demande; ils sont bien plus susceptibles d'engendrer une demande et une production plus faibles. Bien sûr, il est également possible que la production décline simplement parce que les prix de vente imposés sont un échec, et non parce qu'il s'agit d'une entente. La demande des clients en réponse aux services supplémentaires que les prix de vente imposés génèrent peut être trop faible en comparaison de la réponse des clients à la hausse des prix. Dans ce cas, cela provoquera une chute de la demande et de la production. Cependant, lorsque cela survient, le fabricant devrait être disposé à interrompre son programme de prix de vente imposés sans avoir recours au système juridique car il vendrait moins sans recevoir un prix de gros supérieur.[61]

Au contraire, les prix de vente imposés qui sont utilisés pour promouvoir une distribution plus efficace (généralement par des services pré-vente plus importants) devraient accroître la production. En principe, toutefois, un bon test de la règle de raison est simple à concevoir : si la production se réduit lorsque les prix de vente imposés sont mis en place alors les fabricants devraient soit volontairement arrêter d'y avoir recours ou faire face aux éventuelles conséquences juridiques; si la production augmente alors les prix de vente imposés réussissent le test. Marvel reconnaît qu'il serait difficile de faire passer le test à des cas réels, essentiellement car les données avant/après ne seront sans doute pas disponibles. Par conséquent, il considère le test de la production comme une composante souhaitable, pas l'intégralité, du test de la règle de raison pour les prix de vente imposés.

Comanor et Scherer ont cependant émis des inquiétudes théoriques sur l'exonération des défendeurs sur la base de la seule augmentation de la production. Ils démontrent que, comme illustré à la Figure 2 ci-dessus, même si la production augmente après l'imposition de prix de vente, il est toujours possible que le bien-être du consommateur diminue. En fait, ils soutiennent que "[l'affirmation selon laquelle les prix de vente imposés qui augmentent la production augmentent le bien-être du consommateur. . . devrait être reconnue comme un cas particulier qui ne s'applique pas dans des conditions vraisemblables."[62]

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59 *Voir* Robert Steiner, "The Nature of Vertical Restraints," 30 Antitrust Bulletin 143 (1985) (remarquant que les prix de vente imposés combinés avec des accords exclusifs sont particulièrement préjudiciables pour la concurrence intramarques).

60 Cette idée vient de plusieurs ouvrages de Robert Bork, notamment "A Reply to Professors Gould and Yamey," 76 Yale Law Journal 731 (1967) et "Resale Price Maintenance and Consumer Welfare," 77 Yale Law Journal 950 (1968), ainsi que Howard Marvel et Stephen McCafferty, "The Welfare Effects of Resale Price Maintenance," 28 Journal of Law & Economics 363 (1985).

61 Kneepkens, *supra* n.4 au 658 et n.9.

62 Comanor & Scherer, *supra* n.22 au 2.

En prenant en compte leur point de vue, nous déduisons du test de la production:

- Si la production diminue alors soit les prix de vente imposés sont un échec et les fabricants sensés devraient volontairement l'abandonner ou les prix de vente imposés sont l'œuvre d'une entente qui a l'intention d'imposer des prix plus élevés sans offrir davantage de services (même si les défendeurs devraient avoir la possibilité d'expliquer la raison pour laquelle ils poursuivent un programme financièrement irrationnel).

- Si la production demeure stable ou augmente alors l'existence d'une entente peut être rejetée, mais les conséquences sur le bien-être sont toujours indéterminées du point de vue de Comanor/Scherer.

La charge de la preuve

Un aspect important de toute approche par la règle de raison est celui de savoir à qui incombe la charge de la preuve. Présumer les prix de vente imposés licites, reviendrait à contraindre le demandeur d'établir leur effet délétère sur la concurrence dans chacun des cas? Ou les prix de vente imposés seraient présumés illicites à moins que les sociétés qui souhaitent les appliquer ne puissent apporter la preuve que les consommateurs en tirent un bénéfice net ? La réponse à cette question est certainement la caractéristique la plus importante de la règle de raison dans les affaires de prix de vente imposés car celui qui supporte la charge de la preuve est moins susceptible d'avoir l'avantage. En fait, Blair considère que l'attribution de la charge de la preuve constitue une question "qui tranche" dans les affaires de prix de vente imposés qui sont évaluées selon la règle de raison.[63]

La preuve sera difficile à établir dans la plupart des industries car il n'y aura généralement pas de données "avant et après" permettant de déterminer l'effet réel des prix de vente imposés sur la production et les clients. De plus, même sur un marché où il existe des données avant et après sur les prix de vente imposés, comment peut-on prouver que– tout le reste étant identique– les prix de vente imposés génèrent ou non un plus grand volume de ventes en contribuant à des services comme la certification? Tout le reste sera rarement, sinon jamais, identique. Quid si la production a chuté mais elle aurait chuté encore davantage sans les prix de vente imposés? Le défi qui consiste à distinguer les effets des prix de vente imposés de ceux des autres forces est sans doute extraordinaire.

Par conséquent, attribuer la charge de la preuve aux défendeurs pour démontrer que leurs prix de vente imposés augmentent l'efficacité peut ne pas s'avérer très différent de l'illégalité per se. Sans aucune expérience avec laquelle comparer leur marché particulier avec et sans prix de vente imposés, les demandes relatives à l'efficacité des défendeurs seront tout sauf faciles à rejeter comme un simple prétexte. Dans le même ordre d'idée, imposer aux gouvernements et aux demandeurs privés la charge de la preuve d'un effet anticoncurrentiel peut aboutir à ressembler étrangement à une légalité per se.

2.3.4 Raccourcis vers l'approche complète de la règle de raison

Plutôt que de réaliser une évaluation complète des faits et des circonstances dans chaque affaire concernant des prix de vente imposés, l'agence ou le tribunal peut adopter une approche modifiée qui élimine rapidement les cas dans lesquels il est particulièrement improbable que les prix de vente imposés portent atteinte à la concurrence. Cette approche par les règles d'exonération a été utilisée pour un certain nombre d'autres comportements, comme les fusions et les restrictions verticales non basées sur le prix. Une règle d'exonération, par exemple, peut automatiquement autoriser le comportement en question si la part de marché du défendeur n'excède pas un certain niveau. Les seuils basés sur la concentration du

63 Blair, *supra* n.6 au 149.

marché global peuvent également être utilisés. Autrefois, les approches basées sur la part de marché étaient utilisées à la fois par les agences européennes et américaines pour évaluer certaines restrictions verticales. Les agences américaines ont abandonné cette méthode, malgré tout, et les règles d'exonération européennes excluent expressément les prix de vente imposés.[64]

Une objection à l'utilisation des règles d'exonération basées sur les parts de marché pour les prix de vente imposés est qu'elles sont peu adaptées aux prix de vente à l'instigation des revendeurs. Plus précisément, l'objection est que les prix de vente imposés à l'initiative des revendeurs sont rarement voire ne sont jamais justifiés; par conséquent, ils ne devraient jamais bénéficier d'une règle d'exonération. C'est exactement ce que feraient les seuils basés sur les parts de marché dans les cas où les seuils ne sont pas atteints, sans se préoccuper de savoir qui est effectivement responsable d'avoir initié le programme de prix de vente imposés.

Une autre approche offre la possibilité d'abréger l'analyse d'une manière assez différente. Au lieu d'identifier rapidement les cas dans lesquels les prix de vente imposés seront autorisés, ce tri accélérerait les choses en imposant des présomptions irréfutables d'illégalité dans certain cas. Elle a été suggérée par les Professeurs Comanor et Scherer dans leur *amicus brief* de l'affaire *Leegin*. Bien que la Cour suprême ait choisi de ne pas la retenir, elle vaut la peine d'être relevée. Leur idée est la suivante: Lorsque les prix de vente imposés sont induits par les fabricants, employer l'analyse de la règle de raison. Lorsque les prix de vente imposés sont induits par les revendeurs, les considérer illicites à moins que le(s) défendeur(s) ne puisse(nt) apporter la preuve que les prix de vente imposés ne sont pas anticoncurrentiels. Ce raccourci présente les avantages d'être objectif, prévisible, facile à comprendre et à mettre en œuvre. (L'analyse peut ne pas très aisée dans les cas de prix de vente imposés à l'instigation des fabricants, mais Comanor et Scherer ont également un raccourci dans ces cas. Nous l'exposerons brièvement.)

Outre l'objectivité de leur approche, la prévisibilité, la transparence et l'administrabilité, Scherer et Comanor ajoutent qu'elle serait également exacte, qu'elle identifiera correctement les cas qui nécessitent un traitement per se. Ils soulignent que la théorie économique n'est d'aucune aide pour soutenir l'idée que les prix de vente imposés initiés par les revendeurs augmentent la concurrence ou le bien-être du consommateur. "Dans de tels cas," ajoutent-ils, "les prix de vente imposés et les restrictions similaires conduisent à un prix plus élevé pour le consommateur sans valeur prouvée en retour à moins que l'on, ne souscrive à la notion selon laquelle la protection des petits revendeurs est souhaitable en soi."[65] Pour illustrer la signification de ce qui est en jeu, les auteurs remarquent que lorsque le vide juridique qui permettait aux pharmacies de détail aux États-Unis de faire pression et de bénéficier des prix de vente imposés a été comblé, leurs marges bénéficiaires ont chuté doucement en moyenne de 40 pour cent à environ 20 pour cent, se traduisant par des économies pour les consommateurs et les assureurs de 40 milliards de dollars américains.[66] Il convient de noter que les auteurs font référence aux marges

64 Règlement (CE) n°2790/99 de la Commission (22 décembre 1999) para. 10; Ministère de la Justice américain, Vertical Restraints Guidelines (1985); *voir également* (Anne Bingaman, Procureur général adjoint, "Antitrust Enforcement, Some Initial Thoughts and Actions," discours devant la Section Antitrust de l'Association du Barreau américain (10 août 1993) (revenant sur les lignes directrices et remarquant qu'elles "élèvent indûment la théorie au détriment de l'analyse des faits ")). Les exemptions par catégorie de la CE s'appliquent aux sociétés dont la part de marché est inférieure à 30 pourcent, même si la Commission peut toujours imposer des restrictions réglementaires lorsque des réseaux parallèles d'accords verticaux ont des effets similaires qui couvrent collectivement plus de 50% d'un marché donné. Alors ces règles d'exonération ne s'appliquent pas, la CE utilise une approche parla règle de raison. En vertu des anciennes lignes directrices américaines, l'entente verticale n'aurait pas été remises en cause si, entre autres choses, le pourcentage du marché global approvisionné par les sociétés ayant adopté la pratique était inférieur à 60 et la part de marché de la société en cause était inférieure à dix pour cent.

65 Comanor & Scherer, *supra* n.22 au 8.

66 *Id*.

bénéficiaires, non aux niveaux de prix. Ceci émousse l'argument en faveur des prix de vente imposés selon lequel des prix plus élevés à cause de prix de vente imposés ne sont probablement pas préjudiciables pour les consommateurs, qui soi-disant auraient bénéficié de services pré-vente plus importants stimulés par les prix de vente imposés. Au moins, les chiffres ne suggèrent pas que les pharmacies aient perdu leurs gains financiers tirés des prix de vente imposés du fait de la concurrence en les consacrant à des investissements supplémentaires dans une concurrence non basée sur les prix.

Qu'en est-il du plan de Comanor et Scherer dans les cas où les fabricants sont à l'origine des prix de vente imposés? Le raccourci qu'ils suggèrent pour ces cas est fondé sur le principe que les prix de vente imposés sont davantage susceptibles de porter atteinte aux consommateurs quand ils sont utilisés largement sur un marché pertinent. "Dans de tels cas, le choix des consommateurs est limité aux biens qui supportent des marges de distribution importante en l'absence de déplacements longs et exténuants pour faire leurs achats. Et si sous couvert de hautes marges, la plupart des revendeurs s'engagent dans une promotion pré-vente importante, leurs efforts s'annuleront largement au total, aboutissant à un équilibre entre les coûts promotionnels, les prix élevés et marges élevées avec relativement peu voire pas d'augmentation de la demande."[67] En gardant ceci à l'esprit, les auteurs suggèrent qu'une approche structurelle dans laquelle la règle per se est invoquée si le volume des ventes à prix imposés sur le marché pertinent dépasse un seuil donné (ils suggèrent 50 pour cent, ou bien un index Herfindahl-Hirschman au dessus de 1800) et les ventes à prix imposés du défendeur ajoutent au moins un autre montant donné de volume (ils suggèrent dix pour cent, ou une augmentation de l'index Herfindahl-Hirschman d'au moins 100). Lorsque les deux seuils sont dépassés il y aurait présomption d'illégalité, que le(s) défendeur(s) pourraient réfuter en démontrant que les prix de vente imposés étaient nécessaires pour s'assurer que des services efficaces étaient fournis par les revendeurs, que la définition du marché était trop étroite, que les consommateurs disposaient en réalité de plein d'autres choix (en dehors des prix de vente imposés), etc.

Bien que Comanor et Scherer ne le précisent pas particulièrement, on peut présumer que dans les cas de prix de vente imposés induits par le fabricant où au moins l'un des seuils ci-dessus n'est pas atteint, leur recommandation serait d'appliquer une présomption de légalité qui pourrait être réfutée par le demandeur. Sans se préoccuper d'atteindre ou non les seuils structurels, l'une ou l'autre partie bénéficiera d'une présomption dans l'approche de Comanor/Scherer, ce qui revient à attribuer la charge de la preuve à l'autre partie. Parce que supporter la charge de la preuve sera sans doute difficile, cette approche est en réalité susceptible d'aboutir à une économie judiciaire importante. Les demandeurs seront moins enclins à porter leurs affaires en justice si les caractéristiques structurelles ne se traduisent pas par une présomption d'illégalité, et les défendeurs seraient bien moins disposés à plaider les affaires dans lesquelles cette présomption s'applique. La question de savoir si cette solution est souhaitable, puisque dans la plupart des cas, elle aboutira probablement à ignorer les facteurs non structurels évoqués à la partie 2.3.3., est ouverte au débat. Une fois encore, toute la question de l'approche est d'être en mesure d'ignorer ces facteurs. Ils constituent la source de la plupart des incertitudes et de la subjectivité qui affecteraient l'approche de la règle de raison, en la rendant plus lente et plus onéreuse. L'approche de Comanor/Scherer constitue un risque calculé. Elle ne vise pas une issue parfaitement exacte dans chaque cas, mais un compromis entre l'efficacité et l'exactitude dans tous les cas.

3. Les prix de vente imposés en pratique : approches et événements récents dans une sélection de juridictions de l'OCDE

3.1 L'Union européenne

Dans l'Union européenne, la plupart des restrictions dans les accords concernant l'approvisionnement et la distribution sont permises sauf s'il existe un pouvoir de marché. Le règlement de 1999 sur les

67 *Id*. au 9.

exemptions par catégorie pour les accords de coopération verticale reconnaît que les parties peuvent conclure des accords pour gérer la chaîne de distribution pour améliorer l'efficacité. Il reconnaît également que les accords à plus faible échelle ne sont pas susceptibles d'affecter la concurrence ni amont ni en aval. Par conséquent, le règlement applique un tri par les parts de marché qui exonère la plupart des accords de l'article 81 tant qu'ils impliquent un fournisseur disposant d'une part de marché inférieure à 30 pour cent.[68]

Lorsqu'un accord vertical implique un fournisseur ayant plus de 30 pour cent de parts de marché, il n'y a toujours pas de présomption que l'accord contrevient à l'article 81. Mais avec un pouvoir de marché supérieur l'inquiétude s'accroît que les accords verticaux puissent affecter la concurrence en excluant les autres fournisseurs, en constituant des barrières à l'entrée ou en réduisant la concurrence intermarque et en favorisant la collusion. Par conséquent, la norme de la règle de raison s'applique.

La fixation d'un prix de revente minimum est toutefois une pratique qui reste prohibée quelque soit la part de marché. En effet, les prix de vente imposés sont considérés comme des infractions *per se*, au moins avec le respect de prix minimum.[69] L'article 4(a) du règlement relatif aux exemptions par catégorie exclut les accords qui causent une "restriction de la capacité de l'acheteur de déterminer son prix de vente " du dispositif du règlement. Ceci laisse de tels accords vulnérables à l'Article 81 (1) du Traité CE, qui interdit les accords qui fixent "de façon directe ou indirecte les prix d'achat ou de vente". Recommander un prix pour la revente ou exiger des revendeurs qu'ils respectent un prix de revente maximum est parfois autorisé malgré tout. En particulier, les prix de vente maximum imposés sont permis jusqu'au seuil de 30 pour cent de parts de marché, à condition que ces derniers n'équivalent pas à un prix de vente fixe ou minimal à la suite d'une pression ou de mesures d'incitation de la part du fournisseur.[70] Au-delà de ce seuil de parts de marché, la règle de raison s'applique, en prêtant la plus grande attention sur le niveau (le cas échéant) de pouvoir de marché dont le fournisseur dispose et sur la position de marché de ses concurrents. De manière intéressante, certaines restrictions territoriales sont permises pour la revente, comme celles qui protègent des systèmes de concessions exclusives, qui préservent des différences fonctionnelles entre grossistes et revendeurs ou qui empêchent la revente de composants qui aboutissent à concurrencer le fournisseur.[71]

3.2 États-Unis

Le traitement per se des prix de vente imposés s'est éteint d'une mort lente aux États-Unis. Tout d'abord déclaré illégal en 1911, le statut juridique des prix de vente imposés a suivi une histoire juridique extrêmement compliquée au niveau fédéral pendant le reste du 20ème siècle. La Cour suprême a commencé à écorner les contours de la règle per se contre les prix de vente imposés dès 1919. Dans les années 80, le retrait complet des prix de vente imposés du domaine de la règle per se était inévitable. La Cour a fini par procéder au changement dans l'arrêt *Leegin* en 2007.

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68 Règlement (CE) n° 2790/99 de la Commission (22 décembre 1999).

69 Techniquement, même les prix de vente imposés minimum pourraient être autorisés si aucun effet notable sur le marché n'est attendu. En pratique, toutefois, les juridictions européennes n'ont jamais soutenu qu'un accord imposant des prix de vente corresponde à cette description. Kneepkens, *supra* n.4 au 656 n.3.

70 *Voir Volkswagen AG v Commission*, Tribunal de Première Instance affaire T-208/01 (3 décembre 2003) (un fabricant qui a adressé des circulaires et des mises en garde aux concessionnaires en les priant instamment de ne pas dévier des prix de revente non contraignants recommandés n'était pas responsable d'une fixation de prix); *mais voir* la décision de la Commission *Nathan-Bricolux*, JO [2001] L 54/1, paras. 86-90 (estimant que fixer un prix maximum tout en interdisant les remises et les rabais revenait à fixer des prix de revente).

71 OCDE, European Commission – Peer Review of Competition Law and Policy (2005), p. 24.

La décision de 1911, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, reposait en partie sur la croyance que les effets des prix de vente imposés n'étaient pas différents de ceux des fixations de prix horizontales entre revendeurs.[72] Bien que du point de vue d'aujourd'hui il soit facile de critiquer la Cour pour avoir fait ce parallèle, il n'est pas très difficile de l'excuser non plus. Après tout, presque 50 ans devaient s'écouler avant que Lester Telser n'explique la raison pour laquelle les fabricants imposaient des prix de vente même s'ils n'en profitaient pas quand les revendeurs constituaient des ententes.[73]

La décision de 1919 *United States v. Colgate & Co.* et toute la jurisprudence qui l'a interprétée garantissaient aux fabricants le droit d'annoncer des prix au détail suggéré et refusaient de traiter avec les revendeurs qui ne suivaient pas ces suggestions, à condition que le fabricant agisse unilatéralement et que toute décision d'un revendeur de se conformer soit une décision indépendante.[74] En d'autres termes, les prix de vente imposés ne constituent pas une violation à moins qu'il n'y ait un accord, exprès ou tacite, entre le fabricant et les revendeurs qui coopèrent. *Colgate* a été le début de la fin de l'applicabilité de la règle per se aux prix de vente imposés aux États-Unis. En théorie, au moins, tout fabricant qui voulait contourner l'interdiction per se pouvait en effet, toujours imposer des prix de vente, tant qu'il évitait effectivement de conclure des accords sur les prix de vente imposés et était disposé à résilier les revendeurs non coopératifs.[75] *Colgate* a également créé une incohérence dans la politique antitrust américaine en ce qui concerne les prix de vente imposés, car cela signifiait que ce que le fabricant n'avait absolument pas le droit d'atteindre directement par des prix de vente imposés il pouvait l'atteindre indirectement en refusant de traiter. La plupart des autres juridictions sinon toutes, soit dit en passant, n'ont pas d'exception comme la doctrine *Colgate.* En Europe, par exemple, ces méthodes indirectes pour atteindre les mêmes résultats que les prix de vente imposés sont précisément interdites.[76]

Début 1937, le Congrès a promulgué un certain nombre de lois qui ont amendé la loi Sherman pour rendre les prix de vente imposés licites dans de nombreuses circonstances.[77] Ces amendements ont été abrogés en 1975. A la fin des années 70 et dans les années 80, la Cour a restreint l'étendue des conduites couvertes par *Dr. Miles* et a renversé la règle per se pour les restrictions verticales non basées sur les prix, pour la remplacer par l'approche de la règle de raison.[78] Ceci a crée une situation embarrassante dans laquelle la Cour voulait prendre en compte la possibilité que les restrictions verticales, non basées sur les prix dans la concurrence intramarques puisse avoir des effets positifs sur le bien-être qui dépassent les effets négatifs que ces restrictions pouvaient avoir sur la concurrence intermarques. Mais les restrictions

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72 *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

73 Lester Telser, "Why Should Manufacturers Want Fair Trade?" 3 Journal of Law & Economics 86 (1960).

74 250 U.S. 300 (1919).

75 En pratique, la doctrine *Colgate* n'a pas globalement été utile pour les affaires. *Voir* Frank Mathewson et Ralph Winter, "The Law and Economics of Resale Price Maintenance," 13 Review of Industrial Organization 57, 62 & n.11 (1998) (remarquant qu'au cours de l'histoire de la doctrine, on a considéré que "les relations commerciales normales entre un fabricant et un revendeur comprennent des communications qu'exclut la doctrine").

76 *Voir* Commission européenne, Lignes directrices sur les restrictions verticales ¶ 47, 2000 J.O. (C 291) 1, 11 (interdisant spécifiquement les prix de vente imposés via des méthodes indirectes comme "les menaces, l'intimidation, les mises en garde, les amendes, les retards ou la suspension des approvisionnements ou la résiliation des contrats "); *voir également* Wælbroœk, *supra* n.2 au 96 n.42 ("il est clair qu'il n'existe pas d'équivalent à la doctrine *Colgate* dans le droit européen de la concurrence ").

77 Ces lois étaient la Loi Miller-Tydings sur le maintien des prix de revente (1937) et la loi McGuire (1952).

78 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

verticales sur les prix qui, selon les arguments des économistes, pouvaient se compléter de la même manière étaient toujours illégales per se.

Cela a été partiellement résolu en 1997, lorsque les prix de vente maximum imposés ont perdu leur statut de violation per se de la loi Sherman. Ayant été considérés illégaux per se dans une décision de 1968 largement critiquée,[79] les prix de vente maximum imposés étaient passés dans le domaine de la règle de raison dans l'arrêt *State Oil v. Khan* pour les raisons discutées à la Partie 2.3.2.[80] Sur la base des résultats actuels, il semble que les prix de vente maximum imposés puissent aussi bien être devenus légaux per se.[81]

Dans l'arrêt *Leegin* de 2007, la Cour a adopté la règle de raison pour toutes les restrictions verticales. Mais ce faisant, elle pourrait avoir remplacé une approche compliquée par une autre. Les caractéristiques souhaitables d'un bon test de la règle de raison ont déjà été exposées. Si *Leegin* avait décrit ce test en détail et de manière claire, alors le revirement de la responsabilité *per se* aurait pu être moins controversé. Mais il ne l'a pas fait. La Cour a laissé aux juridictions inférieures le difficile travail de trouver la manière de distinguer les "bons" prix de vente imposés des "mauvais", en les mettant en garde de"s'assurer que la règle fonctionne pour éliminer les restrictions anticoncurrentielles du marché et de donner davantage de directives aux sociétés."[82] Un commentateur a déjà déclaré que ce qu'on a demandé de faire aux juridictions inférieures est quelque chose qui ne peut pas être fait. "L'implication de l'analyse économique est évidente : il n'est pas possible de mener un test de la règle de raison qui résolve la question de savoir si l'utilisation promotionnelle de prix de vente imposés est ou non raisonnable."[83]

Leegin ne propose que trois suggestions aux juridictions inférieures en ce qui concerne les facteurs à prendre en considération dans les futures affaires relatives aux prix de vente imposés. Tout d'abord, le nombre de fabricants qui utilisent les prix de vente imposés est pertinent car plus un marché fonctionne avec des prix de vente imposés plus il est facile de maintenir une entente et plus il est probable que les consommateurs seront privés d'un choix significatif. En second lieu, il est important de voir si les prix de vente imposés ont été initiés par les fabricants ou les revendeurs car dans ce dernier cas, la facilitation de l'entente est plus susceptible d'être la raison réelle qui se cache derrière les prix de vente imposés.[84] Enfin, la Cour a indiqué que les juridictions inférieures devraient considérer la question de savoir si les fabricants ou les revendeurs impliqués dans l'accord sur les prix de vente imposés ont un pouvoir de marché. Si le fabricant détient un pouvoir de marché, alors il peut utiliser les prix de vente imposés essentiellement pour acheter les revendeurs pour qu'ils ne proposent pas les produits des concurrents. Plus un revendeur a de

79 *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

80 *State Oil v. Khan*, 522 U.S. 3 (1997).

81 *Voir par exemple, Mathias v. Daily News*, 152 F.Supp. 2d 465 (S.D.N.Y. 2001) (ordonnance de référé contre un demande relative à des prix de vente imposés maximum) (citée dans Marvel, *supra* n.16 au 4).

82 *Leegin*, 127 S. Ct. au 2720.

83 Blair, *supra* n.6 au 150-51. Blair soutient que la Cour avait pleinement conscience de l'impossibilité de cette cession. Il laisse entendre par conséquent que la Cour avait l'intention de conférer la légalité per se de facto aux prix de vente imposés. *Id*.

84 La Cour a également fait valoir que les prix de vente imposés initiés par les revendeurs pouvaient servir à protéger un revendeur dominant, inefficace de concurrents plus efficaces ou innovants. Si cela est vrai pour la concurrence par les prix, le raisonnement de la Cour s'effondre lorsqu'il s'agit de concurrence non basée sur les prix. Un revendeur plus efficace aurait des marges bénéficiaires plus importantes et pourrait les utiliser pour financer un niveau de service plus important que celui offert par le revendeur dominant inefficace. Il peut également prendre des parts de marché en offrant des biens "gratuitement" avec les produits couverts par les prix de vente imposés, se conformant ainsi techniquement à la politique de prix de vente imposés mais en offrant au client une meilleure affaire quoi qu'il en soit.

pouvoir de marché, plus il est difficile pour un fabricant d'éviter sa demande de prix de vente imposés en se tournant vers d'autres distributeurs.

Soit davantage d'informations devraient être prises en compte dans une enquête selon la règle de raison sur les prix de vente imposés ou une sorte de raccourci entre les lignes de l'UE ou celles suggérées par Scherer et Comanor devrait être construit. *Leegin* n'offre aucun indice sur ce que signifie une trop grande couverture du marché par des prix de vente imposés, ni ce que représente un pouvoir de marché trop important, ni s'il faut ou non utiliser le test de la production et comment le faire. Voyons comment une juridiction inférieure s'en est récemment sortie en s'appuyant sur les directives de l'arrêt *Leegin*.

En juin 2008, une cour d'appel fédérale a rendu une décision qui s'est appuyée sur la jurisprudence *Leegin*. Le demandeur Toledo Mack Sales & Service, Inc. ("Toledo") était un concessionnaire agréé de camions tout-terrain fournis par le défendeur Mack Trucks, Inc. ("Mack"). Mack a exigé de ses concessionnaires qu'ils signent des accords leur accordant une zone de responsabilité ("AOR") – un territoire géographique que les accords ne décrivaient pas comme exclusif. En fait, la politique affichée de Mack était que les concessionnaires soient libres de réaliser les ventes où qu'ils veuillent. Sur la base de cette politique, Toledo a cherché à vendre de manière agressive les camions Mack dans tous les États-Unis en cassant les prix des autres concessionnaires. Mack, a toutefois conseillé à Toledo d'arrêter de faire de la concurrence sur les prix aux autres concessionnaires Mack. Finalement, Mack a résilié la concession de Toledo.[85]

Toledo a alors engagé une action contre Mack, prétendant que Mack avait violé l'article 1 de la loi Sherman, entre autres choses. Au procès, Toledo a apporté la preuve qu'il y avait un accord horizontal non écrit entre les concessionnaires Mack selon lequel les concessionnaires ne se livreraient pas entre eux à une concurrence par les prix. Toledo a également apporté la preuve que Mack avait un accord vertical avec ses concessionnaires en vertu duquel ils étaient dissuadés de vendre en dehors de leur territoire géographique (malgré la politique officielle). Dans le cadre de cet accord, Mack a annoncé qu'il retarderait ou n'accorderait plus de remise sur les prix de gros aux concessionnaires qui vendraient en dehors de leurs territoires. Enfin, Toledo a apporté des preuves indiquant que les accords verticaux de Mack avec ces concessionnaires étaient largement le résultat de la pression de ces concessionnaires.

Le tribunal de district a rendu un jugement en droit contre la demande de Toledo selon laquelle Mack avait violé la Section 1 de la loi Sherman. Un "jugement en droit" signifie essentiellement que si toutes les preuves présentées au procès par une partie sont supposées être vraies et que chacune des conclusions raisonnables qui en sont tirées en faveur de cette partie, la cour ne peut quand même pas faire droit à la demande cette partie car la preuve est légalement insuffisante. En appel toutefois, le dernier point au fond de la demande de Toledo n'était pas en cause; au lieu de cela, la question était seulement celle de savoir si la demande était étayée par des preuves suffisantes pour lui permettre d'aller devant un jury. La cour d'appel a décidé qu'elle l'était et par conséquent a cassé la décision du tribunal de district.

Il faut une définition très large des prix de vente imposés pour considérer l'accord de Mack avec ses concessionnaires comme relevant de cette catégorie de conduite. L'accord ne disait rien du tout sur les prix de revente. Au contraire, il semblait pouvoir plus facilement être retenu comme une restriction territorial. Toutefois, la cour d'appel s'est appuyée sur la jurisprudence *Leegin* pour le principe selon lequel lorsqu'un "accord vertical fixant un prix de revente minimum " est conclu aux fins de faciliter une entente horizontale, l'accord vertical est évalué par la règle de raison.[86] Si cela constitue une erreur de la cour d'appel, elle pourrait être considérée comme une erreur sans importance. Même si l'accord vertical avait été qualifié de restriction territoriale, après tout, la règle de raison aurait toujours été applicable.

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85 *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3ème Cir. 2008).

86 *Id*. au 225 (citant *Leegin*, 127 S. Ct. au 2717).

Mais à la lumière des facteurs que la cour d'appel a pris en considération dans son analyse par la règle de raison et du fait que la cour ait regardé les directives de l'arrêt *Leegin,* il est clair que la cour a bénéficié d'instructions plus détaillées dans *Leegin* – si seulement elles s'y étaient trouvées. Tout d'abord, la cour d'appel a listé quatre facteurs qui, selon ses propres précédents, sont pertinents pour l'évaluation des restrictions au commerce selon la règle de raison:

> (1) que les défendeurs aient contracté, se soient associés ou aient conspiré entre eux; (2) que l'association ou la conspiration ait produit des effets contraires, anti-concurrentiels sur les marchés géographiques et du produit pertinents; (3) que l'objet de et la conduite conformément à ce contrat ou cette conspiration aient été illégaux; et (4) que les demandeurs aient subi un préjudice en raison du résultat à venir de cette conspiration.[87]

Simplement, ces facteurs n'englobent pas assez d'informations pour permettre à une juridiction de rendre une décision intelligente sur la question de savoir si une restriction verticale devrait ou non être illégale. En fait, ils n'englobent *aucune* des informations nécessaires pour une telle décision. Le premier et le quatrième facteurs n'appartiennent pas à l'analyse par la règle de raison. Le premier est au contraire une condition préalable pour procéder à une analyse par la règle de raison. Le quatrième concerne l'étroite question de savoir si la partie qui a introduit l'action a droit à réparation si le comportement du défendeur est réputé anti-concurrentiel, non la question plus importante de savoir si la conduite a porté atteinte à la concurrence et aux consommateurs. Les second et troisième facteurs, plutôt que de faire la lumière sur les deux décisions essentielles qui doivent être prises, assument simplement que ces décisions ont déjà été tranchées. Toute la question de la procédure de la règle de raison consiste à déterminer si la restriction est anti-concurrentielle et, en fin de compte, illégale. Dire que ces considérations fon elles-mêmes partie de l'analyse par la règle de raison revient à créer un retour en boucle inutile.

Percevant peut-être que ces quatre facteurs n'étaient pas particulièrement utiles, la cour a également mentionné deux des trois facteurs identifiés par la Cour suprême dans *Leegin*, la source de la restriction et si le fabricant ou le revendeur avait un quelconque pouvoir de marché. La cour a ensuite débattu sur la question de savoir si les preuves de Toledo sur chacun des facteurs étaient suffisantes pour se présenter devant le jury.

Les preuves ont été facilement considérées comme suffisamment fortes sur la question de savoir si Mack et ses concessionnaires avaient contracté, s'étaient associés ou avaient conspiré entre eux et si l'origine de la restriction était la pression des revendeurs. Mais la cour a ensuite fait référence au précédent qui soutient que les "effets contraires, anti-concurrentiels " pouvaient être satisfaits seulement en démontrant que le défendeur avait un pouvoir de marché. L'expert de Toledo a témoigné que Mack avait un pouvoir sur deux marchés; par conséquent, aux fins de réviser un jugement en droit, la cour d'appel a été convaincue par les preuves de Toledo sur les effets anticoncurrentiels. L'équation du pouvoir de marché avec l'effet anticoncurrentiel est particulièrement troublant dans un contexte de prix de vente imposés, étant donné que la cour a déclaré que le pouvoir de marché "est la capacité à augmenter les prix au-dessus de ceux qui prévaudraient sur un marché concurrentiel."[88] Même si elle est utile comme indicateur du pouvoir de marché dans d'autres situations, l'utilisation de cette condition comme variable pour les effets anti-concurrentiels dans les cas de prix de vente imposés peut potentiellement être injuste pour les défendeurs et les consommateurs. Après tout, les prix de vente imposés augmentent souvent les prix même lorsqu'ils accroissent le bien-être du consommateur. Vu qu'il est vrai que dans les marchés où les prix de vente imposés augmentent le bien-être du consommateur, le concept de "marché concurrentiel "

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87 *Id*. (citant *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3ème Cir. 1998)).

88 *Id*. au 226 (citant *United States v. Brown University.*, 5 F.3d 658, 668 (3ème Cir. 1993)).

devrait prendre en compte le fait que les prix de vente imposés eux-mêmes devraient probablement être réputés concurrentiels, et que cela devrait exonérer le défendeur. Mais il est difficile d'avoir confiance dans le fait que les cours identifieront correctement ces situations lorsque la raison pour laquelle elles considèrent cette affaire est en premier lieu d'essayer de trancher si les prix de vente imposés sont pro- ou anti-concurrentiels. Ceci constitue une autre boucle inutile.

L'arrêt *Leegin* aurait pu résoudre ces problèmes immédiatement et pour tout, mais il ne l'a pas fait. Étant donné que même les cours d'appel ont toujours des difficultés à articuler une règle de raison raisonnable, il est difficile de ne pas abonder dans le sens de la conclusion de Stucke selon laquelle la règle de raison offre peu de prévisibilité aux participants du marché.

3.3 Royaume Uni

Lorsque le Comité de la concurrence a tenu sa dernière table ronde sur les prix de vente imposés en février 1997, deux types de produits étaient encore exclus de l'interdiction générale sur les prix de vente imposés au Royaume Uni : les livres et les médicaments de marque en vente libre (OTC). Depuis lors, les deux exemptions ont été annulées. L'exemption pour les livres a été renversée en mars 1997.[89] Quatre ans plus tard, le Tribunal des pratiques restrictives a éliminé l'exemption pour les médicaments – une décision qui a eu presque immédiatement des effets sur les prix. Dans les heures qui ont suivi la décision du tribunal, certains supermarchés ont annoncé des réductions de prix de 25 à 50 pour cent sur les principales marques de produits comme les antalgiques, les remèdes contre la toux et les vitamines. Chaque point de pourcentage déduit du prix moyen a été estimé avoir permis aux consommateurs d'économiser 16 millions de livres sterling par an.[90]

Plus récemment, deux affaires ont été tranchées simultanément par la cour d'appel en 2006. Les affaires, jointes en raison de leurs faits et de leurs questions très similaires, impliquaient des accords fixant les prix de copies de vêtements de football fabriqués par Umbro Holdings Ltd et de jouets et de jeux fabriqués par Hasbro UK Ltd. Dans chacun des cas, la cour a confirmé les décisions du tribunal d'appel sur la concurrence en considérant que les accords avaient été conclus par un fabricant et au moins deux revendeurs, que les accords étaient à la fois verticaux et horizontaux, et qu'ils étaient illégaux.[91]

Le cas relatif aux équipements de football a d'abord impliqué trois revendeurs: JJB Sports, le plus grand revendeur d'articles de sport au Royaume Uni; Allsports, qui représente environ 50 % de la taille de JJB; et Sports Soccer, un plus petit discounteur. Umbro, le fabricant, avaient des licences exclusives pour produire les articles en question : des copies des équipements officiels des équipes d'Angleterre et de Manchester United. Le moteur de ces accords en l'espèce ne correspondait pas nettement ni au schéma des prix de vente imposés initiés par le fabricant ni purement par le revendeur. Au contraire, Umbro et les deux plus grands revendeurs non discounteurs voulaient tous un accord de prix minimum. La pression est venue à la fois de JJB et de Allsports sur Umbro et d'Umbro sur Sports Soccer.

La cour d'appel de la concurrence a considéré que JJB disposait à la fois d'"un pouvoir de marché considérable " en raison de sa part de marché et d'"un pouvoir de négociation considérable " en raison de la taille de ses commandes auprès d'Umbro.[92] S'il était vrai qu'Umbro avait une licence exclusive pour

89 Michael Utton, "Books Are Not Different After All: Observations on the Formal Ending of the Net Book Agreement in the UK," 7 International Journal of the Economics of Business, 115 (2000).

90 OCDE, Competition Law and Policy in 2001-2002 (Rapport annuel du Royaume Uni), disponible sur www.OCDE.org/dataOCDE/33/29/2489084.pdf.

91 *Argos Ltd and another v Office of Fair Trading; JJB Sports plc v Office of Fair Trading*, Cour d'appel (Civil Division), [2006] EWCA Civ 1218.

92 *Id.*, para. 49.

fabriquer les équipements, qui était considérée comme essentielle pour tous revendeurs de vêtements de sport, il était également vrai qu'Umbro dépendait de JJB. En 2000, par exemple, la valeur des commandes de JJB pour les produits de la marque Umbro représentait le double de la valeur de ses commandes de copies d'équipement Umbro. JJB "ne pouvait pas avoir causé de réelles difficultés à Umbro en plaçant tout ou partie de ses achats de produits de marque à un concurrent comme Nike. Par conséquent, Umbro s'est senti sous pression . . . pour faire ce qu'il pouvait pour apaiser les inquiétudes commerciales que lui avait exprimées JJB."[93] L'une des inquiétudes commerciales de JJB était de mettre un terme à la vente à bas prix de Soccer Sports de copies d'équipement. JJB a donc exercé une pression sur Umbro pour qu'il fasse quelque chose.

Il y a quelques autres faits essentiels. Tout d'abord, Allsports a également exercé une pression sur Umbro pour mettre un terme aux ventes au détail à prix réduits. Ensuite, plusieurs revendeurs y compris JJB et Allsports ont communiqué entre eux par l'intermédiaire d'Umbro, pour signaler qu'ils ne vendraient pas en dessous d'un certain niveau tant qu'aucun des autres (y compris Soccer Sports) ne le ferait pas non plus. En troisième lieu, en réponse à la pression de JJB et de Allsports, Umbro a soutiré du discounteur Sports Soccer un accord de ne pas vendre en dessous de ce niveau en le menaçant de réduire ses approvisionnements. Mais avant d'y consentir, Sports Soccer a exigé– et a obtenu– des assurances que les autres revendeurs ne descendraient pas en dessous de ce prix, non plus.[94]

De manière intéressante, Umbro a été reconnu avoir été hostile à la vente au rabais même sans pression de la part de JJB et de Allsports. La société avait un intérêt à maintenir un prix élevé pour préserver son image exclusive et authentique auprès des clients. Néanmoins, Umbro n'avait pris aucune action unilatéralement pour restreindre les ventes avec remises ; c'est la pression de JJB et de Allsports qui en réalité a poussé Umbro à menacer Sports Soccer.[95]

Que de tels faits aient conduit à une décision en faveur de l'Office of Fair Trade (OFT) n'est pas inattendu, étant donné que les accords verticaux comme les accords horizontaux fixant les prix sont illégaux per se au Royaume-Uni. Mais le fait qu'un accord de fixation de prix vertical soit intervenu au moins en grande partie en conséquence de la pression mise par les revendeurs qui avaient effectivement convenus entre eux de fixer les prix vaut la peine d'être remarqué. A tout le moins, il jette un peu de suspicion sur l'idée que les prix de vente imposés ne facilitent jamais les ententes entre revendeurs.

Il serait plus facile de ne pas tenir compte de l'affaire des équipements de football et de le considérer comme une aberration si ce n'était pour le fait qu'elle allait de pair avec une autre affaire qui impliquait une conduite très similaire. L'affaire des jouets et des jeux tout d'abord impliquait deux revendeurs, Argos et Littlewoods, qui sont les deux principaux revendeurs par correspondance au Royaume Uni. Hasbro est l'un des plus grands fabricants de jeux et de jouets du pays. Comme dans l'affaire des équipements de football, les accords de fixation de prix en cause ont été reconnus à la fois verticaux et horizontaux.

Certains revendeurs (il n'est pas clairement précisé lesquels) ont exercé une pression sur Hasbro car ils n'étaient pas contents des marges qu'ils réalisaient sur certains produits Hasbro. Hasbro avait peur que ses produits soient déréférencés (*c'est-à-dire* que les revendeurs arrêtent de proposer ses produits) s'il ne pouvait pas aider les revendeurs à augmenter leurs marges sur ses produits. Une fois encore, il n'est pas clairement précisé d'où est venue la pression, mais l'on sait qu'Argos et Littlewoods sont toutes les deux

93 *Id.*

94 *Id.*, paras. 55-57, 92.

95 *Id.*, paras. 41, 58.

de bien plus grandes sociétés qu'Hasbro au Royaume Uni, et que chacune d'entre elle proposait davantage de produits Hasbro que les seuls produits en cause dans cette affaire.[96]

Hasbro a répondu aux inquiétudes des revendeurs en concevant un "initiative tarifaire" qui visait à persuader les revendeurs de suivre les prix au détail recommandés par Hasbro. Elle savait que cette initiative était peu susceptible de réussir à moins qu'Argos et Littlewoods y participent toutes les deux. Elle savait également que chacun de ces deux revendeurs avait particulièrement peur que l'autre vende moins cher que lui. Par conséquent, Hasbro a assuré le rôle de coordinateur central, de manière assez similaire à ce qu'Umbro a fait avec ses concessionnaires, en fournissant des accords d'Argos, Littlewoods, et d'autres revendeurs qu'ils suivraient les prix recommandés tant que les autres revendeurs le feraient. Hasbro a également transmis des assurances aux participants, qu'elle avait obtenu des accords de plus de revendeurs.[97]

La cour d'appel a fait droit à la demande de l'OFT selon laquelle il y avait des accords bilatéraux illégaux, verticaux fixant les prix entre Argos et Hasbro, et entre Littlewoods et Hasbro. Elle a aussi retenu les conclusions selon lesquelles même s'il n'y avait pas de preuve de communications directes entre les deux revendeurs, leur accord respectif avec Hasbro "était conditionné l'un par l'autre et . . . faisait partie d'un ensemble de conduites poursuivies avec un objectif commun. Les accords bilatéraux parallèles ou les pratiques concertées, ainsi liées, étaient considérées ensemble comme un seul accord ou une pratique concertée entre les trois sociétés."[98] En d'autres termes, Argos et Littlewoods ne pouvaient pas échapper à leur responsabilité pour la fixation de prix horizontale juste parce qu'elles avaient eu recours à un intermédiaire pour s'entendre l'une avec l'autre. Les sociétés et leurs concurrents avaient effectivement constitué une entente qui avait été facilitée par le programme de prix de vente imposés d'Hasbro.

Ceux qui ont minimisé ou carrément nié la portée des prix de vente imposés inspirés par des ententes entre revendeurs peuvent considérer ces deux affaires comme de simples anomalies irritantes. Pour ceux qui croient que de tels arrangements ne sont pas si rares, ces affaires offrent une affirmation que les doutes fondés purement en théorie n'empêchent pas nécessairement les conduites anticoncurrentielles de survenir.

3.4 Allemagne

En Allemagne, comme dans un certain nombre de pays, l'industrie de la vente de livres est exonérée de l'interdiction générale sur les prix de vente imposés qui s'appliquerait autrement.[99] En fait, les prix de vente imposés sont effectivement exigés par la loi dans l'industrie de la vente de livres.[100] La raison officielle a peu à voir avec l'économie traditionnelle ou la politique de la concurrence. L'objectif auto-déclaré de la loi est de protéger les livres en tant que bien culturel en assurant qu'une large sélection de livres soit offerte aux clients dans un grand nombre de points de vente. Ainsi, les objectifs de la politique liés à la préservation de la culture surpassent les objectifs liés à la concurrence.

Les éditeurs de livres fixent les prix au détail de leurs livres, et l'Association allemande des marchands de livres surveille l'application du système des prix de vente imposés. En fixant les prix, les

96 *Argos Limited & another v Office of Fair Trading*, Cour d'appel de la concurrence [2005] CAT 13, para. 130.

97 Office of Fair Trading Case CP/0480-01, "Agreements Between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd Fixing the Price of Hasbro Toys et Games" (21 novembre 2003), paras. 42-55.

98 *Argos Ltd and another v Office of Fair Trading; JJB Sports plc v Office of Fair Trading*, Cour d'appel (Civil Division), [2006] EWCA Civ 1218, para. 116.

99 La France et la Corée du sud, par exemple, ont de telles exemptions en vigueur.

100 Buchpreisbindungsgesetz (Loi sur les prix de vente des livres), amendée le 14 juillet 2006.

éditeurs doivent prendre en considération la contribution des petits libraires à l'objectif de proposer des livres le plus largement possible, ainsi que le service professionnel qu'ils offrent. Les éditeurs ne sont pas autorisés à approvisionner les libraires non-traditionnels (par exemple, les grands supermarchés, les grands magasins) à de meilleures conditions ou à des prix inférieurs qu'ils ne vendent aux libraires traditionnels.

L'une des préoccupations de cette politique est que, sans cela, certains revendeurs pourraient ne prendre que la « meilleure partie » c'est-à-dire dans le contexte du marché du livre, ne stocker que les titres des livres populaires et les vendre avec remise plutôt que dépenser de l'argent à stocker un grand choix de titres. Cette pratique, on le craint, retirerait de l'activité pour les libraires traditionnels qui repose sur les bénéfices de la vente de titres à succès au prix maximum pour subventionner le coût du stockage de livres moins en vogue.[101] Les libraires qui n'accordent pas de remise seraient soi-disant contraints de fermer boutique ou d'adopter la même stratégie que ceux qui feraient une exploitation sélective. Ces deux solutions auraient pour conséquence d'offrir un moindre accès au public à tous les autres ouvrages, diminuant le niveau et la diffusion de la culture dans la société.

En 1997, la dernière fois que le Comité a considéré ce sujet, le Secrétariat a remarqué que l'argument de l'écrémage "semblait être démenti par l'expérience de certains pays qui autorisent les remises sur les livres."[102] La croissance des chaînes nationales de librairies de taille moyenne faisant de la publicité pour des livres à succès à prix remisés avait été suivie par un développement des chaînes nationales de magasins à large échelle proposant de larges choix et services. De plus, même si Internet n'en était qu'à ses débuts à ce moment là, la note de référence remarquait que les librairies en ligne augmentaient la possibilité "que tous les titres, même les plus obscurs, puissent être facilement disponibles pour les consommateurs sans être proposés à la librairie locale. De ce point de vue, les prix de vente imposés, tout en pouvant constituer une aide au maintien de marchands particuliers, pourraient empêcher le développement de nouveaux systèmes de distribution plus efficaces. Ici, les prix de vente imposés à l'initiative des revendeurs pourraient être considérés comme une tentative visant à empêcher l'émergence de nouvelles formes de concurrence."[103]

Aujourd'hui, certains libraires basés sur Internet qui vendent à des clients en Allemagne proposent un large inventaire de titres que toute librairie traditionnelle aurait du mal à égaler, et leur développement ne semble pas avoir été empêché par les prix de vente imposés. Cela peut être dû au fait que les ventes directes transfrontalières de livres en langue allemande à des clients en Allemagne font l'objet d'une exonération particulière de la loi sur les prix de vente imposés, grâce à un accord de compensation avec la Commission européenne.[104] Dans tous les cas, le succès des grands libraires sur Internet sape l'argument de l'écrémage. Non seulement ils sont en mesure de vendre à plus bas prix mais d'une certaine manière ils offrent un service sensiblement meilleur que les librairies traditionnelles. Les vendeurs sur Internet offrent un large choix de titres ainsi qu'une pléthore d'informations sur chaque ouvrage, y compris des revues de professionnels et d'amateurs et des suggestions d'autres lectures. De plus, certains ont commencé à inclure des rubriques pour proposer des livres d'occasion sur la même page que celle qui présente les livres neufs qui sont en vente, ce qui permet aux clients de faire davantage d'économie s'ils le souhaitent. Enfin, ces

101 *Voir* Jürgen Backhaus et Reginald Hansen, "Resale Price Maintenance for Books in Germany and the European Union: A Legal et Economic Analysis," 8 Current Issues in Competition Theory and Policy 299 (2002) (soutenant que si ce n'était pour ces subventions croisées, le "résultat final serait un nombre inférieur de produits ayant beaucoup de succès avec le désavantage d'une diversité plus réduite des produits.").

102 OCDE, Resale Price Maintenance, OCDE/GD(97)229, p. 9.

103 *Id.*

104 Buchpreisbindungsgesetz, section 4; *Sammelbrevers und Einzelrevers*, [2002] 4 CMLR 1278.

librairies virtuelles sont accessibles à tout le monde, partout– dans les grandes villes et dans les villages, de la même façon– à condition d'avoir accès à un ordinateur et de disposer d'une connexion Internet.

Est-ce que le principal résultat de la poursuite du système des prix de vente imposés pour les livres en Allemagne sera le maintien d'une entente entre revendeurs, ou plutôt le maintien de la culture allemande ? Certains universitaires insistent sur le fait que ce n'est pas le cas. Backhaus et Hansen remarque qu'une entente augmenterait les prix au dessus du niveau concurrentiel et réduirait la production. Ils déclarent ensuite :

> Comme il est apparu aujourd'hui, les accords sur les [prix de vente imposés] se traduisent par un prix fixé mais pas par une réduction de la production. De plus, les accords n'aboutissent pas à un prix uniforme; les éditeurs individuels restent libres de fixer leur prix au niveau qu'ils souhaitent, et ils se concurrencent entre eux à la fois avec les prix et la qualité de leur produit ou mieux, de lignes de produits. Donc, parler d'une entente étire démesurément la signification appropriée de la condition économique et n'ajoute pas en clarté. En conclusion, nous remarquons que les . . . accords n'éliminent pas la concurrence par les prix, mais qu'ils ont un effet culturel en ce sens que par subvention croisée on soutient la diversité culturelle. Cette diversité implique que certains ouvrages, les publications 'tendance' peuvent être vendues plus cher, mais qu'un grand nombre de livres seront également vendus moins cher qu'ils ne l'auraient été autrement. L'effet global sur le prix n'est pas une augmentation, et mettre un terme à ces accords n'aboutirait pas automatiquement à une baisse globale du niveau des prix des livres.[105]

Cet argument peut être critiqué à plusieurs titres. Tout d'abord, il n'est pas sûr que les auteurs puissent être confiant dans le fait que l'imposition de prix de vente n'a pas abouti à une réduction de la production. Car les prix de vente imposés ont été en vigueur pendant très longtemps dans l'industrie du livre en Allemagne, obtenir des données pour une comparaison avant et après serait très difficile. En second lieu, la question des éditeurs qui restent libres de fixer le niveau de prix qu'ils souhaitent et de se faire concurrence les uns les autres n'est pas très pertinente si le problème est une entente au niveau de la vente au détail. La concurrence par les prix *est* éliminée à ce niveau (*c'est-à-dire* le prix qu'un revendeur facture pour un livre donné par rapport au prix que certains autres revendeurs facturent pour le même ouvrage). En troisième lieu, il n'apparaît pas clairement non plus comment les auteurs peuvent être certains que l'effet global sur les prix du système de prix de vente imposés n'est pas une augmentation, mais juste une redistribution des revenus de certains titres sur d'autres.

3.5 Norvège

Quelques aperçus empiriques sur l'effet des prix de vente imposés dans l'industrie du livre sont disponibles dans une étude qui vient d'être faite par la Norvège, qui a mis fin, il y a quelques années, à son exemption pour les prix de vente imposés dans l'industrie de la vente du livre. En juillet 2008, l'autorité norvégienne de la concurrence a rendu un rapport sur les effets d'un accord de 2005 qui limitait substantiellement le système des prix de vente imposés qui régissait les ventes de livres en Norvège depuis 1998. Tandis que le vieil accord avait empêché quiconque en dehors des clubs de livres de réduire le prix au détail de livres neufs, le nouvel accord étend ce droit à tout détaillant qui vend des livres. De plus, la

105 Backhaus & Hansen, *supra* n.101.

période d'attente pour les nouvelles sorties, pendant laquelle aucun revendeur ne peut vendre en dessous du prix de vente imposé, a été réduite de 24 à 16 mois.[106]

La réforme du système des prix de vente imposés pour les livres en Norvège aurait pu aller beaucoup plus loin qu'elle ne l'a fait. Par exemple, il y a toujours une période d'attente pendant laquelle le prix de vente maximum imposé reste en vigueur pour les nouveaux titres. De plus, même quand cette période est terminée, les revendeurs n'ont le droit de proposer des remises que de 12,5 pourcent du prix fixé par l'éditeur au maximum. Cela peut conduire à se demander si le nouvel accord fait réellement une différence, car le prix recommandé pouvait simplement être augmenté de 12,5 pourcent dès le départ, pour annuler l'effet de la remise ensuite.

Finalement, ces mesures ont quand même eu des effets remarquables et positifs. La principale conclusion du rapport est que le nouvel accord a non seulement conduit à une plus grande production, mais également à un plus grand choix de titres d'ouvrages vendus et à moindre prix, également.[107] Au cours des années 2004 jusqu'à 2007, le prix moyen des livres en Norvège a baissé d'environ quatre pourcent même si l'indice des prix à la consommation s'est élevé d'environ cinq pourcent. Dans le même temps, le nombre total de livres vendus ainsi que le nombre total de titres vendus ont chacun augmenté d'environ 30 pour cent.[108] L'expérience de la Norvège avec les prix de vente imposés pour les livres par conséquent jette le doute sur le besoin d'exonération comme en Allemagne, même sur un fondement purement "culturel". Il suggère également qu'éliminer complètement les prix de vente imposés sur ces marchés pourrait être la meilleure politique.

3.6 Suisse

La Commission de la concurrence suisse a initialement examiné les prix de vente imposés sur le marché du livre en Suisse en 1999, et les a déclarés illégaux. En appel, la Cour suprême fédérale a renvoyé l'affaire devant la Commission, en lui demandant de considérer si les prix fixés pour les livres pouvaient être justifiés sur le fondement de l'efficacité économique. Après avoir recherché si les prix de vente imposés conduisaient à une augmentation dans le choix, la variété ou les ventes en raison d'une augmentation du nombre de points de vente au détail ou de meilleurs conseils de vente, la Commission a conclu que ces effets positifs ne pouvaient pas être prouvés. Les prix de vente imposés sur le marché du livre étaient par conséquence considérés comme une restriction illégale.[109] Ceci a créé un conflit intéressant avec le voisin de la Suisse, l'Allemagne. Un point important à garder à l'esprit toutefois est qu'en droit suisse, la commission de la concurrence ne pouvait pas considérer si les prix de vente imposés étaient souhaitables sur le fondement de la politique culturelle.[110]

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106 Les parties à ces accords étaient l'Association des Libraires norvégiens et l'Association des Éditeurs norvégiens. D'autres aspects de leur système de prix de vente imposés ont été également éliminés. Par exemple, les libraires traditionnels n'ont plus le droit exclusif de vendre les livres scolaires. Pour plus de détails, voir l'Autorité de la concurrence norvégienne, "The Development of Sales in the Book Industry 2004 to 2007," Rapport 1/2008 (juillet 2008).

107 *Id*. au 5.

108 *Id*. au 9.

109 Voir Rapport annuel 2005, Commission de la concurrence, disponible sur www.weko.admin.ch/publikationen/index.html?lang=en&PHPSESSID=7530f7afcd2ca73b980d00dffdb2cd4f

110 Cartels Act (RPW 2005/2, p. 269 et seq.).

4. Conclusion

Même si les prix de vente imposés réduisent la concurrence par les prix intramarques, il n'est pas clair qu'ils réduisent le bien-être du consommateur. Les prix de vente imposés n'augmentent pas toujours le bien-être du consommateur, non plus, même si la production augmente. Avec de telles implications ambiguës en termes de bien-être, il n'est pas possible de savoir a priori si les prix de vente imposés sont généralement utiles ou néfastes pour les consommateurs. Par conséquent, ils ne peuvent pas être considérés comme purement pro-concurrentiels ou purement anticoncurrentiels. Cela a conduit la plupart des commentateurs à s'opposer à ce que l'on considère les prix de vente imposés comme une violation per se.

La solution alternative – qui consiste à évaluer les prix de vente imposés par l'approche de la règle de raison– n'est globalement pas satisfaisante non plus. La règle de raison prend plus de temps, coûte plus cher, et est moins prévisible que la règle per se. Les règles d'exonération et les diverses autres démarches peuvent être utiles, mais plus on y a recours plus grand est le risque d'aboutir à une solution erronée dans les décisions individuelles.

La plupart des avantages et des inconvénients théoriques des prix de vente imposés a été bien connue pendant au moins 20 ans. Ce dont on a besoin, ce sont des travaux plus empiriques sur les prix de vente imposés. Mathewson et Winter ont déjà remarqué il y a dix ans qu'il n'y avait pas beaucoup de preuves empiriques sur les prix de vente imposés et leur remarque est toujours d'actualité.[111] On a toujours besoin de nouvelles études sur ce qui motive réellement l'imposition de prix de vente et leurs effets.

111 Mathewson & Winter, *supra* n.75 au 80.

AUSTRIA

On 12 September 2008, the Austrian Federal Competition Authority (Bundeswettbewerbsbehörde; BWB) hosted an International Conference on Resale Price Maintenance, a one day conference in Vienna bringing together practitioners from regulatory authorities and private practice as well as academics.

This contribution summarises the main discussion points and draws conclusions of the conference.

1. Background and structure of the conference

The conference "Resale price maintenance - an issue for the European agenda?" on 12 September 2008 in Vienna was the first major international conference organised by the BWB. About 120 delegates attended, two-thirds coming from abroad, i.e. from 26 countries including the US, Indonesia, Israel, Russia, Moldavia, Norway, Switzerland and most EU member states. The audience was mainly composed of delegates from competition agencies and law firms, but also of business people and academics.

In the light of recent developments in the US and the forthcoming revision of the EC Block Exemption on Vertical Agreements, the conference offered a great opportunity to exchange views and to learn about the developments in Europe and the US. In their introductory speeches Bernhard Heitzer, President of the Bundeskartellamt, gave an overview about the European and German situation concerning resale price maintenance (RPM) and William Kovacic, Chairman of the FTC, allowed a better understanding of the US situation in general and the Leegin case in particular. In a first Panel national enforcers explained the economic reasoning of RPM and the enforcement practice of their national competition authority. Following, in Panel 2, practitioners and academics analysed possible loopholes as well as alternatives and summed up their experience. The final panel discussed whether there is a need for change in attitude towards RPM.

2. Presentations and main discussion points

All slides used at the conference are published on the conference website www.bwb-conference.at. In the following, the main points are summarised:

Bernhard Heitzer, President of the German Bundeskartellamt, gave an excellent overview of the European and German situation concerning RPM: As a hard core restriction listed in Art. 4 of the Block Exemption Regulation on Vertical Restraints an agreement containing a minimum resale price cannot benefit from the block exemption. There is a negative presumption that such an agreement will not fulfil the conditions of Art. 81 (3) EC: It is assumed that RPM will either not have positive effects or that, where efficiencies are likely to result, these will not be passed on to consumers and/or that RPM is not indispensable for creating these efficiencies. However, it is still possible that Art. 81 (3) EC applies to an agreement if the firm in question comes forward with substantiated claims that the RPM will bring about efficiencies. If the efficiencies outweigh the negative effects and the other conditions of Art. 81 (3) EC, such as the indispensability test, are also fulfilled, the agreement is not prohibited. In case a maximum resale price is imposed on the buyer or where a particular resale price is only recommended, the agreement can benefit from the block exemption. He did not consider Leegin as a starting shot for reforming RPM in Europe. Rather, the methods of treating RPM in the US and Europe may even converge: Both systems now follow a rule of reason approach. The burden of proof on vertical price fixers may be higher in Europe. Due to the differences between European and US markets Heitzer warned against taking up economic thinking adopted with the US economic model in mind. He was very sceptic that inter-brand competition could often outbalance the anticompetitive effects due to the loss of intra-brand competition caused by RPM.

William E. Kovacic, Chairmen of the US Federal Trade Commission, provided an excellent insight into the US system and the background of the Leegin decision. He illustrated how the legal rules developed in the Dr. Miles decision in 1911 changed and softened until Leegin. While Dr. Miles forbid minimum resale price maintenance as well as non-price restraints as per se illegal (it was considered to be too complicated to separate the good from the bad), in the Sylvania decision in 1977 non-price restraints were put under the rule of reason. First thoughts arose whether RPM should remain per se illegal, but the time was not ripe yet. In decisions in 1984 and 1988 the term "agreement" was redefined and in the Leegin case in 2007 the Supreme Court finally decided that also minimum resale price maintenance should be evaluated under the rule of reason. Kovacic stressed however, that the decision was a tight one (five to four) and that States do not necessarily go along with the decisions of the Supreme Court. Some states (e.g. New York and California) are strictly against the Leegin decision - therefore "compliance programmes should not be thrown away". In light of the Leegin decision of the Supreme Court, in 2008 the FTC granted a petition by women's shoe company Nine West to modify a prior order prohibiting it from engaging in RPM. Kovacic informed that the FTC will hold a workshop to develop how to go ahead. They will start a research programme and envisage a co-operation with Europe in order to collect necessary empirical evidence on RPM from all jurisdictions.

Panel 1 gave an overview of the (economic) reasoning of the enforcement practice of national competition authorities. It became clear that many competition authorities investigated RPM cases, e.g. the Czech authority is currently focusing on RPM cases, while e.g. the Dutch authority follows a more lenient approach: this is partly due to a decision by Dutch Court that the NMa has to prove appreciable effects of RPM. Many favoured a very cautious approach to RPM as recent literature confirmed that RPM can cause serious harm and efficiency benefits might not be that convincing. In several competition authorities RPM is the most complained about practice.

First, **Anne Perrot**, Vice-President of the Conseil de la Concurrence, explained the economic reasoning of RPM: RPM can avoid double marginalisation, increase inter-brand competition by increasing sales services and can avoid free riding. On the other hand RPM can facilitate upstream collusion, it can help to extract monopoly profits and lead to higher prices. Perrot stressed that many economists consider that RPM should be evaluated under the rule of reason but that new models predict that RPM is mostly anticompetitive. In France 16 cases were sanctioned since the entry into force of the Block Exemption Regulation. In a case by case analysis three cumulative criteria have to be evaluated: retailer have to be aware of the retail price the supplier wants them to charge; prices are monitored to prevent any deviation by a retailer; and recommended prices are followed by a significant number (80 %) of retailers.

Amelia Fletcher, chief Economist of the Office of Fair Trading, showed that after the removal of RPM for books in 1997 more books were sold and more titles were published while the effect on prices remained unclear: individual prices rose partly, however important discounts were offered and models like "buy three for two" evolved. Furthermore, new entry was enabled by novel distribution channels like supermarkets. This experience might lead to the conclusion that the efficiencies often claimed to become true only by RPM might not be that convincing. Furthermore, Fletcher reported on two object cases concerning toys and football kits. As a conclusion Fletcher stressed that recent literature confirmed that RPM can cause serious harm and efficiency benefits might be overstated, like the experience in the book case showed. This would favour an object approach while leaving the possibility for exemption under Art. 81 (3) EC, subject to indispensability, important. Fletcher concluded that it is important to set out a theory of harm in order to have a good decision basis for setting fines and for case prioritisation - a field the OFT will work on.

Robert Neruda, Vice-Chairman of the Czech Office for the Protection of Competition, reported that in 2007 the Czech competition office took the strategic decision to focus more on RPM and therefore has recently engaged in several investigations of RPM. This was due to the fact that the former lenient

approach led to a widespread use of RPM in the Czech Republic. The authority therefore wanted to restore the credibility of enforcement, encouraged by the fact that Czech retail prices seem to be the highest in the region and competition inefficient. Neruda therefore favoured to retain the system of rebuttable presumption of illegality (with the burden of proof of pro-competitive effects on undertakings). Otherwise, legal certainty would be reduced, costs of enforcement would be increased dramatically and strict bans on more serious infringements like horizontal price fixing might possibly be jeopardized.

René Jansen, Member of the Board of the Dutch competition authority, reported that the NMa follows a more lenient approach to RPM. This was partly due to the fact that in 2005 the Trade and Industry Appeals Tribunal, the highest court to rule on competition cases, overturned an NMa-decision regarding RPM. It decided that - although the specific agreement had the objective to restrict competition - the agreement has to have an appreciable effect on the market in order to be prohibited. As the NMa had not investigated this issue, the NMa was ordered to reassess the case. Finally, the NMA dropped the case as the evidence collected pointed into the direction of very low market shares. Now the NMa dismisses most of the claims concerning RPM after a short investigation as most sectors showed very strong inter-brand competition and there was little evidence for the facilitation of horizontal cartels. While there are some cases where competition authorities undoubtedly have to intervene (e.g. when RPM is used to execute market power or to enhance transparency in a horizontal cartel), the NMa considers it merits discussion whether minimum resale price maintenance should be treated similar to other vertical agreements under the Commission's block exemption for vertical agreements. An interesting proposal of Jansen was to understand the Leegin decision as a natural experiment to detect whether developments after Leegin have more pro- or more anti-competitive effects.

Luc Peeperkorn, Senior Administrator of DG Competition and leading official for the review of the Block Exemption Regulation on Vertical Agreements, stressed that - unlike the former per se prohibition in the US - in Europe there is always room for companies to come forward with substantiated claims that RPM will bring about pro-competitive effects. Many of the cases dealt with under Article 81 in the last 10 years concerned RPM, where the RPM was often applied in combination with other hard core restrictions. In none of these cases the parties came up with convincing efficiencies. It can be expected that in general RPM will neither be an effective nor an indispensable means to create efficiencies. For example, in the discussion it was suggested that RPM could be useful for a manufacturer to provide the right incentives to its distributor in case the latter is also a rival of the manufacturer. Peeperkorn argued that in this case a maximum price and not a fixed or minimum price would be the appropriate measure. Free riding, another often used argument for RPM, can also not be avoided by RPM - it does not effectively provide an incentive to spend the extra profit obtained as a result of the price increase on promotion and services.

Panel 2 considered loopholes and alternatives to RPM and summarised the experience of practitioners.

Patrick Krauskopf, Deputy Director of the Swiss Competition Commission, reported that RPM was abolished three years ago in Switzerland. The intermediate findings, published at the beginning of September, however did not show clear results. This might be due to the fact that time is just too short to produce clear effects.

Andreas Reindl, Executive Director at the Fordham Competition Law Institute, showed that suppliers can use a broad range of restraints and strategies to soften price competition among its retailers while not applying RPM: non-price restraints like exclusive territories, service and promotion obligations; price-related strategies like co-operative advertising programmes including minimum advertising prices or recommended prices; and "no-agreement strategies" focusing on unilateral conduct and the like. Even though "alternative" strategies may serve a similar purpose as explicit RPM and may have the same effect of raising retail price, they are treated much more favourable under the competition law as their pro-

competitive rationales are more readily accepted than in cases of explicit RPM. Reindl was concerned that current EU competition law operates in a strict black and white model where a price-related restraint was either blacklisted and therefore "quasi per se" unlawful or would fall under the block exemption and was therefore not subject to any analysis. This situation would focus on the wrong question: the emphasis is mainly put on the characterisation (RPM or not? price or non-price?) rather than on the analysis of the competitive harm. This leads to more legal uncertainty than might be expected. With the trend toward settlements, the room for competition authorities to "hide" weak or unclear cases increases which could further increase legal uncertainty and undermine predictability. Therefore a better analytical framework should be developed to determine when a case involving price restraints could raise competitive concerns that should be further investigated.

Volker Viechtbauer, Head of the Legal Department of Red Bull, explained that RPM is a clear no-go for Red Bull. It is hard to explain to sales people and to convince them. A strong commitment from the highest management level is a precondition. From Red Bull's business perspective the most important drawbacks of the prohibition of RPM is that it makes parallel trade attractive and leads to a slow margin erosion of the operators. Viechtbauer stressed however that parallel trade is an issue Red Bull accepts and has to accept as a matter of fact. Alternatives to RPM include maximum resale prices or recommended resale prices, however it is rarely used with Red Bull. Further alternatives comprise price corridors at the international level (this is however hopeless in case of exchange rate variations), the differentiation of goods and services as well as the choice of the right distribution channels.

Felix Michael Klement, Partner at the law firm Wildmoser, Koch & Partner, considered that the application of Art 81 (3) EC seems to be impossible in most cases of RPM, particularly as the fair share for consumers is difficult to substantiate: neither the additional value of increased services nor of a market entry can be quantified. He criticised the lack of guidance for the assessment of RPM under Art 81 (3) EC. Furthermore, Klement deemed it incomprehensible that - while a price recommendation is allowed - a not enforced compliance with the recommendation might be considered a cartel.

David G. Anderson, Partner at the law firm Berwin Leighton Paisner LLP, reported that - when discussing about Leegin - he was confronted with the statement that "the difference between the permitted and the prohibited is understood only by lawyers and people from mars." Being US national but advising also clients in Europe for more than 15 years, he compared EU and US practice. He concluded that the EU has historically been more hostile to vertical restraints than the US. Even when RPM was per se illegal in the US, loopholes existed with the Colgate decision already for decades. However, in Anderson's experience Leegin did not yet trigger much public debate in Europe - except at this conference. He thought that a serious discussion about RPM is however needed and criticised that - as RPM is largely a no-go in the EU - it is impossible to collect experience what would really happen. He proposed to evaluate RPM in the future at least under the concept of appreciability or the de minimis rule: if market shares are low, concerns regarding prices and collusion are low, too.

Finally, **Panel 3** discussed whether there is a need for change in Europe and if yes, in which direction this should go.

Luc Peeperkorn, Senior Administrator of DG Competition and leading official for the review of the Block Exemption Regulation on Vertical Agreements, stressed that due to the difference between the US per se approach (no efficiency defence at all possible) and the EU hardcore approach (efficiency defence not excluded) the potential need for change is not the same in the EU as it was in the US. In the US the question how RPM should be assessed still needs to be answered - a question that will be reconsidered also in the EU in the course of the review of the vertical restraints regime. The answer how to assess RPM will depend on the likelihood of both its negative and its positive effects. Peeperkorn was sceptic that all efficiencies linked in general to vertical restraints can also be realised effectively through RPM. He was

not convinced of the argument brought forward at this conference that the burden of proof under Art. 81 (3) EC for RPM is too difficult to overcome as this would then be true for all agreements. The current EU approach therefore might be a good option also for the future, although it certainly merits more discussion.

Luc Gyselen, Partner at the law firm Arnold & Porter LLP, stressed that the burden of proof under Art. 81 (3) EC is allocated in a different manner than under the US rule of reason making it much more difficult for companies in the EU. He criticised that in the EU no analysis of the market power takes place when assessing RPM. Furthermore, as RPM is a hard core restriction listed in Art. 4 of the Vertical Block Exemption Regulation (BER), the whole agreement falls outside the scope of the BER. A classification under Art. 5 of the BER (making only the specific provision not to benefit from the BER) would already help. In general however, he hoped that in the future pro- and anticompetitive effects of RPM will be assessed as is done with other vertical restraints or Art. 82.

László Szakadát, Member of the Hungarian Competition Council, was even more pronounced and argued that RPM should in general be lawful unless the competition authority has evidence for the existence of anti-competitive effects. RPM should only be challenged if it is a facilitating device of the company to monopolize or to collude. The burden of proof should be on the competition authority. Szakadát proposed to set up certain safe harbours.

Konrad Ost, Head of Unit for German and European Competition Law in the Bundeskartellamt, warned on the administrative burden if RPM would be qualified as basically harmless and actual anticompetitive effects would have to be proven by the competition authority: Watering down RPM rules would make enforcement unreasonably cumbersome and ineffective in practice. In reality, a kind of rebuttable presumption in favour of RPM legality would thus mean giving "carte blanche" to potential abusers. This would not be justified due to the low likelihood of pro-competitive effects: there is only a vague expectation that there might be cases which might prove to be pro-competitive.

As moderator of panel 3 **William E. Kovacic**, Chairman of the Federal Trade Commission, summarised the thoughts discussed: As everything depends on a presumption of efficiencies and the likelihood of pro-competitive effects of RPM, more economic/empirical work should be done. As budgets of national competition authorities are low, it could be envisaged to co-operate with universities. Furthermore, the introduction of some kind of analysis of market share/de minimis could be thought of in order to check whether potential negative effects are likely. (Also in Leegin and in Nine West market shares were very low.)

Theodor Thanner, Director General of the Austrian Competition Authority, finally summarised the main discussion points and drew conclusions.

3. Conclusions

As - at least for several competition authorities - RPM seems to be the most complained about practice, a change in attitude towards RPM might entail important consequences for competition authorities. While - due to the recent legal status of RPM - consequences of RPM could not yet be studied in practice, Leegin might be seen as natural experiment. The US FTC will hold a workshop and start a research programme in order to define how to assess RPM. Also in Europe there is the feeling that - at least for case prioritisation - some more research/deliberations would be needed.

Several competition authorities expressed the fear of a too high administrative burden in case of a more lenient approach to RPM in the light of an unclear probability of pro-competitive effects. The UK's experience concerning the abolishment of RPM in book retailing points into the direction that claimed efficiencies might be overstated. Some raised doubts that the objectives claimed to be followed by RPM

are really efficiently achieved by minimum resale prices. Most of the competition authorities seem to favour the current approach, while some other competition authorities as well as lawyers and academics would support to treat minimum resale price maintenance similar to other vertical agreements. In this way a black and white model could be avoided and the emphasis could be mainly put on the analysis of the competitive harm rather than on the characterisation (RPM or not? price or non-price?).

While still differing in opinion, it seemed that a common understanding could be reached that the introduction of some kind of analysis of the market share/ appreciability might at least merit further discussion. Due to a Court decision the Dutch competition authority already has to analyse whether the RPM agreement has an appreciable effect on the market. Also in the US further developments have to be pursued as at the moment some Federal States which do not necessarily have to follow the Supreme Court seem to be unwilling to follow the Leegin decision.

To summarise, pros and cons were put on the table. Thereby the conference achieved its aim to form a good basis for discussion in the European Union on the review of the Vertical Block Exemption Regulation.

CZECH REPUBLIC

This paper summarizes the experience of the Czech Office for the Protection of Competition (hereinafter referred to as "the Office") in conduct that is described as resale price maintenance (hereinafter referred to as "RPM"). First of all, it focuses on the issue of RPM definition, especially the question which types of vertical price agreements are considered as prohibited by the Czech law. In the next part of the paper, legal treatment of RPM in Czech competition law is examined, whether it is *per se* prohibited practice or not, and also efforts to introduce RPM provided for by the law in the Czech Republic will be discussed. Further, it is pointed out that lately, the Office has been conducting investigations concerning several RPM agreements that are either still in progress or have been closed by a decision. Reasons are examined why the Office is proceeding in this way even now when lively debates are led in the international field on the negatives and positives of RPM and on appropriateness of prosecution of these practices. In conclusion, proposals of the Office are indicated, among others in relation to the prepared amendment of the EC block exemption on vertical agreements (hereinafter referred to as "the block exemption on verticals" or "VABER").[1]

1. RPM definition

Czech law doesn't comprise a definition of RPM. According to Art. 3 par. 2 a) of the Act No. 143/2001 Coll., on the Protection of Competition, as amended (hereinafter referred to as "the Competition Act"), such agreements belong to prohibited agreements distorting competition that result or may result in distortion of competition because they contain agreement on direct or indirect price maintenance. This provision is consistently interpreted so that it relates to price agreements which were concluded among competitors (price cartels), as well as to price agreements that were concluded among undertakings operating on different levels of distribution chain (typically between a producer and a distributor). RPM is a name for the situation when a producer with a distributor or a distributor with a final seller agree on price for which the products would be sold (typically but not necessarily to consumers).

The most distinct type of vertical agreements on price for further sale is setting of *fixed price* for which the products are sold. Such agreements have always come within the prohibition according to Czech competition law. This applies also to agreements that don't set unified fixed price to sellers but their subject is the obligation of sale for *minimum price*. Even such agreements lead to the unification of price level within a distribution system and restrict price competition within a brand. On the other hand, the Czech competition law generally doesn't consider maximum or recommended price agreements as hard core provisions; both these practices are excluded from the prohibition with no exception, if they are committed by a competitor that has a small market share.[2] Fixing of *maximum prices* doesn't necessarily lead to price unification within a brand; moreover, such agreement may be considered as a protection of consumers against excessive prices by sellers. *Simple recommendation of price* for further sale on the part of supplier of the goods isn't generally prohibited by Czech competition law, even though – as the

1 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, Official Journal L 336, 29.12.1999, p. 21-25

2 See also points 225 to 228 of Commission notice - Guidelines on Vertical Restraints, Official Journal C 291, 13.10.2000, p. 1–44

experience of the Office shows – application of recommended prices usually brings unification of price level of a certain product in many sectors (typically in book sale area). The conclusion about non-prohibition can be applied only if the provision on price recommendation isn't accompanied by other provisions that would imply that price marked as recommended is fixed or minimum price in fact. An example is a situation when special benefits are offered to the customer on the part of the supplier for maintenance of recommended prices or when non-compliance with recommended prices results in negative consequences (e.g. termination of business relationship).

Vertical setting of fixed or minimum prices is prohibited regardless of whether it is direct (fixed prices setting) or indirect – whatever way that leads to the same result, e.g. by using a price formula.

2. Legal treatment of RPM in the Czech law

As it has been stated, agreements on RPM are considered as agreements that fulfil both formal and material aspects of agreements distorting competition. As far as material aspects are concerned, proving either real impact on competition or at least potential of an agreement to cause such an impact is the condition of prohibition of certain bi- and multilateral agreement (Art. 3 par. 1 of the Competition Act). According to current Czech case-law[3] and commentary literature[4], *proving of price agreement existence is sufficient to stating that it is a case of prohibited agreement distorting competition since every price agreement causes detriment to competition*. It means that the real negative impact on competition is – in case of price agreements including RPM agreements – irrefutably presumed.

Czech law currently considers *de minimis* rule as a means to exemption of an agreement distorting competition from prohibition, not as a (negative) definition aspect of an agreement distorting competition (as it is case ion EC competition law). This difference has no important implications for legal regime of RPM agreements. Same as in the Community law, in the Czech competition law agreements on resale price maintenance are exempted from the application of *de minimis* rule.[5]

The Competition Act transposed EC block exemptions into the Czech competition law as it declared them to be directly applicable even for the legal relationships that have no effect on trade pursuant to Art. 81 of the EC Treaty.[6] This legal model means i.e. that the Office is entitled and obliged to always apply provisions of VABER to vertical agreements. However, VABER – according to its Art. 4 (a) - doesn't cover agreements restricting the ability of a buyer to set their sale price. Therefore RPM agreements aren't exempted from the statutory prohibition on the basis of block exemptions application.

The Czech Competition Act, similarly as the EC competition law, presumes that a prohibited agreement distorting competition may be exempted from the prohibition under cumulative fulfilment of four conditions (Art. 3 par. 4 of the Competition Act, analogy of Art. 81 par. 3 the EC Treaty), if: the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit; do not impose on the

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3 See decisions of the Regional Court in Brno No. 62 Ca 14/2006-34 of 31. 1. 2007 *Jizerské pekárny* and No. 31 ca 71/2004-129 of 22. 11. 2005 *Oskar Mobil*.

4 See e.g. *Raus, D., Neruda, R.* Zákon o ochraně hospodářské soutěže. Komentář a souvisící české i komunitární předpisy. 2. vydání. Praha : Linde Praha, 2006, s. 86 or *Munková, J., Kindl, J.* Zákon o ochraně hospodářské soutěže. Komentář. 1. vydání. Praha : C.H. Beck, 2007, str. 35.

5 See § 6 par. 2 Competition Act, par. 11 (2) (a) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis). Official Journal C 368, 22. 12. 2001, p.13-15.

6 See § 4 par. 1 Competition Act.

undertakings restrictions which are not indispensable to the attainment of the stated objectives; and finally do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the market of goods, the supply or purchase of which constitutes the object of the agreement.

The Czech law doesn't preclude the possibility that RPM agreement is exempted from the prohibition upon the application of this statutory exception. In the past, the Office hasn't dealt with this possibility in its decision-making practice, as it built upon the presumption that the application of statutory exception for vertical price agreements doesn't come into question. Although the case law of the Czech administrative courts hasn't disputed this practice, the Office has - in its recent decisions - explicitly dealt with the possibility of exemption of RPM agreements from the prohibition on the basis of application of Art. 3 par. 4 of the Competition Act. Therefore the exemption of RPM agreements according to the Czech Competition Act comes to question. Hence RPM cannot be considered as a practice *per se* prohibited, but as a *hard core* provision for which the anticompetitive impact is presumed, and which however – under cumulative fulfilment of the above-mentioned four conditions can be exempted from the statutory prohibition.

In contrast to the Community law, it is not clear in the Czech legal system, who has to prove fulfilment of the conditions for exemption from the prohibition. Whereas in the EC competition law, *burden of proof* that relates to proving fulfilment of the conditions pursuant to Art. 81 par. 3 of the EC Treaty stays unambiguously with the parties to the prohibited agreement[7], in the Czech law no such unambiguous rule is explicitly stated. Currently, an amendment to the Competition Act[8] is discussed in the Parliament of the Czech Republic that would explicitly provide for that burden of proof to prove fulfilment of conditions for exemption from the Act stays with the party to the proceedings (party to the agreement). Until then, the Office, in accordance with procedural care and general principles of Czech administrative procedure, according to that it is the administrative body that is obliged to establish facts, examines possibility of exemption *ex officio*, even when the parties to the case don't claim that.

As far as other *procedural issues* are concerned, both contractors of such a RPM agreement are the parties to the administrative proceeding. In practice, a rule is often applied according to which the Office may in case of proceedings relating to similar vertical agreements - when one of the parties of such agreements is the same undertaking that proposes concluding of such agreements to other undertakings – restrict the range of the parties only to such an undertaking. According to the experience of the Office, in the Czech Republic, RPM is an instrument of suppliers since it is them who generally initiate the conclusions of such agreements. With regard to this fact, only a supplier (producer) was the party to the case in the vast majority of cases that have been lately conducted before the Office. Decision was addressed to and fine was imposed only on them.

3. Sector exemptions

In contrast to many other OECD countries, in the Czech Republic, there are no products or services for which RPM would be allowed or prescribed by special legislation, although now and then, there have been attempts to introduce such a special regulation. For example, the Office has been systematically preventing – for almost all its existence – the efforts to establish fixed prices of books. In the last opinion on this issue of 2004 addressed to the Czech Ministry of Culture the Office stated i.e. that *"an introduction of fixed prices of books would present non-systematic intervention to competition law concept which would be in contradiction to principles of both Czech and Community legal rules. At the same time, it would be the case of a measure to the detriment of not only consumers – readers, but also book sellers and, in the*

7 See Art. 2 Coucil Regulation 1/2003 on the implementation of competition rules.

8 Parliamentary issue No. 591, V. electoral period, http://www.psp.cz/sqw/text/orig2.sqw?idd=29953, new provision § 21d.

final consequence, the whole book market." With reference to the experience of the countries where fixed prices of books were cancelled, the Office further pointed out that *"whereas price flexibility leads to higher book sale, higher number of readers, thus to the broader possibility to publish "non-commercial" books, the price-level increase which is necessarily connected to setting fixed prices of books, deters both occasional readers and the readers sensitive to price – including the youth who should be encouraged to read"*. Unified prices of books weren't introduced in the Czech Republic in spite of these repeated efforts.

Similarly, in 2003, the Office opposed the efforts of the Czech Ministry of Health and the Czech Chamber of Pharmacists to introduce unified price of medicaments in pharmacies in the whole area of the Czech Republic during the whole year. The Office argued that by fixing of medicament prices the system of price competition would be distorted on most levels of distribution chain. The essential element would be removed that encourages pharmacies to be effective. The Office emphasized that unified prices would above all lead to increases in prices of medicaments, restrictions of choice and quality of provided services, thus to the detriment of consumers. The unified prices weren't finally introduced.

4. Current decision-making practice

Since 2007, the Office has conducted several investigations relating to the application of RPM in various sectors. In some cases, the Office opened administrative proceedings, and in three cases decision has already been published, while some cases are still in progress. In the following part, basic information on these cases will be given – both on the published decisions and on the pending cases.

4.1 Kofola case

Agreement on RPM concluded between the producer of soft drinks Kofola and its distributors was established in almost 60 contracts that were valid and effective between 2001 and 2008. These agreements were gained from both Kofola company and their contractors, and also during the dawn raid which was conducted by the Office in parallel in four business premises of the party to the proceedings.

This proceeding was interesting from several points of view. Firstly, it was the largest RPM case that has been dealt with by the Office so far – as the size of the market affected by this conduct, the extent of affection and duration of the offence comes to question. In the course of the proceedings, the Office also found out that Kofola company hadn't provided all requested documents or that it edited these documents after the proceedings were opened so that they didn't contain RPM obligations. For this violation of procedural rules, Kofola company was sanctioned the largest fine that has ever been imposed for such an offence by the Office. After the Office had acquired enough evidence on RPM and also on the breach of procedural obligations, Kofola company asked for direct settlement.[9] Within the direct settlement procedure the company admitted its liability, established the extent and duration of the anticompetitive behaviour and its legal qualification and submitted sufficient evidence. As a consequence of the above-mentioned facts, Kofola company was imposed a fine amounting to CZK 13.552.000 (around EUR 550.000). As a result of direct settlement procedure, the fine totalled only 50 % of the amount that would otherwise be imposed on the company according to the rules for calculation of fines.[10]

9 To the procedure of direct settlements in the practice of the Office, see the paper of the Czech Republic for this October´s meeting of the Working party No. 3.

10 See the Guidelines of the Office on the method of setting fines http://www.compet.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines/.

4.2 Dellux, Estée Lauder cases (selective cosmetics)

In 2007, the Office conducted, within its supervisory authority, an investigation in the area of distribution of selective cosmetics, especially with regard to possible fixing of final sale prices by suppliers of branded perfumes to their customers. This investigation resulted in the initiation of two administrative proceedings – with Estée Lauder CZ and DELLUX CZ. Both companies are non-exclusive suppliers of many exclusive world-famous cosmetic brands and they were using RPM between 2001 and 2008.

Using testimony of witnesses, the Office has proved that the agreements on resale price maintenance of selective cosmetics were complied with, and that this compliance was supervised and enforced by suppliers. This isn't very usual; according to the Office's experience, customers are generally dependent of their suppliers and take interest in maintenance of long-term business relationships – therefore they are not willing to give evidence against their suppliers. In such case, the Office has to acquire evidence in a different, time and money consuming way, e.g. by conducting a dawn raid.

Administrative proceeding conducted with Estée Lauder CZ has already been lawfully closed (fine amounting to CZK 818.000, EUR 33.000). DELLUX CZ has also been fined (CZK 1.089.000, EUR 43.500) – this decision hasn't come into force yet since the party to the case has lodged an appeal against the decision.

4.3 Investigation in the area of outdoor equipment

In 2007, the Office received several complaints against behaviour of companies dealing with manufacturing and distribution of outdoor equipment. Efforts of these suppliers to maintain high price levels in retail sale of their products, especially in Internet sale, were subject to these complaints.

The Office initiated investigations and subsequently opened administrative proceedings with six undertakings – outdoor equipment suppliers - for alleged violation of Art. 3 par. 1 of the Competition Act. Simultaneously with the initiation of administrative proceedings, the Office carried out several dawn raids that consisted above all in examination of electronic correspondence and paper documents. It resulted from the gained evidence that oral agreements had been concluded on resale price maintenance of outdoor equipment. Further, the gained electronic correspondence confirmed that there had been pressure on distributors exercised by suppliers to maintain these prices, above all for e-commerce. Maintenance of prices had been monitored and, in cases of deviation, also sanctioned.

These cases that are not closed yet are characterized by the fact that the RPM agreements weren't part of written contracts of outdoor equipment but they were oral agreements or agreements concluded on the basis of electronic correspondence. Therefore the Office, in accordance with the decision-making practice of the European Commission and European case law, has dealt above all with fulfilment of formal aspects of prohibited vertical agreements – that is conformity of will of both contractors who have to participate explicitly or implicitly in conclusion and fulfilment of a contract. In other words, investigation and probation of the Office in these administrative proceedings is directed towards proving fulfilment of essential aspects of agreement; that is proving bilateral act taking form of an explicit or tacit agreement of both sides.

Administrative proceedings conducted with undertakings operating in the market of outdoor equipment supplies have not been closed, yet. Currently, statements of objections are being drafted.

4.4 Albatros case (books)

As already mentioned, in the Czech Republic, in contrast to many other countries, there are no sector exemptions from the prohibition of vertical price fixing, not even for the area of books, to which Albatros case is related.

Within the framework of administrative proceedings conducted with Albatros company, editing and publishing house of children's literature, the Office identified, in the contracts concluded with customers of Albatros, agreements on setting of minimum price or setting of fixed price for which it was possible to resale books to end consumers. The price agreements found by the Office were contained in contracts relating to sale of particular books, above all Harry Potter and the Deathly Hallows (seventh part).

Although the price agreements related to only a limited number of customers, the Office came to conclusion on anticompetitive effects of the above-mentioned price-fixing agreements, for the following reasons. First, the agreements related to sale of books for which high volume of sale and high turnover had been expected – which was indicated by sale of the previous parts of Harry Potter books. Furthermore, it was a book in the sale of which non-specialized bookstores took interest; above all retail chains (supermarkets, hypermarkets) which, in the case of sale of previous volumes of Harry Potter, had supplied the books to end consumers at prices well below the recommended retail price. Supplying of the above-mentioned book by retail chains had negative impact on sale of this book in traditional bookstores (that maintain spontaneously and unconditionally recommended prices). On the other hand, it brought benefit to end consumers that were able to save even one third of the price, compared to the price set by producer.

Retail book market is characterized by the fact that in most cases, book-sellers sell books at recommended retail prices. In the case of sale of Harry Potter and the Deathly Hallows there was a danger of price competition for book-sellers from retail chains, therefore Albatros concluded both agreements on minimum resale price– that related above all to Internet mail-order stores which have regularly lower sale prices in comparison to common book-stores – and, at the same time, it refused to supply the book to retail chains in the first selling wave and obliged all the contractors to supply the book only to end customers. Through the combination of RPM agreements and agreements on restriction of range of customers, it tended to full protection of specialized book-stores against price competition on the part of retail chains because it was sure that common book-stores wouldn't compete against each other. Through this conduct, however, consumers were clearly harmed as they had no opportunity to acquire the book at a significantly lower price. The negative impact was even worse due to the fact, that demand elasticity of this book is particularly little elastic for its high popularity, advertisement and target group (children or parents)

This administrative proceeding hasn't been closed yet, however there is a strong presumption that the case would be handled using direct settlement procedure.[11]

5. Competition policy of the Office in relation to RPM and its reasons

From the above-mentioned it is clear that detection and sanctioning of RPM agreements currently present relatively significant part of the Office's agenda. It is also known that the Office ranks among the smaller group of competition authorities – at least within the European Union – that allocate their resources to this issue.

The decision to devote resources to the issue of RPM was a deliberate decision of the Office that was made in 2007 for the reason that will be analyzed in the following parts of this paper. It was made in the

[11] To the procedure of direct settlements in the practice of the Office, see the paper of the Czech Republic for this October´s meeting of the Working party No. 3.

same year as US Supreme Court judgment in *Leegin* was published that initiated lively debate on suitability of current legal regulations of (in)compatibility of RPM with competition law – on the both sides of the Atlantic (*per se* prohibition in the USA, *hard core* treatment in the EC law). Within the framework of these debates, it is often pointed out to opinions of many economists according to which RPM may have and does have pro-competitive effect, therefore it is unsuitable to apply automatic prohibition to it. According to some authors the *Leegin* decision presents fundamental turn in the assessment of threat of RPM to competition; refutable presumption of pro-competitive effect of such agreements should be applied for the future. Some competition authorities don't consider RPM as their priority and don't deal with this issue although in their legal regulations RPM is still prohibited. Discussion on this topic will certainly be even more intense in relation to upcoming revision of VABER where legal regime of RPM will clearly be one of the items of debate.

In this context, a serious question presents itself: is it suitable and adequate that the Office, in the context of last developments of economic theory and decision-making practice in other jurisdictions, deals with the issue of RPM so intensely? Isn't it better to allocate resources solely to the most serious violations of competition law, namely cartels and exclusionary practices of dominant undertakings? Has the Office deliberately chosen RPM since proving them is generally simpler than proving other offenses?

The following text brings a list of facts and findings that are – according to the Office – sufficient reason and explanation for its practice.

For start, lets state that the interest of the Office in detection of RPM isn't just incidental. The decision to focus on RPM was made in 2007 and became one of the short-term priorities of the newly established Competition Section of the Office. It isn't the only or most important priority of the Office in the area of competition protection. In fact, only a relatively few case handlers deal with RPM, while the vast majority of resources is spent in other areas, i.e. cartels, abuses and mergers.

The reasons why the Office takes interest in RPM can be divided in the following groups: legal reasons, competition policy reasons, reasons originating in empirical experience with Czech economy and reasons originating in economic theories.

5.1 Legal reasons

As it has been stated, the Czech competition law – same as the European competition law – considers RPM agreements as prohibited agreements distorting competition that are considered to be *hard core* provisions. The decision-making practice and case law confirm that there is room for the application of the exemption from prohibition but this room is very limited.

In this legal regime, there is no possibility for the Office to reject possible complaints against existence of RPM only with reference to legality of such conduct (the question of rejection of the complaints against anti-competitive behaviour with reference to its low importance and to other priorities is currently subject to internal debate within the Office).

Even the *Leegin* case hasn't changed these reflections. First, it is still a judicial act from a foreign jurisdiction that *in principle* cannot have a direct impact on the current Community and Czech competition law. Moreover we are convinced that the *Leegin* case may indicate a changed attitude of American courts and antitrust bodies towards RPM. From the perspective of current European (and Czech) competition law, it is still rather harmonization of condition for legal qualification on both sides of the Atlantic, than anything else.

Given that one of the conclusions of the decision in the *Leegin* case is impossibility to apply *per se* rule for RPMs and admission of the possibility that RPM may – in certain circumstances – be in

conformity with antitrust law, then this principle has been in force in the Community and Czech competition law for a long time. As it has been already stated, the fact that RPM is considered as hard core provision doesn't preclude the possibility of application of statutory exception from the prohibition of agreements according to Art. 81 par. 3 of the EC Treaty or Art. 3 par. 4 of the Czech Competition Act.

In this respect the legal treatment is the same. Allocation of burden of proof brings another question – in other jurisdictions it can be carried out differently. However it is a procedural, not material legal question. The suitability to maintain the current rules of allocation of burden of proof in the European competition law will be discussed further on.

5.2 Competition policy reasons

Once a particular conduct is prohibited, it is for the sake of both society and credibility of the legal order, that the restriction is observed in the practice. This applies not only generally but also for prohibitions in the area of competition law. If the RPM is in consequence of the legislator's decision, in accordance with the case law and unchallenged decision practice of competition authorities, *de lege lata* prohibited (though with possibility of legal exception), it is desirable to verify whether this prohibition is respected, and if not so, proceed suitable steps in order to ensure its observance.

During the past periods the Office relied more likely on prevention and informal settlements regarding the less and medium-serious anticompetitive conducts. A lot of its efforts and resources were allocated on education of professional and laical public, explaining which conduct is deemed as inadmissible and, in the case a minor infringement, the Office would focus on its prompt elimination rather than on a sanction. The Office relied on self-regulation of the undertakings' behaviour, expecting that the undertakings, aware of the illegal aspect of such conduct would, not tend to commit anticompetitive conduct. Among others the RPM fell into the category of infringements which were deemed as solvable through this mechanism.

The above-mentioned attitude brought a lot of positive outcomes (enhancement of the Office's practice transparency, prompt removal of the problem in particular cases etc.). On the other hand the Office found out, during its own investigations, that some types of less serious anticompetitive behaviour are quite widespread in the Czech economy. It has been found out that the RPM is frequently used in many sectors. The Office's previous lenient attitude may be one of the reasons. As we learned from the unofficial statements of some undertakings and their lawyers, the business community has deliberately decided, in some cases, to infringe the restriction of RPM set by the competition law on the assumption that their conduct will not be detected by the competition authority and if so, the competition authority would be willing to agree on alternative solution. The undertakings could have come to the conclusion that using the prohibited RPM is not connected with real risk of sanction and therefore it always pays off. It is interesting that according to some of the lawyers there has been a decrease of interest of companies in creating and introducing the compliance programs in recent times.

From this experience the Office come to the conclusion that the effectiveness of a standard (vindictive) and alternative solution (without sanctions, mainly in cases of acceptance of the commitments) of competition problems are interdependent. Providing that for the infringement of particular prohibition a sanction is missing, it is very likely that the prohibition will not be observed. This is valid also within the competition law and important implications arise for the practice of competition authorities, mainly within jurisdictions where private enforcement of competition law does not play an important or significant role and where the competition authority is the only competition law enforcer. To all appearances the Czech Republic falls within these jurisdictions.

Having in mind that the above-mentioned considerations are fully valid for the situation in the RPM area it would be necessary, according to the Office, to restore the prohibition observance, including the

trustfulness of the surveillance, including the potential punishment of RPM ban infringements. The Office therefore decided to conduct several investigations of more important RPM cases, which were identified during its supervisory practice or on the grounds of complaints, and these eventually bring to the end, including the imposition of adequate sanction according to the publicly accessible method on setting of fines. These administrative proceedings should serve as a clear signal towards the business public, that the mentioned prohibition still exists and its violation is interconnected with a risk of a real sanction and that the Czech competition authority is willing to detect and punish this kind of behaviour. Eventually, the general knowledge of the business public concerning this topic should be extended, including the rise of the level of spontaneous observation of the prohibitions which are set by the law.

5.3 Situation in the markets

According to many reports, including those published in the media, the Czech Republic belongs to the economies with the highest retail prices within the Central Europe, namely in several areas. Motor vehicles, electronics, perfumes, drugstore goods and many others can be mentioned as examples. Prices in these markets are significantly higher than in Germany or Austria. Having in mind that the conditions are not negatively influenced by the tax rate applied in the Czech Republic the reason of this situation may be an insufficient effectiveness of the competition both *interbrand* and *intrabrand*. If such suspicion occurs it is necessary for the competition authority to pay special attention also to the contracting limitations which are aimed on restricting the intrabrand competition.

5.4 Reasons of economic theory

All the above-mentioned considerations are not, according to the Office's opinion, in contrary to the economic theories concerning RPM. We are very well aware of theories which emphasize benefits arising from RPM, pleading for lenient treatment or even for permission of such behaviour. On the other hand, there are economic theories, even recent ones, emphasizing negative effects of RPM.

Without any ambition to enter into extensive discussions regarding particular theories, following conclusions are considered as important for the purposes of choosing an adequate practical approach towards RPM.

None of the economic theories, emphasizing pro-competitive impacts of RPM, has been demonstrated in practice and thus the conclusions have remained unverified at least. As for the benefits used as an argument, their existence has never been proved in practice and if so, these are not benefits for consumers but for those undertakings who participate on RPM. These theories of pro-competitive impacts of RPM yet remain theories, without any appropriate reflection in the real world.

By contrast, validity of the economic theories, stressing anticompetitive impacts of RPM, has been repetitively verified in practice. It is our opinion that as the best example serves the price development and quality and extent of the market offer, where the vertical price fixing approved by law was removed. Natural experiments from other countries, where the RPM's permission was abolished concerning some particular products, e.g. books[12], show evidence that the RPM brings higher prices, and, on the contrary, its abolition does not negatively affect the extent of offer and amount of goods sold. [13]

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12 Cp. presentation A. Fletcher, chief economist OFT, Conference on RPMs, Wien, 11. September 11 , 2008, http://www.bwb-conference.at/files/pdf/Fletcher.pdf; in general see situation in Switzerland and USA, stated in the article *Bejček, J.* K důvodnosti automatického zákazu vertikální cenové fixace. Právník 8/2008, pp. 825 – 854

13 In details, see recently published work of J. Bejček, who conducted an extensive research of different sources in the area of competition economy. Conclusions of his works correspond with abovementioned

6. Future proposals

According to the Office's opinion it is necessary, within the contemporary excited debate, to distinguish the legality and illegality of RPM, on one side, and prioritization of competition authorities' activities, on the other. A legitimate decision of a competition authority to focus solely to serious anticompetitive conducts can be obviously made without changing the legal regime of RPM's assessment (Drop-off of spontaneous adherence to such non-enforced restriction can be a specific problem - see above).

Moreover, the Office stands for the opinion that the contemporary principle, stating that the RPM arrangements represent *hard-core* offence, enables the parties to the agreement to argue for the efficiencies of such arrangement and eventually, when the agreement meets given conditions, to apply a statutory exemption on this agreement. An irrefutable presumption of RPM's anticompetitive character is both legally and virtually effective within the EC and Czech competition law and a strong presumption of non-fulfilment of the conditions required for exemption from the restriction, which may be overcome if the opposite is proved; yet the burden of proof rests upon the parties to the agreement. The second principle, applicable in EC law, will soon be explicitly established also in the Czech Competition Act. We consider this legal mechanism as adequate and corresponding with the empirical experience, which demonstrates that the RPM has virtual negative impact on competition in overwhelming majority of cases, while the pro-competitive impacts are rather theoretical or hypothetical. Refutable presumption of illegal character is therefore an expression of proportional representation of anticompetitive and pro-competitive cases of RPM in the real world. Such legal solution decreases distinctively the costs of RPM's restriction enforcement on the part of the competition authorities at the same time.

Possible change of this system, consisting either in cancellation of presumptions, shift of the burden of proof on the competition authority, or even complete transition to the *rule of reason* principle is not regarded by the Office as an appropriate solution for the RPM within the context of European and Czech competition law.

We presume that it is first of all a duty of a producer to prove that the RPM is essential and reasonable solution for his business, of which the consumer can benefit and that there are no less-anticompetitive alternatives available. The producer has the most suitable information and data while the competition authority should only verify their relevance and credibility.

According to our opinion, abandonment of contemporary system would lead to the significant decrease of legal certainty in the area of competition law. It would come to "sacrifice" the simple and generally comprehensive rule, that *the prices should not be negotiated among competitors*. This basic rule gives the parties being forced to accept introduction of RPM strong protection against the other party. A threat occurs that a simple rule will be replaced by the pure economic analysis without evident borders, because of its "case by case" formulation. Such system would make undertakings' position significantly harder. The situation, however, would put competition authorities or courts in more difficult position, too, because the analysis of illegality would be made significantly complicated and difficult.

At the same time, a change of contemporary system may lead to dramatic increase of administrative costs spent on detection and proving the anticompetitive RPM cases. Proving real effects of the RPM on the competition, or moreover non-fulfilment of the requirements for the exemption is very demanding on time and human resources. This time-consumption is regarded to represent a bigger obstacle in case of relatively less serious infringements, including the RPM, where the amount of the fine expected is not so

findings. See *Bejček, J.* K důvodnosti automatického zákazu vertikální cenové fixace. Právník 8/2008, pp. 825 – 854.

high. This fact may lead to intentional or preconscious decrease of competition authorities' interest in the active approach in this area and eventually in resignation on anticompetitive RPM prohibition enforcement. In many economies, where the private enforcement of the competition law is not working very effectively, this fact would lead to the situation that RPM would be prohibited but an infringement of this ban wouldn't have any factual punitive consequences.

This may lead the business and other expert community to the conclusion that the RPM is *per se* admissible, which would be evidently false even in case of leaving the current system of strong legal presumptions.

Moreover, we agree with the opinion, that the liberalisation and trivialization of approach to the price agreements, or at least to some types, brings real threat of erosion and trivialization of even more serious or very serious distortions of the competition law. [14]

Especially on these grounds we are convinced that it is highly appropriate to maintain contemporary legal regime of RPM agreements in the European and Czech competition law, as a *hard core* provision with a irrefutable presumption of anticompetitive impact of RPM and with a refutable presumption of non-fulfilment of the conditions required for the exception. We think it is appropriate that parties to an agreement (and not the competition authority or plaintiff) bear the burden to prove positive effects and their passing-on to the consumers, as well as absence of less restrictive solution of the same problem.

Following materials were used while preparing this paper:

- *Bejček, J.* K důvodnosti automatického zákazu vertikální cenové fixace. Právník 8/2008, pp. 825 – 854.
- *Peeperkorn, L.* Resale Price Maintenance and its Alleged Efficiencies. European Competition Journal, Vol. 4 No. 1 June 2008, pp. 201 – 208.

[14] Cp. *Bejček, J.* K důvodnosti automatického zákazu vertikální cenové fixace. Právník 8/2008, pp. 825 – 854.

FINLAND

1. Introduction

The approach of the Finnish Competition Authority (hereinafter the FCA) as regards RPM has undergone some changes since the last OECD roundtable on RPM in 1997. The focus of this paper is to present these changes and to explain how they are reflected in the decisions made by the FCA. The changes involve not only changes in the legislation (and in the legal definition of RPM), but also a switch in priorities and a change from legal approach to more economic based approach.

1.1 The Competition Act until 2004

The Article 4 of the old Competition Act stipulated

> "When business is conducted, it shall be prohibited to request from the subsequent sales level that, in the domestic sale or rental of products offered, a certain price, compensation or the determination thereof shall not be exceeded or undercut."

In consequence, not only setting the minimum resale price, but also setting the maximum resale price was prohibited. It was possible for the company to apply for an exemption based on efficiencies. Recommended price was prohibited only if it was considered harmful.

1.2 The 2004 amended Competition Act

1.2.1 Definition

The Act on Competition Restrictions was harmonised with the EU competition rules in May 2004. The wording of Articles 4 and 5 of the new Competition Act is now almost identical with Article 81(1) and 81(3) of the EC Treaty, and the national provisions are interpreted in accordance with the EC rules.

In accordance with EC law, the Finnish law now prohibits agreements or concerted practices which have as their direct or indirect object setting a fixed or minimum resale price or price level. This means not only an agreement directly establishing the resale price is forbidden, but also achieving this in a more indirect manner, e.g. by fixing the distribution margin, fixing the maximum level of discount the distributor can grant from prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level.

The RPM is regarded as a hardcore restriction, which means that its object is seen to be the restriction of competition, without need to establish harmful effects. However, a hard core restriction is not the same as a per se prohibition. Even if a hardcore restriction means a strong negative presumption, it is not completely ruled out that the company would show the pro-competitive effects being greater than the restrictive effects.

On the other hand, maximum or recommended price is not considered in itself to lead to RPM, and is prohibited only in the circumstances in which it works as RPM. The most important factor for assessing possible anticompetitive effects of maximum or recommended resale price is the market position of the supplier. The practice of imposing a maximum resale price or recommending a resale price may infringe the Competition Act if it leads to a uniform price level.

1.2.2 The Approach

Before 2004, the FCA did not deal with very many RPM cases. Directly after the harmonisation with the Article 81(1), FCA put top priority to all hard core restrictions, also vertical ones. Among these cases were also some RPM cases which were taken to the Market Court.[1]

However, more priorisation was needed as it became apparent that the resources of the Market Court and the FCA would not be sufficient to deal with all hard core restriction cases. In setting priorities, the FCA takes into account especially the existence and extent of consumer harm, preventive effects and the usefulness of intervention compared to the costs of the investigation.

2. The Case Law

In 1998, *Kesko Oyj* and *K-ruokakauppiasyhdistys ry* applied for exemption for maximum pricing. Kesko Food manages K-food store retail chains and combines their purchasing power, arranges logistics, acquires store sites and gives marketing and development support for K-food stores. All K-food stores in Finland are run by K-retailer entrepreneurs. The FCA did not grant the exemption for maximum pricing, since Kesko did not demonstrate that the conditions for the exemption were fulfilled. In the FCA's opinion, it was possible that the maximum pricing would lower the retail prices of Kesko group, but there was a significant risk that in the oligopolistic markets the pricing scheme would only have led to dampening of the competition. In 2001, the FCA found out that the undertakings had carried on with their pricing plans regardless of the FCA's position on the matter. In 2005, the FCA proposed the Market Court to impose fines for the undertakings. The case is pending.

After the harmonisation of the domestic and EU competition rules in 2004, the FCA has decided to make a proposal to the Market Court for imposing fines in some RPM cases.

In December 2005, the FCA proposed fines to a camping equipment wholesaler *Greendoor Oy* for applying RPM. Although the market share of the wholesaler was not very significant, the FCA found it necessary to take action, because the case involved alleged collective boycott by the 'brick and mortar' dealers who wanted to avoid competition with an Internet dealer.

In March 2006, the FCA proposed fines to *Tecalemit Oy*, who had included a RPM clause in the service authorisation agreement. Due to this agreement, the maintenance service companies were prevented from pricing their services independently to compete with each other and with Tecalemit Oy.

In August 2007, the FCA issued a prohibition decision in a RPM case instead of proposing fines. The FCA had started investigations after receiving several complaints about the pricing of the *Topfield* brand of digital receivers. Kjaerulff 1 Oy, the official importer of the Topfield digital receivers, was alleged to set the prices for the end customers. In the investigations, the FCA found out that Kjaerulff 1 Oy had required at least some of its retailers to use the recommended price in their advertising as a condition for receiving reimbursement for marketing. The FCA found in its decision that Kjaerulff 1 Oy's practice was a breach of the competition legislation and ordered Kjaerulff 1 Oy to cease this practice. The decision referred to paragraph 47 of the EC Vertical Guidelines, according to which making the reimbursement of promotional costs by the supplier subject to the observance of a given price level amounts to indirect resale price maintenance.

[1] In Finland the fine imposed by the Market Court is a administrative fee, which is to be paid to the state. If the dealer wants compensation, he has to file damages claim in a district court.

In this case the FCA found it important to intervene because the sending of the analogical television signal was ending in the end of 2007 and all the television viewers were forced to buy a digital receiver. Topfield was one of the top brands at the time in the Finnish markets.

In June 2008, the FCA stated in its decision that *John Crane Safematic Oy* had infringed the RPM prohibition. The case concerned sales and installation of the lubricant system of vehicles and machines in Finland. The complainant, repair and installation shop Qvist Oy, accuses the supplier of the lubrication system John Crane Safematic Oy for abuse of dominant position (unreasonable purchase and sales conditions), horizontal competition restraints (sharing of markets, customers and procurement sources) and vertical competition restraints (RPM, exclusive customers and non-competition clauses). The FCA decided to make a prohibition decision instead of making a proposal to the Market Court to impose fines, as the anti-competitive effects on the market were not that significant.

The FCA has considered it important to allocate the recourses to cases where restriction causes harm to consumers. Especially when the supplier has significant market power and when the dealers are also active in enforcing the RPM on other dealers, the FCA finds it appropriate to take the case to the Market Court to impose fines.

The FCA is presently investigating RPM agreements of a leading Finnish home ware design company. The products in question are sold widely in all major stores in Finland and the company has as well its own retail store chain. This makes the company not only the supplier, but also a competitor to the independent retailers. The company has fixed the resale price with its retailers already for some years. Some of the retailers have signed a written contract including a RPM clause, while others are committed in an oral agreement and also act accordingly.

The distribution system is not selective, as large amount of the products are sold through discount stores. Some of the dealers were trying to cut the prices, but almost all price competition was eliminated as the supplier threatened to stop supplying. When the discount stores were forced to raise the prices, the consumers did not switch to other brands, but only to other dealers. The supplier in this case has significant market power and does not face real competition from other brands. In these circumstances, RPM is very likely to cause harm to consumers and competition. The FCA is considering to make a proposal to the Market Court to impose fines in this case.

The hardcore nature of RPM is particularly useful in this case. Even though the clear objective of the parties involved seems to have been to use their market power to raise prices in an anticompetitive way, preliminary economic assessment of the case has given clear indications that it would be burdensome for the FCA to get sufficient evidence on negative welfare effects.

3. On the effects of RPM on competition and consumer welfare

Economists often argue in favour of allowing RPM, but many of these arguments are not always convincing. Often efficiency problems could be solved in less restrictive ways.

3.1 Motives for RPM and effects on consumers

The so-called free rider problem is often said to be solved efficiently by RPM. However, there are other less restrictive ways to solve this problem. Territorial restrictions, both exclusive and selective, can be used to prevent free riding on the investments made by only some dealers. As the absolute territorial protection is forbidden, applying these restraints leave some room for competition. It can also be argued that the RPM is not the best way to solve the free riding problem. If the manufacturer uses RPM to guarantee that the dealers would provide enough services, the dealers have the opportunity to spend money on promotion, but they can as well let the others do it and simply enjoy the large margin. Limited territorial

protection is a more effective way to solve the free riding problem. In addition, the implementation of excessive services and the benefits of these to consumers may be uncertain and highly questionable.

Furthermore, in order to ensure the end customers a certain service level and to differentiate his product from the products of the competitors, the supplier could himself carry these costs. In this case, all the sales these services generate would bring more volume to the supplier and the problem with free riding is not raised at all.

The problem of double marginalisation is often also considered to be a justification for RPM. This problem is however best solved with a maximum price, which is not a hardcore provision.

Luxury image is often said to be a reason for RPM. When the price is high, and the product is available in outlets signalling high quality, the consumers believe more in the quality of the product. But there is no consumer benefit in high prices, unless the availability of the product is further improved. Improving the availability of a product necessitates supplying a wider population of outlets. Consequently the product is being distributed via outlets of inferior quality-signalling standard. With working competition between the outlets, there is a clear tension between the strive to large volumes and the maintenance of exclusivity of the product. RPM is a measure to combine these strives, which is about to boost the profitability of the supplier . Unfortunately, this may occur at the expense of consumers, as intra brand competition is effectively eliminated. Since it is not the high price in itself that makes the product appealing, but rather the experience in the buying process, the manufacturer can achieve the luxury image by selective distribution system, without harm to the consumers.

3.2 RPM in the competitive process

Applying RPM can cause harm through horizontal effects. It can facilitate cartel formation among manufacturers or retailers. Especially in a concentrated market, the practice of using RPM or even publishing maximum or recommended prices may through increased transparency facilitate collusion between the suppliers. On the other hand, if the use of RPM is initiated by the dealers, it can be a way to eliminate the price competition on retail level. Downstream collusion can, in addition, be organised through an upstream player, known as so-called A to B to C collusion.

In addition, the manufacturer can use RPM to limit retailers bargaining on the wholesale price and thereby dampen upstream competition, and reduce the pressure and incentives to make the upstream production more efficient. In a situation where the retailers would be competing with each other, they would as well bargain for lower wholesale prices from the manufacturers. Cutting off this mechanism by the use of RPM may deprive consumers of a substantial surplus.

RPM can facilitate a dominant player to execute market power. A manufacturer with market power might use RPM to make retailers participate in foreclosure of smaller rivals or new entrants, by giving retailers incentives not to allocate shelf space to sell competing products.

Imposing RPM is of similar anti-competitive nature as granting absolute territorial protection. Both eliminate completely the intra-brand price competition from the retailer level, and thus are likely to harm consumers. On the other hand, with maximum price and with selective and exclusive distribution the supplier can achieve efficiency gains.

Although there are a variety of theoretical contributions claiming that the economic benefits of resale price maintenance outweigh the detrimental effects, this should not necessitate any automatic or swift accommodation of competition policy. That is not to question the rightfulness of the analyses cited, but rather to accentuate, that proper consideration is given to the assumptions that these results are constructed upon. It is crucial that the assumptions are realistic and correspond to the working of the actual economy,

in which the competition law is eventually enforced. Moreover, whereas the benefits of resale price maintenance rely on the truthfulness of underlying assumptions, it should be possible for the parties to verify the relevance of these with certainty. Otherwise court rulings will be based on opposing argumentations with premises anchored in probabilities or abstract ways of thinking.

4. Conclusions

Even if RPM is considered a hardcore provision, the unlawfulness is nevertheless a rebuttable presumption. The door for efficiency defence is left open. In addition, a solid theory of harm is extremely important to justify the authority to interfere. Without theory of harm there are no grounds to allocate the resources of the authority and even less grounds to impose infringement fines.

The FCA considers it important to allocate the recourses to the cases where restriction causes harm to consumers. Therefore, a move towards to a casuistic approach would leave more space for economic analysis. However, if there were a presumption of legality and the competition authority would have to show the actual anticompetitive effects in order to make a negative decision in a RPM case, the task would be very difficult and consume a lot of resources. In the FCA's opinion, legal certainty provided by the hardcore approach is less costly for both sides. Negative effects are more likely than unlikely and the efficiency benefits can anyway be achieved with less harmful ways.

FRANCE

Introduction

Rompant avec une longue tradition d'encadrement des prix, l'ordonnance du 1er décembre 1986 consacre le principe de la libre détermination des prix par le jeu de la concurrence. La liberté a été rendue à tous les opérateurs économiques de la chaîne de distribution, fournisseurs et distributeurs, dans les conditions précisées à l'article L. 410-2 du code de commerce[1]. Le fait pour un opérateur d'imposer un prix contrevient à ce principe.

La jurisprudence du Conseil de la concurrence sur les prix imposés est abondante. Depuis la publication du Règlement n° 2790/1999 du 22 décembre 1999[2], le Conseil a sanctionné des pratiques de prix imposés à une vingtaine de reprises[3]. Même lorsque seul le droit interne s'applique, le Conseil utilise les lignes directrices publiées en 2000 par la Commission comme guide d'analyse. Il rappelle systématiquement que ce type de pratiques ne peut pas bénéficier de l'exemption par catégorie prévue par le Règlement vertical. Ce dernier devant expirer au 31 mai 2010, les Etats membres de l'Union européenne réfléchissent actuellement au régime qui prévaudra après cette date.

La présente note commence par décrire l'état de l'analyse économique sur le sujet -sans prétendre à l'exhaustivité. Le maintien de prix imposés peut affecter la concurrence par plusieurs canaux : suppression de la concurrence intramarque, facilitation de la collusion entre producteurs ou distributeurs, réduction de la concurrence intermarques. Plusieurs études empiriques récentes tendent à confirmer la réalité de ces mécanismes anticoncurrentiels. D'un autre côté, l'imposition des prix de détail peut également, dans certaines situations et sous des conditions spécifiques, permettre des gains d'efficacité dans le système de distribution : suppression de la double marge, amélioration des incitations des distributeurs à fournir des services ou à conserver un niveau approprié de stock de marchandises.

La seconde partie de la note souligne plusieurs aspects de la pratique décisionnelle du Conseil de la concurrence. En premier lieu, le Conseil applique un standard de preuve élevé pour établir l'existence d'une entente verticale sur les prix. Ce standard a été validé par la Cour d'appel de Paris. En deuxième lieu, lorsqu'il apprécie la gravité des pratiques et le dommage causé à l'économie, le Conseil tient compte du contexte économique et de l'ensemble des circonstances concrètes de marché. Il accorde une attention

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1 « Sauf dans les cas ou la loi en dispose autrement, les prix des biens, produits et services relevant antérieurement au 1er janvier 1987 de l'ordonnance n°45-1483 du 30 juin 1945 sont librement déterminés par le jeu de la concurrence.

Toutefois, dans les secteurs ou les zones où la concurrence par les prix est limitée en raison soit de situations de monopole ou de difficultés durables d'approvisionnement, soit de dispositions législatives ou règlementaires, un décret en Conseil d'Etat peut règlementer les prix après consultation du Conseil de la concurrence.

Les dispositions des deux premiers alinéas ne font pas obstacle à ce que le Gouvernement arrête, par décret en Conseil d'Etat, contre des hausses ou des baisses excessives de prix, des mesures temporaires motivées par une situation de crise, des circonstances exceptionnelles, une calamité publique ou une situation manifestement anormale du marché dans un secteur déterminé. Le décret est pris après consultation du Conseil national de la Consommation. Il précise sa durée de validité qui ne peut excéder six mois. »

2 Relatif à l'application de l'article 81, paragraphe 3, du traité CE à des catégories d'accords verticaux et de pratiques concertées.

3 La liste des décisions récentes les plus importantes se trouve en annexe.

particulière au degré de concurrence qui subsiste aux différents niveaux de la chaîne verticale. En troisième lieu, le Conseil ne manque pas d'examiner les arguments avancés par les entreprises pour justifier les pratiques ou montrer qu'elles n'ont pas eu d'effet. Enfin, au moment de déterminer les sanctions individuelles, le Conseil examine avec soin la situation particulière et le rôle de chaque entreprise dans le maintien des prix de détail.

1. A titre liminaire, rappel des textes applicables en France

En France, les pratiques imposant un prix de revente peuvent être appréhendées sous l'angle des pratiques anticoncurrentielles- PAC (articles L.420-1 et L.420-2 du code de commerce, articles 81 et 82 du Traité) ou également constituer des pratiques restrictives de concurrence, PCR, sanctionnées par le juge pénal. Aux termes de l'article L.442-5 du code de commerce : « *Est puni d'une amende de 15 000 euros le fait par toute personne d'imposer, directement ou indirectement, un caractère minimum au prix de revente d'un produit ou d'un bien, au prix d'une prestation de service ou à une marge commerciale* ». Pour les personnes morales, le montant est multiplié par 5 (art. 121-2 et 131-38, code pénal).

L'interdiction vise l'imposition d'un prix fixe ou minimum. La diffusion de prix conseillés ou maximaux demeure licite, sauf à démontrer qu'il s'agit de prix imposés de manière directe ou indirecte. Il s'agit d'une jurisprudence constante du Conseil de la concurrence (par exemple décision n°96-D-57, produits cosmétiques, ou n°01-D-58, Benetton) comme des juridictions pénales (arrêt de la Cour de cassation, chambre criminelle, du 31 octobre 2000, société Rockwool Isolation).

1.1 Entente

L'entente sur les prix imposés, prohibée par les dispositions de l'article L.420-1 du code de commerce, constitue une restriction caractérisée au sens de l'article L.464-6-2 du code de commerce. Dans ce cadre, le Conseil de la concurrence analyse les pratiques en tenant compte des principes résultant du règlement (CE) n° 2790/1999 du 22 décembre 1999, concernant l'application de l'article 81§3 du Traité à des catégories d'accords verticaux et de pratiques concertées, et des lignes directrices sur les restrictions verticales n°2000/C 291/01.

1.2 Pratique unilatérale et abus de position dominante

L'application de l'article L.420-2 du code de commerce suppose une étude préalable de marché et la mise en évidence d'une position dominante de l'entreprise qui impose un prix.

Le Conseil de la concurrence a ainsi considéré, dans la décision n°99-D-45, Mattel, que la société Mattel, en position dominante sur le marché de la poupée mannequin, avait abusé de cette position en mettant en place un dispositif tendant à contraindre ses clients distributeurs à se conformer à sa politique de prix.

En revanche, lorsque le fabricant ne détient pas de position dominante sur le marché, les pressions exercées à la suite de plaintes de distributeurs mécontents de prix trop bas constituent une pratique unilatérale (décision n°99-D-31 du Conseil de la concurrence, garnitures de freins).

1.3 Cumul possible des qualifications d'entente et d'abus de position dominante..

Les qualifications d'entente et d'abus de position dominante peuvent être simultanées.

Dans sa décision n°05-D-32 du 22 juin 2005, Royal Canin, le Conseil de la concurrence et la Cour d'appel de Paris ont considéré que la société Royal Canin, en position dominante sur le marché des aliments secs pour chiens distribués en magasins spécialisés et chez les éleveurs-vétérinaires, avait mis en

œuvre avec ses grossistes-distributeurs une entente de prix imposés, doublée d'abus de position dominante à l'égard de ces derniers sous forme de prix imposés et de restriction de clientèle. De même, l'entente sur les prix de vente au détail impliquant la société Royal Canin, les grossistes-distributeurs, les centrales de franchisés et les détaillants s'accompagnait d'abus de position dominante consistant en prix imposés et remises quantitatives fidélisantes.

1.4 Cumul possible des infractions PAC et PCR

Une personne physique peut être sanctionnée au titre des PCR et l'entreprise, personne morale, au titre des PAC. Une personne morale peut être sanctionnée au titre des deux qualifications.

2 L'analyse économique des prix imposés est complexe et en évolution

La complexité de l'analyse des prix imposés provient, au moins pour partie, de la multiplicité de facteurs à prendre en compte, et des possibles interactions entre eux.

En premier lieu, les structures des marchés amont et aval, ainsi que le pouvoir de marché de chaque acteur jouent un rôle central. L'analyse économique tient compte, notamment, du nombre et des parts de marchés des fournisseurs et des distributeurs, du degré de différenciation entre les différents produits et les différents distributeurs, ainsi que de l'existence d'éventuelles asymétries entre les positions et les stratégies des acteurs.

En second lieu, les effets de l'imposition des prix de détail dépendent de la forme des contrats passés entre producteurs et distributeurs. Les contrats peuvent prévoir : des prix de gros linéaires, des tarifs binômes incluant une partie fixe, des tarifs non linéaires avec rabais quantitatifs, des accords d'exclusivité, la possibilité de primes de référencement perçues par le distributeur, subordonnées, le cas échéant, à des conditions particulières, etc.

En troisième lieu, le déroulement et les modalités des négociations entre producteurs et distributeurs jouent un rôle important. Parmi les paramètres qui entrent en jeu, on peut citer : la nature des informations dont dispose chaque participant, notamment ce que chacun sait des négociations menées en parallèle par les autres producteurs et distributeurs ; la manière dont se forment les conjectures sur les contrats négociés par les autres acteurs ; le pouvoir de négociation et les points de menace dont chacun dispose, en particulier les options disponibles en cas d'échec des négociations avec un ou plusieurs partenaires commerciaux[4] ; l'impact, le cas échéant, des contraintes réglementaires, comme l'interdiction de la discrimination, sur le jeu des négociations bilatérales.

En quatrième lieu, la perspective dynamique doit être intégrée dans les raisonnements, ce qui vient encore compliquer l'analyse. Il est en effet fréquent, en pratique, que les producteurs et les distributeurs interagissent de manière répétée dans le temps.

Enfin, la notion de risque intervient dans les incitations des différents acteurs. L'incertitude sur la demande et sur les coûts de production ou de distribution est une autre dimension à prendre en compte dans l'analyse des prix imposés, s'agissant notamment de certaines de leurs justifications.

[4] La question de savoir si les fabricants sont contraints de traiter avec tous les distributeurs présents joue un rôle important dans l'analyse concurrentielle des prix imposés.

2.1 L'imposition des prix de détail peut porter atteinte à la concurrence par différents canaux

Si l'impact du maintien des prix de détail sur la concurrence intramarque est relativement bien connu, l'étude de son effet sur la concurrence entre les producteurs est plus difficile. Les deux aspects sont discutés successivement.

2.1.1 Suppression de la concurrence intramarque

Lorsqu'un producteur en situation de monopole commercialise son produit au travers d'un réseau de distributeurs, il a en principe tout loisir de proposer à chacun un contrat permettant de maximiser le profit total des acteurs (producteur et distributeurs). Il suffit de proposer un prix de gros supérieur au coût unitaire de production tel que les prix résultant de la concurrence entre les distributeurs soient optimaux pour l'ensemble des acteurs. Le partage entre le producteur et les distributeurs du surplus ainsi créé peut alors être réalisé au moyen du prix de gros unitaire et, le cas échéant, de transferts fixes, en fonction des pouvoirs de négociation respectifs des différents acteurs.

Le mécanisme précédent ne fonctionne plus lorsque les termes des contrats signés entre le producteur et chaque distributeur ne sont pas observables par les autres distributeurs. Dans ce cas, en effet, chaque distributeur a intérêt à proposer au producteur de réduire secrètement le prix de gros qu'il lui facture, ce qui lui permet de baisser son prix de détail et ainsi de détourner vers lui une partie de la demande qui s'adresse aux distributeurs concurrents[5]. Le producteur a intérêt à répondre favorablement à une telle demande, car les gains qu'il retire de la hausse des ventes réalisées par le distributeur « déviant » excèdent les pertes qu'il subit du fait de la baisse des ventes des distributeurs concurrents. O'Brien et Shaffer (1992) démontrent ainsi que le producteur ne parvient pas, en l'absence d'un mécanisme crédible d'engagement, à maintenir un prix de gros supérieur à son coût de production. L'opportunisme des distributeurs, combiné avec l'impossibilité pour le producteur de s'engager sur des prix de gros élevés, est favorable aux consommateurs, qui bénéficient de prix plus faibles.

O'Brien et Shaffer (1992) montrent que le producteur peut résoudre son problème d'engagement en faisant en sorte que la marge des distributeurs s'annule, ce qui supprime le problème d'opportunisme.[6] En théorie, un moyen d'y parvenir est d'imposer un prix de revente *maximum* au même niveau que le prix de gros. En pratique, les observations du Conseil dans plusieurs affaires (cf. *infra*, 2.2.a), ainsi que certains travaux empiriques sur données françaises (cf. *infra* 1.1.d), suggèrent que les distributeurs réalisent des marges faibles, voire nulles, et sont rémunérés dans une large proportion par des transferts fixes en provenance des fabricants.

D'une manière générale, des contraintes réglementaires peuvent aider les fournisseurs à s'engager sur des prix de gros élevés, en rendant impossibles les déviations unilatérales évoquées ci-dessus. Ainsi, en France, l'interdiction de la discrimination oblige le fournisseur à facturer le même prix de gros à tous les distributeurs et empêche les baisses secrètes de prix accordées à un distributeur particulier. Cette interdiction légale fournit un moyen d'engagement crédible au fournisseur, et l'aide à exercer son pouvoir de marché. La réforme engagée en France, qui libéralise les relations entre producteurs et distributeurs,

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5 Chaque distributeur, dans la relation avec ses fournisseurs, ignore l'intérêt des distributeurs concurrents. Ce phénomène, qualifié d' « opportunisme » par les économistes, est au cœur de la concurrence intramarque. Voir aussi Hart et Tirole (1990).

6 L'opportunisme des distributeurs ne peut jouer que si ces derniers réalisent une marge de détail, c'est-à-dire s'il existe un écart positif entre les prix de gros et de détail. En effet, lorsque cet écart est nul, l'opportunisme d'un distributeur entraînerait des pertes pour ses concurrents, qui cesseraient donc de distribuer le produit. Le fournisseur n'aurait donc pas intérêt à accepter la baisse de prix de gros demandée.

permettra à chaque distributeur de négocier plus librement avec ses fournisseurs et devrait donc jouer dans le sens d'une baisse des prix aux consommateurs.

2.1.2 Facilitation de la collusion entre producteurs

Jullien et Rey (2007) adoptent une perspective dynamique et s'intéressent à la possibilité pour les producteurs de maintenir durablement des prix supraconcurrentiels. Ces auteurs mettent l'accent sur les aléas qui affectent l'environnement des distributeurs. Ils supposent que ces derniers font face à des chocs locaux de demande ou à des variations non anticipées de leur coût. En l'absence de prix imposés, de tels chocs conduisent les distributeurs à ajuster leur prix de détail. En fixant les prix de détail de manière centralisée, les producteurs se privent de la connaissance que les distributeurs ont des conditions locales de demande et de coût ; mais, d'un autre côté, ils rendent les prix plus uniformes, et les déviations d'un accord collusif sont plus faciles à détecter.

En l'absence de RPM, une baisse de prix d'un distributeur peut être interprétée par les producteurs soit comme une déviation de l'un d'entre eux, soit comme le résultat d'un choc sur les conditions locales de demande ou de coûts. Dans l'incertitude quant à l'origine de la baisse du prix, les producteurs peuvent hésiter à mettre en œuvre les représailles, ce qui rend l'équilibre collusif plus difficile à soutenir. Au contraire, dans le cas où les producteurs fixent eux-mêmes les prix finals, ils lèvent toute ambiguïté quant à l'origine d'une baisse de prix. Ainsi, l'imposition des prix de détail facilite la détection des déviations, permet une mise en œuvre plus rapide des mesures de rétorsions, et facilite ainsi le maintien de prix collusifs.

Les producteurs font donc face à un arbitrage entre flexibilité des prix et collusion : ils décident d'imposer les prix de détail lorsque les gains d'une meilleure détection des déviations excèdent l'inefficacité due à la rigidité des prix. Jullien et Rey (2007) montrent que c'est le cas lorsque les chocs environnementaux sont d'ampleur modérée[7]. Surtout, ils montrent que, dans la plupart des cas, il y a conflit entre l'intérêt des producteurs et celui des consommateurs, et que la décision des producteurs d'imposer les prix de détails nuit aux consommateurs.

Jullien et Rey (2007) rappellent que les arguments développés par la littérature antérieure ne suggèrent pas que les restrictions verticales de nature tarifaire soient les plus dommageables à la concurrence[8]. Ils soulignent le caractère novateur de leur analyse des prix imposés comme pratique facilitatrice de la collusion, qui apporte une justification nouvelle à l'attitude spécialement sévère des autorités de concurrence vis-à-vis de cette pratique en comparaison d'une attitude plus conciliante à l'égard des restrictions non tarifaires. Les auteurs ne vont cependant pas jusqu'à émettre des recommandations s'agissant du standard de preuve qui devrait prévaloir. L'exemple des échanges d'informations, examiné récemment par le groupe « concurrence » de l'OCDE, illustre la complexité du traitement juridique des pratiques facilitatrices.

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7 Le résultat vaut pour des valeurs intermédiaires du taux d'escompte des producteurs. Ce taux mesure la valeur que ceux-ci accordent à leurs revenus futurs, ou leur degré de « patience ».

8 Ainsi, l'article de Rey et Stiglitz (1995) montre le caractère potentiellement anticoncurrentiel de restrictions non tarifaires, comme l'exclusivité géographique. En attribuant des territoires exclusifs à leurs distributeurs et en leur déléguant la décision du prix, les producteurs peuvent s'engager de manière crédible à suivre les hausses des prix de leurs concurrents, ce qui réduit l'intensité de la concurrence intermarques. On peut noter que la délégation de la décision de prix aux distributeurs et l'imposition des prix de détail sont deux stratégies diamétralement opposées. Les canaux par lesquels elles affectent la concurrence sont sans rapport.

2.1.3 Réduction de la concurrence intermarques

D'autres travaux cherchent à mieux comprendre l'impact sur la concurrence de l'entrelacement des relations entre producteurs et distributeurs. En pratique, en effet, il est fréquent que des producteurs commercialisent leurs produits par l'intermédiaire des mêmes distributeurs. Ces travaux, qui considèrent un cadre statique et sans aléas, visent à montrer que la pratique des prix imposés peut réduire les incitations des producteurs à se faire concurrence. Même si le secteur n'est pas caractérisé par les facteurs habituellement considérés comme facilitant la collusion, le maintien des prix de revente peut conduire à une augmentation des prix de détail néfaste aux consommateurs.

Ces travaux mettent en évidence une tension entre concurrence intra et intermarques, qui empêche les producteurs, en l'absence de prix imposés, de maintenir les profits élevés. Pour contrer les effets de la concurrence entre distributeurs, les fournisseurs doivent en effet proposer des prix de gros élevés (sinon les prix de détail seraient trop faibles de leur point de vue), mais c'est précisément ce à quoi s'oppose la concurrence intermarques.

Rey et Vergé (2004) montrent que l'imposition des prix de détail élimine cette tension et réduit, voire élimine, les concurrences intra et intermarques[9]. Si les producteurs contrôlent les prix de détail, ils peuvent tout à la fois choisir des prix de gros faibles et des prix de détail élevés. Lorsque les marges de gros sont nulles, l'intégralité des profits variables est réalisée en aval, puis transférée aux producteurs par le biais des transferts forfaitaires. Ainsi, lorsqu'ils choisissent les prix de détail, les incitations des producteurs sont alignées avec la maximisation du profit total de l'industrie. L'externalité négative exercée par les producteurs les uns sur les autres, qui passait par les marges de gros, disparaît, puisque ces dernières sont nulles[10].

Ces résultats ne valent cependant que sous certaines hypothèses relatives aux négociations entre producteurs et distributeurs. En particulier, lorsque ces derniers peuvent menacer de ne pas distribuer certains produits, les fournisseurs doivent leur laisser des rentes, ce qui complique grandement l'analyse.

2.1.4 Validation empirique sur données françaises

Dans l'ensemble, la théorie économique suggère que la concurrence est réduite lorsque les producteurs et les distributeurs parviennent à éliminer l'une des deux marges, de gros ou de détail. Les incitations à se faire concurrence sont alors réduites, et les profits sont partagés par des transferts forfaitaires. En France, dans le secteur de la grande distribution, c'est la marge de détail qui a tendu à s'annuler. Plusieurs travaux économétriques sur données françaises confirment ce mécanisme. Certaines des affaires mentionnées dans la seconde partie de cette note, notamment l'affaire des jouets, en apportent une illustration complémentaire.

Concrètement, les prix de détail des distributeurs ont augmenté plus vite que l'inflation en France à partir de 1997. Ce mouvement est lié à la conjugaison de deux interdictions, celle de la discrimination entre les distributeurs et celle de la revente à perte. La réglementation des relations entre producteurs et distributeurs imposait aux premiers, jusqu'à une date récente, de publier des conditions générales de vente publiques et non discriminatoires et leur interdisait de négocier des barèmes de prix spécifiques à chaque

9 Rey et Vergé (2004) supposent que producteurs et distributeurs passent des contrats consistant en un prix de gros et un montant fixe (un transfert forfaitaire) payés par le distributeur au producteur et que les producteurs ont tout le pouvoir de négociation (c'est-à-dire lorsqu'ils peuvent proposer aux distributeurs des contrats à prendre ou à laisser).

10 Dans le cas français, on observe la situation « miroir » où ce sont les marges de détail, et non celles de gros, qui sont nulles (cf. infra).

distributeur. A cette première réglementation s'ajoutait une seconde, relative à la revente à perte. La loi Galland, instaurée en 1996, définissait le seuil de revente à perte comme le prix facturé au distributeur au moment de la livraison du produit. En particulier, le prix seuil ne prend pas en compte les remises et rabais perçus par les distributeurs *a posteriori* (marges dites « arrière »), même lorsque ces derniers peuvent les anticiper au moment de la vente. L'application de cette loi a entraîné une baisse des marges « avant », l'écart entre les prix de gros et de détail se réduisant, voire s'annulant ; dans un mouvement parallèle, les marges « arrière », transferts des producteurs vers les distributeurs, se sont accrues pour assurer la rémunération des distributeurs. L'interdiction de la revente à perte a ainsi permis aux producteurs de fixer un prix minimum de revente, identique pour tous les distributeurs à cause de l'interdiction de la discrimination.

Les travaux de Biscourp, Boutin et Vergé (2008), qui s'appuient sur la base de données à partir de laquelle est calculé l'indice des prix à la consommation en France, confirment que la loi Galland, combinée à l'interdiction de la discrimination entre distributeurs, a conduit à une forte réduction de la concurrence intramarque, et suggèrent que l'addition des deux réglementations est responsable, au moins en partie, de l'augmentation des prix des biens de consommation courante observée dans les mois suivant son introduction. Ces travaux montrent que la force du lien entre les niveaux des prix et la structure locale des marchés (mesurée par des indices de concentration locale) s'est significativement affaiblie au moment de l'entrée en vigueur de la loi Galland.

Les travaux de Bonnet et Dubois (2008), menés sur des données de prix de vente au détail d'eau en bouteille en France entre 1998 et 2000, adoptent une approche structurelle, en modélisant la concurrence oligopolistique entre producteurs. Ils cherchent à identifier les comportements et le type de concurrence qui permettent de mieux représenter les prix observés. Leurs résultats suggèrent que les contrats entre producteurs et distributeurs sont à tarifs binômes, que les fournisseurs parviennent à imposer les prix de revente et qu'à l'équilibre les marges de détail des distributeurs sont nulles.

2.2 Sous des conditions spécifiques, les prix imposés peuvent améliorer l'efficacité de la distribution

La théorie économique a identifié plusieurs types de gains d'efficacité potentiels apportés par la fixation des prix par les fournisseurs, mais a aussi montré que de tels gains ne peuvent se produire que lorsque des conditions spécifiques sont satisfaites.

2.2.1 Suppression de la double marge

Lorsque producteurs et distributeurs fixent successivement les prix de gros et de détail, chacun s'attribue une marge positive de manière à maximiser son profit. L'empilement des marges peut conduire à un prix de détail plus élevé que le prix de monopole (c'est-à-dire le prix qui maximise la somme des profits des producteurs et des distributeurs), réduisant les bénéfices des entreprises comme le bien-être des consommateurs. Le maintien des prix de revente permet à un producteur et à son distributeur de prendre en compte l'effet de leurs prix respectifs sur le profit des partenaires et supprime le problème de la double marge.

On doit noter que l'imposition d'un prix de revente *minimum* n'empêche pas les distributeurs d'ajouter une marge positive à celle du fabricant. Un prix de revente *maximum* -restriction qui n'est pas, en général, considérée comme problématique par les autorités de concurrence- suffit pour éliminer l'inefficacité de la double marge.

De plus, cette justification ne vaut que si la libre fixation des prix conduit effectivement à l'empilement des marges. Pour cela, deux conditions doivent être simultanément satisfaites : (i) les contrats

entre producteurs et distributeurs spécifient des prix de gros uniformes ; (ii) les producteurs ont assez de pouvoir de négociation[11].

Lorsque les contrats entre les producteurs et leurs distributeurs prévoient des modes de tarification plus élaborés, comme un tarif binôme (prix de gros et transfert forfaitaire), le phénomène de double marginalisation disparaît, le transfert forfaitaire permettant de partager le surplus entre les parties même si la marge variable de l'un des partenaires est nulle. D'où la nécessité de la première condition.

Concernant la seconde condition, Dobson et Waterson (2007) étudient l'arbitrage, en présence de prix de gros uniformes, entre réduction de la concurrence et inefficacité de la double marge. En l'absence de prix imposés, chaque distributeur, pour rester compétitif dans la concurrence en aval, est incité à faire pression sur ses fournisseurs pour obtenir des prix de gros faibles. D'un côté, l'imposition des prix de revente, en supprimant cette incitation, réduit la concurrence intermarques. De l'autre, les prix imposés suppriment la double marge.

Les auteurs montrent que l'impact net des prix imposés sur les consommateurs est négatif lorsque les distributeurs ont un fort pouvoir de négociation et se livrent entre eux à une concurrence intense. Dans cette situation, en effet, la marge des distributeurs est faible en l'absence de prix imposés, leur pouvoir de négociation leur permet de négocier des prix de gros faibles avec les fournisseurs et la concurrence intramarque les force à transmettre aux consommateurs, sous forme de baisses des prix de détail, les avantages ainsi obtenus. Au total, dans cette situation, la fixation des prix de détail par les producteurs apporte peu de gains en terme de réduction de la double marge et fait perdre beaucoup en terme de réduction de la concurrence intermarques. Il s'ensuit que, sans ambiguïté, les prix imposés nuisent aux consommateurs dans ce cas.

2.2.2 Amélioration de la qualité des services fournis par les distributeurs

Il est fréquent que les distributeurs fournissent des services (information avant la vente, conseils aux consommateurs, livraison gratuite, etc.) qui rendent les produits plus attractifs aux yeux des consommateurs et qui accroissent ainsi la demande. Souvent, le niveau de service n'est pas vérifiable et, pour cette raison, ne peut pas faire l'objet d'un contrat entre les deux partenaires. Le distributeur doit donc recevoir des incitations appropriées pour exercer un niveau d'effort efficace.

Lorsqu'ils choisissent la quantité et la qualité des services qu'ils proposent aux consommateurs, les distributeurs tiennent compte de leurs profits propres, mais pas de ceux de leurs fournisseurs. Si la marge des distributeurs est faible, il est vraisemblable que le niveau de services soit sous-optimal du point de vue de l'ensemble de la chaîne verticale. L'imposition des prix de vente, en garantissant aux distributeurs une marge suffisante, peut rétablir leurs incitations à fournir un niveau efficace de services.

Toutefois, des contrats plus élaborés qu'un simple tarif linéaire, comme un tarif binôme, peuvent résoudre le problème. Si les contrats entre les producteurs et les distributeurs comprennent un transfert fixe, cette justification n'est pas opérante.

Par ailleurs, il peut arriver que tout ou partie de la demande créée par les efforts promotionnels d'un distributeur soit captée par des distributeurs concurrents qui proposent des prix faibles mais peu de services. Dans ce cas, le distributeur ne bénéficie pas, ou seulement partiellement, du surcroît de demande qu'il a engendré. Anticipant le parasitisme, il réduit son niveau de services, qui est sous-optimal. L'imposition des prix de détail évite que des distributeurs opportunistes, en « cassant » les prix, n'attirent les consommateurs convaincus d'acheter grâce aux efforts fournis par d'autres.

11 Voir Dobson et Waterson (2007).

L'imposition des prix de détail ne répond cependant au risque d'opportunisme que dans certaines conditions. Il faut en premier lieu vérifier que la quantité et la qualité des services sont un élément déterminant dans la stratégie de vente du produit, et que le distributeur est véritablement menacé de parasitisme. En outre, d'autres solutions, moins restrictives de concurrence, peuvent atteindre le même objectif. C'est le cas des réseaux de distribution sélective qui permettent aux fabricants de s'assurer que leurs distributeurs respectent des obligations précises en terme de services, et réduisent ainsi le risque de parasitisme. Le Conseil a eu l'occasion de sanctionner des pratiques de prix imposés pour des produits qui relèvent de la distribution sélective, comme les parfums et cosmétiques du luxe (décision 06-D-04 du 13 mars 2006). Dans un tel contexte, présenter l'imposition de prix imposés comme un remède au risque de parasitisme serait peu convaincant.

Le Conseil note que, d'une manière générale, aucune entreprise n'a jamais évoqué devant lui des arguments de ce type pour justifier une pratique de prix imposés.

2.2.3 Incitation à conserver des stocks suffisants

Il est fréquent que les distributeurs doivent passer leurs commandes de stocks à leurs fournisseurs avant de connaître le niveau exact de la demande. Quand cette dernière est incertaine, ils peuvent être incités à stocker moins de marchandises pour éviter le risque d'une chute des prix en cas de demande faible. Deneckere et al. (1997) montrent qu'en rendant impossible une telle chute des prix, l'imposition des prix de détail par les fournisseurs permet d'inciter les distributeurs à commander un niveau suffisant de marchandise. Ces auteurs montrent également que l'impact sur les consommateurs dépend de l'ampleur des fluctuations de demande.

Plus précisément, l'imposition des prix de détail profite toujours au producteur, et conduit à des commandes plus élevées des distributeurs et donc à un niveau supérieur des stocks. Lorsque les fluctuations de la demande sont fortes, les prix imposés nuisent aux consommateurs, car ils les empêchent de profiter de prix bradés en cas de demande faible. En revanche, lorsque les fluctuations sont faibles, l'imposition des prix par le fournisseur profite aux consommateurs, car elle induit des stocks plus élevés et limite la hausse des prix en cas de forte demande.[12]

Toutefois, ce résultat dépend de plusieurs hypothèses, notamment l'existence d'une concurrence parfaite entre les distributeurs. Il conviendrait également de vérifier que d'autres méthodes que les prix imposés, comme des politiques de reprises des invendus, ne parviendraient pas à restaurer des incitations efficaces en matière de stocks tout en étant moins dommageables pour la concurrence.

Cette justification des prix imposés n'a jamais été avancée devant le Conseil de la concurrence.

3. La pratique décisionnelle des autorités de concurrence

Depuis la publication du Règlement 2790/1999, le Conseil de la concurrence a condamné des pratiques de prix imposés à près de vingt occasions. Tous ces cas présentent des caractéristiques diverses, s'agissant de la concentration des marchés amont et aval, de la présence ou non d'un réseau de distribution sélective, des pouvoirs de négociation respectifs des fabricants et des détaillants, etc. A titre illustratif, certains fabricants sanctionnés pour des pratiques de prix imposés étaient en position dominante[13] ou se

12 En l'absence de prix imposés, les stocks sont plus faibles, car le producteur maintient, au moyen de prix de gros élevés, une certaine rareté pour éviter l'effondrement des prix en période basse ; les consommateurs profitent certes d'un prix réduit en cas de demande basse, car le prix est libre de s'ajuster à la demande, mais ce gain est plus que compensé par la perte causée par les prix élevés en cas de forte demande.

13 Dans l'affaire 05-D-70, la société Disney était en position dominante sur le marché des cassettes vidéo préenregistrées destinées aux enfants. La pratique de prix imposés a été jugée contraire au droit des

trouvaient en duopole[14] sur le marché concerné ; dans d'autres cas, les fournisseurs étaient plus nombreux[15].

Sur le plan juridique, toutes les affaires de prix imposés traitées par le Conseil de la concurrence ont en commun le fait que l'imposition des prix de détail a été jugée contraire au droit des ententes[16],[17]. A cet égard, la pratique décisionnelle montre que le Conseil adopte un standard de preuve élevé pour établir l'existence de l'entente verticale sur les prix.

En droit communautaire, la pratique des prix imposés est considérée comme une restriction « caractérisée » qui ne peut pas bénéficier de l'exemption par catégorie prévue par le Règlement vertical. Selon les lignes directrices sur l'application de l'article 81(3) du Traité[18], qui ont été publiées en 2004 par la Commission européenne, il est « *fort peu probable* » que de telles restrictions puissent être exemptées individuellement au titre du progrès économique qu'elles apporteraient. Cela étant, le Conseil ne s'est jamais interdit d'examiner les arguments présentés par les entreprises mises en cause visant à justifier les pratiques ou à montrer qu'elles n'ont pas eu d'effets. Le Conseil apprécie ces arguments et, le cas échéant, en tient compte dans l'évaluation de la gravité de la pratique et du dommage causé à l'économie, et, *in fine*, dans le calcul de la sanction.

3.1 Le Conseil applique un standard de preuve élevé pour établir l'existence d'une entente verticale sur les prix

La signature d'un contrat de distribution qui stipule le respect de la politique commerciale ou de la politique de communication du fabricant par les revendeurs (ou prohibe certaines techniques de vente telles que les prix barrés, soldes, prix « discriminatoires ») suffit à caractériser l'existence une entente verticale sur les prix. Il en est de même de l'acceptation de la part des distributeurs de remises conditionnées au respect des prix recommandés par le fournisseur. Dans la décision n° 05-D-07 du 24 février 2005 (Browning Winchester), la preuve d'une entente verticale résulte du contrat de distribution prévoyant que le fabricant a le contrôle des prix de détail via le contrôle de la publicité sur les prix.

Lorsque l'existence d'une entente verticale entre producteurs et distributeurs ne peut pas être établie par la production d'une preuve formelle, comme une clause contractuelle, la preuve d'une telle entente, qui suppose un accord de volontés entre les entreprises, est rapportée lorsqu'un faisceau d'indices *graves, précis et concordants* converge pour établir les trois points suivants :

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ententes, et n'a pas été considérée comme un abus de position dominante. De même, dans l'affaire 07-D-06, Sony était en position dominante sur le marché pertinent, mais les prix imposés relevaient d'une pratique d'entente verticale, non d'un abus de position dominante.

14 Dans l'affaire 03-D-45, le marché était celui des calculatrices scientifiques, qui est caractérisé par un duopole de fait (avec les marques Casio et Texas Instruments).

15 Affaires des jouets (07-D-50) ou de la parfumerie de luxe (06-D-04).

16 Dans un cas (Royal Canin, 05-D-32 du 22 juin 2005), le maintien de prix de détail a également été considéré comme un abus de position dominante.

17 Les pratiques qui ne relèvent pas de l'entente et qui ne sont pas le fait d'un fournisseur en position dominante ne peuvent pas être appréhendées par le droit de la concurrence. Lorsque la DGCCRF est saisie d'une plainte d'un distributeur victime de représailles de la part d'un fournisseur en réaction au non-respect de prix conseillés, elle peut faire usage de l'article L.442-5 du code de commerce, qui réprime pénalement « le fait pour toute personne d'imposer, directement ou indirectement, un caractère minimum au prix de revente d'un produit ou d'un bien ».

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- les prix de vente au détail souhaités par le fournisseur sont connus des distributeurs (« évocation des prix ») ;

- une police des prix a été mise en place pour éviter que des distributeurs déviants ne compromettent le fonctionnement durable de l'entente (« police des prix ») ;

- ces prix souhaités par le fournisseur et connus des distributeurs, sont significativement appliqués par ces derniers (« application significative »).

Chacun de ces éléments est lui-même établi par recoupement d'indices, dont la valeur probante est appréciée in concreto, sous le contrôle de la Cour d'appel et de la Cour de cassation.

Pour établir le premier point –l'évocation des prix, le Conseil s'appuie sur des pièces émanant du ou des fournisseurs concernés sur lesquelles sont indiqués les prix aux consommateurs. Ainsi, dans la décision 06-D-04 du 13 mars 2006 (parfumerie de luxe), le Conseil explique que « *l'évocation des prix avec les distributeurs peut être démontrée à partir de tout procédé par lequel un fabricant fait connaître à ses distributeurs le prix auquel il entend que ses produits soient vendus au public*. » Dans cette affaire, l'évocation des prix a été démontrée par différents éléments : catalogues de produits mentionnant des prix publics indicatifs, des courriers indiquant aux distributeurs les marges minimum à appliquer, diffusion de prix « conseillés » pour positionner les produits concernés. De même, dans la décision 07-D-50 du 20 décembre 2007 relative à la distribution des jouets, le Conseil a montré que les prix minimum préconisés par les fournisseurs étaient évoqués par différents moyens :

- diffusion de prix de vente conseillés ;

- rappel par les fournisseurs à certaines grandes surfaces spécialisées de l'interdiction d'imputer d'éventuelles remises sur facture sur le prix de revente ;

- négociation entre fournisseurs et distributeurs de conditions commerciales garantissant que le tarif d'achat majoré de la TVA s'imposerait, du fait de l'interdiction de la revente à perte, comme un prix minimum de vente aux consommateurs.

La démonstration de la deuxième condition, relative à la police de prix, peut s'appuyer sur l'observation de divers comportements. Dans les décisions 03-D-45 (calculatrices), 05-D-70 (cassettes vidéo) et 06-D-04 (parfumerie de luxe), le Conseil a démontré que les fournisseurs surveillaient l'application des prix recommandés au moyen de relevés de prix effectués par leurs agents commerciaux. Dans l'affaire de la parfumerie de luxe, certains éléments démontraient que les détaillants dénonçaient à leurs fournisseurs les distributeurs concurrents dont la politique de prix s'écartait des recommandations communes. Dans l'affaire des jouets, le distributeur Carrefour s'était engagé auprès des consommateurs à leur rembourser dix fois la différence de prix que ceux-ci pourraient observer sur un même produit dans un magasin d'une enseigne concurrente. Cette opération aboutissait à déléguer aux consommateurs l'exercice de la police des prix, et permettait à Carrefour d'être informé rapidement d'éventuelles baisses de prix par les concurrents. Dans la majorité des cas, Carrefour faisait pression sur le fabricant pour qu'il contraigne les distributeurs déviants à remonter leurs prix, ce qui se traduisait par la publication d'errata sur les catalogues.[19]

[19] A défaut, Carrefour tentait d'obtenir du fabricant de meilleures conditions lui permettant d'aligner son prix sur celui du distributeur déviant. En cas d'échec, il retirait le jouet de ses rayons pour éviter d'avoir à rembourser la différence. C'est à l'occasion de tels retraits que l'attention des enquêteurs de la DGCCRF a été attirée et que l'enquête de concurrence a été initiée.

La démonstration de l'existence d'une police des prix ne nécessite pas d'établir que des mesures de représailles ont effectivement été mises en œuvre à l'encontre de distributeurs déviants. Dans l'affaire de la parfumerie de luxe, le Conseil a rappelé que « *la jurisprudence exige seulement que soit prouvée la mise en place d'une police des prix fondée sur un système de contrôle par le fournisseur, les représailles ne constituant qu'une catégorie extrême dans les actes de cette police, parmi un large éventail allant des simples contrôles de prix, aux pressions, menaces de rétorsions et représailles effectives*. »

Concernant la troisième partie du faisceau d'indices, le Conseil s'appuie sur des déclarations ou des pièces établissant sans conteste cette application et/ou recourt à l'observation directe des prix de détail. Dans la décision 06-D-04, il considère « *qu'un taux de respect supérieur ou égal à 80 % suffit à démontrer que les prix publics indicatifs (PPI) étaient significativement appliqués par les distributeurs, et permet d'établir que l'indice à placer dans le faisceau est constitué. En revanche, lorsque ce taux est inférieur à 80 %, il convient de pousser plus loin l'analyse et de prendre en considération la dispersion effective des prix relevés, en observant directement, sous forme d'un graphique, la concentration effective des prix à proximité du prix public indicatif (PPI).* » Cette dernière condition n'a pas pour objet de vérifier rigoureusement la significativité, au sens statistique du terme, de l'application des prix imposés. Les deux premières conditions du faisceau ayant été vérifiées, la troisième vise seulement à s'assurer que les prix observés ne remettent pas manifestement en cause la pertinence factuelle du grief.

La méthodologie du Conseil n'a pas été remise en cause par les juridictions d'appel.

A l'instar du Conseil de la concurrence, le juge pénal utilise un standard de preuve élevé lorsqu'il est saisi de pratiques de prix imposés. Généralement, le procureur de la République, qui dispose de l'opportunité des poursuites (article 40 du Code de procédure pénale), ne saisit pas le juge correctionnel du seul constat de pratiques de prix imposés. Il exige que soient apportés précisément les éléments montrant que le fournisseur empêche le distributeur de pratiquer des prix inférieurs à ceux préconisés (cf. TGI Paris 14/11/99, CA Paris 24/03/99[20], TGI Versailles 29/06/07, vente de meubles de salon, TGI Paris 21/05/97[21], TGI Bobigny 05/04/93, secteur des jouets, CA Paris 13/11/95, agence matrimoniale, CA Rennes 28/3/96[22]).

3.2 Les justifications avancées par les entreprises et la modulation la sanction en fonction des circonstances concrètes de marché

3.2.1 L'examen des justifications avancées par les parties

Le Conseil constate que les entreprises n'avancent que rarement des justifications à la pratique de prix imposés. Lorsqu'elles le font, il examine leurs arguments, et le cas échéant, en tient compte dans l'appréciation du dommage. Outre la réduction de la double marge et le maintien de l'image de leurs produits, les entreprises ont invoqué leur manque d'autonomie du fait de l'interdiction de revente à perte.

Dans l'affaire de la parfumerie de luxe (06-D-04), les fabricants ont mis en avant l'image de luxe des produits concernés. Selon eux, les prix proposés par certains détaillants, inférieurs aux prix recommandés, détérioraient la valeur de leurs marques, et la préservation de l'image de luxe attachée à leurs produits légitimait leurs efforts pour maintenir un prix de vente au détail élevé. Le Conseil a répondu qu'il ne lui appartenait pas de dire « *quel niveau de prix est nécessaire pour conférer à un produit une image de luxe. Mais dès lors qu'un fournisseur choisit de confier la distribution de son produit à des entreprises*

20 Référence BID 09/2000

21 BID 98-125 – 04/1998

22 BID 97-320 10/97

autonomes, il lui revient de respecter dans tous les cas les articles L. 410-1 et L. 420-1 du code de commerce qui garantissent au distributeur la liberté de fixer ses prix sous la seule réserve de la législation relative à la revente à perte. En l'espèce, les pratiques illicites ont permis aux entreprises impliquées dans les ententes verticales d'obtenir les profits correspondant à l'existence d'un réseau intégré de distribution sans en supporter les coûts, qui sont très importants. »

Dans plusieurs affaires[23], les distributeurs ont mis en avant leur manque d'autonomie face à la législation sur l'interdiction de la revente à perte. Comme expliqué dans la section 1.1.d) ci-dessus, la réglementation interdit aux distributeurs de vendre un produit à un prix inférieur au prix de gros facturé par le fabricant, le prix seuil ne prenant pas en compte le paiement des services de coopération commerciale ni les remises et rabais perçus par les distributeurs a posteriori (marges dites « arrière »), même lorsque ces derniers peuvent les anticiper au moment de la vente. Dans ces affaires, le Conseil a répondu « *qu'un tel argument ne peut […] être accepté dans le cas où ces seuils de revente à perte ont été […] artificiellement établis par le biais de soi-disant remises « conditionnelles » qui étaient en fait garanties.* »[24] Pour mettre en évidence le caractère volontairement surévalué du seuil de revente à perte, le Conseil s'est appuyé dans ces différentes affaires sur des éléments qui convergeaient pour démontrer « *une définition exagérément extensive de la notion de coopération commerciale et une présentation volontairement faussée du caractère conditionnel des ristournes*. » C'est ainsi, dans l'affaire des jouets, qu'il a pu rejeter la contrainte réglementaire comme justification de la pratique de prix imposés et conclure que : « *Loin d'avoir été une contrainte dont elles ne pouvaient s'affranchir, le seuil de revente à perte, artificiellement gonflé, a été le mécanisme utilisé pour s'assurer de la maîtrise uniforme des prix de vente aux consommateurs.* »[25] Cette analyse est cohérente avec les travaux théoriques et empiriques présentés dans la section 1.1.d, qui suggèrent que la suppression de la marge de détail des distributeurs (marge « avant ») et la manipulation du seuil de revente à perte permettent à l'ensemble des distributeurs et fournisseurs d'éliminer la concurrence intramarque, de réduire la concurrence intermarques, et, au total, de maintenir des prix supraconcurrentiels.

Enfin, dans l'affaire des jouets (07-D-50), le fabricant Lego a invoqué l'argument d'efficacité selon lequel les prix imposés bénéficient aux consommateurs en réduisant l'inefficacité de double marginalisation. Le Conseil a répondu, en ligne avec les travaux économiques présentés dans la première partie, que « *la suppression de la double marge ne peut compenser l'effet négatif de réduction de la concurrence que dans des circonstances très particulières (faible concurrence des producteurs sur le marché amont et faible concurrence des distributeurs sur le marché aval, fort pouvoir de négociation des producteurs vis-à-vis des distributeurs), qui ne sont pas réunies dans le secteur du jouet. S'agissant de l'application de prix minima imposés (par exemple, par le biais de l'application d'un seuil de revente à perte), ces travaux montrent que l'élimination de la double marge n'est jamais suffisante pour compenser la perte de surplus du consommateur due à la réduction de la concurrence*. » On peut également rappeler que la fixation d'un niveau précis de prix n'est pas nécessaire pour remédier au problème de la double marge et que l'application d'un prix *maximum* suffirait à résoudre le problème (cf. *supra*, 1.2.a).

3.2.2 La modulation et l'individualisation des sanctions

La sanction financière totale la plus importante prononcée dans le cadre d'une affaire de prix imposés a été infligée aux fournisseurs et distributeurs dans le secteur de la parfumerie de luxe (06-D-04). Elle s'est élevée à 45,4 millions d'euros. En l'espèce, le Conseil a relevé que « *de nombreuses pièces du dossier*

23 Décisions 03-D-45 (calculatrices), 05-D-70 (cassettes vidéo), 06-D-04 (parfumerie de luxe), 07-D-50 (jouets).

24 Décision 03-D-45 (calculatrices).

25 Décision 07-D-50 (jouets).

*évoquent les efforts des producteurs pour réduire la norme du rabais concerté [*rabais que peut consentir un détaillant à ses clients*] de 20 à 15 %, pratique ayant sur le prix de détail un effet à proportion.* » Il a estimé qu' « *un supplément des prix, payés chaque année par les consommateurs, de plusieurs points de pourcentage constitue une évaluation prudente du dommage causé à l'économie*. » A la décharge des fournisseurs, le Conseil a relevé l'absence de position dominante simple ou collective.

D'une manière générale, le Conseil module les sanctions en tenant compte de la gravité des faits reprochés, de l'importance du dommage causé à l'économie et de la situation particulière de chaque entreprise. S'agissant des ententes verticales sur les prix, il accorde une attention particulière au degré de concurrence qui subsiste sur le marché.

Ainsi, dans la décision 07-D-06, qui a sanctionné Sony pour une pratique de prix imposés dans le cadre de la pré-réservation de sa console de jeu PS2, le Conseil a relevé que la concurrence entre distributeurs n'avait pas été totalement éliminée et a tenu compte « *du fait que certains distributeurs ont offert aux consommateurs des avantages en termes de facilités de paiement (…), de bons d'achat à valoir sur de futurs achats (…), ou des à-côtés (…)* »[26]. Le Conseil a estimé que la durée limitée des pratiques constituait une autre circonstance atténuante pour le fabricant : « *La durée de la pratique a été brève puisqu'elle est circonscrite à la période de l'opération de pré-réservation et du lancement de la console PS2, soit du 1er septembre 2000 au 24 novembre 2000.* »

De même, dans l'affaire des jouets (07-D-50), le Conseil a noté que le fournisseur Lego, contrairement aux autres fabricants, ne s'était pas appuyé, pour imposer les prix de détail, sur la réglementation prohibant la vente à perte et avait, pour cette raison, *« rencontré des difficultés à faire appliquer les prix de l'entente par les GSA [grandes surfaces alimentaires], ce qui a légèrement atténué ses effets.* », Le Conseil en a tenu compte pour déterminer la sanction infligée à Lego. Par ailleurs, le Conseil a relevé que le secteur de la production de jouets était faiblement concentré et qu'aucun fabricant ne disposait d'une position dominante. S'agissant des petits producteurs, il a relevé que « *les négociations commerciales sont déséquilibrées […] en particulier vis-à-vis de la grande distribution alimentaire qui, compte tenu de son poids conséquent dans la distribution, est une voie d'accès incontournable pour les fabricants, alors que le jouet représente moins de 1 % du chiffre d'affaires de ces distributeurs leaders*. » Ces éléments ont été pris en compte dans la détermination des sanctions infligées aux petits producteurs.

A contrario, le Conseil a considéré à plusieurs reprises que les pratiques de prix imposés étaient d'autant plus graves qu'elles étaient mises en œuvre par des entreprises ou groupes d'envergure internationale ou détenant d'importantes parts de marché. Ainsi, dans la décision 05-D-70, le Conseil a considéré comme circonstance aggravante l'envergure internationale et la position dominante[27] de Buena Vista Home Entertainment, dont « *les comportements sont susceptibles de constituer la norme dans le secteur »*.

De même, dans la décision 03-D-45, le Conseil a souligné que « [l]es pratiques en cause [de prix imposés] sont encore aggravées au cas particulier, dans la mesure où elles sont le fait de deux opérateurs qui détenaient ensemble, pour les années 1994 et 1995, plus de 89 % en volume du marché des calculatrices "scientifiques" ou à "usage scolaire" (et presque 92 % en valeur) et chacun, des parts de marché importantes. »

Dans cette affaire, les deux fournisseurs s'étaient non seulement entendus avec leurs distributeurs pour fixer les prix de détail, mais avaient, de surcroît, échangé des informations sur leurs stratégies commerciales et leurs prix. Le Conseil a estimé que « *les pratiques d'ententes verticales visant les prix de*

26 Paragraphes 127 et 128 de la décision 07-D-06.

27 Le marché était celui des cassettes vidéo préenregistrées destinées aux enfants.

vente des calculatrices à usage scolaire, […] de même que les échanges d'information établis entre les sociétés Texas Instruments France et Noblet ont eu pour effet non seulement de fausser le jeu de la concurrence sur le marché, mais aussi de permettre une augmentation des prix des calculatrices scientifiques simples, alors que le prix des autres calculatrices, comme d'ailleurs celui de beaucoup d'autres produits électroniques a baissé sur la période. » La coexistence de pratiques horizontales et verticales illustre les arguments théoriques développés ci-dessus (cf. notamment la section 1.1.b), selon lesquels le maintien des prix de revente réduit non seulement la concurrence intramarque mais peut aussi faciliter la collusion entre les deux producteurs et réduire la concurrence intermarques.

La responsabilité de chaque acteur dans le maintien des prix de détail est un élément important dans l'individualisation des sanctions. Ainsi, un rôle particulièrement actif dans la police des prix est considéré comme une circonstance aggravante. A titre d'exemple, dans la décision concernant la distribution des jouets (07-D-50), le Conseil a tenu compte du rôle joué par Carrefour dans la surveillance des prix et la remontée de l'information aux fabricants : « *La société Carrefour France a participé activement à une entente en vue de restreindre la concurrence et d'imposer les prix de vente publics au consommateur en 2001, 2002 et 2003, notamment par son rôle primordial dans le fonctionnement de la police des prix assurant la stabilité de l'entente*. » Comme il l'a fait dans d'autres affaires[28], le Conseil a relevé que le distributeur se présentait aux consommateurs comme ayant une politique de prix agressive.

Conclusion

L'analyse concurrentielle des prix imposés est particulièrement complexe. Dans la plupart des cas concrets, on dispose, au mieux, d'indications partielles sur l'impact des pratiques sur les prix de détail payés par les consommateurs. Sur le plan théorique, la compréhension par les économistes des mécanismes fondamentaux à l'œuvre reste imparfaite. Plusieurs travaux récents, publiés ou en voie de l'être, suggèrent que l'imposition des prix de détail peut réduire la concurrence intermarques, voire la supprimer complètement. Certains travaux empiriques semblent confirmer ces résultats. Toutefois, la multiplicité des paramètres de l'environnement concurrentiel à prendre en compte rend difficile l'émergence d'un consensus scientifique sur la portée des résultats obtenus. Au total, la théorie ne fournit pas de recommandations de politique économique absolument tranchées. La question du traitement juridique des prix imposés reste vivement débattue au sein de la communauté de la concurrence.

Tenant compte de la complexité des effets des pratiques de prix de revente imposés, le Conseil de la concurrence applique un standard de preuve élevé pour établir l'existence des ententes verticales sur les prix. Lorsque les entreprises avancent des justifications, ce qui, en pratique, est relativement rare, le Conseil ne manque jamais de les examiner. De plus, lorsqu'il apprécie le dommage à l'économie et détermine les sanctions, il tient compte des circonstances économiques concrètes, en particulier du degré de concurrence qui subsiste sur le marché, et examine avec soin la situation et la responsabilité individuelle de chaque entreprise. Ces différents éléments permettent de tenir compte des nuances ressortant de l'analyse théorique des pratiques de prix imposés, aussi bien que des spécificités éventuelles de chaque cas examiné par le Conseil.

Si cette approche évoluait, elle ne pourrait le faire dans le seul cadre de la pratique décisionnelle du Conseil, dans la mesure où celui-ci applique également le droit communautaire. En effet, l'application des règles communautaires de concurrence ne résulte pas seulement de la jurisprudence et de la pratique décisionnelle, comme cela peut être le cas dans d'autres juridictions, mais aussi des règlements pris pour l'application du traité CE, qui sont directement applicables dans les Etats membres. Une telle évolution ne pourrait donc intervenir que dans le cadre d'une réflexion plus globale, comme celle qui est actuellement menée au niveau communautaire. La réflexion doit notamment tenir compte de la sécurité juridique et de la

[28] Décisions 03-D-45 (calculatrices), 05-D-70 (cassettes vidéo), 07-D-50 (jouets).

souplesse de fonctionnement que le cadre réglementaire actuel semble apporter aux réseaux de distribution. Ainsi, la possibilité de diffuser des prix maximaux ou conseillés peut concourir aux politiques commerciales des fabricants, tout en laissant aux distributeurs la liberté de fixer leur marge en fonction de leurs coûts et des services rendus lors de la vente.

En réponse aux questions soulevées par l'OCDE, les développements ci-dessus montrent que l'approche suivie en France permet, dans tous les cas où c'est pertinent, d'apprécier les pratiques de prix imposés in concreto et de tenir compte de leurs effets réels ou potentiels sur la concurrence.

ANNEXE

LES PRINCIPALES DÉCISIONS RÉCENTES DU CONSEIL DE LA CONCURRENCE EN MATIÈRE DE PRIX IMPOSÉS

Décision 01-D-45 du 19 juillet 2001 relative à une saisine présentée par la société Casino France.

Décision 03-D-40 du 5 septembre 2003 relative à des pratiques mises en œuvre dans le secteur des batteries industrielles.

Décision 03-D-45 du 25 septembre 2003 relative aux pratiques mises en œuvre dans le secteur des calculatrices à usage scolaire.

Décision 05-D-07 du 24 février 2005 relative à des pratiques mises en œuvre sur les marchés des armes et des munitions civiles.

Décision 05-D-32 du 22 juin 2005 relative à des pratiques mises en œuvre par la société Royal Canin et son réseau de distribution.

Décision 05-D-66 du 5 décembre 2005 relative à la saisine de la SARL AVANTAGE à l'encontre de pratiques mises en œuvre dans le secteur des produits d'électronique grand public.

Décision 05-D-70 du 19 décembre 2005 relative à des pratiques mises en œuvre dans le secteur des vidéocassettes préenregistrées.

Décision 06-D-04 bis du 13 mars 2006 relative à des pratiques relevées dans le secteur de la parfumerie de luxe.

Décision 06-D-37 du 7 décembre 2006 relative à des pratiques mises en œuvre dans le secteur de la distribution des cycles et produits pour cyclistes.

Décision 07-D-03 du 24 janvier 2007 relative à des pratiques relevées dans le secteur de la parfumerie de luxe par la société Clarins SA.

Décision 07-D-04 du 24 janvier 2007 relative à des pratiques mises en œuvre par le réseau de franchise Jeff de Bruges.

Décision 07-D-06 du 28 février 2007 relative à des pratiques mises en œuvre dans le secteur des consoles de jeux et des jeux vidéo.

Décision 07-D-50 du 20 décembre 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution de jouets.

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GERMANY

1. Legal Background and Definition of Resale Price Maintenance (RPM)

Since the amendment to the German Act against Restraints of Competition (ARC)[1] in 2005, § 1 ARC contains a general clause which mirrors Article 81 (1) EC. The provision bans "agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition." Resale price maintenance (RPM) also falls under this definition. Consequently, in Germany both Article 81 (1) EC and § 1 ARC apply to RPM. It follows that Article 81 (3) EC and the corresponding § 2 ARC are applicable as well, which exempt such an agreement "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; [and] (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question". Further to this, § 30 ARC provides for an exemption from the general RPM prohibition for books, newspapers and magazines[2].

The ARC, in its present form, does not contain a definition as to what is considered to be RPM. However, § 14 of the ARC(old) which specifically prohibited RPM can still be used as a definition. It banned any "agreements between undertakings which […] restrict a party in its freedom to determine prices … in agreements which it concludes with third parties on the goods supplied, on other goods, or on commercial services." This broad definition is only narrowed insofar as the setting of maximum resale prices is now accepted in Article 4 lit. a of the EC Commission's Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (No 2790/1999)[3].

2. RPM in the Bundeskartellamt's experience

In the experience of the Bundeskartellamt, as regards the pricing of products, an important concern for producers is downward pressure on prices at the retail level. In that respect, e-mail or other correspondence by producers telling resellers that they are selling a high quality product which must therefore not be sold at low prices is not uncommon. Producers seem to be afraid that a general erosion of prices charged to the final consumer will ultimately lead to retailers bargaining harder and demanding lower prices from their suppliers. One objective of producers therefore is to secure stable (high) prices. Consequently, RPM has been criticised as potentially weakening the productivity pressure on the producer's margin[4].

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1 An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf.

2 The Bundeskartellamt has not as yet been able to assess whether this has led to positive effects that can be measured in competition terms.

3 The Regulation is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:336:0021:0025:EN:PDF.

4 See Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 *et seq*., p 207 *et seq*.

From the retailer's perspective, it deserves mention that some retailers shy away from price competition at the retail level. Thus, manufacturers are often lobbied by dealers to enforce minimum price levels.

The Bundeskartellamt receives complaints about fixed resale prices from both retailers and end customers. While the former are prevented from boosting their sales through price cuts, the latter complain that they have been unable to obtain discounts from dealers.

RPM is often imposed "across the board", regardless of whether a product is technically sophisticated or easy to use[5]. The service argument, *i.e.* the argument that a uniform price level is needed to ensure proper customer service and advice and to avoid free-riding (see below), thus often seems to be a pretext to use RPM to restrain the freedom of setting prices in vertical business relations. So far, the Bundeskartellamt has not been confronted with any case where a company has credibly brought forward an efficiency defence on the grounds that RPM was indispensable to generate pro-competitive effects. Rather, less restraining measures such as exclusive distribution, price recommendations and the setting of maximum prices would have been sufficient.

3. Competitive Effects of RPM

3.1 Positive effects of RPM – Avoid free-riding

The primary argument in favour of fixed resale prices is that free-riding can be avoided[6]. Resale price maintenance guarantees the seller a certain profit margin on the product sold. This encourages him to concentrate his sales efforts on a particular product. In the same vein, RPM allows sellers to provide better services to consumers such as better advice and product explanations. Conversely, RPM prevents other distributors or sellers from benefiting from promotion efforts made by rivals. Without resale price maintenance the following might happen: Seller A is heavily investing in advertising a certain product or providing costly additional service to customers. Seller B who is located nearby makes no such investment. As he has not incurred promotional costs seller B may now be able to sell the product cheaper than seller A, thus free-riding on A's efforts. The problem may also arise where seller A operates a physical store whereas seller B only sells goods over the internet.

However, a seller may not use the extra profits guaranteed through RPM to invest them in promotion after all. Such guaranteed extra profits cannot be considered to provide a sufficient incentive to actually spend the extra money on promotion[7]. Instead, the seller may stick with all or some of the extra profits rather than investing in promotion, possibly still free-riding on other sellers' promotional efforts. Consequently, the problem of free-riding is not solved.

The majority opinion in the *Leegin* case furthermore argued that RPM may be useful for new entrants to a market[8]. By ensuring resellers a high profit margin the latter will be encouraged to sell the product

5 See Tirole, *The Theory of Industrial Organization*, Cambridge, Massachusetts, 1988, p. 183.

6 Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 et seq, p. 208 *et seq*. See also Tirole, *The Theory of Industrial Organization*, Cambridge, Massachusetts, 1988, p. 183; Motta, *Competition Policy*, Cambridge, 2004, p. 313. See also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U. S. (2007), Opinion of the Court, p. 11, available at http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf.

7 Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 *et seq.* p. 209.

8 See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U. S. (2007), Opinion of the Court, p. 11, available at http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf, p. 11.

with the higher profit margin rather than a competing product which may be less profitable for them. In such a scenario the uniform pricing would help to avoid an erosion in retail prices which could occur if resellers were competing on price. On the other hand, this is not an argument to allow RPM for a long period, or for established players and brands[9]. It is, *a fortiori*, also not an argument for establishing the rule that competition authorities should always bear the burden to prove the anticompetitive effects of RPM[10].

The proponents of RPM concede that fixed resale prices will lead to uniform pricing vis-à-vis the final consumer. They claim, however, that this decrease in intra-brand competition is outweighed by the stimulation of inter-brand competition[11]. The view that it is more important to protect and maintain competition between producers than to protect competition between distributors does not, however, give sufficient credit to intra-brand competition. Intra-brand competition is competition at the distributors' level, *i.e.* competition of the market level vis-à-vis the consumer. This competition at retail level – and consequently a consumer's possibility to choose the retailer with the mix of price and service that suits him or her best – should not be limited by competition laws or their application[12].

3.2 Negative Effects of RPM – Lessening inter- and intra-brand competition

Depending on the goods in question, the price may play a varying role. However, price is generally one of the essential criteria in the overwhelming majority of purchase decisions. This holds especially true where the end customer is concerned. Of course, manufacturers are free to sell their goods to distributors at a high price (and thereby achieve a high price level) *e.g.* if they consider that this contributes to a desired product image. However, it is difficult to see how restricting the *retailer's* freedom to set prices and thus keep them artificially high should yield any tangible benefits for the consumer.

Rather, prices can be expected to be higher since distributors are prevented from lowering their sales price for a particular product[13]. Since RPM eliminates intra-brand price competition at the retail level, any consumer wishing to buy a particular product of a certain brand cannot shop around for a good price but has to settle for the price imposed by the manufacturer. It is doubtful whether in practice inter-brand competition can work as an effective counterweight to the elimination of intra-brand price competition. Proponents of RPM argue that high price levels are discouraged due to inter-brand competition. However, branded products by their very nature are often differentiated, either technically or in terms of image. Inter-brand competition is thus already prevented to some extent from working as a corrective. What is more, competitors might not always be inclined to compete on price but instead prefer a non-offensive pricing environment supported and stabilised by RPM. On the other hand, there is the likelihood that fierce intra-brand competition will ultimately also boost inter-brand competition.

It also seems worth mentioning that when RPM is applied it will be unusual that price-cuts of producers vis-à-vis distributors are passed on to consumers since it is unlikely that in this event the fixed

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9 See Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 *et seq.*, p. 211.

10 Cf. Schwaderer, *Eine Frage der Abwägung: Form- oder wirkungsbasierter Ansatz*, WuW (2008), p. 657.

11 See, for instance, the FTC's and DOJ's Brief for United States as Amicus Curiae 6 (available at http://www.ftc.gov/os/2007/01/070122Leegin06-480amicusPDC.pdf), p. 10.

12 See Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 *et seq.*, p. 207. Cf. also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U. S. (2007), dissenting opinion (Justice Breyer), p. 4, available at http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf.

13 Cf. Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 *et seq.*, p. 207.

retail price would be adjusted. Consequently, price-cutting is unlikely to generate any additional turnover in the product concerned.

Furthermore, RPM may facilitate collusion and stabilise cartels, in particular supply-side cartels[14]. Fixed prices at the retail level increase price transparency in a market. In this way, they facilitate the monitoring of cartel discipline. Moreover, they make it far less attractive to cheat on other cartel members. Especially in markets with few players, RPM may lead to price alignment at a certain level, given the greater price transparency in the market. The same effect may arise when recommended sales prices are used in a market. RPM would, however, considerably strengthen this effect.

4. Need for change in German and European competition law?

In the wake of the *Leegin* judgment, there are calls in Europe to stop regarding RPM as generally anticompetitive[15] and introducing a rebuttable presumption in favour of its legality[16].

The Bundeskartellamt is of the opinion that this would be a step in the wrong direction[17]. The above-mentioned arguments in favour of and against RPM show that RPM may generate efficiencies but also make it very clear that these efficiencies are often not sufficient to outweigh the severe restrictions in price competition which it causes. Consequently, jurisdictions have to weigh the risks and benefits and find solutions that are practical and manageable for competition agencies[18].

In this respect it needs to be stressed that the approach towards RPM under the European and German rules differs considerably from the US *per se* approach that applied to RPM before the *Leegin* judgment. Under European law, it is presumed that RPM is anticompetitive. However, if companies come forward with evidence that a vertical agreement generates efficiencies that may fulfil the conditions of Article 81 (3) EC or § 2 ARC, the competition agency would have to make its case that the agreement is indeed anticompetitive[19].

In view of the negative effects of RPM mentioned above, it does not seem justified to change this order of presenting evidence. More specifically, in the light of these effects, a (rebuttable) presumption in favour of RPM's legality would impose too heavy a burden on a competition agency or a plaintiff to

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14 Motta, *Competition Policy*, Cambridge, 2004, p. 158, Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 *et seq.*, p. 206. Cf. also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U. S. (2007), dissenting opinion (Justice Breyer), p. 4 *et seq.*, available at http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf.

15 See Kneepkens, *Resale Price Maintenance: Economics Call for a More Balanced Approach*, ECLR (2007), p. 656 *et seq.*; Kasten, *Vertikale (Mindest-)Preisbindung im Licht des "more economic approach"*, WuW (2007), p. 994 *et seq.*; v. Weizsäcker, *Konsumentenwohlfahrt und Wettbewerbsfreiheit: Über den tieferen Sinn des "Economic Approach"*, WuW (2007), p. 1079; Orbach, *Antitrust vertical myopia – the allure of high prices*, Arizona Law Review 50 (2008), pp. 286 *et seq.*

16 See, for instance, Alese, *Unmasking the masquerade of vertical price fixing*, ECLR (2007), pp. 514-526.

17 See also Schwaderer, *Eine Frage der Abwägung: Form- oder wirkungsbasierter Ansatz*, WuW (2008), p. 653 *et seq.* who argues that the majority vote in *Leegin* "does not yield any new empirical insights about how often the benefits or harm of vertical minimum price restraints actually occur. Thus, the majority should not cause Europe to change its approach."

18 Cf. Justice Breyer, transcript of the hearing in the *Leegin* case, p. 18. The transcript is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-480.pdf.

19 For a more detailed comparison see Peeperkorn, *Resale price maintenance and its alleged efficiencies*, European Competition Journal (2007), p. 201 et *seq*., p. 203 *et seq.*

establish that a specific RPM system has anticompetitive effects[20]. Furthermore, given the limited resources available, cases of RPM that may merit being taken up under competition law would probably not be investigated.

Moreover, a change does not seem justified since the alleged pro-competitive effects of RPM often do not materialise in the real world. What is more, such effects can mostly be achieved by measures that are less restrictive of competition. Consequently, the negative effects resulting from eliminating intra-brand competition are normally not outweighed by alleged pro-competitive effects.

The Bundeskartellamt is therefore of the opinion that the current rules under EC law (which are mirrored by German law) address the RPM issue in an appropriate manner. To successfully invoke an efficiency defence, the thresholds of Article 81(3) EC have to be met. The Bundeskartellamt is open to carefully reviewing any valid arguments in favour of RPM and to assessing whether very specific circumstances might make some form of RPM indispensable to achieve pro-competitive effects.

[20] See Schwaderer, *Eine Frage der Abwägung: Form- oder wirkungsbasierter Ansatz*, WuW (2008), p. 653 *et seq.*, 659 *et seq.* Cf. also Tirole, *The Theory of Industrial Organization*, Cambridge, Massachusetts, 1988, p. 186. Cf. also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U. S. (2007), dissenting opinion (Justice Breyer), p. 9 *et seq.*, pointing out that it is not easy to "identify instances in which the benefits are likely to outweigh the potential harms". The Slip Opinion is available at http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf.

HUNGARY

1. Introduction

The 1990 Competition Act of Hungary contained a prohibition of horizontal agreements but no general prohibition was envisaged for vertical restrictions. Only one specific vertical provision was mentioned, prohibiting resale price maintenance "should it result in the limitation or exclusion of competition". Due to the necessity of harmonisation in the process of the accession to the European Union, in 1996 the present Competition Act was adopted containing in line with EC 81(1) a general prohibition of restrictive (horizontal and vertical) agreements.

The change in the legislation though altered the applicable legal argumentation, has not considerably transformed the policy applied towards these agreements. This constancy however is not due to the maintenance of an effects based assessment, but to the fact that unless specific circumstances were identifiable, the GVH was always less friendly with fixed and minimum resale prices. A shift in this thinking however can be identified in the latest decision of the authority.

2. Definition

As resale price maintenance were identified all forms of contractual rights to establish the resale price, its minimum and/or maximum level, to determine the applicable margin or to propose recommended prices. All these behaviours were assessed under the same heading, but not necessarily with the same outcome.

3. Assessment under the 1990 Act

Since under the 1990 Act RPM only qualified as an infringement if it resulted in the restriction of competition, the GVH had to assess the agreement's actual or potential impact on competition in each case. It was considered that it was unlikely that a prohibition to deviate upwards from the proposed price had a negative effect on competition, as it cannot reduce competition among resellers. Therefore maximum retail prices and maximum resale margins were normally considered not to be covered by the prohibition of the Act at all.

Recommended prices were also considered legal unless because of other mechanisms the reseller actually lost its freedom to determine the resale price.

It was established that competition is not an objective but only a tool for the promotion of consumer welfare as it provides for more efficient economic activity. In such a context price competition is only positive if it does not lead to the reduction of quality. In line with this approach it was recognised that certain, e.g. luxury products and products involving special technological solutions, or the maintenance of goodwill might require distinguished and expensive supply conditions. In such cases it is in the interest of consumers to have the incentives of suppliers maintained for the provision of high-level sales services. The establishment of a minimum price level can contribute to such objectives, securing eligible margin for the provision of these services. Interestingly however, these considerations were taken into account in the assessment of individual exemption though they should have form part of the analysis whether the given contractual provision was covered the prohibition at all.

Similarly to this case the GVH also left alone the short term, one-off resale price fixings applied for marketing purposes. The reasoning in these cases however was also somehow erroneous in the sense that instead of establishing that due to its effects it did not fall under the prohibition at all, the GVH established

that the agreements in question were of minor importance and thereby not covered by the otherwise applicable provision.

Nevertheless the fixing of resale prices and minimum resale prices was in general considered as illegal as in practice the parties could not raise acceptable justifications. Arguments such as that the minimum price helps to avoid ruinous competition among wholesalers, thereby facilitating supply for the benefit of consumers were rejected. Other unsuccessful arguments were that the high price made a distinction between the given beer and the products of small local breweries, which made a trade-off between quality and price giving preference to the latter. It was also unsuccessfully claimed that in the case of certain products traded in great quantities, market mechanisms themselves established a price level below which it was not profitable, while above it was not possible to sell the product and that the established price was exactly at that level. The parties submitted also in vain, that price competition is not an absolute element of competition and that its restriction is not sufficient to establish the exclusion of competition.

4. Assessment under the 1996 Act

With the adoption of the 1996 Competition Act the legal background for the assessment of resale price maintenance has changed. The prohibition of restrictive agreements now applies generally to all vertical agreements. It is not strictly mentioned anymore that an RPM (or any other vertical agreement) is illegal only if it results in the limitation or exclusion of competition, but the text of the provision does not necessarily entail *per se* prohibition either. Nevertheless the GVH established that agreements fixing the retail price are *per se* illegal. This "*per se"* illegality however only means that the actual and potential effects of the agreement on RPM are not assessed while evaluating its illegality (as it was according to the former Act) but only in a second stage when the GVH decides on the compliance of the agreement with the conditions of exemption. RPM agreements may therefore be exempted and do not qualify as hard core agreements as the *de minimis* rule also applies to them.[1] Besides a "*per se"* illegal resale price fixing agreement with insubstantial effects could avoid punishment if ceased during the suspension of the procedure.

The present approach upholds that recommended prices are not anticompetitive if they leave open the possibility for the reseller to decide independently on its pricing strategy, but should they be accompanied by other measures resulting any actual resale price fixing, or the undue restriction of the applicable margin, the prohibition applies. Maximum resale prices are normally not considered as anticompetitive either.

The rationale of the present approach, while accepting the eminence of inter brand competition, is to protect intra brand competition as well. It is claimed that the restriction to freely set prices might lead to the complete elimination of intra brand competition, increase transparency facilitating horizontal collusion among producers or sellers, it establishes a minimum level of profit for the reseller while maximising the discount that can be given to consumers. It may also effect the lessening of competitive pressure on the upstream level, thereby reducing incentives to increase efficiency and innovation.

The latest decision elaborates on the effects of RPM agreements and applies an effects based interpretation though it does not explicitly and generally overrule the "*per se"* approach. In the decision the GVH accepts the argumentation that the establishment of varying resale prices of an energy drink in different HoReCa premises cannot result in the establishment of a uniform price level and that there were no signs that this selective price fixing had any exclusionary effects. The case was terminated, meaning that despite the presence of resale price fixing, there was no restriction of competition and therefore there

[1] The Hungarian Competition Act does not contain a definition of hard core agreements, only establishes that horizontal price fixing and market sharing does not fall under the *de minimis* rule.

was no need to evaluate the four conditions for exemption. Such an interpretation could signal a return to the original, effects based approach.

5. Conclusion

As it was seen above the starting point in 1990 was a clearly effects based legal provision, in the application of which however, the GVH was already willing to bear in mind a kind of *per se* approach towards resale price fixing, while remaining lenient with other forms of RPM, like maximum or non binding recommended prices. The legislative change made possible a more formalistic approach and the GVH did in fact declare a kind of *per se* illegality of minimum and fixed resale prices, while maintaining the lenient approach towards maximum and non binding recommended prices. It seems therefore that there was no real change in the policy considerations during the first 15 years. The latest decision however entails the possibility of the future application of a real, effects based assessment of fixed and minimum resale prices.

JAPAN

1. Introduction

The Antimonopoly Act ("AMA") prohibits "Unfair Trade Practices" (Article 19). The term "Unfair Trade Practices" means any acts prescribed in each Item of Paragraph 9 of Article 2 of the AMA which tend to impede fair competition and are designated by the JFTC. The designation of "Unfair Trade Practices" is stipulated by Public Notice.

In Item 4 of Paragraph 9 of Article 2 of the AMA, "Dealing with another party on such conditions as will unjustly restrict the business activities of the said party" is stipulated. Resale Price Maintenance ("RPM") is prohibited as unjustly restricting another party's selling price of goods under Paragraph 12 of the "Designation of Unfair Trade Practices" (Fair Trade Commission Public Notice No. 15, 1982) (hereinafter referred to as "General Designation"), which stipulates as follows:

1.1 Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982)

Resale Price Restriction

(12) Supplying goods to another party who purchases the said goods from oneself while imposing, without justifiable grounds, one of the restrictive terms listed in the following items:

- Causing the said party to maintain the selling price of the goods that one has determined, or otherwise restricting the said party's free decision on the selling price of the goods; or

- Having the said party cause an entrepreneur who purchases the goods from the said party to maintain the selling price of the goods that one has determined, or otherwise causing the said party to restrict the said entrepreneur's free decision on the selling price of the goods.

In the following sections, we would like to introduce the viewpoint on RPM under the AMA and the exemption system from the AMA on the provision of RPM. We would also like to introduce preceding court cases and recent JFTC cases, which are related to the theme of this roundtable.

2. Viewpoint on RPM

2.1 The position of RPM under the AMA

The JFTC published "the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act" (published on 11 July 1991, and amended on 1 November 2005) (hereinafter referred to as "Distribution Systems and Business Practices Guidelines") and shows the viewpoint on RPM. In these guidelines, RPM is regarded as "in principle illegal as an unfair trade practice" because "it is one of the most basic matters in a firm's business activities that it independently determines its own sales price, in keeping with conditions in a market, and moreover this secures competition among firms and consumer choice."

2.2 Viewpoint expressed in Supreme Court Decisions

The Courts defined the meaning of a "justifiable ground" for RPM as follows:

- In a Supreme Court Decision (the Wakodo case described later) in 1975, the plaintiff claimed that it had a "justifiable ground" based on the appropriateness of its business judgment. However, the court ruled that an action which might look appropriate in the ordinary sense, i.e., an action that was rational or necessary merely from the viewpoint of business management or business transactions not directly related to the maintenance of the competitive order, was not therefore necessarily supported as having a "justifiable ground." The plaintiff further claimed that the resale price maintenance taken for goods with weak market competitiveness in the course of business activity would promote further competition with other goods and that such action should be considered to have a "justifiable ground." To this claim, the court replied that resale price restriction was prohibited mainly to exclude restriction on competition in the business activities of the restrained party. The court explained that, even if the resale price maintenance enhanced the competition between the party taking such action and its competitors, the tendency of such action to impede competition could not be denied; insofar as such action did not always have the same economic effect, as in a case where free price competition was maintained among the sellers of the goods concerned that the party put restraints on.

- In another Supreme Court Decision in the same year (the Meiji Shoji case described later), the plaintiff claimed that the restraint of prices did not constitute a "restraint of trade" described under Item 8 of the former General Designation of Unfair Trade Practices. It also claimed that its actions, taken to defend itself from loss leader selling, substantially satisfied the requirements of the designated resale price maintenance system[1] and had a "justifiable ground." However, the Supreme Court ruled as follows: "From the viewpoint of promoting fair competition, prices in trade and selection of suppliers, which are essential contents of the trade, should be individually decided by the free discretion of the trading party considering the economic efficiency. Any restraint imposed on these issues by an entity other than the above party is exactly the restraint of "trade" as described above." The court further defined a "justifiable ground" as follows: "This is an idea solely from the viewpoint of maintaining a fair competitive order and means that the restrictive term is not concerned with hampering free competition in the other party's business activity. Simply because it is necessary or rational in business management for an entrepreneur to impose the restrictive term cannot be regarded as being a 'justifiable ground'." Further, in response to the plaintiff's argument that substantial satisfaction of the requirements of the designated resale price maintenance system was sufficient to constitute a "justifiable ground," the Supreme Court stated "whether implementation of the resale price maintenance was appropriate or not should be judged from the viewpoint of public benefits by the appellee (JFTC) in the above designation procedure, considering various circumstances. The court ruled that if an entrepreneur without designation by the JFTC took an action to maintain resale prices generally and systematically imposed on all resellers, such entrepreneur did not have a legally 'justifiable ground'."

[1] According to Article 24-2, Paragraph 1 of the AMA before its amendment, which exempts goods designated by the JFTC from prohibitions against resale price maintenance, cosmetics and medicines were designated as of 1975, when this Supreme Court Decision was issued. However, no item is designated as such at present (Refer to Ⅳ later).

Lawsuit brought by Wakodo Co., Ltd. seeking to overturn a JFTC Decision (Supreme Court Decision on July 10, 1975)

Wakodo Co., Ltd. (hereinafter referred to as "Wakodo"), which was an exclusive seller of powdered baby milk manufactured by Sankyo Nyugyo K.K., established a retailer registration system, reward money system and distribution route confirmation system as sales promotion measures for powdered baby milk. It decided the powdered milk price for wholesalers, the wholesale price for retailers and the retail price, and requested that wholesalers sell the products at the designated wholesale price. It implemented the sales systems described above by notifying the wholesalers that, if they did not follow the request, it would consider adjusting the amount of the reward money as a disadvantage of noncompliance.

The JFTC considered such action by Wakodo to be trade with wholesalers on conditions that restrict trades between wholesalers and retailers. The JFTC ruled that this action fell under Item 8 of the former General Designation of Unfair Trade Practices and was in violation of Article 19 under the AMA. It ordered Wakodo to (1) abolish its sales promotion measures, (2) prohibit calculation of the reward money based on the extent of cooperation on the respondent's request and (3) disseminate the measures taken according to (1) and (2) among the wholesalers (Hearing decision on October 11, 1968).

Wakodo filed a suit to rescind the JFTC decision, but the judgment by the Tokyo High Court on July 17, 1971, entirely upheld the JFTC decision and rejected the request. Wakodo appealed again, objecting to the decision, but the Supreme Court ruled on July 10, 1975, that Wakodo's resale price maintenance of powdered baby milk was not supported by a "justifiable ground" and fell under Item 8 of the former General Designation of Unfair Trade Practices and was in violation of Article 19 under the AMA.

Lawsuit brought by Meiji Shoji Co., Ltd. seeking to overturn a JFTC Decision (Supreme Court Decision on July 11, 1975)

Meiji Shoji Co., Ltd. (hereinafter referred to as Meiji Shoji) was an exclusive seller of powdered baby milk manufactured by Meiji Dairies Corporation. When introducing a new product in 1964, Meiji Shoji decided to register the wholesalers and retailers and to establish a large amount payment system and incentive system so that the price of powdered baby milk could be maintained. It had the wholesalers swear to observe the wholesale price fixed by Meiji Shoji and to trade with only registered retailers. It had trading with the wholesalers under the condition that it would largely reduce the rebate or cancel registration of the wholesalers who did not cooperate under such a system.

The JFTC considered such action by Meiji Shoji to be trade with registered wholesalers on conditions that restrict the trading between registered wholesalers and registered retailers. The JFTC ruled that this action fell under Item 8 of the former General Designation of Unfair Trade Practices and was in violation of Article 19 under the Antimonopoly Act. It ordered Meiji Shoji to (1) abandon its sales promotion policy, (2) prohibit calculation of the rebate based on the extent of cooperation with the sales promotion policy of Meiji Shoji, and (3) disseminate the measures taken according to (1) and (2) among the registered wholesalers (Hearing decision on October 11, 1968).

Meiji Shoji filed a suit to rescind the JFTC decision, claiming that its restraint of prices did not constitute the restraint of “trade” described under Item 8 of the former General Designation and that its action was a self-defense measure against loss leader selling and therefore based on a “justifiable ground.” The Tokyo High Court rejected Meiji Shoji’s claim on July 17, 1971, dismissing its request. On appeal, the Supreme Court ruled on July 11, 1975, that there was no “justifiable ground” for any actions taken by Meiji Shoji to maintain prices for powdered baby milk, and that such actions fell under Item 8 of the former General Designation of Unfair Trade Practices and were in violation of Article 19 under the AMA.

2.3 JFTC's administrative viewpoints on RPM

In the Distribution Systems and Business Practices Guidelines, the JFTC shows the administrative viewpoint on the provision of RPM in the AMA. The viewpoint is as follows.

Viewpoint

- It is one of the most basic matters in a firm's business activities that it independently determines its own sales price, in keeping with conditions in a market, and moreover this secures competition among firms and consumer choice.

  In cases where, as one aspect of marketing activities, or as requested by distributors, a manufacturer restricts the sales price of distributors, it is in principle illegal as an unfair trade practice, because it reduces or eliminates price competition among distributors.

- In cases where a manufacturer's suggested retail price or quotation is indicated to distributors as a reference price, such conduct itself is not a problem[2].

  In cases where the price is not merely given as a reference price, however, and the manufacturer seeks to restrict the resale price of the distributors by causing them to keep the reference price, such conduct falls under the conduct described in A above, and is in principle illegal.

Restricting Resale Price

If a manufacturer restricts the free decision of the sales of distributors, such act corresponds to RPM, which is in principle illegal as an unfair trade practice (General Designation Paragraph 12). The "Guidelines Concerning Distribution Systems and Business Practices" stipulated the criteria under which resale prices are restricted or not:

- Whether resale prices have been restricted is to be judged based on the determination of whether any artificial means is taken to secure the effectiveness in attaining sales at the price indicated by the manufacturer. In the following cases, it shall be judged that the effectiveness in attaining sales at the price indicated by the manufacturer is secured:

  - In cases where a written or oral agreement between a manufacturer and its distributors causes the distributors to sell at the price indicated by the manufacturer, as shown in the following examples:

    - Where a written or oral contract provides that sales are made at the price indicated by a manufacturer;

    - Where distributors are required to pledge in writing to sell at the price indicated by the manufacturer:

[2] In cases where a manufacturer sets a suggested retail price, it is preferable that it is not shown as "True Price" (Seika), "Set Price" (Teika), or the number of the price alone, but shown as non-binding expressions such as "Reference Price" (Sanko Kakaku) or "manufacturer's suggested retail price" and that in case of announcing the suggested price to distributors and consumers, the manufacturers clearly state that the suggested retail price is given solely for reference and that each distributor should determine its resale price independently.

- Where a manufacturer only starts dealing with such distributors that accept such a condition that they sell at the price indicated by the manufacturer; and

- Where a manufacturer deals with distributors on conditions that the distributors sell at the price indicated by the manufacturer and that unsold goods are not to be discounted but to be repurchased by the manufacturer.

- In cases where any artificial means, such as imposing or suggesting to impose economic disadvantage if sales are not made at a manufacturer's indicated price, causes distributors to sell at the indicated price, as shown in the following examples:

  - Where the curtailment of shipments or any other economic disadvantage (including the reduction of quantities shipped, raising of shipment price, reduction of rebates, refusal to supply other products: hereinafter the same) is imposed in the event that sales are not made at a manufacturer's indicated price or where a notification or suggestion to that effect is made to distributors;

  - Where rebates or other economic rewards (including lowering of the shipment price, supplying of the products; hereinafter the same) are provided in the event that sales are made at a manufacturer's indicated price, or where a notification or suggestion to that effect is made to distributors; and

  - Where a manufacturer gets distributors to sell at the manufacturer's indicated price by the following means:

    - Collecting sales price reports, patrolling retail establishments, conducting price supervision by salespersons dispatched to shops, examining ledgers or records of retailers, and so forth in order to ascertain whether sales are being made at the manufacturer's indicated price;

    - Identifying price-cutting distributors by making use of secret marks and requesting wholesalers who supplied the goods to such distributors not to sell to them;

    - Buying goods from price-cutting distributors and requesting such distributors or wholesalers who supplied them to buy the goods or pay the cost of their purchases; and

    - Transmitting complaints to price cutting distributors from nearby distributors with regard to low-price sales, and requesting the price -cutting distributors to end such sales.

- In cases where discriminatory treatment in the form of refusals to deal or provision of rebates, and so on, has been used to secure the effectiveness of restrictions on resale price, such conduct itself is illegal as an unfair trade practice (Paragraph 2 (Other Refusal to Deal) or 4 (Discriminatory Treatment on Transaction Terms, etc.) of the General Designation).

- In A above, the price indicated by a manufacturer to distributors includes both a specific price and any of the following types of price level:

  - Price to be within x% discount from the manufacturer's suggested retail price;

  - Price to be in a specific range (no less than Y JPY and no more than Z JPY);

- Price to be approved in advance by the manufacturer;
- Price to be not less than that charged by nearby stores; or
- Price to be suggested by the manufacturer to the distributors as the lowest limit by such means as warning the distributors against discount.

- The guidance regarding restrictions on resale price described in A, B and C above shall apply not only to conduct by a manufacturer vis-à-vis direct customers but also to conduct vis-à-vis secondary wholesalers or retailers which are indirect customers, either directly or indirectly via wholesalers (Paragraph 12, 2, or 4 of the General Designation).

Cases which are usually not illegal

In cases where in the following kinds of transactions, a direct purchaser from a manufacturer only functions as a commission agent, and if it is recognised that in substance the sale is being done between the manufacturer and its ultimate purchasers, even if the manufacturer instructs resale price to the direct purchaser, it is usually not illegal:

- In case of consignment sales, and if the transaction is made with a consignor on its own risks and account so that a consignee bears no risk beyond that associated with its obligation to exercise the care of a good manager in the shortage and handling of goods, collection of payments, and so on, i.e., is not liable for loss of goods, damage to them, or for unsold goods; or

- In case of transactions where a supply price is negotiated and decided directly between a manufacturer and a retailer (or user), and the manufacturer instructs a wholesaler to deliver goods to the retailer (or the user), and if the manufacturer is deemed, in substance, to sell the goods to the retailers (or the user), under such circumstances that the wholesaler is charged only with responsibility for the physical delivery of the goods and collection of payment, and a fee is paid for such work.

3. Recent cases

The JFTC took legal measures against RPM as an Unfair Trade Practice in 10 cases in the past 10 years. Recent cases are described below.

3.1 Case against Hamanaka Co., Ltd. (Cease and desist order on 23 June 2008)

Hamanaka Co., Ltd. (hereinafter referred to as "Hamanaka") is a company that commissions the manufacture of yarn for hand knitting or handicrafts in the form of a ball with the trademark "Hamanaka" or "Rich More" (hereinafter referred to as "Hamanaka wool") to other contract manufacturers, and sells Hamanaka wool. Hamanaka wool is more popular than other products as it is often used for knitting or handicraft works which appear in knitting magazines published by Hamanaka and others. Because of this, many consumers purchase Hamanaka wool by designating it, so that Hamanaka wool is an indispensable product in the merchandise of retailers who sell yarn for hand knitting or handicrafts. Hamanaka engaged in the following acts without any justifiable grounds.

- Hamanaka fixed the discount limit price[3] for Hamanaka wool and thereafter requested that retailers sell the product at such discount limit price or higher and had the wholesalers request that retailers to which such wholesalers sold Hamanaka wool also sell the product at the discount limit price or higher. To assure the actual effect of the request to the retailers, Hamanaka stopped shipment of Hamanaka wool to retailers that did not satisfy such requests or to wholesalers distributing the product to such retailers.

- b Also for the sale of Hamanaka wool by means of the Internet, Hamanaka decided to have retailers sell the product at a price equal to or higher than the discount limit price. Hamanaka requested the retailers to sell the product at the discount limit price or higher and had the wholesalers request the retailers to which it sold Hamanaka wool to sell the product at the discount limit price or higher.

The JFTC deemed this act to be in violation of Article 19 of the AMA (Item 1 and 2, Paragraph 12 [Resale Price Restriction] of Unfair Trade Practices) and issued a cease and desist order on 23 June 2008.

3.2 Case against Nissan Chemical Industries, Ltd. (Cease and desist order on 22 May 2006)

Nissan Chemical Industries, Ltd. (hereinafter referred to as "Nissan Chemical") is an agricultural chemical manufacturer/seller, which imports and sells herbicides to prevent and remove weeds with the trademark "ROUNDUP High Load" for wholesalers. Wholesalers sell ROUNDUP High Load to retailers such as home improvement retailers selling commodities and goods for gardening, retailers specialised in selling materials for agriculture such as agrichemicals, etc., directly or via wholesalers at the next distribution level. As ROUNDUP High Load is more widely known compared to other herbicides through its advertising in television, radio and newspaper leaflets, more than a few consumers purchase it by designation or continuously, so that it is an indispensable product for home improvement retailers in their merchandise.

Nissan Chemical directly or indirectly through its partner wholesalers and without justifiable ground, forced home improvement retailers to sell three kinds of "ROUNDUP High Load" at the recommended retail prices by means of:

- Requesting them to sell the products at the recommended retail prices set by the manufacturer/seller while suggesting that shipment would be suspended unless the request was met and by, directly or indirectly through its partner wholesalers, halting or reducing the quantity of shipment to those home improvement retailers which failed to meet the request; and

- by supplying packages of three five-litre or 0.5-litre bottles trademarked with "ROUNDUP High Load" merely to those home improvement retailers which had accepted a proposed trading condition, which was to sell them at the suggested retail prices.

The JFTC deemed this act to be in violation of Article 19 of the AMA (Item 1 and 2, Paragraph 12 [Resale Price Restriction] of Unfair Trade Practices) and issued a cease and desist order on 22 May 2006.

4. Exemption

The provisions of the AMA shall not apply to "a commodity, which is designated by the JFTC" and "the work" even if manufactures restrict resale prices (Paragraph 1 and 4 of Article 23). There has been no

[3] "Discount limit price" means the price 10% lower than the standard price for sale by the unit of a ball or other prices as the lower limit when the retailer sells the product with a discount.

commodity designated by the JFTC since April 1997. The meaning of "the work" is limited to 6 items, which had been institutionalised to be sold at set prices at the time of the introduction of the exemption provision on RPM in 1953. The 6 items include 4 items such as books, magazines, newspapers and record disks and 2 items such as music tapes and music CDs, whose function and availability are identical with record disks (hearing decisions against Sony Computer Entertainment Co., Ltd., on 1 August 2001).

KOREA

1. Definition of Resale Price Maintenance

Under the Monopoly Regulation and Fair Trade Act of Korea (hereinafter the "MRFTA"), Resale Price Maintenance means an enterprise's act of coercing, in trading goods or services, its transaction partner enterprise or enterprises in following stages of transaction to sell or provide them at a price fixed in advance at each stage of distribution, or conducting transactions under any agreement or binding condition for that purpose[1].

As defined by the MRFTA, RPM must involve setting a particular transaction price. The transaction price includes a maximum, minimum and standard price as well as a resale (supply) price. It also includes the case in which an enterprise, while setting the scope of resale (supply) price, allows its transaction partner enterprise or enterprises in following stages of transaction to set sales prices within the resale (supply) price range[2].

2. Motives for RPM

Manufacturers use RPM to protect credit and reputation of their branded goods, which they fear could be degraded in case their dealers and distributors sell them at a bargain to increase sales. Moreover, RPM ensures a certain level of price throughout the distribution process to guarantee stable profit to dealers and distributors, which in turn help manufacturers or distributors secure distribution channels and expand their market power.

3. Korea's RPM Regulation

Article 29 of the MRFTA clearly states that no enterprise shall engage in resale price maintenance, provided that this shall not apply to the case where there is justification in terms of the maximum price maintenance. What this means is that except for the maximum price maintenance, maintenance of the minimum price or other resale prices is considered to be "per se illegal".[3] Therefore, practically, there is no need to prove anti-competitiveness such as harmful effect on consumer welfare and price.

Meanwhile, in relation to the maximum price maintenance, its illegality should be determined considering whether there is any "justification" When it comes to determining the existence of such justification, there are two general approaches.

The first approach is that the maximum price maintenance, in principle, should be deemed unlawful just like the minimum price maintenance, but if the enterprise concerned actively justifies its act and the argument is acknowledged valid, the maximum price maintenance should be considered not unlawful. The

1 Article 2 (6) of the MRFTA

2 Guidelines for Resale Price Maintenance Review B. Scope of Transaction Price

3 Under the MRFTA of Korea, there is no concept that corresponds to "per se illegal" or "rule of reason" of Anglo-American Law. So please note that for the sake of easy understanding and convenient explanation, this paper has adopted the two terms.

second approach is that unlike the minimum price maintenance, the maximum price maintenance should be first scrutinised under the "rule of reason" for its anti-competitiveness and effect on consumer welfare before determined illegal or not.

Recent enforcement against RPM

(Unit: No. of cases)

Year	2005	2006	2007
Corrective Measures	12	2	5

4. RPM Exemption

Currently, RPM is granted exemption from application of the MRFTA only in published literary works (including e-publication) designated by the Fair Trade Commission after consultation with the relevant central administrative agencies and goods that have met certain requirements and have been designated by the Fair Trade Commission in advance. However, as for now, no goods aside from literary works are granted antitrust exemptions for RPM.

As published literary works have characteristics of cultural products such as creativity and artistic quality, when they are totally exposed to price competition, the following harmful effects can be caused:

- incentive to create on the part of writers is reduced, undermining the foundation for creation of various creative works;
- the will to publish on the part of publishers is reduced, weakening the publishing industry;
- profit for bookstores is reduced, increasing the risk of their bankruptcy.

Therefore, without allowing RPM in this area, opportunities for consumers to have various cultural products might be restrained. For its part, the court recognised this in its ruling, saying that by nature, the publishing industry tends to have multiple companies, which leads to a highly competitive market structure with a high proportion of small-size businesses and active entry to the market by new entrants, and so allowing RPM in this sector might not cause serious harm as seen in other sectors[4].

Currently, literary works to which antitrust exemptions for RPM are granted include practical books and all kinds of periodicals and daily papers of less than 18 months, except for self-study reference books.

5. Controversies over RPM from Policy Perspective

As mentioned above, the MRFTA of Korea is applying a principle similar to "per se illegal" of Anglo-American Law to RPM. However, opinions have been continuously raised against this "per se" rule, calling for adopting the "rule of reason" instead. Such opinions cite the fact that RPM can prevent distributors from free-riding. In particular, as the US Supreme Court ruled in June 2007 that the minimum price maintenance should also be subject to the rule of reason, discussion over the issue has become more active.

[4] Decision by the Seoul High Court of March 19 1996

In light of this trend, the Korea Fair Trade Commission, as part of its efforts to improve its laws and regulations, has set up a Task Force to review regulations on RPM, including evaluation on whether to keep in place the regulation making the minimum price maintenance unlawful per se.

MEXICO

Introduction

This paper outlines the treatment of resale price maintenance (RPM) under the Mexican Federal Law of Economic Competition (hereinafter FLEC).The first section deals with the legal definition of RPM and provides a brief description of its main elements. The second section lists the approach, provisions and jurisprudence applicable to this conduct. The third section identifies motives and competition concerns related to RPM. The fourth section presents main features and rationale of the approach applied to the analysis of specific cases. Finally, section 5 offers final remarks on this topic.

1. Definition

The FLEC defines Resale Price Maintenance (RPM) as follows:[1]

> *Article 10, first paragraph. (...) relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, whose purpose or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favour of one or several entities or individuals, in the following cases:*
>
> *(...)*
>
> *Article 10, index II . To set the prices or other conditions that a distributor or supplier has to abide by when commercialising or distributing goods or providing services.*

This legal definition indistinctively applies to fixed, minimum and maximum RPM at any stage and to any participant in the distribution chain of goods and services (i.e. suppliers, distributors, wholesalers, and retailers). It also comprises non-price vertical resale settings and its scope includes all parties involved in the vertical relationship, (i.e. the supplier that sets conditions to distributors and the distributor that imposes conditions to suppliers).[2]

This definition has been suitable to deal with all the forms in which RPM has been analyzed in the cases reviewed by the Mexican Federal Competition Commission (hereinafter CFC). Usually, RPM appears in combination with other non-price vertical restraints, such as the establishment of different conditions between different distribution channels,[3] selective distribution,[4] geographic protection, or

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1 Amendments to the FLEC in 2006 modified the RPM definition from "to set the prices or other conditions that a distributor or supplier has to abide by when marketing or distributing goods or providing services" to "(…) commercialising or distributing goods or providing services."

2 The rest of the document adopts the term "*supplier*" in reference to the economic agents that provide the products or services (i.e. the upstream stage in the distribution channel); and the term "*distributor*" to identify their purchasers (i.e. the downstream stage in the distribution channel). For example, a wholesaler could be a *supplier* of its *distributors*, the retailers; or it could be a *distributor* when it purchases the products from its *supplier*, the manufacturer.

3 Different RPM prices may take the form of discounts allowed or recommended to different distribution channels.

exclusivities.[5] In those cases, the use of the *rule of reason* has proven to be useful as a consistent standard to assess the overall purpose and effects of the vertical restraints in the markets.

2. Applicable legal provisions and Court decisions

RPM, like all other vertical restrains[6], is defined as a relative monopolistic practice and subject to the *rule of reason*.

Under the FLEC and its Regulations, the analysis of a vertical restriction requires the assessment of the *form* and facts that constitute the conduct in order to determine when it must be investigated. It also requires an assessment of the conduct and its real or likely effects on the relevant market in order to determine whether it is illegal or not. When the conduct fulfils the *form*, the responsible party wields *substantial power in the relevant market*, and the *purpose and effect test* are positive, only then can there be a presumption of illegality. The defendant may present arguments regarding the efficiency-enhancing benefits that may result from these practices, and how these outweigh their potential anticompetitive effects.

The procedural application of the *rule of reason* follows a four-pronged analysis:

1. The conduct under investigation must fulfil the legal definition established in Article 10, index II quoted above. There is no room for exemptions on vertical agreements under the FLEC and its Regulations. In Article 3, the FLEC establishes that *"All economic agents are subject to the provisions of this law, whether they are individuals or corporations, agencies or entities of the federal, state of local administration, associations, professional groups, trusts or any other form of participation in economic activities."*[7]

2. The responsible party (distributor or supplier) shall wield substantial (*monopolic* or *monopsonic*) power in the relevant market. Therefore, economic agents engaged in RPM but without substantial market power, do not violate the law. The FLEC and its Regulations set the criteria applied both for defining the relevant market[8] and for determining the existence of market power (or dominance).[9]

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4 RPM may be combined to the scope of product presentation supplied to distributors. For example, a supplier could distribute a large-pack of the product only through discount or club stores at a specific price, and distribute a small-pack presentation in other stores.

5 Vertical market segmentation and RPM may be part of the effective application of exclusive distributorship or franchising contracts.

6 Article 10 typifies as relative monopolistic practices the following conducts: vertical market division, resale conditions maintenance, tied sales, exclusive dealing, refusal to deal, and collusive, vertical boycott, predatory pricing, loyalty discounts, cross-subsidisation, discrimination in price or conditions of sale, and raising rivals costs.

7 Articles 5 and 6 of the FLEC only exclude those parties endowed with constitutional rights and who therefore are not considered to be monopolies by the CFC. Those parties are: workers' associations created under the corresponding legislation to protect their interest; temporary privileges granted to authors and artists for the production of their work and those granted to inventors and individuals perfecting improvements for the exclusive use of their inventions; and associations or cooperatives that directly sell their products abroad.

8 Article 12 of the FLEC and article 9 and 12 of the Regulations of the FLEC.

9 Article 13 of the FLEC and articles 11, 12 and 13 of the Regulations of the FLEC.

3. In order to identify whether the unilateral conduct of dominant firms is illegal or anticompetitive, the conduct is assessed on the basis of its purpose and actual or likely effects in the market. To violate the FLEC, the conduct's aim or effect must or may be "to improperly displace other agents from the market, substantially limit their access thereto, or establish exclusive advantages in favour of certain persons."10 The vertical restraints' aim or effect is assessed either in the relevant market (i.e. where the restraint is performed or the responsible party has market power) and/or in related markets where the effects take or may take place.

   The Supreme Court ruling in the Warner Lambert case[11] recognises that unilateral conducts can be appraised on the basis of its object and actual or likely effects in the markets by stating:

   > *"(…) According to the [article 10 of the FLEC] an act can be considered a relative monopolistic practice in any of the following hypothesis: a) when it has the purpose to displace another agent from the market; b) when apart from its objective, it may produce those effects; and c) when, [it] has any of those effects; in the first assumption, the law fundamentally refers to the objective of whoever performs the conduct, while the second considers the real risk of the act. Thus, in those hypothesis the Law has a preventive goal, and in the last hypothesis, the Law refers to the actual effects of the act, regardless the aim of its author, thus, it has a suppressive goal; (…)."* [Emphasis added]

   This jurisprudence provides a clear standard for the burden of proof of the *effect test:* the CFC must prove that the conduct has the purpose and/or actual or likely effects forbidden by law. This is an interpretation of the statute and not of the specific case, and therefore it can be evoked in future decisions.

4. Responsible parties with substantial market power may present efficiency arguments and other elements to the CFC, on the gains in efficiency deriving from a relative monopolistic practice and its favourable influence on the process of competition and free market entry, which must be taken into consideration in the evaluation of any vertical restriction referred to in Article 10 of the FLEC.

   In the application of an efficiency defence, a clear terminology is important, otherwise it may produce legal uncertainty for the defendant, or result in inconsistent decision-making for the CFC or increase the litigation opportunities for responsible parties to challenge CFC's decisions before the judiciary, in order to avoid or delay the enforcement of the FLEC.

   Article 10 of the FLEC establishes what an efficiency defence stands for.[12] The procedure does not explicitly define how efficiency gains should be assessed by the CFC. However, pursuant the

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10 The first paragraph of Article 10 is an *umbrella provision* for all the relative monopolistic practices.

11 Appeal for Review 2589/96, *Grupo Warner Lambert México S.A de C.V. v. Federal Competition Commission*, p. 202. In this sentence, related to a predatory price conduct, The Supreme Court established judicial interpretation of the *effect test* established in the first paragraph of article 10 of the FLEC. An electronic version in Spanish of this sentence is available at:

http://www.cfc.gob.mx/index.php?option=com_content&task=blogsection&id=20&Itemid=371&limit=1&limitstart=17.

purpose of the FLEC, the overall assessment of vertical restrictions is applied under a total welfare standard, in which efficiencies are directly balanced against the anticompetitive effects on a case-by-case basis.[13]

The party may also offer to the CFC credible measures to suspend, suppress, or correct the alleged relative monopolistic practice. The economic agent must show that the competition process has been restored in order for the case to be concluded.[14]

2.1 Assessment of RPM

The overall effects *assessment* is subject to the *total surplus test* following the explicit objective of promoting social welfare and overall economic efficiency which is contained in the FLEC.[15]

The CFC must analyse the impact of the conduct on allocative and productive efficiency gains. As to allocative efficiencies, competition restraints lead to a reduction of efficiency as output is reduced below competitive levels, leading to "dead-weight" losses. Such losses are to be netted out against productive gains. Dynamic efficiency gains may also be included when available and duly quantified, along with supporting data and documents.

According to the *total surplus standard*, as long as the efficiency gains (usually productive and dynamic efficiencies) from a conduct outweigh the efficiency losses from any resulting significant lessening of competition (usually allocative efficiency losses), the conduct is not sanctioned.

3. Motives for RPM and competition concerns

The CFC considers that RPM may be used with several purposes and have different real or likely effects on competition, some of them being neutral or even favourable to the competition process.[16]

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12 The amendments to the FLEC in 2006 added a last paragraph to Article 10 in order to spell out the efficiency gains that may be claimed by defendants. The main ones are the introduction of new products; a better use of outlet, damaged or perishable goods; cost reductions stemming from the creation of new techniques and production methods; increases in the production scale or production of new products with the same production factors; introduction of technological innovations that produce new or better products; improvements in quality, investments and their recoupment. Within the same amendment, the statute now provides that defendants will also be allowed to claim that the alleged illegal exclusionary practices: *"(...) do not cause a significant price increase, or a significant reduction of consumer choice, or an important inhibition in innovation within the relevant market, as well as all others that demonstrate that the net consumer welfare gains stemming from such practices offset its anticompetitive effects."*

13 The welfare standard adopted by the CFC takes into account the welfare effects of the two sides of the market: suppliers and consumers. According to Motta (2004), "economic welfare is the standard concept used in economics to measure how well an industry performs."; "It is a measure which aggregates the welfare (or surplus) of different groups in the economy. In each given industry, welfare is given by total surplus, that is the sum of consumer and producer surplus."

14 Article 33 bis 2 of the FLEC. The amendments to the FLEC added this provision previously established in Article 41 of its Regulations. Once the aforementioned offer has been received, the CFC shall suspend the investigation for fifteen days. At the end of this period, the CFC shall issue its decision. If the defendant's offer is accepted, the investigation is concluded.

15 The purpose of the FLEC is stated in its article 2 as follows *"The purpose of this law is to protect the competition process, and the free market access, by preventing monopolies, monopolistic practices and other restrictions that deter the efficient operation of the goods and services market."*

3.1 Motives (purposes) for RPM

RPM may be used by both parties involved in the distribution relationship, but the motives and economic incentives may be different for suppliers and distributors. A supplier may want to establish minimum RPM conditions for the following reasons:

- To stimulate inter-brand competition by reducing the incentives for intra-brand competition among distributors of the same brand and allowing them to make the necessary investment to reach and maintain customers.

- To develop intra-brand standards of price, service and quality. In markets where inter-brand competition exists, RPM may increase the number of distribution points and create incentives for distributors to offer pre and post sales value-added services by reducing the incentives for low-cost distributors to *free ride* promotion efforts of full-service distributors.[17] Intra-brand price competition may lead distributors to abandon providing consumers with value-added services, thereby lowering overall demand.

A distributor may enter into RPM agreements in order to:

- Obtain profit margins that are high enough so as to allow them to provide value-added services [18] to final consumers. As a consequence, more distributors would enter into the distribution system and would have incentives to compete in providing better services. Thus RPM may become a legitimate tool for suppliers to *compete* for distributors.[19] The overall effect must balance reductions in intra-brand price competition against increases in intra-brand non-price competition and inter-brand price and non-price competition.

- Protect investments in value-added-services from free riding. In absence of RPM, some distributors may cut the retail price and *free ride* on other distributor's investments on pre-sales services. As mentioned before, customers could make their selection at a full-service store that provides cost incurring services like product demonstration by specialised staff, but could ultimately buy the product from a low-cost store.

The CFC considers that no distinction should be made based on the level of price restriction involved in RPM agreements since at any level, fixed, maximum[20] and minimum resale prices are likely to have anticompetitive effects.

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16 Economic studies and papers consulted by the CFC include Areeda and Hovenkamp (2004), Jullien, B. and Rey, P. (2001), Grimes (1995), Marvel (1994), Marvel and McCafferty (1985), Pauline (1998) and Posner (2001).

17 Consumers would first go to a full-service store where trained sales people would provide them product information, demos or samples. Once the consumers decide to buy that product, they would do so at another store that doesn't offer service, but that offers the same product at a lower price (i.e. a low-cost distributor).

18 Product information delivered through advertising, promotion and on-site demonstration; or product availability and reliance achieved by keeping inventory stocking and so forth.

19 Hope of wide acceptance is one of the main reasons why suppliers adopt RPM.

20 The CFC considers that the setting of maximum resale prices may be anti-competitive in certain circumstances. There is also a danger that arrangements for setting maximum prices may, in fact, involve

3.2 Competition concerns

Suppliers may impose minimum RPM to hinder competition from new low-cost competitors. Through RPM, a supplier could sustain high-cost distribution systems in the market and thus induce artificial economic barriers to entry (i.e. higher than those that would prevail in the absence of the RPM). This strategy may hinder the opportunities for low-cost competitors to enter into the market or to reach the scale necessary to successfully compete in the market. In the long run, this conduct may allow the supplier to charge higher prices to consumers. The final outcome of this conduct will depend on the size of the scale economies in the distribution chain, which will determine the possibilities of existent competitors or newcomers to achieve the *critical mass* necessary to become viable in the market.

A supplier participating in two related markets may also have incentives to use RPM to obstruct or impede their competitors in one (relative) market to achieve the scale economies that may allow them to compete in the other (related) market. In the short run, this conduct may allow the supplier to reduce competition in the relevant market (where the RPM is imposed). In the long run, the same conduct may allow him to monopolise the related market. The effects of this conduct will depend on the existence of the scale and scope economies in both markets, the relevant and related one.

Suppliers may use RPM to limit the portfolio of low-cost products to distributors in order to prevent them from becoming competitors in the upstream market. In the short run RPM would hinder competition in distribution; in the long run, it would protect the supplier's power in the upstream market. Such an arrangement may be anticompetitive if supply and distribution exhibit scale and scope economies.

A dominant distributor may impose RPM over a significant number of suppliers to hinder the development of competing low-cost distribution channels. A distributor with monopsonic market power may force its suppliers to impose equal or higher RPM to other distributors with the purpose of obtaining profits higher than those that would prevail in the absence of RPM. Again, scale economies in distribution are determinant to the success of this strategy in order to maintain monopolistic retail prices in favour of the dominant distributor.

3.3 RPM and collusion

A common rationale for the rule of per se illegality in some jurisdictions is that minimum resale price maintenance eliminates the ability of distributors to engage in price competition.

Hypothetically, under the FLEC, if the distributors or suppliers engage in a price fixing conduct through RPM, the CFC could treat this agreement as an absolute monopolistic practice (i.e. collusion or hard core cartel)[21] and analyse it under the *per se* rule if there is enough evidence to determine that RPM conduct is in fact a mechanism to sustain the operation of a cartel.

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an understanding between the parties that the 'maximum resale price' is the (fixed) price at which the product must be resold and so may amount to fixed price RPM.

21 Article 9 of the FLEC establishes "*Absolute monopolistic practices are contracts, agreements, arrangements, or combinations among competitive economic agents, whose aim or effect are any of the following: I. To fix, raise, to agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect; II. To establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services; III. To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or IV. To establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding. The acts mentioned in this*

However, if the evidence reveals that the RPM did not result from an agreement between competitors, but from a unilateral conduct, then the RPM shall be subject to the rule of reason.

4. Case reviews

The use of the *rule of reason* to assess RPM has been adequate and effective to deter prohibited uses of these agreements. From 1993 to 2008, the CFC handled 18 cases allegedly related to RPM, but it has not found anticompetitive effects in the RPM conducts subject to investigation.

Nevertheless, two investigations are useful in showing the type of evidence that is taken into account to assess RPM. The first case is the investigation of the complaint of *Casa Ley* (distributor) against minimum resale prices imposed by Yakult (supplier) to its distributors. The second case is an *ex officio investigation* into large supermarket chains (distributors) that were allegedly forcing their suppliers to charge less favourable minimum resale prices to other competing stores under the threat of suspending their purchases.

4.1 Casa Ley v. Yakult[22]

On September 4 2000, the CFC initiated an investigation based on the complaint presented by Casa Ley (distributor or retailer) against Yakult (producer), who allegedly imposed selective high resale prices to illegally displace the complainant from the market of a *probiotic* milk drink, and subsequently refused to deal with him.

4.1.1 Relevant and related markets

Yakult developed the market of probiotic fermented milk drinks (hereinafter probiotic drink) and, consequently, holds the higher brand recognition in the relevant market, to the point that other brand's product are usually referred to as *yakult* by final customers.

The market analysis revealed that other fermented milk drinks, including yoghurt were not substitutes of *probiotic* drinks mainly due to differences in the biotic composition and health effects[23] perceived by final consumers.

Yakult developed four different distribution channels: home delivery by independent sellers, exclusive stores, supermarket chains, and dairy stores of milk products. In this distribution structure, Yakult offers the same product in different presentations and at different wholesale prices between their distributions channels, but maintains the same minimum retail price. Most favourable conditions were granted to independent sellers, which accounted for 51 percent of Yakult's total sales income. Supermarket chains, such as Casa Ley, paid the highest wholesale price (or the lower margin) amongst the distributors.

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article will not have any legal effects and the economic agents engaged in such acts will be subject to the penalties established under this law, notwithstanding any criminal liability that may ensue."

22 Files DE-29-2000, RA-07-2002 y RA-105-2002. The first resolution of this case was challenged twice by Casa Ley. This summary does not present the procedural features, but focuses on the economic analysis of the relative monopolistic practices that sustains the final resolution. A longer case summary is available in Spanish at: http://www.cfc.gob.mx/index.php?option=com_content&task=blogcategory&id=65&Itemid=120&limit=7&limitstart=63.

23 As advertised by Yakult and other producers, *probiotic* drinks contain bacteria that arrive live to the digestive system and benefit the health of the consumers. On the other hand, yogurts contain bacteria that are quickly killed off by stomach acid and lack *probiotic* properties.

Casa Ley requested from Yakult the same wholesale price offered to independent sellers and denied to follow the minimum resale price imposed. In response, Yakult refused to supply its products to Casa Ley.

4.1.2 Market power

The FCC determined that Yakult wielded market power since it had the largest market share, of 79% based on sales income and 76% on sales volume, and the existence of significant economic barriers to entry due to strong brand recognition. Other firms participate in the relevant market, including Nestle as the closest competitor with 15% of the market sales income, but it seems that they did not create inter-brand price competition. The price per litre of Yakult's products was significantly higher than that of its competitors, but it was able to maintain its market share. In consequence, Yakult was summoned as *alleged responsible* for the imposition of minimum resale prices to its distributors and refusal to deal with Casa Ley.

4.1.3 Yakult challenge and CFC decision

Yakult successfully challenged the decision on substantial market power. It proved that economic entry barriers were lower than those originally determined by the CFC. On the one hand, Nestle was a newcomer in the relevant market with a strong brand and a mature distribution structure for food products, which was rapidly increasing its market share, while Yakult was losing its own. On the other hand, Yakult proved that yoghurts constituted a closely related market from which producers may enter into the relevant market without significant investments. Among the potential competitors, Yakult identified Danone which held a market share of 46% based on sales and strong brand recognition in the product group of yoghurts and yoghurt drinks that would allow it to enter into the relevant market. Consequently, the CFC closed the investigation without delving into the effect analysis of the conducts.

In addition, Yakult presented an efficiency defence aimed to prove that wholesale price differences among the distribution channels allowed the provision of value-added services to final consumers.

- Independent sellers do not require credits; they deliver advertisement and product information directly to the home of the final consumers and generate higher geographic penetration. This distribution channel was developed with the purpose to provide a greater satisfaction to the final consumer, given that the reseller will try to serve the client in her own home, with minimal waiting time. Hence, value is added to the product by means of the level of added service.

- It provides different services to its distributions channels, incurring in different costs that explains the differences in wholesale prices if offers them. Yakult supplies to supermarket chains with door-to-door transportation, brand-advertisement and promotions, and pay periods of 30 to 45 days. It does not provide these services to independent sellers, which allows it to avoid some supply costs that, in turn, reflect in lower wholesale prices for them.

Yakult argued that its pricing policy impedes supermarkets to "free ride" on the promotional efforts of independent sellers, which would undermine their incentives to spend resources on promotion and, finally, could cause their disappearance. As a consequence, intra-brand price competition was restricted but non-price competition was enhanced. The information provided by Yakult was taken into account to define the relevant market and assess market power, but it was not necessary to develop the *effect* test given that the defendant was found not to have market power.

4.2 Ex officio investigation into supermarket chains[24]

On May 16 2002, the CFC initiated an *ex officio* investigation into large supermarket chains that allegedly were forcing their suppliers to charge higher resale prices to other competing stores under the threat of suspending their purchases. This concern, however, did not discard other potentially unlawful behaviour that had come to the attention of other competition authorities, such as discrimination as to the terms these chains offered when selling distribution services to upstream suppliers, or possible leveraging of market power from the distribution to the supplier side as they increased their reliance on self-branding.

Although the allegations were principally directed to Wal-Mart's Mexican subsidiary (hereinafter Walmex), the CFC sought to undertake a general comparison of purchasing and marketing policies of the different supermarket chains in the country[25], in order to ascertain whether these had damaging effects on the competition process. One of the first elements to prove was whether Walmex, or any other large chain, could have substantial market power in terms of the FLEC.

4.2.1 Relevant and related markets

To determine the relevant market, the CFC analysed the services that supermarkets chains provide to both consumers and suppliers. In its analysis of services to consumers, the CFC reviewed different store formats such as megamarkets, hypermarkets, warehouses, price clubs, supermarkets and convenience stores. In its analysis of services to suppliers the CFC considered that the final price for goods that a chain had obtained, largely depended on the bargaining power of each party on the transaction as well as on the types of services that a chain offered to its suppliers.

The mere fact that a supermarket managed to obtain lower prices from suppliers did not imply or indicated the existence of a relative monopolistic practice. Demanding efficiency and low cost from its suppliers ultimately drives the price down for the end user, in contrast to a distributor who might increase margins via resale price maintenance. It would be reasonable to expect that low-cost distributor to be opposed to resale price maintenance to the extent of refusing to carry products under such agreements.

Throughout the investigation, the CFC gathered information from the chains and their principal suppliers, and undertook several price-monitoring exercises for products in these stores and requested information from the Office of the Federal Attorney for Consumer Protection (PROFECO).

The relevant market was defined as the acquisition, distribution and marketing of goods by self-service stores with a national geographic dimension. On the demand side, the definition of self-service stores was associated to their product offering and the surface they occupied. Stores included under the definition of relevant market had to have three product lines: perishable and edible goods, clothes, and general merchandise. On the supply side, services provided to wholesalers, as well as a chain's procurement, are centralised, and national systems are managed directly by the chains who will seek to buy in larger volumes from selected producers and from specialised or dedicated wholesalers. These supplier service systems provide chains with distinguishing features from other traditional marketing channels.

4.2.2 Market power

Walmex not only had the largest market share as measured by the value of its sales and number of stores, it was the most important commercial firm in Mexico and Latin America and the second most important firm listed in Mexico's stock exchange, as measured by its share's trade index. Walmex's

[24] File IO-02-2000.

[25] Investigation scope included Auchan, Casa Ley, Comercial Mexicana, Gigante, Carrefour, and Soriana.

growth was directly related to an international trend in the growth of self-service chain stores, which have become increasingly important as retail distribution changes.

Sixteen of the main product suppliers used Walmex store-chain as their most important retail distribution channel. In these distribution agreements there was an asymmetry between the importance that suppliers attribute to Walmex as a distributor and the importance that any individual supplier's sales represent for Walmex's total sales. Moreover, the use of self-service stores providing a broad selection of goods and services at a single location, known as one-stop shopping, has become more widespread, and thus had the potential of conferring Walmex substantial market power.

Finally, the CFC noted that Walmex had exhibited accelerated growth following its 2000 strategy of low prices, and that this growth had continued during a slowdown in private spending. In fact, its market participation had increased while that of Comercial Mexicana and Gigante, with stores located in similar regional markets, had decreased. Soriana stores had not been affected but this was mostly attributed to the fact that they are located mainly in the northern region of the country where the presence of Walmex stores is less important.

After reviewing the facts uncovered by the investigation, the CFC determined that Walmex was an economic agent with substantial market power.

4.2.3 Efficiency gains

Among the efficiencies of supermarket chains were: (a) that they had scale and scope economies because of their procurement systems, which let them handle larger volumes in a centralised manner and allowed them to cut brokerage costs since they could avoid paying a margin to traditional wholesalers, giving them greater ability to monitor quality and reduce backlog; and (b) they were more effective in identifying consumption patterns and adjusting their pricing policies, discounts, and services for specific consumers. Thus these companies had greater bargaining power with suppliers compared to other marketing channels and therefore tended to be more efficient.

Walmex's procurement system had introduced important efficiencies into Mexico's distribution markets which had led to increases in productivity and profit margins that translate into a greater ability by Walmex to invest its own resources without resorting to debt. These efficiencies had arisen from innovations in its distribution system and its everyday low pricing policy aimed mainly towards cutting operational costs. Walmex had invested in specialised distribution centres, logistics and telecommunication systems, as well as its own transportation fleet, which not only has led to reduced coordination costs, but improves inventory management. The overall effects of efficiencies, cost reductions and low pricing policy, were passed on as benefits for suppliers, by moving merchandise more rapidly and shortening their average payment period These benefits were also passed on to consumers, through low prices.

4.2.4 CFC decision

The CFC found no evidence that Walmex was pressuring its suppliers to charge higher prices to its competitors, under the threat of suspending purchases of their products, unsubstantiated by the facts. In fact, studies on prices for a sample of supermarket chains, undertaken by both the CFC and PROFECO, concurred in their findings of overall lower prices in these sampled Walmex stores, relative to other stores in the sample, for a selected group of products over a pre-specified time frame. This did not mean, however, that all products reviewed had a lower price in the sampled Walmex stores.

On March 6 2003, the CFC closed the *ex officio* investigation without taking any enforcement action. In addition, Walmex voluntarily committed to notify its procurement agents that negotiations with suppliers must not make reference to the conditions they offer to Walmex competitors.

5. Final remarks

In Mexico, RPM agreements are assessed under the rule of reason, the same way as for all other price and non-price vertical restrictions. The CFC considers that this approach is adequate since it allows assessment under the same standard all vertical price and non-price vertical restraints, frequently used in combination.

The use of the *rule of reason* is also in line with economic literature that reveals the conditions under which RPM can enhance consumer welfare and when it can harm it. There are many circumstances in which RPM promotes inter-brand competition and the provision of value- added services.

In practice, RPM assessment is quite complex. Arguments for and against it require a substantial burden of proof. Under certain circumstances, RPM might have overall anticompetitive effects, and in a different context it might be neutral or even favourable to the competition process. The final assessment of positive and negative effects of RPM in markets must be subject to an overall surplus test to determine whether RPM is anti-competitive.

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NETHERLANDS

In this paper some comments are offered on the issue of resale price maintenance. What follows is not an all-encompassing analysis, but a discussion of a few aspects that the Netherlands Competition Authority (hereafter: the NMa) considers to be relevant to the issue at hand.

1. The legal status of resale price maintenance

In the Netherlands rules concerning resale price maintenance have not been laid down in any specific legal provision.[1] The conduct can be assessed under articles 6 and 24 of the Dutch Competition Act, possibly in combination with articles 81 and 82 of the EC Treaty. Article 24 forbids abuses of dominant positions by undertakings in analogy with article 82 of the Treaty while article 6 is substantially equal to article 81 EC.

With the introduction of the Dutch Competition Act of 1998, which is phrased in conformity with articles 81 and 82 of the EC-Treaty, the Dutch Parliament explicitly stated that Dutch competition law should neither be stricter, nor more lenient than European competition law. Hence, the NMa closely follows European regulation, guidelines and case law. The Commission Regulation (EC) NO 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (BER) and The Commission Guidelines on Vertical Restraints (The Guidelines) provide the NMa with the relevant legal framework for the assessment of RPM.

Article 4 of the BER excludes an agreement that restricts the buyer's ability to determine its sale price from the benefit of the block exemption. The Guidelines define resale price maintenance as 'those agreements whose main element is that the buyer is obliged or induced to resell not below a certain price, at a certain price or not above a certain price'. This group comprises minimum, fixed, maximum and recommended resale prices. Resale price maintenance is considered to be a 'hardcore' restriction when it comprises minimum and fixed resale prices. [2]

The Guidelines identify two main negative effects of resale price maintenance on competition:

- A reduction in intra-brand price competition. Fixed or minimum resale price maintenance means that distributors can no longer compete on price for that brand. This in return may lead to less downward pressure on the price for the particular goods and therefore lead to a reduction of inter-brand competition as an indirect effect.

- Increased transparency on prices. Increased transparency and responsibility for the price changes makes horizontal collusion between manufacturers or distributors easier.

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1 The law governing the use of resale price maintenance in the book sector (De wet op de vaste boekenprijs) is an exception. This law came into force in 2005.

2 This terminology of 'hardcore' originates from the Guidelines. The BER itself does not use the terminology of 'hardcore restrictions'.

The current European framework regarding resale price maintenance (in the rest of the text we use the term resale price maintenance synonymously with resale price maintenance that comprises minimum or fixed resale prices) is not equivalent to per se illegality. Agreements containing hard core restraints fall outside the safe harbour of the BER but are not automatically illegal since they might be exempted under Article 81(3). However many practitioners believe that the current European framework regarding resale price maintenance (RPM) approaches a per se illegality in practice. This belief is based on (some of) the following factors:

- The BER categorizes RPM as a severely anti-competitive restraint.
- RPM is not granted the benefit of the safe harbour that many other vertical restraints enjoy.
- The Guidelines explicitly state that individual exemption of vertical agreements containing hardcore restrictions is unlikely.
- The Guidelines discuss the negative effects of RPM in detail. However, the Guidelines make no reference to possible efficiency enhancing uses of resale price maintenance.
- The term 'hardcore' suggests that the Commission is referring to a severe object-based infringement.
- The Commission Notice on agreements of minor importance explicitly states that agreements containing RPM cannot benefit from the safe havens granted to other agreements of minor importance.

2. NMa's experience with resale price maintenance

The antitrust department of the NMa is split into different sections. Most complaints or tips regarding resale price maintenance involve sectors that belong to Section Trade and Manufacturing. This particular section receives a non-negligible amount of tips concerning possible use of resale price maintenance each year. The number of tips varied between 25-36 (per year) in the period 2004-2006. The section also receives 3-4 formal complaints per year regarding resale price maintenance.[3] Almost all tips originate from consumers. The scope of the tips in terms of number of sectors is broad. In 2006, for example, the section received tips regarding approximately 20 different sectors. More recently, the section has been receiving an increasing number of tips from internet distributors who claim that resale price maintenance is being used to reduce competition between internet distributors and the traditional distributors.

The NMa dismisses these tips or complaints when there is evidence of ample interbrand competition and/or very little evidence that suggests that resale price maintenance is being used to facilitate a horizontal cartel agreement. The NMa usually dismisses formal complaints regarding resale price maintenance on the basis of lack of priority. Such a 'priority decision' refers to criteria that are used to prioritize investigations (these criteria are 'economic impact', 'consumer impact, 'effectiveness and efficiency of intervention' and 'gravity of the infringement').

In some cases it seems plausible to assume that resale price maintenance is efficiency enhancing. The tips that the NMa has received regarding luxury products are perhaps illustrative. The initial surveys regarding the specific products suggest ample interbrand competition. Regarding most of the sectors cartel forming is ex ante speaking unlikely (a very large number of competitors, very low entry barriers etc.). A plausible business explanation in these cases seems to be the protection of the image of the product.

[3] These numbers are rough indications.

Possible price corrosion due to intrabrand competition could have the effect of eroding the exclusive character of the brand. This in turn could lead to a reduction of the demand for the brand, resulting in lower production and to a reduction in consumer welfare.

3. Relevant Dutch jurisprudence

In December 2005, the Trade and Industry Appeals Tribunal (The Tribunal), the highest court in the Netherlands that rules in competition cases, overturned NMa's decision in the Secon case. The Secon case was about (vertical) retail price maintenance of G-star clothing. The NMa considered that resale price maintenance was an object based infringement and, hence, that an investigation into the effects of the resale price maintenance on the market was unnecessary.

According to the Trade and Industry Appeals Tribunal court (CBb) resale price maintenance can indeed be considered as an agreement which has as its object the restriction of competition. The Tribunal explicitly referred to article 4 of the BER to support this conclusion. The Tribunal however ruled that it still needs to be proven that the agreement has the potential to *appreciably* restrict competition on the market. More specifically, the Tribunal ruled that it was NMa's responsibility to investigate and establish the appreciability of the restriction, which cannot be done *in abstracto* but has to be done by taking into account the concrete factual and economic circumstances. It was held that the NMa had failed to investigate these circumstances sufficiently. The fining decision was overruled and the NMa was ordered to reassess the case.

Since all the evidence on the character of the G-star-agreement pointed in the direction of very low market shares, the NMa did not consider it worthwhile to investigate the matter in more detail after the Tribunal's ruling and decided to drop the case.

4. Economic theory

4.1 RPM can be harmful

Various economic theories show that resale price maintenance can be harmful. Below we consider the most well-known theories of harm. Resale price maintenance can facilitate cartels between manufacturers or dealers.[4] Resale price maintenance can also function as a commitment device and thus enable a manufacturer to exercise its market power.[5]

RPM can facilitate a manufacturers' cartel in two ways. RPM can facilitate a manufacturers' cartel by reducing the incentive to cheat. Absent RPM a secret price cut leads to higher sales and thus to higher profits for the cheating manufacturer. With effective RPM the secret price cut does not lead to increased sales by the dealer and will thus not be interesting for the manufacturer. RPM can also facilitate a manufacturers' cartel by increasing price observability. Absent RPM manufactures find it difficult to

[4] See for example Yamey (1960), Resale price maintenance and shoppers choice, Hobart Paper, No. 1, Institute of Economic Affairs; Clarke P. and Corones S. (2000 (1999)). Competition law and policy. Oxford University Press: Oxford; Telser L.G. (1960), Why should manufacturers want fair trade? The journal of Law and Economics;; Jullien, B en Rey, P. (2007), Resale Price maintenance and Collusion, Rand Journal of Economics, Vol.38, No. 4; Rey and Caballero-Sans (1996),The policy implications of the economic analysis of vertical restraints, Economic Papers, European Commission, no. 119, 1996; Marvel, H. P. (1995) The resale price maintenance controversy: Beyond the conventional wisdom, Antitrust L. J. Vol. 59. .

[5] See Rey, P and Verge,T (2005), The economics of vertical restraints, available at: http://www.economics.soton.ac.uk/staff/Verge/Verticals.pdf.

distinguish between retail price changes that are the outcomes of demand and/or cost shocks at retail level and retail price changes that are the outcomes of cheating. RPM removes this difficulty by eliminating retail price changes.

RPM can also facilitate a dealers' cartel when the dealers use the manufacturer to enforce and monitor their cartel. Letting the manufacturer enforce the dealers' cartel price not only provides an effective enforcement mechanism for the dealers but also enables the cartelizing dealers to eliminate competition from dealers that are not part of the cartel. Since the higher margins at the downstream level will reduce demand for the manufacturer the manufacturer will not voluntarily enforce the dealers' cartel. The manufacturer must be coerced to do so by for example a boycott threat. The possibility of a dealers' cartel is thus mainly limited to cases where the dealers have enough power to be able to coerce the manufacturer.[6]

RPM can also enable a manufacturer to exercise its market power. Absent RPM a manufacturer might not be able to exercise its market power because of the so called 'commitment problem'. The manufacturer has the incentive to renegotiate contracts with other dealers (the dealers will be offered lower wholesale prices) once a particular dealer has accepted to pay supra-competitive wholesale prices. Since the dealers anticipate this incentive they will refuse to pay supra competitive wholesale prices in the first place unless the manufacturer can effectively commit itself to the higher wholesale prices. RPM can then be used as an instrument of commitment. With RPM the secret wholesale price cut does not lead to increased sales by the dealer since the retail prices are fixed. The incentive to renegotiate is thus eliminated.

4.2 RPM can be efficiency enhancing

According to various economic theories resale price maintenance can be efficiency enhancing.

Economists who believe that RPM is efficient usually stress that the manufacturer would actually be harmed if it were to use RPM in the absence of efficiencies. Resale price maintenance would namely increase the costs of distribution and thus lead to a decrease of the volume sold by the manufacturer. The manufacturer would thus only engage in the practice if it is convinced that there are efficiencies.

There are various theories providing alternative efficiency rationales for the use of resale price maintenance. A well known efficiency enhancing rationale for resale price maintenance is that it aligns the incentives of the distributor to those of the producer by for example protecting high service distributors from free-riding from low-service distributors. Another well known theory refers to the role that resale price maintenance can have in protecting the image of exclusive products by preventing possible price erosion due to intrabrand competition. Yet another theory states that RPM can support adequate dealer inventories when dealers are faced with demand uncertainty. It is also claimed that RPM helps manufactures obtain quality certification from dealers with a good reputation. [7]

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6 See Marvel H. P. (1995) The resale price maintenance controversy: Beyond the conventional wisdom, Antitrust L. J. Vol. 59.

7 See for example Telser L.G. (1960), Why should manufacturers want fair trade? The journal of Law and Economics; Marvel, H.P. and McCafferty, S (1986), The political economy of resale price maintenance, Journal of Political Economy, 94(5): 1074-95; Springer and French (1986), Deterring Fraud, Journal of Business, 59(3), 433-49; Overstreet en Fisher (1985), Resale price maintenance and distributional efficiency: Some lessons from the past, Contemporary Policy Issues, Vol III (3), pp. 43-58; Marvel and Peck (2001), Vertical Control, Retail Inventories & Product Variety, available at economics.sbs.ohio-state.edu/pdf/marvel/peck.pdf.

According to these theories the reduction of intra-brand competition through the use of RPM can actually increase consumer welfare even when the prices are higher due the use of RPM. By increasing the level of services RPM leads to a shift in demand. RPM might also increase the costs of service provision leading to a shift in supply. Consumer welfare will increase when all consumers value the product-specific services equally -the shift in demand is parallel-- and output increases. Consumer welfare might diminish when there are different valuations of the services - the demand shift is not parallel. This result can be loosely explained by the following. There might be consumers that would have bought the product in the absence of dealer services. These consumers are less well-off after the introduction of RPM. Consumers which value the services will be better off after RPM. So the total effect on the consumers will depend on the relative mix of the two types of consumers.[8]

4.3 Empirical evidence

It is common belief among economists that there is little empirical evidence that resale price maintenance always or almost always tends to restrict competition. Some commentators argue that the pro-competitive instances of resale price maintenance are in any case not rare.[9]

5. Should RPM be illegal per se?

As noted above, in theory the current European legal framework on RPM is in principal not equal to per se illegality. However many practitioners believe that in practice the framework approaches to per se illegality or in any case to a very strict stance towards RPM. In this section we consider if such a stance is warranted.

Pro-competitive theoretical explanations of RPM are of themselves insufficient arguments against per se illegality. The observation that in some instances RPM has had pro-competitive effects is also not enough. If the socially beneficial instances of RPM are rare, per se illegality can be an appropriate policy stance. Likewise the mere theoretical possibility of anticompetitive effects cannot form the basis of per se illegality. Neither can observations of anticompetitive instances of RPM give conclusive evidence on the issue. Statistical evidence regarding the effects of RPM which give us insight regarding the 'typical' effect must form the basis of the policy decision concerning the legal status of RPM. [10]

On the basis of current empirical evidence regarding RPM it is difficult to ascertain whether per se illegality towards RPM is warranted. The current empirical evidence appears to be partially outdated,

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8 Note that this result assumes that the manufacturer does not adjust wholesale prices and that the inframarginal customers also pay for RPM. Marvel criticizes this assumption by noting that the manufacturer might chose to pay for the extra services by lowering the wholesale price instead of letting the inframarginal consumers pay for the extra services. This can imply that RPM does not lead to a price increase; this would be the case when the marginal costs of production and distribution are constant. Marvel H. P. (1995) The resale price maintenance controversy: Beyond the conventional wisdom, Antitrust L. J. Vol. 59

9 See for exampleOverstreet T (1983), Resale Price Maintenance: Economic Theories and Empirical Evidence, FTC Bureau of Economics Staff Report and Ippolito P. M. (1991), Resale Price Maintenance: Empirical Evidence From Litigation, Journal of Law & Economics 34, 263–293.

10 An argument which is often used to defend the per se illegality of RPM is that firms could use less far-going restraints. We believe that such an argument cannot be given too much weight since this argument is based on the assumption that RPM is a 'far-going' restraint. Thus this argument seems to be assuming what it is supposed to explain. Furthermore, it is not evident why solutions such as vertical integration or extensive advertising by manufacturers -these are often considered to be alternatives to the use of RPM- will be more beneficial for the consumer.

scarce and non conclusive. However, as noted above some empirical studies conclude that the pro-competitive instances of RPM are not unusual. Given this context the NMa believes that further discussion/research regarding the legal status of RPM is essential.

6. Conclusion

We believe empirical evidence regarding the 'typical' effect of RPM is essential in order to make a meaningful policy choice for RPM. In the meantime the NMa considers it important to genuinely acknowledge the possibility of pro-competitive effects of RPM in individual cases and supports open discussion regarding the legal status of RPM.

POLAND

1. RPM under the Polish law

A Resale Price Maintenance is an agreement whereby an upstream firm (usually the manufacturer) fixes conditions under which the product would be sold by the downstream firm (usually a distributor). It may involve an outright setting of the downstream price, but also fixing maximum rebates or even prohibiting below cost sales is caught by the prohibition of restrictive agreements provided by the Competition and Consumer Protection Act.

Under Polish competition law RPM is prohibited, but it is exemptable if it can be shown that such an agreement contributes to technical or economic progress, consumers receive a fair share of the benefits generated by the agreement, while at the same time the restrictions do not go beyond what is necessary for the realization of efficiencies and the agreement does not allow its participants to eliminate competition with respect to a substantial part of the products in question. So far, however, no exemption has been granted to parties of an RPM agreement, as they neither don't claim any efficiencies at all, or the justifications for an agreement they offer are clearly insufficient.

2. Pros and cons of RPM

There are several reasons firms might engage in RPM, both pro- and anticompetitive ones. The efficiency-driven RPM might be introduced to, among others:

- avoid free-riding on sales effort by retailers;
- induce efficient retail service – enhance service at the expense of price competition;
- shield retailers from demand fluctuations.

RPM can also be used anti-competitively, to:

- support a retailers' cartel, where producer, enforcing the minimum price helps retailers overcome monitoring and disciplining problems, which could otherwise undermine the cartel,
- dampen competition among producers by making retail prices more transparent and price cutting at the producer level unprofitable,
- solve monopolist's commitment problem, limiting customers' incentives to bargain aggressively.

3. RPM in the jurisprudence of the Polish competition authority

RPM cases are not numerous in the jurisprudence of the Office of Competition and Consumer Protection (OCCP). Since 2003 there were ten RPM cases decided by the OCCP, concerning the distribution of motor oil, chainsaws, books, decorative paint and building materials. Of the products concerned, only chainsaws seem to require some additional services by the retailer/distributor. In three

cases producers seemed to posses at least some market power (two with over 30% market share and one monopolist).

The two leading cases on RPM concern the distribution of the book "Harry Potter and the Order of Phoenix" and distribution of decorative paints by DIY hypermarkets.

The former case involved a publisher and distributors of the fifth volume of Harry Potter's saga. Due to complaints from wholesalers and retailers about "unreasonable and unjustified" discounting, especially by hypermarket chains, which took place during the sale of "Harry Potter and the Goblet of Fire", the publisher decided that the new Harry Potter book would be distributed predominantly by the selected group of undertakings (wholesalers and one major media retailer), who would commit themselves contractually not to sell the book for less than 90% of the cover price. A participant in the agreement, running a mail-order book club, who advertised a lower price in his catalogue, upon a rebuke from the publisher, raised his price, expressing regret for a "mistake" in a letter sent to other participants and published in a trade magazine.

The facts of the case indicated that the publisher's overriding concern was to limit large wholesalers' incentives to bargain aggressively, by safeguarding a minimum price of the book and wide profit margins for the wholesalers, which in turn allowed him to command a higher price for a product much in demand. Parties to the agreement took care to disseminate the knowledge of the minimum price of the book – the information about maximum rebates was provided not only by the trade press, but by at least one national daily as well, which led to the expectations among bookstores that competition in selling the book would be "softer". The publisher himself was reported to justify pricing restrictions with the need to protect interests of smaller bookstores against competition from hypermarket chains. Overall, the behaviour of the parties to the agreement was clearly aimed at keeping prices high and none of the standard efficiency explanations seem to apply.

The second case concerned an agreement between a large producer of decorative paint (Polifarb) and DIY hypermarkets. As the competition between the latter was intense, Polifarb found it difficult to raise prices for its products. To counteract this, it initiated a "stabilisation plan", whereby retailers would be rewarded with special rebates for keeping to recommended prices and those who did not stick to them would not be supplied as long as their prices were below the recommended level. Polifarb acted as a cartel supervisor, gathering complaints from retailers, disciplining deviators and mediating conflicts between hypermarkets (explaining price differences, announcing price changes introduced by competitors, etc.). As the analysis of the prices showed, the agreement was successful and the products were generally sold at prices recommended or higher. None of the parties claimed efficiencies and Polifarb expressed regret for "unauthorised" actions of its sales staff.

The above-mentioned cases show that RPM can hurt consumers in practice and anti-competitive effects of such agreements cannot be easily dismissed, even if in many cases they may appear overblown.

4. Approach to RPM

Treatment of RPM under competition law remains a hotly debated issue. In contrast to horizontal price fixing, RPM may be efficient, a fact which goes strongly against blanket prohibition of this practice. On the other hand, there are both theoretical and practical examples of RPM being employed to suppress competition, it can be also pointed out that efficiencies commonly associated with RPM may not apply to a large class of products (e.g. those, which do not need additional sales services). It is therefore difficult to set the enforcement balance right.

Taking a conservative approach, it might be argued that a current framework for assessing RPM agreements (illegality with a possibility of an exemption) is not without merits, as it allows both to forbid anti-competitive instances of RPM and to exempt efficient ones. Even though it may discourage some of the latter – meeting exemption criteria may prove difficult and parties to agreements may not be sophisticated enough to justify their RPM arrangements – it also blocks anti-competitive behaviour. A "grey area" may remain, namely agreements without obvious efficiencies, whose anti-competitive potential is very limited due to lack of any market power on the part of the parties. This fact may, however, be reflected in the fines imposed on the parties to such agreements.

The OCCP is looking closely at the debate on the merits of RPM, with a view of making use of its insights. Current framework, however, i.e. prohibition with exemptions, for all its problems (like relative difficulty of providing evidence of RPM's benefits under the exemption criteria or comparatively high level of economic and legal sophistication required, which makes it hard for SMEs to argue their case), does not seem to have unduly negative effects. It may need a review though, should more empirical evidence come to light, concerning the balance of negative and positive effects of RPM.

SPAIN

When dealing with RPM cases, the Spanish Competition Authority applies Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (the Block Exemption Regulation, BER)[1].

Hardcore restrictions currently 'blacklisted' in Article 4 of the BER have generally been supposed to infringe competition rules, as it has been understood that their objective is to restrict the ability of the 'buyers' (in the sense of the BER) to compete with each other, either by means of price restrictions (RPM) or of territorial or customers' protection, leading to market foreclosure or to coordinated behaviour at the supplier and/or at the buyer level.

This means that these restrictions have normally been treated as *per se* illegal, regardless of their actual effects on competition, although the Guidelines on Vertical Restraints (Commission notice 2000/C 291/01, the Guidelines)[2] state that "vertical agreements falling outside of the BER will not be presumed illegal but may need individual examination" (para. 62). It is also true, though, that the same Guidelines argue that individual exemption of vertical agreements containing hardcore restrictions is "unlikely" (para. 46).

Since the adoption of the BER, some events have contributed to consider the need to rethink the treatment of the vertical restrictions on the article 4 of the BER, especially the RPM. The most evident, the US Supreme Court Judgement in the *Leegin* case, which overruled a *per se* treatment of RPM in place for many years in that jurisdiction. Moreover, in line with the majority of the Court in *Leegin*, contemporary opinions of many economists are in favour of softening the approach to RPM, as well as to other hardcore restrictions, as they are alleged to have pro-competitive benefits that might overcome their negative effects, and as actual negative effects of hardcore restrictions might not be as important as they were thought to be. Of course, there have been important opinions on the contrary too.

Regarding this issue, the experience of the Spanish Competition Authorities leads us to conclude that hardcore restrictions may only have negative effects when the undertakings have enough size and strength as to influence the market and interbrand competition is weak. Also, we think that hardcore clauses may, in many cases, enhance efficiency and be procompetitive. Thus, as such clauses may be motivated both by pro-competitive and anti-competitive purposes and may have both pro-competitive and anti-competitive effects, it should not be *per se* assumed that their object or effect is a restriction of competition.

In the opinion of the CNC, the approach to these cases should be economic and effects-based. In order to prohibit RPM clauses and other hardcore restraints, competition authorities should show that they have a likely negative net impact on competition and on consumer welfare.

1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:336:0021:0025:EN:PDF

2 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y1013(01):EN:HTML

As of whether the cases of fixed/minimum resale prices (hardcore in the sense of BER, see article 4) and maximum/recommended resale prices (covered by BER, see article 5) should be distinguished, in our opinion the competition authorities should assess on a case-by-case basis whether recommended/maximum prices really amount to fixed prices[3]. If yes, the effects of such price fixing should be carefully analysed instead of considering the practice as *per se* illegal, as mentioned above.

[3] In its Decision on case 490/00, of 11 July 2001, the *Tribunal de Defensa de la Competencia* (in September 2007 the former two competition authorities, the *Tribunal de Defensa de la Competencia* and the *Servicio de Defensa de la Competencia* merged into the *Comisión Nacional de la Competencia*) found that even though petrol stations were allowed to offer discounts to the resale price indicated by the oil company, they had limited incentives to do so because of fiscal considerations. In Resolution of 31 May 2005, case 579/04, the *Tribunal* concluded that an alleged recommended resale price was actually fixed because the supplier threatened to resolve the agreement if the price was not followed by the distributor. In Resolution of 21 June 2007, case 612/06, the former *Tribunal* considered a minimum resale price proved through the empirical evidence and the rationale of such practice.

SWITZERLAND

Vertical restraints have been a competition concern in Switzerland for several years as they have been claimed to be a reason for the high price level in Switzerland. With the reform of the Swiss Federal Act on Cartels and other Restraints on Competition (Cartels Act, LCart) in 2003, resale price maintenance (RPM) agreements became subject to direct sanctions if they eliminate effective competition.

However, there have only been a few investigations regarding RPM agreements ever since the revised Cartels Act came into effect on 1 April 2004. Possible reasons are twofold: Firstly, the revised Cartels Act is very likely to have preventive effects: During a transitory period from 1 April 2004 until 31 March 2005 undertakings had the possibilities to either notify or terminate RPM agreement without incurring any sanctions. Many undertakings used this opportunity to check whether their distribution systems complied with the new legal provisions and if necessary adjusted them. It is to be expected that these adjustments did not require an elementary change in business practices especially for multinational firms which have had already to comply with such provisions in other European countries. Secondly, existing RPM agreements – due to the tougher Cartels Act – might no longer figure in writing in the distribution agreements, but have become either more informal, e.g., take the form of oral menaces if a retailer does not adopt a certain resale price, or unilateral according to the Colgate-doctrine. This renders RPM agreements more difficult to detect and to prove for competition authorities.

This contribution starts with an overview of the legal framework regarding RPM in Switzerland (1) including a description of the relevant clauses (1.1), the definition of RPM (1.2) and a delineation of the assessment of RPM according to Swiss law (1.2). This overview is followed by an appreciation of RPM (2), starting with an enumeration of the pros and cons (2.1). Based on these considerations, the question is raised whether a per se rule or a rule of reason is to be preferred (2.2). Moreover, empirical evidence of the effects of RPM is illustrated (2.3). This contribution concludes with an outlook (3).

1 Legal framework in Switzerland

1.1 Relevant clauses

In contrast to the European system which is based on a prohibition principle, i.e., forbids certain agreements while giving the possibility of exemptions, the Swiss system is based on an **abuse principle**. This means that agreements are in principle lawful unless a harmful effect on competition is proven. However, for certain types of severely anti-competitive restraints, e.g., RPM agreements and protective foreclosure of the Swiss market, the **reform of the Cartels Act** in 2003 with Art. 5 para. 4 introduced a legal **presumption** that competition is being eliminated where minimum or fixed prices are set or in the case of clauses foreclosing territories that serve to prohibit passive sales being made to distributors or end users. These presumptions reduce the burden of proof for the Swiss Competition Commission (Comco) for the concerned agreements.

In July 2007 Comco revised its **Notice** on the Competition Law Treatment of Vertical Agreements (hereinafter: VA-Notice),[1] wherein it laid down the criteria according to which it will presume the elimination of effective competition within the meaning of Art. 5 para. 4 LCart. In this context, Comco

[1] Available at http://www.weko.admin.ch/publikationen/00213/index.html?lang=en.

concedes interbrand competition no decisive importance. Possible gains in efficiency can only be taken into account in exceptional cases (see below, 1.3).

The revised VA-Notice came into force on 1 January 2008. The wording and structure draws on the block exemption regulation for vertical agreements[2] (hereinafter: Vertical-BER) and the associated guidelines[3] as one of the aims of the revision was to harmonize the VA-Notice with European law.

1.2 Definition of RPM

An RPM is a vertical agreement whereby a manufacturer imposes the resale price of its product upon its retailers or indirectly influences their pricing policy, for example by granting financial incentives to implement a certain resale price. Price restrictions fall under Art. 5 para. 4 LCart if they **(indirectly) impose fixed or minimum sale prices**. Art. 5 para. 4 LCart also covers RPM agreements designated as **price recommendations** (Section 10 para. 1 lit. a VA-Notice). However, **maximum prices** are not covered by Art. 5 para. 4 LCart provided that they do not amount to a fixed or minimum sale price.

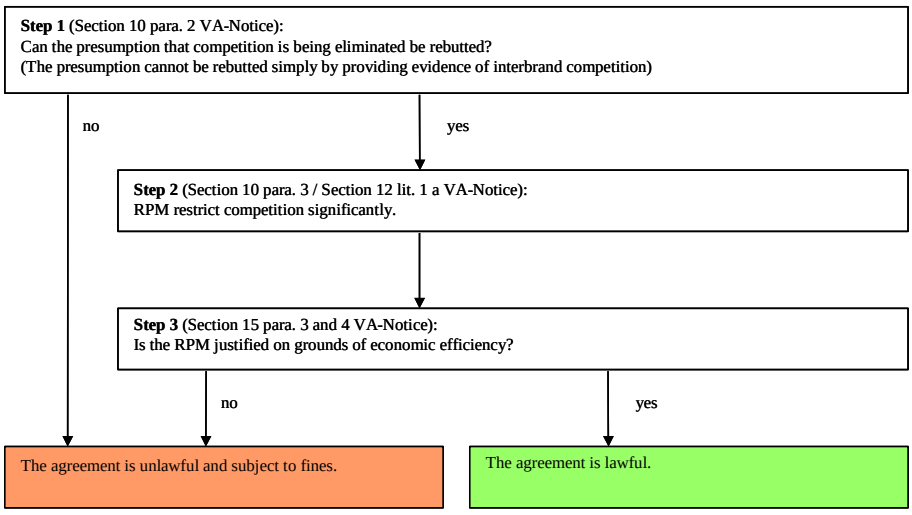
An application of Art. 5 para. 4 LCart requires the existence of an agreement which affects competition (Art. 4 para. 1 LCart). The concept of agreement centres on the existence of a minimal concurrence of wills between the parties of the distribution agreement, whereas the form in which concurrence of wills is manifested is unimportant so long as it constitutes the faithful expression of the parties' intention.

In sum, the definition of RPM according to Swiss law is **equivalent to** the one under **European law**.

1.3 Assessment of RPM

The following figure illustrates the **three-step assessment** of RPM under Swiss competition law:

Figure 5.Figure: Assessment of RPM under Swiss Competition Law



2 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336/21.

3 Commission Notice on guidelines on vertical restraints, OJ 2000 C 291/1.

Step 1

As already noted, there is a **presumption** that RPM agreements eliminate effective competition (Art. 5 para. 4 LCart). This presumption cannot be rebutted simply by producing evidence of interbrand competition (Section 10 para. 2 VA-Notice). In contrast, market power, i.e. the presence of interbrand-competition, is taken into consideration for the assessment of all other vertical restraints with the exception of territorial foreclosure through prohibition of passive sales.

The rebuttal of the presumption of elimination of effective competition will be difficult in the presence of RPM. However, it might still be possible under the following circumstances:

- Besides interbrand-competition, other factors are present.[4]

- It is an open question whether other competition parameters such as **quality** can serve as an element to rebut the presumption of elimination of effective competition. For horizontal price agreements the Swiss Federal Court stated that the presumption of elimination of effective competition can be rebutted with competition parameters other than price, e.g. quality (see below, 2.3).[5]

If the **presumption cannot be rebutted**, effective competition is considered to be eliminated. Then, the agreement is unlawful and subject to fines.

Step 2

In case the presumption **can be rebutted**, RPM agreements are regarded as **significantly restricting competition**, irrespective of the market share of the undertakings concerned (Section 10 para. 3 and Section 12 lit. a VA-Notice). This implies that there is **no *de minimis* rule** for RPM under Swiss competition law.

Step 3

If competition is restricted significantly, it remains to be determined whether the RPM agreement can be justified on **grounds of economic efficiency**. Section 15 VA-Notice describes the requirements under which vertical agreements affecting competition are deemed to be justified on grounds of economic efficiency – for example through more efficient distribution organization in terms of product upgrading or improvements in manufacturing processes, or reductions in distribution costs – and if the restriction of competition is necessary to achieve this (Art. 5 para. 2 LCart). If no such grounds are seen to be present, the agreement is unlawful.

Section 15 para. 4 VA-Notice contains a list of possible justifications for vertical restraints that undertakings may claim in the context of Art. 5 para. 2 LCart. Possible justifications for RPM in this lists are

- Protection for a limited duration of investments aimed at **opening up new** geographical or product **markets** (lit. a);

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4 See Walter A. Stoffel, 2008, "Vertikalabsprachen und Marktabschottung – Zur neuen Bekanntmachung der Wettbewerbskommission," presentation hold at the Geneva Conference "Economic Experts in Competition Law." Available at http://www.weko.admin.ch/publikationen/00276/VertBek_Redetxt_3.pdf?lang=de.

5 Decision of the Swiss Federal Court 129 II 18 E.8.3.4.

- **Avoiding free-rider problems** of manufacturers or distributors resulting in inefficiently low levels of sales promotion measures for promoting sales (lit. d);

- **Avoiding a double price mark-up** (double marginalization), which can arise if both the manufacturer and the distributor have market power (lit. e).

2 Appreciation of RPM

2.1 Pros and cons

RPM agreements can have pro-competitive, but also anti-competitive effects:

- In a nutshell, **pro-competitive motives** for RPM are generally those to serve some coordination (externality) problem, such as avoiding the problems of free-riding or double marginalization.

- Possible **negative effects** of RPM are that they can be used as a facilitating device to police and enforce manufacturer or dealer cartels. Also, RPM can serve to limit retailer bargaining and thereby dampen upstream competition.[6] Furthermore, it can be used as a commitment device to extract monopoly profits.[7]

Moreover, in Switzerland RPM are claimed to be a reason for the high price level in comparison to other European countries. Against this background, Comco considers RPM to be a severely anti-competitive vertical restraint. This opinion is expressed by the rule that the presumption of elimination of effective competition by an RPM agreement cannot be rebutted simply by providing evidence of interbrand-competition (Section 10 para. 2 VA-Notice). Also, RPM are deemed to restrict competition significantly irrespective of the market share of the involved undertakings (see above, 1.3).

One has the bear in mind that prices might rise if certain RPM agreements are abolished. In such cases, RPM has the same effects as a maximal price. However, overall, Comco attaches more importance to the cons of RPM.

2.2 Per se or rule of reason?

2.2.1 Economic theory

Economic analysis stresses that RPM may both improve and harm economic efficiency and welfare and that detrimental effects of RPM are only possible in the presence of (significant) market power of any of the parties involved.[8] Against this background, a **rule of reason approach** seems to be preferable to a per se prohibition of such restraints. Thereby, the risk of committing **type 1 errors**, i.e. prohibiting efficient RPM agreements or providing incentives for firms to opt for less efficient means (such as vertical integration) in order to achieve the same results could be reduced. Furthermore, from a liberal perspective, business behaviour that cannot be proven to be harmful should generally be allowed.

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6 See Paul W. Dobson/Michael Waterson, 2007, "The Competition Effects of Industry-wide Vertical Price Fixing in Bilateral Oligopoly," International Journal of Industrial Organization, 25(5): 935-962.

7 See Daniel P. O'Brian/Greg Shaffer, 1992, "Vertical Control with Bilateral Contracts," Rand Journal of Economics, 23:299-308; Patrick Rey/Thibaud Vergé, 2004, "Bilateral Control with Vertical Contracts," Rand Journal of Economics, 35(4): 728-746.

8 See Massimo Motta, 2004, "Competition Policy – Theory and Practice," Cambridge University Press, Chapter 6.

However, a problem with the rule of reason approach is that the effects of RPM on (consumer) **welfare** is often **difficult to assess** as it depends on the structure of demand which is often unknown.[9] A further drawback is the associated **legal insecurity** for market participants.

2.2.2 Swiss Approach

The Swiss Cartels Act with its legal presumptions of illegality is based on a rule of reason approach. However, with the concretization about the rebuttal of the presumption in the VA-Notice, i.e., that the presumption cannot be rebutted simply by producing evidence of interbrand competition, a step was taken in direction per se prohibition. As outlined in the considerations of the VA-Notice, the reasons for this are the following: Firstly, this proceeding reflects the will of the legislator as expressed in the parliamentary deliberations. Secondly, Comco assumes in the case of practices covered by Art. 5 para. 4 LCart that anti-competitive effects outweigh efficiency-enhancing effects. Thirdly, this approach corresponds to the practice of the European competition authorities, which in principle impose a ban on RPM agreements. Therefore, Comco only recently opted for a **"very restricted" rule of reason approach**.

2.3 Empirical Evidence

2.3.1 General remarks

Until today, no decision was taken according to Art. 5 para. 4 LCart. However, a decision was made in the Swiss book trade regarding industry-wide RPM agreements. As this bundle of agreements was based on two horizontal agreements and given that the revised Cartels Act with its new presumption of illegality of RPM was not in force yet at the time of the investigation, the investigation formally focused on horizontal – and not vertical – price agreements (Art. 5 para. 3 LCart). Nevertheless, the book case is presented below since today the investigation would most probably also focus on the vertical price restraints. Moreover, there is empirical evidence regarding the effects of the ban of RPM at hand. Before turning to the book case, the three ongoing investigations regarding RPM are presented.

2.3.2 Ongoing investigations

There are currently three investigations regarding RPM in Switzerland:

- **Price recommendations for off-list medicaments**: Manufacturers of so called off-list medicines, i.e. medicines the purchase of which is not reimbursed by the mandatory basic health insurance, make price recommendation for the resale of their products in Switzerland. The preliminary investigation has shown that a vast majority of producers recommend prices for a total number of about 4'000 products. Price recommendations are published either on the websites of the producers or in data bases of e-mediat AG, specialized in supporting data bases for market participants in the Swiss health care system. As a vast majority of the pharmacies adopts these price recommendations, end prices for consumers in different points of sales are almost identical.

  In June 2006, Comco opened an investigation against Pfizer AG, Eli Lilly SA and Bayer SA regarding their price recommendations for the erectile-dysfunctioning drugs Viagra, Cialis and Levitra. These three medicaments were chosen because the recommendations are widely adopted and are very similar. If the investigation shows that the price recommendations are accepted by the majority of pharmacists or self-dispensing doctors, the price recommendations could

[9] See Roger D. Blair, 2008, „The Demise of Dr. Miles: Some Troubling Consequences," Antitrust Bulletin, 53(1): 133-151, here: 142-148.

constitute unlawful RPM agreements between the three pharmaceutical companies and the pharmacists or self-dispensing doctors.

- **RPM in the field of professional cutting tools**: The investigation against Felco SA, a company producing professional cutting tools in Switzerland, and Landi Schweiz AG, a Swiss trade and service company in the agricultural and non food sectors, was opened in January 2008 because Comco has known about a RPM agreement regarding the sale of professional cutting tools produced by Felco SA and sold by Landi Schweiz SA.

- **Denner/Gaba**: In the investigation against the producer of dental care products, Gaba Schweiz AG (Gaba), Comco in particularly analyzes whether the price recommendations Gaba provides to the resellers of its products constitute unlawful RPM agreements.

2.3.3 Price fixing in the Swiss book trade

Subject of the investigation regarding the Swiss book trade was an industry-wide agreement called "**Sammelrevers**" between bookseller and publishers which fixed the resale price of books written in German. Each single publisher who signed this agreement concluded an individual contract with each single bookseller. The Sammelrevers was based on two horizontal agreements – one between publishers and one between booksellers – regarding the adherence to the Sammelrevers. As explained above, the investigation therefore focused on horizontal – and not vertical – price agreements (Art. 5 para. 3 LCart).

- **History**: In September 1999, Comco confirmed the illegality of the Sammelrevers due to its detrimental horizontal effects for the first time. Comco concluded that the Sammelrevers eliminated competition in the whole industry sector. On appeal, the Federal Supreme Court[10] referred the matter back to Comco stating that competition was not being eliminated by the Sammelrevers due to ongoing **quality competition** in the market. Consequently, Comco had to examine whether the restriction on competition caused by Sammelrevers could be justified on **grounds of economic efficiency**. Concretely, Comco examined whether the Sammelrevers led to a greater variety of products, to an improvement in sales due to an increase in the number of points of sale and better advice, or to a more efficient risk allocation between publisher and booksellers. The investigation confirmed that the positive effects claimed for the Sammelrevers could not be proven and cannot justify the restraint of competition. Therefore, the restraint was judged to be unlawful. This judgment was upheld by the Swiss Federal Supreme Court in 2007.[11] In the following, interest groups submitted a request to the Swiss government for exceptional retention of the cartel due to overriding public interest according to Art. 8 LCart. The Federal Council rejected this request as the government found a cartel not to be a proportionate measure to achieve the claimed public interest objectives. Thus, the cartel was abolished on 2 May 2007.

- **Effects:** In parallel to the abolishment of the cartel, a parliamentary initiative was launched in Swiss parliament that intends to create a law on prices in the books market, similar to laws existing in France, Germany or Austria. In autumn 2007, the parliamentary commission treating the initiative asked the State Secretariat for Economic Affairs (SECO) to evaluate the effects of the free book prices. SECO accepted the mandate, signalling that after such short time, only price effects were expected to be observed, while structural changes were expected to occur only in the long run.

10 Decision of the Swiss Federal Court 129 II 18.

11 Decision of the Swiss Federal Court 06.02.2007 2A.430.

The task to research the effects on book prices so far was given to the University of Applied Sciences Northwestern Switzerland.[12] In collaboration with SECO, the research team got access to data on book quantities and prices sold in March 2007 (two months before abolishment of the cartel). In March 2008 (10 months after abolishment), the research team gathered data on retail book prices in all Swiss bookstores by sending an electronic survey and performing quality checks as well as additional inquiries in stores. Hence, the researchers had two data sets at hand, one containing market data in a fixed price environment, one in a liberalized environment. With these two datasets, it was possible to compare prices before and after abolishment of the cartel.

It should be mentioned that the statistical task to compare the data was not an easy one, as the assortment of sold books changes strongly from one year to another, i.e. only about one third of books sold in 2008 are identical to the books sold in 2007. Thus, an artificial, statistical "average book" had to be constructed to make figures comparable, comprising price data on bestsellers, long sellers and all different kinds of books sold. Furthermore, an international comparison of book prices was found to be difficult as the CHF/EUR exchange rate fluctuated much in the past year and about 90% of books sold in Switzerland are imported from the EUR-area.

The **results** of the study were as follows:[13]

- On average, book prices in Swiss book stores were 1.4% below list prices in March 2008, while the retail prices in March 2007 were identical to list prices due to the cartel. However, the difference of retail store prices from list prices in March 2008 was not different from 0 at a statistically significant level.

- For nearly every book, a store can be found that gives a discount of at least 15%. Minimum prices for some books go as low as 50% below the list price, while maximum prices go as high as 140% of the list price.

- In other words: An informed consumer can save a significant amount of money when buying books compared to the situation before abolishment of the cartel. An informed consumer (i.e. buying in the right store) will now pay in Switzerland less than in Germany for the average book. Before the abolishment of the cartel, prices were 10-15% higher than in Germany.

- Book retailers are just beginning to develop new pricing strategies. They begin to use pricing tools such as vouchers, discounts on segments and member cards that haven't existed before. Several, "non-traditional" new companies have entered the market.

It should be noted that long term effects are economically more important than the short term price effects described above – but they are very difficult to measure as the counterfactual has to remain speculative. SECO believes that not only discount strategies, but also high price strategies can be sustainable in the liberalized market if a respective value such as service quality or a broad range of choice within a segment is offered.

12 See http://www.fhnw.ch/wirtschaft/icc/forschung/forschung-ews/de/forschung/forschung-ews/erste-auswirkungen-der-abschaffung-der-buchpreisbindung.

13 These results refer only to the German speaking part of Switzerland as there was no known cartel in the other regions of Switzerland.

3 Outlook

In Art. 59a LCart, the Swiss government is required to conduct an evaluation of the effects of the Cartels Act and its application by competition authorities. The evaluation project was launched in spring 2007 and comprises among other topics economic and legal analyses as well as an international comparison of the treatment of vertical agreements. Depending on the results of the evaluation, the Federal Council might propose legislative reforms in the area of vertical restraints, namely taking into account the debate on the importance of interbrand competition that was already launched by lawyers, scholars and business associations. Results of the evaluation are expected for the first quarter 2009.

The Swiss approach towards RPM agreements corresponds to a very restricted rule of reason approach. Comco intends to pursuit a policy to seek compatibility with European law and will therefore follow the discussion on the revision of the Vertical-BER in 2010 with great interest. Based on the developments at the European level and the results of the evaluation of the Cartels Act, Comco and the Swiss Government will assess the need for action.

TURKEY

The Turkish experience on Resale Price Maintenance (RPM) will be explained on the basis of legal provisions and case law.

1. The legal framework of RPM in the Turkish jurisdiction

The treatment of RPM in the Turkish jurisdiction finds its legal roots primarily in the Act no 4054 on the Protection of Competition (Competition Act). According to Article 4 of the Competition Act *"Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited"*. Furthermore, the same article provides a non-exhaustive list of practices as examples to this prohibition. In line with this, article 4 (a) states that *"fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale"* is among such examples.

Moreover, Block Exemption Communiqué on Vertical Agreements no 2002/2 (Communiqué on Vertical Agreements) determines the conditions for exempting those vertical agreements as a block from the application of the provisions of article 4 of the Competition Act, Communiqué on Vertical Agreements states that those agreements preventing the buyer from determining its own selling price can not benefit from this block exemption (article 4 (a)). Nevertheless, according to the same article the supplier may set the maximum selling price or recommend the selling price, on condition that it does not transform into a fixed or minimum selling price as a result of the pressure or encouragement by any of the parties. Accordingly, determination of minimum and fixed resale prices by the supplier is definitely prohibited. Guidelines on vertical agreements[1] (Guidelines) explains that in order for the selling prices, of maximum or recommended nature, declared to the buyer not to transform into a minimum or fixed price, it is required to clearly mention on the price lists issued or on the product that the said prices have the nature of being maximum or recommended.

The same Guidelines[2] mentions that besides directly determining the selling price of the buyer by placing an explicit provision in vertical agreements concluded between the supplier and the buyer(s), suppliers may also realise the same infringement by indirect means through various practices. Determining the profit margin of the buyer, determining the maximum level of the discount rate that may be applied by the buyer over the level of a price announced to be the recommended price, applying extra discounts to the buyer insofar as he conforms to the recommended prices, or threatening the buyer with delaying, suspending deliveries or terminating the agreement in case he does not conform to these prices, or applying such criminal sanctions *de facto* may be given as the example of an indirect determination of the resale price. Such practices of *indirectly* determining the resale price fall under article 4 (a) of the Communiqué on Vertical Agreements, thus prohibited.

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1 Guidelines on the Explanation of the Block Exemption Communiqué on Vertical Agreements No:2002/2 can be reached at: http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz6.doc, Paragraph 16.

2 Ibid, Paragraph 17.

Last but not least, direct or indirect methods aimed at the determination of the resale price would be more effective where prices applied by buyers can be monitored and controlled by the supplier[3]. For example, an obligation which may be imposed on all buyers, about reporting those buyers who sell at prices different from the standard price lists shall considerably facilitate the control, by the supplier, of prices applied in the market.

2. Case law

2.1 Doğuş Automotive/Volkswagen case[4]

Doğuş Automotive (Doğuş) is the authorised supplier (importer) of Volkswagen vehicles in Turkey. It was found that Doğuş was fixing the resale prices of its resellers not only with respect to sales in the Volkswagen passenger cars and light commercial vehicles markets but also in the spare parts and accessories markets. Thus, as a result of the investigation carried out Doğuş was found to be in violation of article 4 (a) of the Competition Act that explicitly prohibits the fixing of the purchase or sale price of goods or services and imposed a **fine**.

The Competition Board decision states that the information and documents obtained during the inquiries show Doğuş's involvement in many activities that violated the Competition Act with respect to RPM, beginning from May 1997 until the commencement of the investigation by the Competition Board on 12.12.2000. Doğuş asked its customers whether they were able to buy their vehicles from the resellers at the recommended prices imposed by Doğuş in the questionnaires on customer happiness. The answers to these questionnaires were decisive in the calculation of the profit margins of Doğuş's resellers and moreover they were being used as a tool to punish those who did not comply with it. According to the decision, this practice indicates that Doğuş was using sanctions on its retailers in the absence of obedience to its recommended prices imposed on the retailers. The decision further mentions Doğuş's practice led to fixed prices in the relevant markets and considered as a clear violation of the Competition Act since Doğuş was aiming to restrain the competition in the market, even if in practice some discounts can be made by the resellers.

As a result, it was found that Doğuş was fixing the resale prices of Volkswagen vehicles and the use of expression "recommended" in the price lists did not prevent such practices. Further it was understood that Doğuş was carrying out its anti-competitive practices via determining the profit margin of the buyer (indirect price fixing), decreasing the profit margin of the buyer which is a certain percentage within the fixed prices, controlling periodically the prices and invoices of cars that are being sold, warning the retailers which did not comply with the price lists of Doğuş, cutting the incentive premiums of retailers and sanctioning those retailers that did not follow the price lists. Another issue that prevents the competition between Doğuş's retailers is the fixing of selling conditions of retailers with respect to fleet sales that ends up in sanctioning those who do not comply with them.

Although effect of the vertical agreements with respect to RPM conduct is clear in this case, the decision clearly states that "object" of an RPM conduct is enough for **the prohibition of** such practices under the Competition Act even if they did not result in any anti-competitive effects in the markets. However, absence of effect could be a mitigating factor. A fine was imposed on Doğuş Otomotiv due to fixed resale prices

3 Ibid, Paragraph 18.

4 Competition Board decision dated 5.10.2001; numbered 01-47/483-120; investigation.

2.2 Warner Bros Case [5]

Warner Bros Film ve Video Sanayi ve Ticaret A.Ş. (WB Company) is the distributor of Warner and Colombia branded films to movie theatres in Turkey. WB Company distributes Turkish movies too. The relevant market for this investigation is described as the "distribution of movies with an aim to project them in the movie theatres".

WB Company was fixing the ticket prices of the movie theatres within the same city and the region through the vertical agreements that it signed with them. During the investigation process, a questionnaire was prepared and sent to many movie theatres across Turkey. Question on RPM with respect to ticket prices is an issue that was asked in addition to other issues such as exclusivity, projection period, commercial risks that movie theatres face etc.

The inquiries show that WB Company is considered as a dominant undertaking according to article 3[6] of the Competition Act within the "film distribution market" based on its global power to provide the required amount of qualified films on a continuous basis which also form a barrier to entry for other actors. In addition WB Company's being exclusive supplier to some movie theatres, guarantee prices that it could demand from the movie theatres, its relatively high share for the distribution of Turkish movies based on its strong distribution network represent other important issues in its dominance.

The Competition Board decision states that the existence of IP rights among the producer, distributor and movie theatres does not change the fact that there is a vertical relationship among these actors and those agreements might prevent and/or restrict competition within the market. Finally, the Competition Board decides that WB Company is intervening into and/or fixing the ticket prices of movie theatres based on the vertical agreements, thus in violation of the Competition Act article 4(a) that explicitly prohibits the fixing of the purchase or sale price of goods or services. Besides, the Competition Board decision states that WB Company is abusing its dominant position arising from "film distribution market" within the "distribution of movies with an aim to project them in the movie theatres" market through actions which aim at distorting competitive conditions by fixing and/or controlling ticket prices of the movie theatres, and via equalising ticket prices among competitive movie theatres in line with Article 6 (d)[7] of the Competition Act. Nevertheless, WB Company terminated its conduct and a **fine** amounting to 1% of total turnover was imposed based on this mitigating circumstance.

This case shows that RPM can be used as a conduct by the dominant undertakings to distort competition in a market and thus might be evaluated under article 6 of the Competition Act on abuse of dominant position provision as well as article 4 treatments. RPM practices by WB Company had both the intent and effect of distorting competition. A fine is imposed on WB Company due to fixed RPs.

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5 Competition Board decision dated 8.3.2007; numbered 07-19/192- 63; investigation.

6 Article 3 of the Competition Act defines dominant position as "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers".

7 Article 6(d) prohibits "Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market".

2.3 Efes Case[8]

Efes Pazarlama ve Dağıtım A.Ş. (Efes) is the associate company of Anadolu Efes Biracılık A.Ş. that produces beer. Beer market has a duopolistic structure in Turkey. Efes is responsible for the marketing and distribution of beer produced by Anadolu Efes. This decision discusses the effect and the object of RPM related documents in a very detailed way. In order to understand the effect of the Efes's agreements with its dealers, the invoices are examined. The inquiries did not find any sanction and/or enforcement of Efes on its retailers when there is deviation from the prices that it recommends. This decision also evaluates the objective of those agreements in a separate section and mentions that agreements having the object of prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and therefore prohibited according to the Competition Act. Accordingly, this decision discusses the reasons why suppliers are engaging in RPM conducts and the pros and cons of such practices.

In literature, there are two types of explanations. On one hand, such agreements can be used to coordinate cartels at the supplier and distributor level. On the other hand, they are used to protect some products from free riding, try to create efficiency at the sales points and sales structure, or to introduce new products to the market and to protect product image as a result of which efficiency is attained. The Competition Board decision stresses the fact that among these explanations coordination of cartels and the prevention of free-riding are at the forefront. However, there has been no finding of such objective of Efes. In sum, it was found that Efes is not fixing resale prices of the products that it distributes, thus the investigation found no violation of the Competition Act.

This case did not find any agreements, involving RPM, either object or effect of which are contrary to Competition Act.

2.4 Kütaş Teekanne Case[9]

Kütaş Teekanne is active in the "black tea" and "herbal tea" markets. In a preliminary inquiry, Kütaş Teekanne's vertical agreements with its dealers are examined to understand the scope and enforcement of the provision stating *"Dealer can apply a maximum of (...) % discount to the potential points. The total amount of discounts will be covered by the dealer".* In this regard, this decision puts forward that the relation between Kütaş Teekanne and its dealers needs to be examined.

The inquiries show that in practice dealers can provide discounts to retailers from their gross profit at different proportions due to issues such as buyer power of retailer or payment conditions. Firstly, Kütaş Teekanne did not possess a well established widespread distribution network during the time of the inquiries that would allow it to dictate prices on its dealers which is verified by the invoice checks and dealer statements. Secondly, dealers preferred to set their sales policies on their own at the time of the inquiries. For instance, small dealers prefer to have higher discounts to increase their sales whereas big dealers prefer to follow a single price policy.

Further to effect of the resale prices found in the agreements, the objective of such provisions is also dealt within the decision. The Competition Board decision discusses this provision based on article 4(a) of the Competition Act and article 4(a) of the Communiqué on Vertical Agreements. Additionally, the decision refers to Guidelines that considers determining the maximum level of the discount rate that may be applied by the buyer over the level of a price announced to be the recommended price as an indirect way of setting maximum resale prices and furthermore states that this conduct is prohibited according to the Competition Act. Nevertheless, this decision focuses on the following two points. First of all, it refers

8 Competition Board decision dated 13.7.2005; numbered 05-46/669-171; investigation.

9 Competition Board decision dated 24.8.2006; numbered 06-59/773-226; preliminary inquiry.

to the fact that vertical restraints are capable of restricting the intra-brand competition and thus might have benefits on the inter-brand competition via encouraging dealers to provide services before and after sales in the market. If the inter-brand competition is robust, then the negative effects of lack of intra-brand competition will be less in those markets. The life cycle of the market in question is also important in the determination of how much the lack of intra-brand competition might affect that market. The negative results arising from the lack of intra-brand competition would be more effective in a mature market. Black tea and herbal tea markets in Turkey are dynamic competitive markets without any entry barriers. Secondly, Kütaş Teekanne after loosing its market share to a great extent has ended its activities in the relevant markets via transferring its brands to other companies as a result of which all its activities with its dealers came to an end in 2006 while these agreements are being examined. Due to dynamic nature of the tea markets and the Kütaş Teekanne's not being active in the relevant markets any more, the Competition Board decides not to initiate an investigation against those vertical agreements involving provisions that have the objective of RPM in the absence of effect.

In dealing with RPM in this rather recent case the Competition Board did not initiate an investigation based on mere existence of object vis-à-vis vertical agreements involving provisions leading to minimum resale prices. The Competition Board based its analysis on findings concerning the structure of the market and evidences obtained. This case discussed the pros and cons of inter-brand vs intra-brand competition extensively.

2.5 Vira Case[10]

Vira is the exclusive distributor of the Kryolan branded make-up products in Turkey. The relevant market in question is defined as the "professional make-up products". Similar to the decisions that did not foresee the initiation of an investigation with respect to RPM, Competition Board considers whether the consumers suffer from any loss, vertical prices lead to horizontal price cooperation and inter-brand vs. intra-brand competition is found etc. When the vertical prices fixed by the supplier do not restrict inter-brand competition or they do not lead to supplier or dealer cartels, it is presumed by the Competition Board that inter-brand competition will increase.

In this case, AFW which imports Kryolan brand make-up products made a complaint about Vira which is the distributor of Kryolan branded goods in Turkey saying that Vira is interfered into the selling prices of its retailers. In fact the problems faced between Vira and AFW is arising from illegal import allegations. In practice, the inquiries show that Vira is trying to use price lists as "maximum price lists" in order to prevent consumer detriment due to specificity of these professional make-up products that are used by specific group of people like hotel animation teams, hair dressers, theatre artists…etc. The retailers also state that there has been no sanction by Vira concerning the use of the same price list. Retailers were able to make discounts on those products. The Competition Board decides that Vira's agreements with its retailers can not benefit from the Communiqué on Vertical Agreements because of the 40% market share threshold. However, they can benefit from an individual exemption for a period of 10 years if the relevant provisions are re-structured according to the article 4(a) of the Communiqué.

The Competition Board tries to evaluate the effects of fixed RPM in addition to mere existence of intent and provides an individual exemption on condition that some amendments to RPM provisions.

3. Conclusion

Fixing the purchase or sale price of goods or services is strictly prohibited under the Competition Act. In addition, determination of minimum and fixed resale prices is definitely prohibited by Communiqué on

[10] Competition Board decision dated 2.8.2007; numbered 07-63/767-275; preliminary inquiry.

Vertical Agreements if vertical agreements are to benefit from this block exemption. In its earlier cases, the Competition Board finds it sufficient either the objective or the effect of the agreements to prohibit RPM practices *(Doğuş Automotive/Volkswagen; WB Company; Efes cases)*. Therefore, earlier the undertakings were imposed fines due to RPM in the following two cases: *Doğuş Automotive/Volkswagen; WB Company*. Nevertheless in latter cases, the Competition Board takes into consideration the structure of the market to a great extent and considers the effect of vertical agreements involving RPM and did not initiate an investigation *(Kütaş; Vira cases)*. The inter-brand vs. intra- brand competition and the market structure is discussed extensively in one case *(Kütaş Teekanne)*, while consumers benefit and the real effect on the markets is the main issue in another *(Vira)*.

UNITED KINGDOM

1. Introduction

The OFT has recently been reviewing its position on Resale Price Maintenance (RPM) in light of developments in international practice and economic theory, and an increased need to target scarce authority resources on interventions that maximise impact.

This paper starts with a brief summary of UK and EC law, and a comparison with US law. It then summarises recent developments in economic theory before applying them to some relatively recent UK cases. It concludes with some initial thoughts as to how the OFT might apply its prioritisation process in deciding which RPM complaints to take forward in the future.

2. Legal framework

UK legislation on RPM is based on the EC Treaty. It is regarded as an 'object' restriction under Chapter I of the Competition Act 1998 (the UK embodiment of Article 81 of the EC Treaty). In addition, the UK is required to apply Article 81 if there is an effect on trade between Member States resulting from the practice under investigation.

Because RPM is regarded as an 'object' restriction, the Office of Fair Trading (OFT) is not required to demonstrate harm caused by a particular RPM agreement in order to find it unlawful. Rather, RPM is viewed as harmful by object. This essentially means that RPM is considered to be so likely to be anti-competitive that a harmful effect may be presumed.

That said, EC law recognises that it may be necessary to consider the economic context in which the agreement is (to be) applied before concluding whether a particular restriction constitutes a restriction by object[1].

As with EC law, even if it is found to restrict competition, an RPM agreement can nevertheless be exempted under UK law if it is broadly demonstrated to be indispensable to achieving evidenced efficiency gains that benefit consumers and does not eliminate competition.[2]

In the UK, the OFT has adopted prioritisation principles, with the aim of ensuring maximum impact with its resources, and thus of ensuring that it only brings cases where there is a clear and plausible theory of harm. The OFT will not take forward a case that is incompatible with its prioritisation principles of

1 See, for example, Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235; paragraph 22 of the Commission's Article 81(3) guidelines; and Case T-168/01 *GlaxoSmithKline* v *Commission* [2006] ECR II-2969 at paragraphs 119 et seq. *GlaxoSmithKline* is currently under appeal to the ECJ in Cases C-501/06, C-513/06, C-515/06 and C-519/06.

2 See OFT 401 for guidance on the 1998 Competition Act, and OFT 419 for guidance on Vertical Restraints.

ensuring high impact and strategic significance for any given level of resource, cost, and risk[3]. The issue of how we might apply these prioritisation principles to RPM complaints is discussed below.

The situation in the UK and EC can be contrasted with that in the US. From 1911 to 2007, RPM was per se illegal in the US, meaning that the act in itself was illegal without the possibility of rebuttal.[4] This US approach, while often considered similar to an infringement having 'object' status under EC law, has a crucial difference in that there is no possibility of exemption by proving efficiency gains. The Supreme Court's recent decision in *Leegin*[5] replaced this per se presumption of harm with a rule of reason approach, implying that RPM is an infringement only if, having weighed all the circumstances of the case, the conclusion is that the restrictive practice should be prohibited as imposing an unreasonable restraint on competition under the Sherman Act.

Both the Department of Justice (DoJ) and the Federal Trade Commission (FTC) filed amicus briefs supporting a rule of reason approach. The two agencies argued that per se treatment should be reserved for behaviour that always, or almost always, reduces competition and reduces output and consumer welfare. Since the effects of RPM may be pro- or anti-competitive (as discussed below), they argued that per se treatment is inappropriate.

It is not yet precisely clear how the rule of reason approach will be applied in practice in the US. In particular it is not clear whether there will effectively be a rebuttable presumption of illegality (similar to EC 'object' cases) or whether there will be a full rule of reason assessment (more similar to EC 'effect' cases).[6] It is also important to note that there is extensive private competition litigation in the US, with the DoJ and FTC bringing only a small fraction of the total number of cases taken. This is in sharp contrast to the EC and UK where the administrative system means that, at present, the vast majority of cases are taken by DG COMP or the national competition authorities.[7]

3. Economic theory

The argument against a presumption of unlawfulness for RPM is based on a combination of two intuitions. The first, which formed the basis of the DoJ and FTC's submissions in the *Leegin* case, is that while RPM reduces intra-brand competition, it can promote inter-brand competition. It can do this by

3 See OFT 953con for details of the now closed consultation of our prioritisation principles. Final principles will be published shortly.

4 See *Dr.Miles Med. Co. v John D. Park & Sons Co*., 220 US 373 (1911)).

5 *Leegin Creative Products, Inc v PSKS, Inc*, Supreme Court of the United States, 28 June 2007.

6 We also note that legal practitioners are uncertain whether the Leegin judgment will be as important in practice as it first appears. At least 26 States objected to the Federal Trade Commission's decision to modify a 2000 consent order relating to Nine West, a shoe manufacturer, in light of the Leegin judgment (and are continuing to enforce their State laws on a per se basis). Consequently, US lawyers are likely to continue to advise businesses to comply with a per se approach to RPM, at least for the time being.

7 We note, though, that over 60 per cent of the private actions that did take place in the EU between 2004 and 2008 related to vertical restraints. See 'White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment" COM(2008) 165 final

providing quality certification[8], or by reducing free riding at the distribution level on aspects such as service provision.[9]

The second intuition is based on the standard thinking of the Chicago school that, in any given market, there is only one monopoly profit.[10] An upstream monopolist has no ability to increase its profits through RPM, since it should in any case be able to extract the full monopoly market rent through its wholesale pricing structure (at least so long as non-linear pricing is possible). As such, the argument runs, RPM cannot be welfare reducing.

However, there is also economic literature which supports the claim that RPM can potentially have significant welfare-reducing anti-competitive effects. Specifically, this can occur either where there is a dominant firm upstream in the market, or where there are multiple RPM agreements operating concurrently in the same market.

Categorising the literature rather coarsely, but hopefully without too much injury to the underlying intuitions, there are at least five plausible theories of harm setting out ways in which possible anti-competitive effects can occur.

- **Upstream collusion - a facilitating practice.** This theory relates to inter-brand competition. When upstream firms wish to collude, but negotiate contracts with wholesalers or retailers in private, it can be hard for any collusive agreement to be monitored; rival wholesale prices cannot be monitored and enforced, and retail prices are an imperfect proxy for them. Upstream firms can use RPM as a facilitating practice for collusion since it brings the publicly observable element of price under their control.[11]

- **Upstream protection of monopoly rents - a commitment story.** Where an upstream firm with market power contracts with multiple downstream retailers at different times, and in private, the asymmetric nature of each contracting situation can lead to a dissipation of monopoly rents. Essentially, each negotiation takes previous contracts as given, and so is based on the residual demand curve of the market. The effect of this is that the upstream firm will have an incentive to sign later contracts on more favourable terms. But if those signing earlier contracts expect this to occur, then they will reject their initial offers.

  The overall effect of is that the upstream firm is unable to extract the full rent associated with its market power, because it is unable to commit itself to not cutting prices on later contracts. This commitment problem can be overcome by setting the retail price at the monopoly level under a system of RPM, thus maximising joint profits. As such, RPM can allow upstream firms with market power to extract their full monopoly rents.[12]

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8 As suggested by Marvel, H. P. and S. McCafferty (1984) “Resale Price Maintenance and Quality Certification.” Rand Journal of Economics, 15.

9 his argument was first highlighted in Telser, L.G. (1960).”Why should manufacturers want fair trade?” Journal of Law and Economics, 3.

10 See Posner R.A. (1976) Antitrust Law an Economic Perspective. University of Chicago Press.

11 See Julien, B. and P. Rey (2007) “Resale Price Maintenance and collusion” Rand Journal of Economics, 38-4.

12 See Hart, O. and J. Tirole (1990). "Vertical Integration and Market Foreclosure", Brookings Papers on Economic Activity: Microeconomics, 205-286. This paper discusses commitment problems in a Cournot setting. Similar results are derived for a differentiated product market in O’Brien, D.and G.Shaffer (1992),

- **Downstream collusion - a facilitating practice.** This can occur where downstream firms wish to engage in collusion. They can use the imposition of multiple RPM agreements by an upstream firm (acting as a 'common agent') to facilitate downstream price collusion. The enforcement of RPM can facilitate agreement on prices, monitoring of prices, and even punishment for cheating on the collusive agreement. In some instances, the RPM is effectively no more than a 'sham' vertical agreement, masking a pure horizontal agreement.[13]

- **Downstream protection of rents - entry deterrence.** RPM can benefit downstream firms by making it harder for cut-price entrants to steal business through undercutting them. Such entrants can still make additional profits through greater efficiencies, but they can not use these efficiencies to steal business through lower prices.[14]

- **Dampening of system competition via interlocking relations.** Where the market is characterised by a network of "interlocking" relationships between upstream and downstream firms, RPM can have additional anti-competitive effects. The simplest example would be a market where there is a duopoly of manufacturers upstream and a duopoly of retailers downstream and both retailers carry the products of both manufacturers.[15]

  When retailer bargaining power is high, in such a setting, but there is strong competition between retailers in the downstream market (absent RPM), then this downstream competition incentivises retailers to fight hard for reductions in wholesale prices. Because RPM prevents downstream

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"Vertical Control with Bilateral Contracts", Rand Journal of Economics, 23. The results have been generalised in Rey, P. and T.Verge (2004). "Bilateral Control with Vertical Contracts", Rand Journal of Economics, 35. Note that price ceilings can also solve this commitment problem.

13 In the UK, the practice of retailers coordinating their behaviour via an upstream supplier has become known as "A to B to C" coordination.

In *Argos Ltd & Anor* v *Office of Fair Trading* [2006] EWCA Civ 1318, the Court of Appeal held (at paragraph 141) that '… if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition ... The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.'

This practice has been recognised, but not explicitly modelled, in the economic literature. A related, but slightly different, model is provided in Shaffer, G., (1991) "Slotting Allowances and Resale Price Maintenance: A Comparison of Facilitating Practices" Rand Journal of Economics, 22, which looks at the role of RPM (alongside slotting allowances) in raising prices when retailers have buyer power (in the sense that manufacturers compete to supply them).

14 See OFT 981. "An evaluation of the impact upon productivity of ending resale price maintenance on books" (2007). Report prepared for the OFT by the Centre for Competition Policy at University of East Anglia.

15 This situation can also be defined as "double common agency".

undercutting, it reduces this retailer incentive to negotiate hard on wholesale prices. This in turn dampens upstream competition and creates higher retail prices, to the detriment of consumers.16

RPM can also potentially eliminate all effective competition — at the inter-brand level as well as at the intra-brand level — and yield instead the monopoly outcome, if used jointly with franchise fees. This can be the case even when retail prices are set independently for each retailer, and vertical contracts are negotiated bilaterally and independently from each other (purely "vertical" RPM).17

RPM was traditionally viewed as being imposed by the upstream firm on a price-taking retail market, and much of the economic literature maintained this assumption. By contrast, the last three economic theories above are based on retailers having a degree of buyer power, such that there is negotiation between upstream firms and downstream retailers. This suggests that, in assessing RPM, it can be as important to examine the nature of competition for retailers, both as buyers and as sellers, as the nature of competition upstream.

It is also noteworthy that all of the above theories of harm – other than the commitment one – rely on RPM having a horizontal effect. That is, although the agreement is a vertical one, it will typically be harmful only if there are multiple RPM agreements covering competing firms such that it has some form of horizontal impact.

4. Indispensability and RPM

Under current EC legislation, RPM can still be allowed if the parties are able to show that it is indispensable for achieving evidenced efficiencies which outweigh the negative anti-competitive effects, and so long as there is no alternative way of achieving the same benefits with less anti-competitive harm.[18]

RPM is one of a number of vertical restraints that can be used to control for welfare reducing negative externalities arising from the failure of different firms along a production chain to align their incentives. A classic example is free riding by some retailers on the services provided by others. Depending on industry characteristics, such control can equivalently be achieved through different vertical restraints, and it may be hard to show that RPM is truly indispensable. An example is the equivalence between using either RPM or refusal to supply in order to block low cost, low price entry by internet retailers.[19]

By contrast, we note that RPM is unique in its ability to facilitate horizontal coordination by increasing informational transparency on prices, and thus alternative restraints, such as exclusive

16 The main reference here is Dobson, P.W. and M. Waterson (2007) "The Competition Effects of Industry-Wide Vertical Price Fixing in Bilateral Oligopoly" International Journal of Industrial Organization, 25. Essential to this paper is the bargaining process, whereby wholesale prices depend on the distribution of bargaining power between manufacturers and retailers. This paper finds that RPM may have an anti-competitive purpose by dampening downstream inter-brand competition, since without RPM retailers seeking to remain competitive would bargain more forcibly with manufacturers to cut margins, therefore intensifying competition at both levels.

17 See Rey, P. and T. Verge (2004) "Resale Price Maintenance and Horizontal Cartel" Department of Economics, University of Bristol, UK, Leverhulme Centre for Market and Public Organisation.

18 In addition, the parties involved would also need to show that the other criteria for exemption are met (notably consumer pass-on and lack of a substantial elimination of competition).

19 We note that such a refusal to supply may also constitute an abuse of a dominant position and thus also be a breach of competition law, though in this case Chapter II of the Competition Act 1998 rather than Chapter I.

territories, exclusive dealings, quantity forcing, or even vertical integration with one retailer, may be expected to create less anti-competitive harm than RPM.

In certain situations, however, alternative restraints might not be as easy to implement as RPM, or may not be sufficient on their own. This may make an argument for indispensability easier to make. This is more likely to occur when:

- there is imperfect observability and/or enforceability of the terms of alternative restraints[20] or
- more than one externality simultaneously affects the vertical production chain, and more than one vertical restraint must be used to deal with these multiple externalities[21].

5. UK Cases

5.1 Removal of RPM on books (1997)

From 1901 until 1997, the Net Book Agreement (NBA) allowed publishers to set the retail prices of books. Any retailer that deviated from the agreement could be refused supply of future books by all publishers. The nature of the enforcement of the NBA constitutes a good example of collective RPM.

The book industry was one of the last sectors of the UK in which RPM was legal, since it was seen as having special characteristics, including important social and cultural aspects. The proposal to remove the NBA was therefore hotly debated. Those in favour argued that it would lead to lower prices. Those against argued that increased retail competition would lead to fewer local bookshops, and fewer titles being stocked or published (due to retailers' no longer being able to cross subsidise less popular books with the income gained from best-sellers). This in turn was expected to lead to lower book sales overall.

In 2007 the OFT commissioned the University of East Anglia to evaluate the effects on the UK book industry of removing the NBA.

The study suggested that, contrary to some expectations, total sales volumes for books have increased, as has the number of titles published. In addition, there has been a significant increase in retail diversity. While the sales volumes of traditional retailers have declined, there has been strong growth in new retail channels - in particular internet retailers, supermarkets, and retailers of consumer entertainment products across multiple media (such as the US chain, Borders). The study suggests that this growth of innovative book retailing in the UK would have been substantially slower absent the ability to offer discounted prices. These new entrants had different business models, mostly based on lower costs and innovative cross-marketing and promotional systems. Their growth, at the expense of traditional booksellers, represents an increase in industry productivity.

From this study, we conclude that the NBA caused harm by preventing downstream entry and thereby protecting the inefficient business models of traditional retailers. This is supported by the concerns of high street retailers before the agreement was lifted:

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20 For example, if transport costs are low consumers could easily bypass distribution barriers erected by exclusive territories.

21 For example, a franchise fee could be used to set the wholesale price equal to marginal cost, thus aligning the incentives of downstream and upstream firms to sell a marginal unit of a good. RPM could also be used to prevent downstream firms free-riding on each others' service provision. Together, the franchise fee and RPM could simultaneously solve a combination of double marginalisation and free-riding externalities.

> *"(some booksellers) expressed fears that expansion of the US chains on the UK high street would be as 'reckless' as it had been in the US, and that a price war would break out."*[22]

In addition, in showing that RPM was not in fact needed in this industry for maintaining either sales volumes or range, this study also suggests that the efficiency benefits of RPM can (at the least) be over-stated.

5.2 RPM on Children's toys (2003)

In 2003, the OFT found that Hasbro, one of the largest toy and games suppliers in the UK, had entered into vertical agreements with Argos and Littlewoods, the two largest catalogue-based retail chains, to fix the price of certain Hasbro toys and games at the recommended retail price (RRP).[23] The agreement included two concurrent bilateral price-fixing agreements: one between Hasbro and Argos and the other between Hasbro and Littlewoods as well as a trilateral concerted practice featuring all three companies.

As a case involving RPM, and horizontal price-fixing, Toys was treated as an object infringement and no case-specific theory of harm was required. In fact, it seems unlikely that this is a classic case of manufacturer-induced RPM. No evidence was provided of industry-wide RPM at the upstream level (required for an upstream collusion theory) and it was not obvious that Hasbro had substantial market power (required for a commitment theory).

Rather, the most likely theory of harm would appear to be that the RPM facilitated downstream retail collusion.[24] The two downstream retailers, Argos and Littlewoods, competed vigorously on price and, due to the medium-term permanence of catalogue prices, faced substantial risks from one firm undercutting the other. The agreements essentially removed this element of competition.

The two firms, and Argos in particular, held substantial buyer power over Hasbro since they were the primary retail channel for the toys covered by the agreement.[25] There was also evidence presented in the decision that Argos was viewed as a price leader for much of the remainder of the retail market. If true, then collusion between these two retailers would have had wider downstream effects.

This interpretation is of particular interest since it shows two roles potentially played by RRPs in facilitating collusion: as a way of both communicating intended pricing levels, and as a way of monitoring intentions to deviate from them through a third party. A statement of a Hasbro account manager on his communication role describes this mechanism:

> "Having determined Argos' pricing intentions and passed these on to the other account managers within Hasbro; I received information from those account managers regarding the intentions of other retailers to go with RRPs. I then reverted to Argos and said, without being specific, that it

22 http://www.thebookseller.com/documents/BordersbuysBooksEtc-3rdOctober1997.pdf.

23 Case number CA98/02/2003.

24 It is noteworthy that the OFT's appeal body, the Competition Appeal Tribunal reviewed the evidence for this horizontal 'tripartite' concerted practice and concluded that a finding on this would have been supportable. Nevertheless, it held that it was sufficient for an infringement finding that the OFT had found two bilateral vertical agreements which operated in parallel. "In those circumstances it does not seem to us to make much difference whether the correct analysis is that there was, in addition, a tripartite agreement or concerted practice having the same object or effect." ([2004] CAT 24, Judgment on Liability in *Argos Limited & Littlewoods Limited v Office of Fair Trading*, paragraph 778).

25 It may be relevant here that Hasbro was granted 100 per cent leniency, since it was the first to provide the OFT with evidence of the infringing agreements before the investigation commenced.

was my belief that the future retail price of a product would or would not be at the RRP. I told Argos which products this related to. I never mentioned the name of the retailer who was involved or quantified exactly the price that retailer would go out at. I simply said to Argos that it was my belief from what retailers told us that this or that product would or would not be at the RRP"[26]

5.3 RPM on replica football kits (2003)

The market for replica football kits has three layers:

- Upstream are licence holders such as Manchester United Football Club, Chelsea Football Club, and the English Football Association.
- These licensors grant exclusive licences to manufacturers to make both the actual and replica football kits.
- The replica kits are then sold by the manufacturers to retailers.

An added complication arises from the fact that many of the licensors themselves have significant retail operations.

In 2003 the OFT found that Umbro, a manufacturer of replica kits, had entered into vertical agreements with a number of downstream retailers to fix the price of England, Manchester United, Chelsea, and Nottingham Forest replica kits at the same retail price level.[27] The decision also found that the network of agreements constituted a horizontal concerted practice between the retailers, a theory that was endorsed and expanded by the Competition Appeal Tribunal (and the Court of Appeal) on appeal.

Again, as a case involving both RPM and horizontal price fixing, Replica Kits was treated as an object infringement and no case-specific theory of harm was required, since it was sufficient that the OFT had found two bilateral vertical agreements which operated in parallel. However, there was a clear horizontal element to the case, which is compatible with at least four plausible theories of harm, suggesting that the presumption of anti-competitive effect from RPM was reasonable.

Upstream protection of monopoly rents – the commitment story: Umbro's exclusive license for each replica kit provides them with market power that they may be prevented from exploiting through the problem of contractual commitment discussed earlier. The network of vertical agreements between Umbro and downstream retailers may have been designed to overcome this commitment problem and thereby increased Umbro's ability to extract market rents, to the detriment of consumers. In addition, in increasing the rents that Umbro could extract for a licence, the value of the licence to the upstream licensors would also be increased, making it in the interests of both upstream layers of the market.

Downstream protection of rents – entry deterrence: By imposing a uniform price on retailers, the agreements will have reduced the incentive and ability for cut-price retailers to enter the market and compete away current retailers' profits. During the period of the agreements a large supermarket chain, Asda, had been trying to sell replica kits at a discount, and had resorted to parallel imports to source kits to sell in their shops. Thus the agreements may have been primarily in the interests of the retailers, at their instigation, again at the expense of the consumer.

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[26] Ibid, paragraph 57.

[27] Case number CA98/06/2003.

Downstream collusion – a facilitating practice: The story here is essentially the same as in Toys. That is, that the downstream retailers used the upstream manufacturer as a common agent to facilitate collusion between themselves.

Upstream collusion – a facilitating practice: The inclusion of the national kit in the agreements suggests there may have been an additional element of collusion between the licensors, especially since the agreement coincided with the 2000 European Cup. While a Chelsea supporter is typically unlikely to buy a Manchester United replica kit just because it is a little cheaper, they might have purchased an England kit instead on this basis. RPM may therefore have played a role in facilitating collusion between these various brands.[28]

An interesting aspect of this case is that it might have been difficult to assess which of these various theories of harm was in fact the most likely. As such, and depending on the required burden of proof, it might have been difficult to demonstrate a precise likely effect, if this had been required under the legal framework, even though there are a number of plausible alternatives.

6. Policy implications

In the UK, as under EC law, RPM is presumed to be anti-competitive 'by object' with no requirement for an anti-competitive effect to be demonstrated.

There is little evidence from a UK casework perspective that would militate in favour of relaxing this presumption of anti-competitive effect:

- While the economics literature on RPM highlights some efficiency benefits of RPM, our experience from UK book publishing has been that these efficiency benefits can be over-stated. As discussed above, this was one of the last sectors in the UK where RPM was legal. When RPM was removed, there were significant concerns about whether the efficiency benefits associated with RPM would be lost. In practice, we have instead seen an increase in book sales, in number of titles, in diversity of shopping experience, and we expect future increases in productivity.

- At the same time, whilst accepting the argument that RPM need not always have anti-competitive effects, the facts of the OFT's cases against RPM on Replica Football Kits and Toys were clearly consistent with RPM having anti-competitive effects. There was a clear horizontal story of harm in both cases, and indeed in both cases the horizontal concerted practice was set out as a specific element of the case alongside the vertical RPM.

There may be occasions when RPM, viewed in the economic context, is not necessarily harmful or is indispensable for the efficient correction of incentive misalignment between vertically differentiated firms. The fact that RPM can be harmful in some circumstances, and beneficial in others, implies that interventions can potentially give rise to Type I errors (whereby pro-competitive and efficient activity is prohibited) and Type II errors (whereby there is too little enforcement and anti-competitive activity is insufficiently deterred).[29] Both types of error can have serious and long-lasting effects both on markets directly affected, and on wider markets via the deterrent effect of interventions.[30]

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28 More speculatively, there may also have been an effect through fans 'benchmarking' the price of their own replica kits against others, and being less willing to purchase their club's kit if it is seen to be substantially more expensive than others.

29 There is some (albeit limited) evidence that the law on RPM is giving rise to the former (Type I errors). A survey conducted for the OFT on 'The deterrent effect of competition enforcement by the OFT – discussion

It is important to think about these errors when choosing whether and where to intervene, and the OFT takes minimisation of Type I and Type II errors seriously. One way in which it does this is by applying a set of principles for prioritising its work. These focus on the impact and strategic significance of cases, and weigh this against the associated resource cost and risks. Carrying out this assessment intrinsically requires the OFT to establish a plausible theory of harm before taking forward any case, including RPM cases.

We have been considering how we might analyse RPM complaints to see if they may raise a plausible theory of harm consistent with our prioritisation principles. We consider the following questions to be potentially helpful in this context:

- *Is there significant unilateral upstream market power?*

  If not, then there is unlikely to be a plausible theory of harm related to protecting upstream market power against the commitment problem outlined above.

- *Is there evidence of a network of RPM agreements involving a number of upstream suppliers, and do these suppliers jointly account for a significant share of the upstream market?*

  If not, then there is unlikely to be a plausible theory of harm from RPM facilitating upstream collusion or dampening market competition.

- *Is there evidence that the RPM agreements are 'retailer-instigated' rather than instigated by the upstream supplier? (Relevant evidence here would include (i) whether the retailers engaged in RPM have a degree of bargaining power, (ii)whether they jointly have a degree of downstream market power, and (iii) their role in both initiating and monitoring the RPM.*)

  If not, then there is unlikely to be a plausible theory of harm from RPM facilitating downstream collusion or deliberately foreclosing downstream entry.

It should be recognised that any individual complainant is unlikely to be aware of the full nature and penetration of RPM agreements in their industry. As such, the OFT would strongly encourage parties to continue to lodge complaints about individual instances of RPM. This would allow the OFT to build up a holistic picture of the role of RPM within a particular industry, and then to make an informed prioritisation decision.

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document', OFT 963, found that, in interviews, the most common type of business chilling that UK firms mentioned was that of a supplier who wishes to implement a promotion (or meet competition from a new entrant) by requiring retailers to cut their retail prices. Suppliers are concerned that this may be seen as vertical price fixing and so refrain, even though the behaviour would be likely to benefit consumers. The report mentions that this may be because some of the most prominent cases taken by the OFT under the Competition Act 1998 (such as *Hasbro/Argos/Littlewoods and Replica Football Kit*) have involved vertical price restraints (even though the agreements investigated were clearly rather different).

30 See http://www.oft.gov.uk/shared_oft/speeches/sp008.pdf for a recent speech on the subject by John Fingleton at the 2008 Fordham autumn conference,

UNITED STATES

1. Introduction

The United States Supreme Court recently addressed competition policy approaches to minimum resale price maintenance (RPM) agreements. In its 2007 *Leegin* decision, the Supreme Court (supported by the U.S. antitrust agencies) concluded that these agreements, under which the producer of a product sets a minimum price at which retailers can sell the product, should be evaluated under the rule of reason standard.[1] With *Leegin*, the Supreme Court firmly moved to overrule the existing case law based on the 1911 *Dr. Miles* decision, which held that RPM was *per se* illegal under Section 1 of the Sherman Act.[2] While over the years there have been certain exceptions to this *per se* treatment of RPM,[3] the *Dr. Miles* decision continued to prevent firms from adopting explicit minimum RPM agreements until the Court issued its opinion in *Leegin*. *Leegin* thus grants manufacturers, i.e., the upstream firms in the vertical chain of production, greater freedom to use RPM in their relationships with distributors and retailers, i.e., the downstream firms in the vertical chain of production.

The *Leegin* decision brings the legal treatment of minimum RPM in line with the treatment of other vertical restraints that U.S. courts evaluate under the rule of reason, such as exclusive territories and exclusive dealing. While the courts once viewed many vertical restraints with considerable suspicion, over time they began to recognise that these practices can lead to substantial efficiencies and may therefore benefit consumers.[4] Whereas vertical restraints may have an anticompetitive effect in some circumstances, they also may promote competition by allowing vertically related firms to structure their relationships in a way that improves their ability to compete against rivals. Because consumers may frequently benefit from these practices, it is inappropriate to condemn a particular vertical restraint as a *per se* violation of the Sherman Act without first considering its actual effect on consumers. This reasoning applies equally to minimum RPM as well as to other vertical restraints. As the Court noted in the majority opinion in *Leegin*, because adopting a *per se* rule against RPM "would proscribe a significant amount of procompetitive conduct, these agreements appear ill-suited for *per se* condemnation."[5] This perspective is shared by a

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1 *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.* 127 S. Ct. 2705 (2007). See Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin* 127 S. Ct. 2705 (2007).

2 *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

3 For a discussion of the scope of permissible RPM agreements prior to the repeal of the Miller-Tydings and McGuire Acts in 1975, see Pauline Ippolito and Thomas Overstreet, *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works*, 39 Jl. of Law and Econ. 285 – 328 at 287 (1996). For a discussion of permissible behavior under *United States v. Colgate & Co*., 350 U.S. 300 (1919), see Pauline Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 Jl. of Law & Econ. 263 – 294 at 266 (1991).

4 A key turning point was the Supreme Court's decision in *Cont'l T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), which held that U.S. courts would judge non-price vertical restrictions according to the rule of reason. For a discussion of the effects of *Sylvania*, see James Cooper, Luke Froeb, Dan O'Brien, and Michael Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 Int'l Jl. of Ind. Org. 639 – 664 at 640 (2005).

5 *Leegin*, 127 S. Ct. at 2718.

substantial consensus of economists, many of whom have long argued that a consistent rule of reason treatment of RPM and exclusive territories is proper, since their potential effects and benefits to consumers are similar.[6]

In the wake of *Leegin*, vertically related firms such as manufacturers and retailers may now begin to adopt minimum RPM agreements as standard business practices. If RPM becomes more common,[7] the U.S. antitrust enforcement agencies – the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) – and the courts may need to evaluate the effects of these arrangements with greater frequency. To aid in this task, the antitrust community will be able to rely on the insights from a substantial economics literature that explores the rationales for and effects of RPM. The theoretical branch of this literature identifies both situations where RPM can benefit consumers and ways that firms can potentially use RPM to reduce competition. While this theoretical literature is ultimately inconclusive about whether minimum RPM is generally pro- or anti-competitive, it provides a useful backdrop for assessing the available empirical evidence about the effects of RPM and for guiding investigations into particular instances of RPM. This paper reviews some of the highlights of this theoretical and empirical research and then concludes by discussing some of its practical implications for competition law enforcers.

2. Theoretical Literature Related to RPM

A substantial theoretical economic literature related to minimum RPM developed during the years prior to *Leegin*. Although this literature explores ways that firms could use RPM to harm competition, just as importantly it identifies a variety of circumstances in which RPM may enhance competition and benefit consumers. This research thus generally supports the view that a policy of *per se* illegality for minimum RPM is inappropriate. On the one hand, minimum RPM agreements inherently suppress intrabrand price competition, i.e., competition among competing retailers of a particular good. On the other hand, however, RPM agreements may encourage competition among retailers along non-price dimensions. Whether a particular instance of RPM makes consumers better off or worse off depends on how they value these different kinds of competition. Furthermore, the net effect on welfare of a given instance of RPM depends on how it affects the intensity of interbrand competition between the manufacturer and retailers of the good in question and the manufacturers and retailers of other competing goods. The relative importance of these factors is ultimately an empirical question, but it is useful to review the main theoretical arguments regarding the effects of RPM to help identify the kinds of empirical inquiries that might be useful in the investigation of a particular instance of RPM.

2.1. Service Theories

A prominent strand of economic literature related to RPM emphasises its use as a mechanism to encourage retailers to provide valuable services to consumers.[8] Examples of such services include the

6 The brief filed in *Leegin* by a wide variety of leading antitrust and industrial organisation economists reflects a general consensus among economists regarding the proper legal standard for evaluating RPM agreements. See Brief of *Amici Curiae* Economists in Support of Petitioner, *Leegin* 127 S. Ct. For additional discussion of the desirability of evaluating RPM under the same standard as other vertical restraints, see W. Kip Viscusi, John Vernon, and Joseph Harrington, *Economics of Regulation and Antitrust*, 2nd ed., 240 – 246 (1995).

7 Press reports indicate that this shift may already be occurring. See "Price-Fixing Makes Comeback After Supreme Court Ruling," August 18, 2008, p. A1, *Wall Street Journal*.

8 By "services" we refer to any non-price action by retailers that enhances the demand for the product. The seminal article on RPM's promotion of services is Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 Jl. of Law and Econ., 86 – 105 (1960) (examining the case in which retail services are subject to free riding by rival retailers). Telser's argument was generalised and extended to the case of downstream oligopoly by Frank Mathewson & Ralph Winter, *The Incentives for Resale Price Maintenance Under*

provision of information about product attributes, product demonstrations, post-sale support, pleasant stores, and extended shopping hours. Such services have two key features. First, they are costly to provide. Retailers will invest in these kinds of services only if they are able to recoup their cost, either directly by charging customers for the service, which is not always feasible, or indirectly through the price of the product in question. Second, such services typically expand demand for the product in question. For example, consumers who receive more information about a technologically complex product may be more likely to purchase it, because they have greater confidence that they will receive the product that meets their needs. In such cases, both consumers and the upstream manufacturer benefit from the provision of these services. The consumer benefits directly by receiving the service, and the manufacturer benefits from increased sales, e.g., when the additional retail services enable it to compete more effectively against the producers of other brands of the good in question.

Using RPM to create an incentive to provide retail services would not be necessary if the downstream retailer had an optimal independent incentive to invest in the services, or the upstream manufacturer had other, equally effective mechanisms for providing the necessary incentives. In many situations, however, neither of these conditions is satisfied. If retailers bear the full cost of the services they provide and yet do not receive the full benefit, their independent incentive to provide the services will generally be less than optimal. Furthermore, there may be only limited or ineffective mechanisms available to the manufacturer for overcoming the externality that arises from this divergence of private costs and benefits. For example, it may not be possible for the manufacturer to specify the desired level of selling services for its retailers in a contract that can be enforced in court.[9] If it is not possible or economical to write such a contract, then the retailers will independently choose how much of the relevant service to provide, given their individual incentives.

A manufacturer may wish to use RPM with its retailers in this situation in order to increase their independent incentive to provide retail services. At the margin, an individual retailer's incentive to provide such services depends on both the responsiveness of its own demand to the level of services it provides and the profit margin that it earns on sales of the product. A manufacturer can influence both of these factors by implementing RPM agreements with its retailers.

An important point that is relevant to policy discussions is that the retailer services need not be subject to free riding for RPM to be a profitable and consumer welfare-enhancing strategy. The motivation for RPM arises because retail competition reduces retail margins below the level that a fully integrated manufacturer would have. This causes retailers to provide less service than would an integrated firm. RPM can be used to increase the retail margin thereby giving the retailer incentives to provide additional service.

RPM may be especially useful when retailers cannot appropriate the full benefits of their investments in services because competitors are able to free ride.[10] The iconic example of this phenomenon is the

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Imperfect Information, 21 Econ. Inq., 337-348 (1983) and Frank Mathewson & Ralph Winter, *An Economic Theory of Vertical Restraints*, The Rand Journal of Economics, 27-38 (1984). The Mathewson and Winter papers also show that services need not be subject to free riding by rival retailers to motivate the use of RPM. The role of RPM when services are not free rideable is analysed further in Ralph Winter, "*Vertical Control and Price versus Nonprice Competition*," 108 Q. J. Econ. 61 (1993).

9 This kind of situation, where one party in an economic relationship takes a costly action that benefits another party, and where it is not possible to verify the action in court, is commonly known as moral hazard. See, e.g., Paul Milgrom and John Roberts, *Economics, Organization, and Management*, at 167 (1992).

10 See Telser and Mathewson & Winter, *supra* note 8.

provision of pre-sale information about a product.[11] If a product is highly differentiated or technologically complex, consumers may require information about product attributes before making a decision about whether to purchase. A full service retailer may provide this information, possibly by employing knowledgeable salespeople or offering free product demonstrations, but it would need to set a price that is sufficiently high to cover not only the wholesale price of the good and the usual selling costs but also the provision of information to prospective customers. A discount retailer could then profitably undercut the full service retailer's price, since it would not need to bear the cost of educating customers. Consumers could inform themselves for free at the full service retailer and save money by purchasing from the discount retailer. This behavior would reduce the responsiveness of a full service retailer's demand to its investments in educating customers. Such free riding by discounters would generally undermine a retailer's incentive to provide the needed information to consumers. This underprovision of useful information would then lead to a reduction in demand for the manufacturer's product. Economic theory generally predicts a similar effect for any retail service that is vulnerable to free riding.[12]

RPM provides a mechanism for mitigating the effect of this free rider problem. By imposing a minimum retail price, RPM agreements would reduce discounters' sales by preventing them from undercutting the prices of their full service competitors. Retailers would then have a greater incentive to provide a higher level of service to their customers, since they would be more likely to internalise the benefits of such an investment. Although RPM in this case would reduce intrabrand price competition, it would increase service competition and increase interbrand competition. Its net effect on consumers' welfare would depend on how they assessed the tradeoff between these different kinds of competition.[13]

A related argument is that RPM may encourage the development of retailers that provide certification that a manufacturer's product is of high quality.[14] In many cases consumers are unable to observe the true quality of a product at the time of purchase. This uncertainty is a particular problem for a high quality manufacturer; it would increase demand for its product if it could credibly communicate its true product quality. If retailers are in a better position to assess product quality than consumers, they may find it feasible and worthwhile to develop a reputation for carrying only high quality goods. A retailer that possessed such a reputation would effectively certify that a manufacturer's product is of high quality by choosing to carry it. Establishing such a reputation would generally require costly investments, and retailers would need to earn a return to compensate them for undertaking these investments. This return would generally take the form of a higher markup over the wholesale cost of the product.

As is the case with other services that are vulnerable to free riding, a retailer that established a reputation for carrying high quality goods would be vulnerable to the appearance of discounters that could profitably undercut its prices. A consumer could first visit a retailer that had a reputation for carrying high

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11 See Kenneth Elzinga and David Mills, *The Economics of Resale Price Maintenance*, in Wayne D. Collins (ed.), *Issues in Competition Law and Policy*, vol 3, 1841.

12 But cf. Frederic M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 551-554 (3d ed. 1990). (Scherer and Ross describe limitations to the free rider argument, noting that: only presale service, including advertising and on-site demonstration, should be of concern under a free rider analysis; presale service is unnecessary when customers know what they want and why; and, free riding arguments apply mainly to high value purchases, often sold by high-quality stores enjoying a reputational advantage and an inelastic customer base. "To sum up, the free rider justification has severe limitations. Its plausibility is palpably low in many product areas where RPM is used.")

13 Observers have pointed out that the desire to provide an incentive to invest in these kinds of services can be a rationale for manufacturers to grant exclusive territories to their retailers. See, e.g., Viscusi et al., *supra* note 6 at 245. In such cases RPM arguably restricts retail competition less than exclusive territories.

14 See the discussion in Brief of *Amici Curiae* Economists, *supra* note 6, at 7, or Howard Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND Jl. Econ. 346 – 359 (1984).

quality goods in order to determine if it carried a particular product. After determining the product's quality, the consumer could then purchase from a discounter, which would free ride on the quality certification reputation of its competitor. Such behavior would reduce the incentive to invest in the development of a reputation for carrying high quality goods in the first place. As with other services, RPM could increase this incentive by preventing discounters from undercutting the retailer's price.

While some retail services are clearly vulnerable to free riding, others are not. For example, a retailer that creates a pleasant shopping environment for its customers and has extended shopping hours would likely appropriate the benefits of these investments. It might then seem that retailers would have an optimal incentive to provide these services. This conclusion is not always justified, however, because a manufacturer may prefer that its retailers invest more in such retail services in order to increase the competitiveness of its product relative to those offered by other manufacturers. From the perspective of the entire vertical chain of production and distribution, the retailers' independent incentives may lead them to invest too little in demand-enhancing services. This outcome could occur because intrabrand price competition among the retailers reduces the profit margin that they earn from selling the product, which in turn reduces the incentive to invest in services that would increase sales.[15] There is no guarantee that independent price competition among retailers will lead to optimal incentives to invest in retail services. By imposing minimum RPM, a manufacturer could potentially overcome this problem by using the combination of its wholesale price and the minimum permissible retail price to increase the margin that its retailers earn from their sales of the manufacturer's product. This higher margin would provide the retailers with a greater incentive to invest in retail services.[16]

2.2. Using RPM to Influence Retail Inventories

Several papers argue that manufacturers may also wish to adopt minimum RPM in order to influence the amount of inventory that their distributors or retailers hold.[17] This literature observes that the level of final consumer demand for a manufacturer's product may be uncertain at the time that retailers must make their inventory decisions. For example, a retailer may not be able to predict perfectly the ultimate level of consumer demand for a particular book or music CD. If the actual level of demand turns out to be lower than expected, fierce price competition may ensue as retailers scramble to liquidate their inventories. In such cases price may fall below wholesale cost and the retailers might lose money. If the actual level of demand turns out to be higher than expected, the retailers may wish that they had ordered more units. Yet the possibility of aggressive competition when demand is low could lead retailers to place conservative orders.

Because minimum RPM inhibits the price cutting that would otherwise occur when demand is low, it may lead retailers to hold larger inventories when demand for a product is uncertain. These larger inventories would then lead to lower prices and higher quantity sold when demand is high. Whether consumers benefit from the higher inventories depends on whether their expected gain from the increase in available units in the event of high demand exceeds their loss from higher prices when demand is low. While the effects of this use of RPM on consumers are uncertain and would require an empirical investigation in any particular case, this literature does demonstrate that there are circumstances where the

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15 See Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanism*, 31 Jl of Law & Econ. 265 – 297 (1988).

16 See Mathewson & Winter and Winter, *supra* note 8.

17 See Raymond Deneckere, Howard Marvel, and James Peck (1997), *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, Am. Econ. Rev, 619 – 641 (1997). See also Raymond Deneckere, Howard Marvel, and James Peck, *Demand Uncertainty, Inventories, and Resale Price Maintenance*, Quar. Jl. of Econ., 885 – 913 (1996).

use of RPM can be competitively benign even if the level of retail services does not have an important effect on the level of demand.

2.3. Possible Anti-Competitive Uses of RPM

The preceding discussion notwithstanding, there are circumstances where it is possible that firms could use RPM to harm competition. One potential concern is that colluding firms could use RPM to sustain a price-fixing cartel. Such a cartel could arise at either the retailer or the manufacturer level. As noted in the FTC and DOJ's joint *amicus* brief in *Leegin*, such cartels are themselves *per se* illegal and hence receive condemnation under the antitrust laws irrespective of the legal standard that the courts use to evaluate RPM.[18] Still, the possibility that RPM could be used to sustain such conduct in itself justifies scrutinising these agreements under the rule of reason, rather than adopting a rule of *per se* legality.

Enforcing discipline among its members is one of the main challenges that a price-fixing cartel faces.[19] Because it sets prices at supracompetitive levels, a cartel's members all have an incentive to offer secret price cuts to customers in order to steal sales from the other members. If the members are unable to detect and punish such defections, discipline is more likely to break down and the cartel is more likely to fail. Faced with these challenges, a cartel of retailers or distributors might welcome industry-wide RPM agreements that required the members to charge the collusive price. RPM might then enable the cartel to outsource enforcement of its anti-competitive agreement to upstream manufacturers. The use of RPM to sustain collusion, resulting in price increases, causes consumer harm. The Supreme Court recognised this risk in its *Leegin* decision, and emphasised that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated,"[20] and cautioned courts "to be diligent in eliminating [the] anticompetitive uses" of RPM from the market.[21]

While it is certainly possible that RPM could be used to support a cartel of retailers or distributors, there are good reasons to believe that such conduct is unlikely to be common. Most importantly, a manufacturer would generally not have an incentive to join a conspiracy that eliminated competition among its retailers, because this would lead to a decrease in the derived demand for its product. In effect, a retail cartel would exacerbate the well-known problem of double marginalisation.[22] Thus, absent substantial monopsony power that made a threat of boycott credible, it is unlikely that a group of retailers could successfully convince manufacturers to grant RPM agreements that implemented the terms of a downstream price-fixing cartel.[23] Even if it were compelled to accede to demands for such agreements, a manufacturer would have a strong incentive to foster the development of alternative channels of distribution for its product. The retailer cartel might therefore be short-lived.

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18 See Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 1 at 21 – 22.

19 See, e.g., George Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 – 61 (1964).

20 *Leegin*, 127 S. Ct. at 2717.

21 *Id.* at 2719.

22 See Viscusi et al., *supra* note 6 at 227 for a discussion of double marginalisation, also known as the problem of successive monopolies. See also the Brief for the United States, *supra* note 1 at 18.

23 Even if they could obtain such RPM agreements to implement a cartel, it is not clear how the retailers would be able to monitor the manufacturer's enforcement of the RPM if they were not in a position to directly monitor adherence to a mutual cartel agreement by observing each other's prices. It would generally be in the manufacturer's interest in this case to allow retailers to renege on their agreements in order to reduce the loss from double marginalisation.

A cartel of manufacturers would face the same problem of how to police its collusive agreement. Such a cartel could potentially use industry-wide RPM agreements as a mechanism to help enforce discipline among its members, provided that retail prices are observable.[24] If an individual manufacturer attempted to steal sales from its rivals by offering secret price discounts to its distributors, minimum RPM agreements would prevent retailers from passing on the discount to final consumers, thus limiting any increase in the cheater's sales. The main effect of such a secret discount would then be to enrich the distributor, since it would earn a higher profit margin on sales of the discounted product. By limiting the responsiveness of final demand to secret price cuts, minimum RPM would reduce each manufacturer's incentive to cheat on their cartel agreements.[25]

2.4. Conclusion

Minimum RPM would cause great concern if its main effect were to reduce competition among retailers or manufacturers by, for example, facilitating the establishment of price-fixing cartels. While RPM may injure competition in some cases, the theoretical literature demonstrates that there are many situations where manufacturers may wish to use RPM to increase sales of their products. When the level of retail services has an important effect on demand, the manufacturer's goal is not to eliminate competition among the retailers of its product, but rather to provide them with an incentive to shift their emphasis from price competition to non-price competition. The manufacturer has an incentive to change the terms of its retailers' competition if doing so strengthens the manufacturer's ability to compete with its rivals. Consumers generally benefit from this increase in interbrand competition.

3. Empirical Evidence on the Effects of RPM

Theory alone may not be sufficient to resolve whether minimum RPM is beneficial or harmful to competition in a particular case. Given this uncertainty, careful empirical research on the effects of RPM is needed to help guide the competition law enforcement agencies and the courts as they evaluate this conduct in the future. While some empirical work exists, the fact that minimum RPM agreements have long been *per se* illegal has necessarily limited the amount of empirical research that could be done. Nevertheless, several relevant findings have emerged from the empirical literature that has appeared to date.

The available empirical evidence does not support a conclusion that RPM is widely used to support the operation of price-fixing cartels. Ippolito[26] analysed all litigated U.S. RPM cases between 1976 and 1982 and concluded that the collusion theory could potentially explain the adoption of RPM in only a small fraction of these cases. Only 13.1 percent of the cases in this sample included any allegation of horizontal collusion.[27] A study of the FTC's RPM enforcement efforts between 1965 and 1982 found that they typically involved very competitive retail markets where widespread collusion was not plausible.[28]

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24 See Ippolito, *supra* note 3 at 281. It is important to recognise that, while industry-wide RPM agreements might be consistent with the existence of a manufacturer cartel, they would also be consistent with a conclusion that RPM is generally efficient in the industry in question.

25 The cheating cartel member might enjoy some increase in its sales even if RPM agreements were in force, if retailers had the ability and incentive to use non-price means to shift sales to the relatively more profitable product.

26 See Ippolito, *supra* note 3.

27 *Id.* at 282.

28 Thomas Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economics, Federal Trade Commission (1983).

Ippolito's study also considers whether there is evidence to support the pro-competitive retail service theories for why firms adopt RPM. These theories are difficult to test directly. Nevertheless, this study sheds indirect light on the question by classifying the different products at issue in the cases in the sample into different categories, such as complex products, fashion goods, goods with unobservable quality, and simple products. It is plausible that the retail service theories are more likely to apply to cases that involved complex products, "for which quality and use information were nontrivial issues prior to purchase,"[29] than for simple goods. This analysis concludes that the retail service theories could explain a large fraction of the cases in the sample.

In another study, Ippolito and Overstreet[30] take a different tack by closely examining the record in one individual case for evidence for and against different possible theories for why firms might adopt RPM. This study examines the evidence gathered during the FTC's successful case against Corning Glass Works over its long-standing use of RPM. Subsequent to the court upholding the FTC's decision, Corning abandoned its RPM program. Based on their review of the record in this case, Ippolito and Overstreet conclude that the evidence is inconsistent with a conclusion that RPM supported collusion at either the retailer or distributor level.[31] Furthermore, they conclude that the evidence does not support a theory that Corning used RPM in order to support a manufacturer cartel in any plausible product market.[32] Based on an analysis of Corning's and its competitors' sales and promotional spending before and after the decision in the FTC case, Ippolito and Overstreet conclude that the evidence provides some support for the service theories.[33] For example, their analysis demonstrates that Corning's sales declined in the years following the FTC case, while its competitors' sales generally did not. This pattern of effects is consistent with the conclusion that Corning's RPM enabled it to compete more effectively against its rivals.

While the available empirical evidence regarding the effects of RPM is limited, it is consistent with the conclusion that it is appropriate to analyse RPM under the rule of reason. If explicit RPM agreements become more common in coming years, there should be opportunities to develop additional empirical evidence on the effects of this practice.

4. Implications for Enforcement

In the wake of *Leegin*, the U.S. competition enforcement agencies and the courts may more frequently need to evaluate the competitive effects of individual RPM agreements. In fact, the FTC has already considered a request by Nine West Footwear Corporation to release it from an earlier consent agreement that settled a case dealing with Nine West's use of RPM.[34] Relying on *Leegin*, the FTC granted Nine West's petition on the basis that its potential use of RPM agreements was not deemed to harm consumers at this time. In particular, the FTC reviewed the three factors cited by the Court as particularly relevant to the application of the rule of reason to RPM agreements.[35] These factors are: the number of competitors in the market that have adopted RPM agreements (The Court notes that interbrand competition would divert consumers to lower priced substitutes, thus limiting the likelihood that resale price maintenance could

29 Ippolito, *supra* note 3 at 283.

30 Ippolito and Overstreet, *supra* note 3.

31 *Id*. at 300.

32 *Id.* at 301.

33 *Id.* at 305 – 306.

34 See *In the Matter of Nine West Group, Inc*., Docket No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000.

35 *Leegin*, 127 S. Ct. at 2719-20.

facilitate a manufacturing or retail cartel in markets in which only few competitors employ RPM.[36]); whether the RPM originated with the manufacturer or the retailer (The Court observed that because a manufacturer generally has incentives to promote efficient distribution that are aligned with the interests of consumers, harm to competition is more likely if RPM agreements are brought about as a result of retailer pressure rather than on the manufacturer's own initiative.); and, whether the manufacturer or retailer party to the RPM agreement has market power ("If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers . . . [a]nd if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets."[37]). The FTC concluded that Nine West demonstrated that it did not "run afoul of the *Leegin* factors," due, *inter alia*, to its "modest market share."[38] The Commission concluded that Nine West's use of RPM at this time does not pose any potential competitive concerns.

The FTC's order states that "the Court's elaboration of these relevant factors provides an approach for identifying when RPM might be subjected to closer analytical scrutiny,"[39] and in particular, whether RPM could be used to support either a manufacturer or retail cartel. Accordingly, an investigation into a particular instance of RPM should begin by examining whether there is any reason to believe that such a cartel is possible. One key question is whether RPM is widespread in the industry in question. If few manufacturers have RPM agreements in place with their retailers, or if few retailers have RPM agreements in place with a given manufacturer, then it is not plausible that RPM is being used to help enforce a cartel. Of course, a finding that RPM is widespread in a particular industry would be only a necessary, and not a sufficient condition to conclude that a cartel might exist. Widespread use of RPM is equally consistent with a hypothesis that its efficiencies are widespread, so further evidence would be needed to determine whether collusion was likely.

If the evidence does not point to a manufacturer cartel, possibly because RPM is not widespread among the different manufacturers, it would be appropriate to evaluate whether the manufacturer in question possesses meaningful market power in the relevant product market. If it does not, it is not clear how retailers could use RPM to enforce a cartel agreement; raising the retail price of the one manufacturer's product would just shift sales to the other manufacturers' products. If those products are not also covered by RPM agreements, or if they are sold in other channels of distribution, then the retail cartel might not be able to earn supracompetitive profits.

In the absence of market power, a manufacturer selling through competitive retailers would generally not be able to use RPM unilaterally to harm competition. Although a manufacturer could use RPM to shift the terms of competition among its retailers away from intrabrand price competition and towards competition on non-price dimensions, the presence of robust competition from other manufacturers would prevent consumers from suffering harm from the change in the nature of competition. If price increased by more than the value of the additional retail services, consumers could just switch to one of the alternative products. If a manufacturer selling through competitive retailers faces vigorous competition from rivals, its decision to adopt RPM likely reflects an effort to improve its ability to compete. The existence of market power is therefore a useful screen to determine whether a more thorough consideration of the actual effects of RPM on consumers is warranted. In fact, the FTC cites the lack of significant

36 *Id.* at 2719.

37 *Id.* at 2720.

38 *In the Matter of Nine West Group, Inc.*, Docket No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000 at 15, May 6, 2008.

39 *Id.* at 14.

market power as one reason that it was appropriate to release Nine West from the consent agreement it entered into in 2000, following the FTC's investigation of Nine West's use of RPM.[40]

While the presence of market power is a necessary condition for RPM to harm consumers, it is important to recognise that it is not a sufficient precondition in and of itself. Indeed, consumers could benefit from the effects of minimum RPM agreements even if the upstream manufacturer is a monopoly.[41] Accordingly, it would be inappropriate to conclude merely from a finding that the manufacturer possessed market power that its use of RPM is likely to be harmful to consumers. If products are highly differentiated or technologically complex, it would not be unusual for manufacturers to possess significant market power, and this is exactly the kind of setting where RPM may be most useful to encourage retailers to offer valuable services to consumers.[42]

If available, reliable evidence regarding the effect of RPM on sales of the product in question would be directly relevant to an assessment of its competitive effect. If RPM enables a manufacturer to compete more effectively against its rivals, it should gain sales at their expense. Even if the manufacturer is a monopolist, it may still wish to use RPM to encourage retailers to promote its product or hold greater inventories, thus expanding output and benefiting consumers. A finding that RPM caused sales of the manufacturer's product to increase would also be strong evidence against the hypothesis that its purpose was to sustain a cartel among either retailers or manufacturers.

Critics of RPM generally express a concern that it will lead to higher prices for consumers.[43] Therefore, it might seem that a direct examination of the effect of RPM on retail prices would be useful and important to help to discern whether this is indeed the case, and if so, in which circumstances. The pro-competitive theories about why firms may adopt RPM rest on the manufacturer's desire to influence retailers' behavior by increasing their profit margin on sales of the product in question. These theories make no prediction about whether RPM leads to higher or lower prices.[44] The manufacturer could increase this margin either by imposing a higher retail price through RPM or by using RPM to maintain the current price (or even lower it) and then reducing its wholesale price. A manufacturer might choose to lower price if the additional demand it expected from enhanced retail services enabled it to exploit economies of scale more fully. If an increase in retailer services is associated with an increase in the price elasticity of demand, RPM can lead to lower retail prices. Of course, a manufacturer might also choose both to increase the retail price and reduce the wholesale price. However, a careful empirical analysis would be needed to establish that RPM had this effect in practice.

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40 *Id.* at 15.

41 In Deneckere et al., *supra* note 17, a monopoly upstream manufacturer adopts RPM in order to influence its retailers' inventory choices, and they show that there are conditions under which this RPM benefits consumers. Furthermore, the retail service theories do not generally require that the manufacturer faces competition in order for RPM to benefit consumers.

42 As noted above, Ippolito, *supra* note 3 at 283, found that RPM was widely used with the sale of such products.

43 Writing in dissent in *Leegin*, *supra* note 1, Justice Breyer expresses exactly this concern.

44 Whether minimum RPM leads to higher or lower retail prices depends on a range of factors, including the elasticity of demand with respect to price and service, the effect of additional service on the price elasticity, the presence or absence of scale economies, the nature of upstream and downstream rivalry, and the nature of supply terms (e.g., linear or nonlinear contracts). For a discussion of one set of conditions in which RPM reduces price, see Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. Polit. Econ. 1074 (1986) and Howard P. Marvel & Stephen McCafferty, *The Welfare Effect of Resale Price Maintenance*, 28 J.L. & Econ, 1985.

Even if the available evidence established that RPM led to a higher retail price for a product, it would still be inappropriate to conclude on that basis that consumers had been harmed. If the higher retail price created an incentive for retailers to provide valuable services or higher quality, consumers could be better off, and evidence that sales had increased despite the price increase would suggest that they are. In general, evidence of RPM's effect on quantity is far more probative than price evidence for establishing its effect on consumer welfare. While it might still be useful to investigate directly whether service competition among retailers is significant, it is important to recognise that knowing only how RPM affects final retail prices provides little or no information about its effect on consumer welfare.

Third, any evaluation of the effect of RPM on price should recognise that, if RPM is not an option, a manufacturer may choose to adopt an alternative, less-preferred strategy to accomplish its goals. For example, it may choose to establish exclusive territories or to vertically integrate. Any conclusion about the effect of RPM on retail prices should be based on the appropriate counterfactual comparison. Eliminating RPM may not lead to an increase in intrabrand retail competition, and it may harm interbrand competition.

5. Conclusion

As we concluded in our *amicus* brief in *Leegin*, "[t]here is no sound basis for treating RPM differently from other vertical arrangements."[45] The shift to a rule of reason treatment has the potential to create substantial benefits for consumers, and there is no reason to believe that competition law enforcers and courts will not be able to protect against anticompetitive abuses. While it is unlikely that *Leegin* has ended the debate over RPM, it may spark a new wave of studies that will allow the conversation in the future to be even better informed.

[45] Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 1.

EUROPEAN COMMISSION

Introduction

In EC law resale price maintenance (hereinafter *"RPM"*) refers to agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum price or a fixed or minimum price level to be observed by the buyer. In the case of contractual provisions that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means such as, for instance, fixing the distribution margin or the maximum level of discount the distributor can grant from a prescribed price level[1].

This submission explains the current treatment of RPM in the EU (I) and the *rationale* for such treatment (II). Finally, some leading cases on RPM are also briefly discussed (III).

1. The Current Treatment of RPM in the EU

1.1 RPM in the framework of the Commission's effects based approach

The current EU block exemption regulation applicable to vertical agreements (hereinafter *"the Regulation"*)[2] forms a package with the guidelines on vertical restraints (hereinafter *"the Guidelines"*). This package was the first of a new generation of block exemption regulations and guidelines inspired by a more economic and effects-based approach. The Regulation and the Guidelines are based on the idea that for a proper assessment of a vertical agreement it is necessary to analyse its likely effects on the market, both negative and positive. In general, an effects-based approach implies that likely effects have to be assessed both for the application of Article 81(1) EC, where the Commission must show that the agreement in question has actual or likely negative effects, and for the application of Article 81(3) EC, where the firm must show that the agreement causes actual or likely positive effects, which then have to be weighed against the negative effects.

In addition to such an individual effects-based assessment of a specific agreement there is the particular European technique of the block exemption. For vertical agreements the Regulation provides for a "safe harbour" (block exemption) on condition that the market share of the supplier does not exceed 30%. Below this threshold it is presumed that vertical agreements will either not have negative effects or, if they do, that the net balance will be positive. However, the Commission can withdraw the benefit of the block exemption regulation for the future if the negative effects resulting from a particular agreement are not outweighed by its positive effects, but below the market share threshold such a negative balance is considered unlikely and withdrawal decisions are thus rarely taken in practice[3].

The benefit of the block exemption does not, however, extend to agreements containing a so called *"hardcore restriction"*, and RPM is one of the hardcore restrictions listed in Article 4 of the Regulation. To be precise, an agreement as a whole cannot benefit from the block exemption if it requires the buyer to

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1 For more examples of practices treated as RPM by the Commission see Commission Notice Guidelines on Vertical Restraints [2000] OJ C 291, 1–44, point 47

2 Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336, 21–25.

3 See the Guidelines Section IV "Withdrawal of the block exemption and disapplication of the block exemption regulation", points 71-87

fix, or prevents the buyer from reducing, its resale price. It can, however, benefit from the block exemption where a maximum resale price is imposed on the buyer or where a particular resale price is only recommended, provided that the maximum or recommended price does not amount to a fixed price as a result of pressure from or incentives provided by the supplier or buyer[4].

1.2 Consequences of including RPM in an agreement

As referred to above, the direct consequence of including RPM in an agreement is that the agreement cannot benefit from the block exemption. In addition, the Commission will presume that the agreement as a whole will have actual or likely negative effects. It is also considered that RPM is unlikely to have positive effects or that, where efficiencies are likely to result, these will not be passed on to consumers and/or that RPM is not indispensable for creating these efficiencies. In other words, in addition to the presumption of negative effects, there is also a presumption that the agreement will not fulfil the conditions of Article 81(3) EC[5]. Moreover, if the agreement does not fulfil the conditions of Article 81(3) EC, it is in principle void and unenforceable under Article 81(2) EC[6]. Lastly, there is a considerable chance that the Commission will impose a fine.[7]

However, the above does not mean that there is a *"per se"* prohibition of RPM. Article 81(3) EC can in principle apply to an agreement containing RPM. This means that it is always possible for the firm in question to come forward with substantiated claims that the RPM will bring about efficiencies. The moment that the firm brings forward convincing evidence of efficiencies, the Commission, in order to apply the hardcore rule, will be forced not only to investigate the claimed efficiencies, but also to show the likely or actual negative effects. If the efficiencies outweigh the negative effects, and the other conditions of Article 81(3), such as the indispensability test, are also fulfilled, the agreement is not prohibited[8].

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4 The text of Art 4 of the BER concerning RPM reads: *"The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties . . ."*

5 See the Guidelines, point 46

6 See ECJ, 11/09/2008, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*, case C-279/06; points 75 and 78-79. The ECJ has held that an RPM clause cannot be block exempted and individual exemption under article 81(3) EC is "unlikely". It was for the national court to decide whether the conditions for an individual exemption are fulfilled. If those conditions are not fulfilled, the agreement is automatically void under article 81(2) EC. Furthermore, it is a matter of national law of the EU Member States to ascertain whether the RPM clause can be amended by unilateral authorisation of the supplier and whether a contract which is automatically void may become valid following an amendment of that contractual clause which has the effect of bringing that clause into line with Article 81(1) EC. Moreover, the ECJ has stated that the automatic nullity of an agreement applies only to those parts of the agreement which are affected by the prohibition laid down in Article 81(1) EC or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. If those parts are severable from the agreement, it is not a matter of Community law to decide on the consequences of the nullity for the remaining parts of the agreement.

7 See Section III of this submission dealing with the leading cases on RPM

8 See the Communication from the Commission Notice—Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C 101, 97–118, points 17–27 and 40–47

2. Rationale for current treatment of RPM in the EU

The EU hardcore approach is based on two rebuttable presumptions, as described before, which, at the time the Regulation was adopted in 1999, were considered to ensure an efficient enforcement policy towards RPM under Article 81 EC. This approach can be justified to the extent that it was thought that - on the balance of probabilities - RPM leads very often to negative effects in the market.

2.1 Rationale for presumption of negative effects under Article 81(1) EC

RPM leads or can lead in general to the following negative effects: prevention of a direct price decrease (1); collusion between suppliers and/or buyers (2); lower pressure on the margin of the manufacturer (3).

First, RPM generally leads to a reduction in intra brand price competition[9]. The immediate effect of RPM will be that for a particular brand all or certain distributors are prevented from lowering their sales price. In other words, the direct effect of RPM is a price increase. If this were not the case, the agreement would be ineffective. Moreover, by preventing price competition between different distributors, RPM may hinder new retailers from entering the market with low prices. It may for instance hinder the entry of distribution formats based on low prices, such as price discounters. This may reduce dynamism and innovation at the distribution level.

Secondly, RPM generally leads also to an increased transparency on prices[10]. Therefore, RPM may facilitate collusion between suppliers by enhancing price transparency in the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. RPM may also undermine the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales. It will in general be necessary for the plausibility of such a scenario of collusion that the suppliers form a tight oligopoly and that RPM is applied by all or many of them.

By eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, at the distribution level. Strong or well-organised distributors may be able to force/convince one or more suppliers to fix their resale price and thereby help them stabilise a collusive equilibrium. This loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers.

Moreover, it is recognised that a manufacturer will normally have an interest in ensuring that its distributors compete fiercely, thereby lowering their costs and margins and increasing the sales of the manufacturer. However, the manufacturer generally prefers this competition not to be so fierce that it also starts to put pressure on its own margins. In other words, fierce downstream competition may mean that important buyers will demand lower purchase prices. Such pressure may be more effective where the manufacturer has a commitment problem, (i.e. where the supplier has an interest in lowering the price charged to subsequent distributors). In such a situation, the manufacturer may prefer to agree to RPM, so as to reduce the pressure on its own margin and help it to commit to not lowering the price for subsequent distributors.

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9 See the Guidelines, point 112

10 See the Guidelines, point 112

2.2 Rationale for unlikelihood of exemption under Article 81(3) EC

It is often argued that RPM can lead to the following positive effects: RPM allows distributors to increase promotion (1) and helps entry into new markets (2).

The first efficiency argument often mentioned in favour of RPM is based on the idea that, in a market with competing distributors, a "free rider" problem may reduce the incentive of distributors to promote the manufacturer's product. Each distributor fears that its promotion efforts will not just benefit its own sales, but also the sales of its rivals. As a result, the distributors collectively invest at a sub-optimal level in the promotion of the manufacturer's brand. It is argued that RPM could solve the problem by ensuring the distributors a better margin and by taking away the risk of price cutting by rivals, thereby enabling them to make sufficient funds available for promotion.

RPM may indeed provide the distributors with the necessary extra profits to invest in promotion, as reflected by the resulting higher resale price, but it does not provide the incentive to actually spend this extra profit on promotion. RPM does not take away the underlying "free rider" problem. Instead of using the extra margin for promotion, a distributor will in practice prefer to invest in other means of attracting customers such as offering lower-priced after-sales services or lowered prices achieved through bundling. Since RPM may not lead to extra promotion, or will do so only to a limited extent, it is not an efficient instrument for obtaining the desired efficiency. Other vertical restraints, such as providing exclusive territories, will often be much better equipped to solve the free riding problem. If, for instance, exclusive distribution is combined with imposing a maximum resale price, the efficiencies may be obtained without leading to unnecessary price increases[11].

The second efficiency argument often mentioned in favour of RPM is that it may help a manufacturer to introduce a new brand or enter a new market. Where the introduction of a brand requires specific investments by the first distributor to develop the market and make the brand known, other distributors which start distributing this brand later may free ride on the initial investments of the first distributor. In that context, it is argued that by introducing a price floor, RPM may prevent later distributors from decreasing their price and so make it possible for the first distributor to recover its costs related to the introduction of specific investments.

This argument could indeed justify deviating from the hardcore approach for the launching of a new brand or for entry into a new market. This rationale has been recognised in the Guidelines on Vertical Restraints[12] and also in the Block Exemption Regulation for Technology Transfer Agreements for entry into a new market [13], where certain restrictions on passive sales (in this case sales to customers located in the new exclusive territory by distributors located in other territories), which are normally considered a hardcore restriction, fall within a "safe harbour" for the first two years after entry into the market.

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11 As a side remark, it can be questioned whether the extra promotion would be in the overall interest of consumers. Even in the case of a genuine "free rider" problem, it may be only the marginal (new) consumers which benefit from the extra promotion, but not the possibly larger group of infra-marginal (experienced) consumers which already know what they prefer, which do not benefit from the extra promotion and for which the extra outlays and the RPM only result in a price increase. However, this point is not exclusively linked to RPM but holds also for other vertical restraints.

12 See the Guidelines on Vertical Restraints, Section 1.3 on the "General rules for the evaluation of vertical restraints", point 119, and in particular 10) thereof

13 Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L 123, 11–17, in particular Art 4(2)(b)(ii). See also Commission Notice—Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C 101, 2–42, in particular point 101

However, this is not a justification to allow hardcore restrictions for a long period, or more in general for existing markets and for established brands. Lastly, it can be questioned whether RPM is an efficient instrument for addressing this specific potential "free rider" problem. Instead of preventing price competition between all distributors, it may be more beneficial for the consumers, if the manufacturer rewards the investments made by the first distributor through a lump sum payment or by selling the product temporarily at a lower price to this distributor than to the other distributors. In this way, entry can be stimulated without limiting price competition at the distribution level.

3. Leading cases on RPM

Since the entry into force of the Regulation in 1999 the Commission has adopted 5 decisions on RPM. In all of these cases it was decided that RPM clauses could not benefit from the block exemption and/or the individual exemption under Article 81(3) EC.

In 2000, the Commission adopted a decision concluding that JC Bamford (JCB) violated Article 81 EC by entering into restrictive distribution agreements for construction and earthmoving equipment[14]. The restrictions consisted of limiting cross border parallel trade and fixing minimum resale prices at the wholesale level. JCB either occasionally set retail prices of its distributors or agreed with its distributors on the principle of uniform discounts granted to their retailers. The Commission considered the JCB's infringements as "very serious" and imposed a fine of 39,6 MEUR. In its ruling the Court of First Instance (hereinafter *"the CFI"*) annulled in 2004 the Commission's findings in relation to RPM, and partially those in relation to restrictions on parallel trade. The CFI ruled that the retail sale price scales, although strongly indicative, were none the less not binding. This is because JCB's efforts to influence dealers in their fixing of resale prices involved a too low level of coercion[15]. JCB has appealed the CFI judgment, but the Commission has not cross appealed the findings of the CFI in relation to RPM[16].

In 2000, the Commission adopted a decision concluding that the French company Editions Nathan violated Article 81 EC by entering into restrictive distribution agreements concerning educational material for young children in several Member States[17]. Nathan Editions prevented its exclusive distributors located in Italy, Sweden and Belgium from marketing Nathan products outside their own exclusive territories (more particularly in France) and restricted their freedom to set prices by preventing those distributors from granting larger discounts than those granted by Nathan Editions to its distributors in France. Given that the implementation of the infringement was not systematic, it was considered to be only as "minor". A 60000 EUR fine has been imposed on Nathan Editions.

In 2001, the Commission adopted a decision concluding that Volkswagen violated Article 81 EC by sending several circular letters to its German dealers, urging the dealers not to sell the new "Passat" car model at a price considerably below the recommended resale price and/or to limit or not to grant discounts to customers[18]. The infringement was considered as "serious" and not as "very serious" since some dealers did not follow the instructions of Volkswagen. The Commission imposed a 30,95 MEUR fine on Volkswagen. Subsequently, the Commission's decision has been annulled by the CFI on the grounds that it

14 Case COMP.F.1/35.918 *JCB*, 21/12/2000 (OJ L69/01; 12/03/02)

15 CFI, 13/01/2004, *JCB Service v. Commission*, Case T-67/01, points 121-133

16 ECJ, 21/09/2006, JCB Services v. Commission, Case C-167/04 P

17 Case COMP.F.1/36.516 *Nathan-Bricolux*, 05/07/2000 (OJ L54/01; 23/02/2001)

18 Case COMP/F-2/36.693 *Volkswagen*, 26/06/2001 (OJ L262/14, 02/10/2001)

did not establish the existence of an explicit or tacit acquiescence by the dealers of the supplier's policy, in order to prove an antitrust agreement[19].

In 2000, B&W Loudspeakers notified[20] a selective distribution network for its products requesting clearance under Article 81 EC[21]. The Commission found that the notified agreements contained several hardcore restrictions of competition, namely RPM disguised as a prohibition on "bait pricing"[22]; restrictions on cross supplies between authorised dealers and a prohibition on sales over the Internet. The Commission issued a comfort letter in 2002 only when the company agreed to delete those hardcore provisions, including the one on RPM.

In 2003 the Commission adopted a decision concluding that Yamaha violated Article 81 EC by entering into distribution agreements aimed at partitioning the markets for the provision of traditional and electronic musical instruments and equipment in Europe[23]. The restrictions implemented by Yamaha consisted of preventing parallel imports and fixing minimum resale prices for some of those distributors who engaged in parallel imports. The territorial and price restrictions had the common denominator of insulating national markets and ensuring different price levels within the EU. However, those restrictions were included in a limited number of agreements and were sometimes applied to only a limited number of dealers. Moreover, it appeared that those restrictions had not been implemented in full and the Commission had no evidence of their substantial effects. Therefore, the infringement committed by Yamaha was considered as "serious" and not as "very serious". A 2.56 MEUR fine was imposed on Yamaha.

The decisional practice of the Commission is supported by the jurisprudence of the European courts even though the CFI annulled in two cases (i.e. JCB and Volkswagen) the Commission's findings in relation to RPM. In those cases the Commission was sanctioned for not adducing sufficient evidence to show an RPM agreement rather than for unlawful competitive assessment of RPM.

As far as the competitive assessment is concerned, it is well established case law that RPM amounts to a restriction of competition by object (i.e. a hardcore restriction)[24]. Furthermore, in two recent preliminary rulings under Article 234 EC the ECJ has stated that the application of the block exemption is precluded if the contract concluded between two undertakings (in these cases an exclusive purchasing agreement for petroleum products between a service-station operator and an oil company) contains a clause providing for the fixing of the retail price by the supplier[25].

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19 CFI, 03/12/2003, Volkswagen AG v. Commission, Case T-208/01 confirmed by ECJ, 13/07/2006, Commission v. Volkswagen AG, Case C-74/04 P

20 The first Regulation implementing articles 81 and 82 of the Treaty (Regulation 17/62 OJ [1962] 13/204) created a notification and authorisation system whereby undertakings had to notify agreements to the Commission in order to benefit from the exemption under Article 81(3) EC. The second Regulation implementing Articles 81 and 82 of the EC Treaty (Regulation 1/2003 OJ [2003] L1/1) abolished this system in 2004.

21 Case IV/C-3/37.709 *B&W Loudspeakers Ltd,* 24/06/2002 (press release); IP/00/1418

22 "Bait pricing" relates to the practice of offering certain products at a very attractive price with the aim of attracting customers to the sales outlet

23 COMP/37.975 *PO/Yamaha*, 16/07/2003, not published

24 See ECJ, 03/07/1986, *SA Binon & Cie v. SA Agence et Messagerie de la presse*, Case 243/83, point 44

25 See ECJ, 11/09/2008, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*, quoted in footnote 5 above, point 64 and ECJ, 14/12/2006, *Confederation Espanola de Empresarios de Estaciones de Sevicio v Compañía Española de Petróleos SA,* Case C-217/05, point 64

4. Conclusion

Current case law and practice in the EU towards RPM can only be understood from the perspective of application of the hardcore approach based on two rebuttable presumptions (i.e. of likely negative effects of RPM and unlikelihood of individual exemption). The current treatment of RPM in the EU can be explained by the assumption that the efficiency arguments mentioned in support of RPM are not very strong and that RPM is not an efficient instrument for bringing about efficiencies. However, this was the view of the Commission at the time it adopted the Regulation and Guidelines and does not preclude that further analysis may be needed to achieve again a balanced opinion, useful for policy formulation towards RPM. The review of the Regulation and Guidelines, necessitated by the expiry of the Regulation on 31 May 2010, has recently started. It will be an open process, taking into account new developments of the case law, the enforcement practice and economic theory and will offer ample opportunity for all parties to comment on the current rules and practice, in general and in relation to RPM.

ROMANIA

Resale price maintenance ("RPM") refers to agreements or terms of supply that control price in such a way that the retailer agrees to charge the consumer a price at whatever level the manufacturer whishes or at least not to charge less than that. It is widely known as one kind of intra-brand restraints or vertical price-fixing.

The Romanian legislation applicable to RPM is based mainly on the same principles as those applicable in the EC. In contrast to the non-price vertical restraints that may be allowed and therefore subject to a rule of reason, RPM (minimum or fixed resale price maintenance) is prohibited "per se" in Romanian legislation.

Thus, art. 5(1) a) of the Competition Law (hereinafter called "law") provides that "any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at concertedly fixing, directly or indirectly, the sale or purchase prices, tariffs, rebates, mark-ups, as well as any other terms of trading". According to art.8 (2) of the Law, this prohibition is applicable irrespective of the market share and the turnover of the undertakings involved.

Since RPM is prohibited "per se", its competitive effects have never been weighted against its anticompetitive effects. *Therefore, knowledge about how markets would function if it was permitted is not available under Romanian jurisdiction.* However, taking into consideration that this roundtable will focus to a large extent the debates to the controversy over whether it is more appropriate to treat RPM as a per se offence or more lenient, under the rule of reason, the final aim of this paper is to put forward our own opinion in this matter.

However, the Romanian legislation is more tolerant in respect to other two types of arrangements that may appear in practice:

Maximum resale price maintenance occurs where a dealer agrees not to charge more than the price set by the manufacturer.

Recommended prices – i.e. retail prices at which the manufacturer recommends products to be sold – are allowed by the Romanian competition law, provided they are clearly stated to be nonbinding and no attempt is made by the manufacturer or retailer to treat them as minimum prices. However, recommended prices may sometimes be condemned if they are generally taken as fixed and therefore a mere substitute for RPM.

Thus, art. 5(a) of the Regulation on the enforcement of art.5 (2) of the Law for vertical agreements (the transposition of EC Regulation no.2790/1999) grants the supplier "the possibility to recommend the sale price provided that the respective price would not represent a fixed or a minimum sale price". Moreover, the Guidelines on the application of art.5 of law to the vertical agreements clarify that *"the list comprising the recommended or maximum prices submitted by the supplier to the buyer is not conducive by itself to the maintenance of the resale price"*. The same Guidelines provide that the obligation of the reseller to observe the maximum resale price is exempted by category provided that the market share of the supplier does not exceed the threshold of 30%.

To brief, while minimum resale price maintenance is prohibited "per se", recommended resale prices as well as maximum resale prices may be acceptable provided that the supplier in all written

communications explicitly denotes prices as being recommended. However, Romanian case law as concerns Maximum Resale prices reveals that maximum resale prices may convert frequently in prohibited RPM, as we will describe in more details below.

1. Motives for RPM. For what reasons do suppliers engage in RPM?

It might seem, at a first glance, that the manufacturer would want price competition among its retailers to keep markups to a minimum and so promote demand for its product. However, it turns out that there are several reasons why a manufacturer might try to maintain resale prices.

We shall focus below only on a portion of these reasons.

The free-rider argument is the cornerstone of the pro-competitive explanations offered by the suppliers. The free rider problem exists when retailers are in a position to offer point-of-sale services that increase total sales of the product. The provision of these services has two effects. One effect is to increase the retail price of the product, because retailers must recover the additional cost of providing the services. The second effect is to stimulate additional demand for the product. From the manufacturer's standpoint, the provision of these services is desirable if the cost of providing the services is offset by consumers' willingness to pay for the product, in which case the overall effect of providing the services is to increase demand for the product despite the increase in its price.

Another reason why a manufacturer might whish to establish retail price floors may consist in preventing any retailer from taking sales away from another by charging a lower price. With retail price competition for the product eliminated, once prices settle to the minimum level specified in the RPM agreement, retailers compete with each other for sales by offering valuable retail service to consumers. By redirecting retailers' competitive activities from prices to retail service, RPM limits *intrabrand* competition in prices among retailers but instead can have the effect of enhancing *intrabrand* competition along other dimensions of the competition among retailers and *interbrand* competition among manufacturers and retailers alike for sales of different brands (retail service affects consumers' choices among competing brands).

A manufacturer may want to engage in RPM in order to keep retail prices from falling below some floor during periods of unexpected slack demand. This may occur when retailers must order inventories of a manufacturer's product periodically before demand for the product is known. In some instances, consumer welfare would be higher with RPM performing this task even though RPM may prevent the liquidation of inventories. Of course in other circumstances consumer welfare may not increase with this use of RPM even though the manufacturer's profit does.

2. Arguments against the prevalence of pros in respect to RPM

The problem with the free-rider explanation of the RPM is that it is susceptible to the non-price competition caveat. Retailers' *incentive* to free ride on other retailers' efforts is not curtailed by the introduction of RPM. There is nothing to prevent them from using the payment offered through RPM to finance other forms of non-price competition that will lure consumers away from the service dealers.

On the other hand, RPM may artificially increase prices on most commodities that do not require any cost incurring pre-sales services, might hinder product innovation circles and prevent the public from access to high-quality, low price products. Moreover, in contrast to the non-price vertical restraints, RPM is more likely to be used to fix prices at either stage in an industry provided that the market of supplies is a concentrated market. Where RPM facilitates the organisation and operation of a cartel, its use is and should continue to be unlawful under the antitrust laws.

3. Per se or rule of reason?

3.1 Enforcement of the prohibition

Yet, RCC considered RPM issue in conjunction with other types of vertical restraints, especially exclusive distribution systems. Two cases shall be discussed in more detail below.

3.2 RPM – chewing gum market

In this case, Wrigley's request for individual exemption for its 15 distribution agreements from the provisions of art.5(1) of the Competition Law (art.81(1) from EC Treaty), was denied, since the exemption criteria provided by law were not fulfilled. According to the notification, the market share held by Wrigley exceeded 30% of the chewing gum market (Since 2001 to date, Wrigley has been the most important chewing gum supplier, its market share exceeding 90 %). Accordingly, the contracts could not have been exempted by category, according to the provisions of the Regulation on the enforcement of Art.5 (2) of the Law for vertical agreements.

Moreover, these contracts were actually infringing the law. Originally, the contracts included the following clause: Art. 3: "The price at which the supplier delivers the products to the distributor shall be the price recommended in Annex 2. The distributor is bound to sell Wrigley products at a price within the limits recommended and accepted by the Supplier, foreseen in Annex 2". This clause was modified later on but before the application for the individual exemption forwarded by Wrigley and its distributors to the Romanian Competition Council, art. 3 of the contracts stating that: the price from Annex 2 is the maximum recommended price to be used for resale by the distributor to its customers. Also, the contracts comprised a non-competition clause.

The investigation revealed that Wrigley and its distributors concertedly fixed the resale prices for Wrigley products. This was accomplished directly, in a contractual clause regarding prices, and indirectly by fixing the level of discounts granted on the market as reflected in the very strict Sales Policy, rigorously enforced by Wrigley. Also, the incumbents were dividing the markets and allocating customers. This led to a complete elimination of intra-brand competition and an artificially increased price for the end-user.

The RCC Plenum found that the incumbents infringed art.5 (1) let.a) and c) of the Competition Law, and sanctioned them with a fine of approx. 5.5 million EURO (20 million RON). The Competition Council imposed on Wrigley the interdiction to recommend the resale price to its distributors or any other commercial partner, even if the recommendation regarded the maximum level of the resale price.

Some possible lessons to be learnt from this case are that recommended prices may under certain circumstances be used a substitute for binding resale prices, at least if the resellers are dependent upon the supplier.

3.3 RPM – personal care market

In the CPR Case**,** the notified contracts for individual exemption did not observe also the exemption criteria provided by art.5 alin.(2) of the Romania competition law but favourised the infringement of the provisions of art.5 alin.(1), this leading to the refuse of the individual exemption for the contracts concluded by the CPR supplier and its distributors.

CPR was periodically issuing lists of recommended maximum prices to be used by the distributors when selling CPR's products, according to a right conferred by the contract. The investigation in this case revealed that the recommended maximum resale prices were, in fact, applied by all distributors as uniform and fixed prices. This finding, associated with the dominant position of the CPR supplier (the market is an

asymmetric oligopoly) and the fact that CPR's competitors also recommended resale price led to the conclusion that there was a great likelihood of collusion between suppliers on the Romanian market for personal care.

The infringement of the provisions of article 5 alin (1) let a) of the Competition Law consisted in:

- indirect fixing of the minimum sale price, on the basis of the vertical agreements between the CPR supplier and the other undertakings;

- horizontal agreements among CPR products' distributors, consisting in the indirect fixing of the minimum sale price;

The undertakings parties to this agreement were sanctioned with fine for contravention, the total fines amounting to RON 15 million.

CPR case confirms that vertical price fixing targeting the elimination of the intra-brand competition between distributors may create incentives for collusion between suppliers or distributors (recommended maximum prices were eventually applied as uniform and fix prices) provided that market for supplies is concentrated (in this case, an asymmetric oligopoly market).

Conclusions

In our opinion, RPM is unlikely to achieve any of the pro-competitive goals identified with it by the scholars due to the possibility of non-price competition. Each of the pro-competitive explanations for RPM overlooks the fact that in response to the imposition of RPM, retailers will seek any of the infinite forms of non-price competition which effectively achieve the same results as price competition rather than perform according to the manufacturer's expectations.

It is therefore hard to believe that blocking the possibility of directly reducing retail prices will automatically align retailers' incentives with those of the manufacturer. Once RPM is introduced, each retailer will find it more profitable to save the cost of providing the services, by continuing to free ride on the services provided by its competitors and then use the extra-income to fund various forms of non-price competition (gifts, free or discounted supplements to the RPM-d product, free delivery, credit). **This justifies applying a *per se* illegality rule to RPM.** As we have already shown above, it has anti-competitive effects on one hand, and no objective other than the restriction, distortion, or elimination of competition, on the other hand.

Paradoxically, non-price vertical restraints – which clearly eliminate all possible forms of competition – are capable of achieving pro-competitive goals which RPM is not. By eliminating all forms of competition and turning each retailer into a local monopoly, non-price vertical restraints may - in almost all situations but for those situations where transportation costs are insignificant - effectively relieves the retailer from any danger of free-riding and cause retailers to internalise the manufacturer's incentives. **This justifies applying a rule of reason to non-price vertical restraints.** Although they may be used anticompetitively, they nonetheless have the potential of attaining a multitude of pro-competitive goals.

The similar effects of both kinds of restraints are not a compelling justification for a similar treatment.

RUSSIAN FEDERATION

The FAS Russia recently according to the Resolution of the Government of the Russian Federation hold an analysis of pricing for main socially significant food products, including bakery foods, milk and sunflower seed oil.

As a result there were determined the following reasons for price growth on certain markets:

1. Bread and bakery foods

The main reason for growth of wholesale prices for bakery goods was the price growth for flour sold by baking plants.

Moreover the prices on bakery foods are formed in connection with the price level in different sectors of economy, especially industry and agriculture. The significant impact on pricing of bakery foods is made by the prices on power energy, gas, fuel, transportation services and, naturally, main and ancillary raw materials for producing bakery foods.

The most important factor of the price growth on flour is a price growth on grain, as costs on grain make up to 80% of the cost values of flour. The reasons for price growth on grain are the following:

- global price growth on grain;
- presence of considerable number of intermediate companies on the market;
- general economic factors;
- price growth on power energy;
- salary growth;
- other costs growth;
- other reasons.

2. Dairy products.

Main costs in cost value of milk account for “raw and main materials” (45-69%).

Respectively the main reason of the price growth on dairy products was a price growth on raw milk due to lack of necessary volume of its production under increase of demand on it from dairy producers, which, on its part, is caused by the sharp price growth on dried milk both on domestic and global market. The season factor should also be taken into consideration,

But it should be mentioned that the decrease of prices on raw milk was much higher that the decrease on retail prices for dairy.

3. Sunflower seed oil.

The analysis of the documents received from 4 largest sunflower seed oil producers showed that these companies are not homogenous in their principles of organising their activity. The analysis of dynamics of cost value and retail prices showed that, in general, their growth was followed by the cost value growth. However, in every company these processes have their specifics.

The cost value of products saw a growth of all types of costs. However the growth rate on certain costs was different. The analysis showed that the raw material (sunflower) takes a leading role in the structure of costs in production of sunflower seed oil (55-90%).

Thus it can be concluded that the biggest part in the price structure of food producers is taken by the costs on raw material.

On November 10, 2007 the Government of the Russian Federation adopted a Resolution № 769 "On agreements between the executive bodies of state power of the subjects of the Russian Federation and economic entities on reduction and maintenance of prices on certain categories of socially significant food products of first necessity". This resolution was elaborated and proposed to the Government of the Russian Federation by the FAS Russia.

This Resolution determined that for reduction and maintenance of price for certain categories of food products the executive bodies of state power of the subjects of the Russian Federation have a right to conclude relevant agreements with economic entities that produce food products and (or) organisations selling these food products (hereinafter referred to as agreements). But the agreements could have been concluded on a certain period but not later than for the period till April 30, 2008.

The necessity to adopt such a Resolution was caused by the fact that under considerable price growth on main foods of first necessity in September-October, 2007 the practice of conclusion of different types of agreements (between executive bodies of state power of the subjects of the Russian Federation and economic entities, acting on food market) aimed at price fixing and trade extra charges both for producers and for retailers is widely used.

Meanwhile the article 16 of the Federal Law of 26.07.2006 № 135-FZ 'On Protection of Competition" prohibits agreements between the federal bodies of executive power, state authorities of the subjects of the Russian Federation or between them and economic entities if such agreements lead or can lead to prevention, restriction, elimination of competition, in particular to increase, decrease or maintenance of prices (tariffs) except for cases when such agreements are envisaged by federal laws or statuary legal acts of the President of the Russian Federation and(or) Government of the Russian Federation. Adoption of the Resolution № 769 allowed solving this contradiction.

To implement this Resolution the FAS Russia elaborated Guidelines on considerable terms of agreements concluded between executive bodies of state power of the subjects of the Russian Federation and food producers and (or) food retailers. These Guidelines were sent to the Heads of the subjects of the Russian Federation for using, to the FAS Russia Regional Offices for executing control over compliance of the concluded agreements with the competition law.

This Resolution made it possible to stabilise situation on the regional food markets in respect of price maintenance on socially significant food products.

The period of validity of these agreements expired on April 30, 2008. Presently due to the information received on prolongation of such agreements in the number of regions of the Russian Federation that contradicts the federal law on protection of competition, the FAS Russia sent instruction to its Regional

Offices on holding of activity on prevention of violations of the competition law by bodies of executive power of the subjects of the Russian Federation and a letter to the Heads of the subjects of the Russian Federation on prohibition of prolongation of the agreements.

CHINESE TAIPEI

1. Introduction

Article 18 of the Fair Trade Act deals mainly with vertical price restraints (i.e., resale price maintenance). Article 18 of the Fair Trade Act states, "Where an enterprise supplies goods to its trading counterpart for resale to a third party or such third party makes further resale, the trading counterpart and the third party shall be allowed to decide their resale prices freely; any agreement contrary to this provision shall be void." This means that if any enterprise violates this article, such an agreement will be void and therefore the resale arrangement will be subject to civil and administrative punishment. The legislation applies the "per se" illegal rule, under which no analysis on the existence of the market power of the upstream enterprise is required.

Given that Article 18 does not explicitly distinguish its application based on the types of arrangements in dispute, it applies equally to both minimum and maximum resale price restraints.

With regard to the issue of suggested resale price or reference price, the FTC takes the position that suggested price should be only in the nature of a recommendation; the enterprises should not set penalty provisions in the contract to terminate the distribution rights or impose penalties and so on for the purpose of making the downstream enterprises abide by the suggested resale price. If the upstream enterprises do not require or agree that the downstream enterprises should sell at the list price or without a discount, the upstream enterprises shall not be deemed to be in violation of Article 18 of the Fair Trade Act by merely affixing a price tag or printing words on the products in the form of a list price, suggested price, or a specific range of resale prices.

In cases where enterprises engage in the stipulation of resale prices for consignment contracts, the FTC will take into consideration, as part of the rationale behind its decision to dispose of it, the following factors: (1) It shall determine whether the contract involved is a genuine consignment contract by evaluating its contractual substance (for example, who bears the trading risks, whether the ownership has been transferred or not), rather than taking literally the words employed in the contract. (2) When the substance of a consignment contract could be identified, the FTC will not apply Article 18 of the Fair Trade Act due to the facts that the consignee has earned his commission not from the differences between the purchase and resale prices of the products even though a resale price is stipulated in the consignment contract.

Currently, scholars are divided on the competitive effects of resale price maintenance. The reasons proposed by those who adopt a more lenient view towards resale price maintenance are as follows:

- With respect to branded or trademarked goods, resale price maintenance could very well prevent downstream distributors from engaging in mark-downs, and this would protect the brand's image and reputation.

- Resale price maintenance could prevent mark-downs, thereby ensuring a set amount of profits for downstream distributors and, at the same time, enable the successful entry of new brands.

- Although it could very likely reduce intra-brand competition, resale price maintenance could also motivate downstream distributors to engage in non-price competition, for example creating innovative marketing strategies, offering after-sales service and making greater efforts to raise economic efficiency; it goes without saying that this would benefit consumers. The existence of

inter-brand competition is therefore the prerequisite for treating resale price maintenance leniently as market competition is not completely excluded and consumers' choice options are unaffected.

Conversely, those adopting a more stringent view towards resale price maintenance rely mainly on the following arguments to support their position:

- Upstream suppliers and downstream distributors are separate and independent entities, and the freedom to set the resale price is the right of the distributors and a right which they should not be deprived of.

- Allowing for resale price maintenance is the equivalent of establishing a cartel among distributors, which of course blocks any decrease in consumer prices.

- Price competition is the most important means of competition, and it should, therefore, not be replaced by other non-price methods in the promotion of intra-brand competition.

2. The types of resale price maintenance and compliance measures used by enterprises

In Chinese Taipei, the most common types of resale price maintenance among enterprises include the following:

- Entering into a contract or an agreement: Upstream enterprises and downstream enterprises enact agreed resale prices through a contract or an agreement.

- Making a suggested price list: An enterprise sets a suggested price list on an agreement or records a suggested sale price on the invoice or develops detailed price lists in order to require distributors or retailers to abide by the sale prices.

- Affixing resale price tags on the products and requiring the trading counterparts to cooperate: An enterprise requires distributors and retailers to affix specific price tags on the products or does so by itself, and implements punishment measures on the downstream operators who do not abide by the specific price and sell.

- Mandating the offering of specific discounts: An enterprise mandates the offering by the distributors of the same discounts as the suppliers' when they sell the products.

Compliance measures that might be used by enterprises to ensure the enforcement of resale price arrangements include: (1) cutting off supply; (2) cancelling distribution rights; (3) terminating a contract or an agreement; (4) imposing penalties; (5) retaining or collecting the security deposits; (6) refusing to offer repair services free of charge and offering preferential prices or cancelling rewards. Most of the cases the FTC has dealt with may involve more than one compliance measure.

3. Illegal per se

In practice, the FTC applies the illegal "per se" rule to all forms of resale price maintenance. The FTC takes the position that an enterprise shall allow its trading counterparts to freely decide their resale prices for products. Thus, if an enterprise sets limitations on the resale prices of its products and takes measures to request trading counterparts to follow suit, such an act of restraining downstream business operators' trading activities has already deprived downstream business operators of their freedom to decide on prices based on their own cost structure and competitiveness and has therefore weakened the price competition

among different sales channels within the same brand in the market. This type of act is explicitly prohibited in the Fair Trade Act.

Any enterprise violating the provisions of Articles 18 is ordered by the central competent authority, pursuant to Article 41, to cease or rectify its conduct, or take necessary corrective action within the time prescribed in the order. In addition, the competent authority may impose upon such enterprise an administrative penalty no less than fifty thousand and no more than twenty-five million New Taiwan Dollars and after the lapse of such period, shall such enterprise fail to cease or rectify such conduct, or take any necessary corrective action, the FTC may continue to order such enterprise to so perform within the time prescribed in the order, and may successively impose thereupon an additional administrative penalty no less than one hundred thousand and no more than fifty million New Taiwan Dollars until the order has been faithfully followed.

4. Exemptions

Before the first amendment to Article 18 of the Fair Trade Act in 1999, the provision in Paragraph 1, Article 18 and the provision of Paragraph 2, Article 18 allows the adoption of resale price restrictions on some consumer goods for daily use where (1) similar goods were available in the market under competitive conditions, and (2) where the FTC had announced such goods as being an exception to the restriction on resale price restrictions.

Prior to its amendment in 1999, Article 18 of the Fair Trade Act stated that "an enterprise which supplies goods to its trading counterpart shall allow its trading counterpart to freely decide the prices at which such goods will be resold to a third party by the trading counterpart or at which such goods will be resold by the said third party. Any agreement contrary to this provision shall be null and void except for daily products to be used by general consumers which are subject to free competition with similar kinds of goods available in the market. The items of daily products referred to in the preceding paragraph shall be publicly announced by the central competent authority."

Article 18 of the Law prohibits vertical price restrictions between parties at different functional levels in a market. However, in view of the fact that the markets for daily products are relatively competitive and resale price maintenance can only have a minimal effect on competition, the provision of Paragraph 1, Article 18 provides that daily products to be used by general consumers which are subject to free competition with similar kinds of goods available in the market will not be bound by the prohibition of resale price maintenance.

According to paragraph 2 of Article 18 of the Law, the FTC identifies the scope and items of the "daily products" referred to in the first paragraph of the same article. It should be mentioned, however, that the FTC grants exemptions in the application of the provision of Article 18, paragraph 1 in a very strict manner. There has not been any announcement in regard to the scope and items of the daily products.

However, as a practical matter, the market for such goods would never be fully competitive and thus the exemption has been eventually removed from the Law.

5. Case Study

In the preliminary stages of implementing the Fair Trade Act since 1992, the FTC considered an enterprise engaging in resale price maintenance arrangements to be in violation of Article 18 of the Fair Trade Act. Added to this, in most cases the FTC considered an enterprise implementing compliance measures to ensure the enforcement of such arrangements to be in violation of the Fair Trade Act as well .

5.1 Case 1: Cosmetics products

In 1992, The FTC selected cosmetics and six other products for investigation to ascertain if there was any violation of the Fair Trade Act due to their failure to reflect the reduction in tariffs and the appreciation of the New Taiwan Dollars. The FTC found that five cosmetics companies had uniform selling prices at their retail outlets. Each of their franchise agreements with their distributors contained provisions, requiring the distributors to sell goods at uniform retail prices. In addition, cosmetics companies conceded in front of the FTC that uniform prices were forced upon them as a marketing strategy and to maintain the product image of XX cosmetic products.

The FTC found that the restriction on resale prices and prohibition against any promotional activities of distributors resulted in uniform retail prices for cosmetics nationwide. The FTC decided that the five cosmetics companies at issue should, within ten days upon receipt of the Disposition, notify their distributors in writing that they could now freely decide their the resale prices. Upon issuance of such notification, the cosmetics companies were also to submit a copy of such written notification to the FTC for reference.

5.2 Case 2: Yoplait products (a maximum resale price)

Jing Yuan Corporation (hereinafter "Jing Yuan"), a distributor of Feng Ho Corporation (hereinafter "Feng Ho"), sold the "Yoplait" series of yogurt products. From the agreements entered into by Feng Ho and its downstream distributors, the provisions set the maximum resale price for the products and required the distributors to abide by the rule. If not, Feng Ho would impose penalties. After its investigation, the FTC found that Feng Ho sold Yoplait (550g) to Jing Yuan at the price of NTD 29.2, and recommended a resale price for retailers of NTD38, as well as for end-users of NTD 45. In addition, Jing Yuan purchased Yoplait products from Feng Ho at NTD 26 during the promotion period, and Feng Ho recommended a resale price for retailers of NTD 30-31, as well as a price for end-users of NTD 35. In this case, Feng Ho asserted that the prices prescribed in the contested agreements were simply in the nature of a recommendation and had no binding force, but this argument was found to be untenable. The fact is that Feng Ho ceased supplying Jing Yuan for the reasons that Jing Yuan refused to cooperate with it in promoting Yoplait products, and refused to abide by the resale price. It also sold the products to the retailers at the amount of NTD 30-32 in order to earn more profits. Therefore, the FTC came to the conclusion that Feng Ho had violated Article 18 of the Fair Trade Act.

5.3 Case 3: Motorcycle industry (a minimum resale price)

As a case in point, Cheng Yeh Corporation, the general distributor of Yamaha motorcycles in Taipei City, was accused of being involved in restricting the resale price of motorcycles. After the FTC's investigation, it was found that the general distributor had imposed restrictions on its downstream regional distributors or dealers with regard to the resale prices and the geographical areas of sales, by imposing penalties or other measures. Resale prices were mostly set at high levels by the suppliers in order to obtain the cooperation of the distributors, and this generally harmed consumers' interests. More importantly, the market function was distorted as distributors could not adjust prices on the basis of their unique circumstances. In this case, the general distributor and its trading counterparts by restricting the resale to third parties or by restricting such third parties from making further resale violated Article 18 of the Fair Trade Act.

5.4 Case 4: Contact lens cleaning fluid (a minimum resale price)

Lee Min Optical Co., Ltd. (hereinafter "Lee Min") continued to impose restrictions on the resale price of its "gold double oxy" contact lens cleaning fluid in violation of Article 18 of the Fair Trade Act despite having been ordered to cease the act in a disposition made by the FTC, which was dated October 9, 1996.

After its investigation of twelve retailers in 1999, the FTC found that eleven retailers' purchase and sales prices were consistently set at NTD 220 (before taxes) and NTD 250 respectively, except for one retailer that declared its purchase and sales prices to be NTD 210 and NTD 230, respectively. Nine of twelve retailers declared that Lee Min required or suggested a price of NTD 250, and four retailers indicated that Lee Min threatened to cease supply if they did not sell the products at NTD 250. Two retailers said that Lee Min would increase the quantity supplied as rewards if they did not compete on price. Lee Min stopped supplying the products to two other retailers in 1998 because their selling prices for these products were below the resale price of NTD 250.

Lee Min set a minimum resale price of NTD 250 for the products and used compliance measures to restrict trading behaviour. The compliance measures included directly communicating the required price, cutting off supply, providing bonuses, increasing the quantity supplied and pre-empting sources from other suppliers by identifying the products with serial numbers. In addition to its basic distribution channel, Lee Min also sold its products through consignment. The FTC found that the real purpose of the consignment agreement was to maintain the minimum resale price at NTD 250. On account of its having disregarded the FTC's disposition in 1996 and on account of their repeated and continuous violations of Article 18 of the Fair Trade Act, the FTC imposed an administrative fine of NTD 1 million on Lee Min and ordered it to immediately cease the acts in the year 2000. In this case, the disposed party had unsuccessfully appealed to the Taipei high administrative court.

5.5 Case 5: Reference books

In October 1999, one bookseller reported to the FTC that Lung Teng Cultural Corporation (hereinafter "Lung Teng") forced the downstream booksellers to sell the reference books it publishes at discounts of no more than 20% off the list price for schools or 15% off the list price for bookstore sales and threatened to cease supply if the downstream booksellers refused to cooperate. Based on the FTC's investigation, it was found that Lung Teng handled the sales of textbooks and reference books through four marketing channels. One consisted of the business representatives of Lung Teng who sold the textbooks directly to high schools and vocational schools. The others encompassed bookstores, wholesalers and distributors who mainly sold the reference books.

The FTC sent questionnaires to the downstream bookstores and distributors in 2000 and found that Lung Teng had provided bookstores and distributors with suggested resale prices either orally or in the form of agreements. In the first half of 2000, Lung Teng entered into agreements with its distributors and such agreements included a clause restricting the resale prices to clients to be "at least 80% of the list price." Such evidence demonstrated the request for uniform pricing by Lung Teng.

Even though Lung Teng contended that 20% off the list price was only in the nature of a recommendation and had no binding force, this argument was found to be untenable. The fact is that Lung Teng ceased supplying its books to a number of bookstores who refused to abide by the amount of the discounts given in retail pricing. Lung Teng's actions of restraining resale prices affected the downstream enterprises in not being able to offer reasonable prices based on their particular cost structures and competitiveness and thus weakened the competition among distributors. The FTC reached the conclusion in 2000 that Lung Teng had violated Article 18 of the Fair Trade Act by preventing the distributors and bookstores from freely deciding their resale prices for the reference books at issue. After the FTC reviewed

the respondent's motives, anticipated improper gains, the degree of impact on the trading order, the profit gained, the size and operation of the enterprise, and its compliance with the investigation, the FTC issued a cease-and-desist order to Lung Teng in accordance with Article 41 of the Act and imposed an administrative fine of NTD 500,000 on Lung Teng.

5.6 Case 6: Salt and derivative products

In 1952, the Salt Industry Reformation Committee of the Ministry of Economic Affairs established Taiwan Salt Works (TSW) to provide a stable supply of salt to industry, the public, and the armed forces. In 1995, TSW was then reformed as Taiwan Salt Industrial Corporation (hereinafter "TAIYEN"), and it was still a state-owned enterprise. In November 2003, TAIYEN was privatised and concentrated its production on salt and derivative products, as well as the biotech industry (including the areas of collagen-containing biomedical materials, cosmetics, and nutriceuticals, etc.)

In 2005, franchisees of TAIYEN filed numerous complaints to the FTC, alleging *inter alia* TAIYEN's discriminatory treatment of franchisees and distributors without proper cause, TAIYEN's improper restrictions on operation including marketing channels restraints, different types of product' restraints, sales price restraints.

The FTC found that skincare products (especially the "Lui-miel" series) were the core products sold by TAIYEN's franchisers. The FTC considered that the ownership of such a product was transferred to such franchiser and distributor after a product was sold to a franchiser and distributor by TAIYEN. Such a franchiser and distributor would then have to resell this product to obtain profits, and would also have to bear the risks of being unable to sell the product. Each of TAIYEN's agreements with its franchisers and distributors contained provisions that required the franchisers and distributors to sell products at a single resale price. It is obvious that TAIYEN intended to restrain the resale prices. In addition, when the franchising contract or distribution contract was still in effect, TAIYEN continuously issued letters or facsimiles to inform and to warn its franchisers and distributors not to sell at a price lower than a certain amount. TAIYEN even imposed penalties on or ceased supply to distributors that violated such orders. In 2007, the FTC made a decision that TAIYEN had violated Article 18 of the Fair Trade Act and imposed an administrative fine of NTD 1 million on TAIYEN.

5.7 Case 7: Baby milk powder (fixed resale price)

In July 2005, pharmacies, the consumer protection association and numerous customers filed complaints with the FTC alleging the possibility of resale price maintenance by Bristol-Myers Squibb (Taiwan) Ltd. and Nestle Taiwan Ltd., which required the pharmacies to sell the milk powder Enfalac Infant Formula A+SA (900 gm/can) at the fixed price of NT$539 and Nan (Gold) H.A. (900 gm/can) at the fixed price of NT$575, respectively.

Since the middle of 2005, the Bristol-Myers Squibb Company, the largest milk powder company in Chinese Taipei and Nestle Company, the fourth-largest milk powder company in Chinese Taipei, respectively demanded that the distributors and pharmacies sell the milk powder at the prices stipulated by the two companies. In addition, the two companies demanded that the pharmacies sign sales agreements to agree to the stipulated resale prices. The two companies retrieved the agreements later after the FTC's intervention and asked their business representatives to inform the pharmacies orally to cooperate with the companies. The FTC also discovered that the Bristol-Myers Squibb Company and Nestle Company would no longer offer the milk powder to the pharmacies if the pharmacies refused to abide by the resale prices.

Furthermore, the FTC dispatched personnel for on-site inspections of the pharmacies in more than ten counties/cities and it found that the sales prices of Enfalac Infant Formula A+SA (900 gm/can) in each sales outlet were identical, as were the sales prices of Nan (Gold) H.A. (900 gm/can) milk powder.

Even though the two companies asserted that the prices prescribed in the contested agreements were simply in the form of a recommendation and had no binding force, this argument was found to be untenable. The fact is that the two companies' actions of restraining resale prices caused the prices of the milk powder in the market to be identical and the downstream enterprises were unable to offer reasonable prices based on their competitiveness and cost structures. Thus, such actions would have weakened the price competition of the same brand in the market, and hence this would have been harmful to consumers' benefits.

After the FTC evaluated the market structure, the alleged acts, the function of market competition, and the uniformity of the selling prices, the FTC reached the conclusion in 2007 that the Bristol-Myers Squibb Company and Nestle Company had violated Article 18 of the Fair Trade Act by preventing the distributors and pharmacies from freely deciding their resale prices for the milk powder at issue. Therefore, the FTC issued a cease-and-desist order to the two companies in accordance with Article 41 of the Act and imposed administrative fines of NT$ 4 million and NT$ 2.5 million on the Bristol-Myers Squibb Company and Nestle Company, respectively.

6. Conclusions

After 17 years of implementing the law on resale prices maintenance, the FTC has found more than 36 violations of Article 18 of the Fair Trade Act. Most of these cases were disposed of by the FTC prior to the amendments to the Fair Trade Act in 1999. Since the 1999 amendments, the FTC has had the power to directly impose administrative fines in a more active manner.

Article 18 of the Fair Trade Act deems resale price maintenance to be a conclusively illegal conduct. This prohibition covers only goods. Virtually all articles of the Fair Trade Act encompass both goods and services, but the "resale of goods" in Article 18 refers solely to tangible goods. Extending the interpretation of the current Article to include services has seemed somewhat inappropriate up to now. Nevertheless, to fully achieve the objectives of competition law, the FTC is currently working toward an amendment to include services into Article 18.

Currently, the most experienced countries apply the "rule of reason" to resale price maintenance cases and thus the effect on market competition must be examined. By taking into consideration the practices of various competition authorities and the effect of resale prices maintenance, the FTC has researched and discussed changing the treatment of resale price maintenance to the rule-of-reason standard. The amended Article 18 of the Fair Trade Act will explicitly state that no enterprise shall engage in maintaining resale prices, except for actions for which the actors have proper justification. The FTC considers using the "rule of reason" as a basis to evaluate whether the actor engaging in resale price maintenance has imposed only a minimal effect on competition and that its conduct could have a positive effect.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on "Resale Price Maintenance."

The competitive effects of Resale Price Maintenance ("RPM") and the corresponding "proper" framework of analysis have been disputed for many years. Very generally, over the last few decades the discussion surrounding RPM has been fuelled by an increasing tension between the traditional "per-se unlawful" standard of analysis that applies in most jurisdictions to RPM and economic insights demonstrating that RPM may, in specific circumstances, bring about important efficiencies in distribution. As a result, many commentators have called for a more flexible standard of analysis that would allow courts and agencies to factor those potential pro-competitive effects into the analysis of RPM arrangements. On the other hand, those favouring a per-se, or modified per-se standard generally do not dispute the proposition that RPM may give rise to consumer benefits, but *inter alia* argue that those positive effects are either not significant enough or do not occur with sufficient frequency to warrant abandoning a per-se analysis of RPM, that RPM may in many cases give rise to dealer and manufacturer cartels and other negative effects (such as, in particular the hindering of the emergence and growth of low-cost, innovative retailers), that empirical economic literature confirms that RPM leads to consumer detriment and that courts would not be able to properly evaluate the pro-and anticompetitive effects of RPM, which would lead to de-facto legality of RPM and significant under-enforcement that would harm consumers.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,*[1] the US Supreme Court recently established a framework of analysis that considers market power and market structure to assess the actual effects of minimum RPM under a rule of reason, and abandoned the per-se standard of analysis that had applied to minimum RPM since the *Dr. Miles* judgement of 1911.[2] BIAC believes that, on balance, the application of a rule of reason approach as mandated by the US Supreme Court responds better to the nature and possible effects of RPM and is less likely to result in false positive findings of antitrust liability than would be the case under the per-se standard. BIAC also believes that the way in which such a rule of reason analysis should be conducted merits further reflection.[3]

The nature of RPM arrangements and their regulation in various jurisdictions was a subject of discussion at a 1997 OECD Roundtable. Those discussions highlighted a number of important points. First, with the notable exception of books and some other "cultural goods," at the time most jurisdictions applied a per-se analysis to RPM. Since then, the treatment of RPM-related arrangements (but not RPM itself) among jurisdictions has gradually evolved towards a more nuanced approach that takes into account the actual economic effects of those arrangements. For example, acknowledging the potentially pro-competitive effects of maximum RPM, in the 1997 *Khan* case the US Supreme Court abandoned the per-se standard of analysis for those types of vertical price arrangements.[4] That judgement has been adopted in the *Sylvania*[5] line of cases and is indicative of a more general trend under US antitrust law to limit the

1 *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 127 S. Ct. 2705 (2007) (hereinafter Leegin).

2 *Dr Miles Medical Co. v. John D. Park & Sons Co*., 220 U.S. 373 (1911).

3 *See also, infra*, paragraphs 27 – 30.

4 *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

5 *Continental T.V. Inc., v. GTE Sylvania Inc*., 433 U.S. 36 (1977).

category of cases that are so intrinsically likely to produce negative effects that they merit per-se treatment.[6] The Khan-doctrine has also been exported to the EC. Starting in the mid-1990s in Europe, the European Commission has progressively embraced the notion that the enforcement of antitrust policy in the field of vertical restraints should be guided by economic insights. As a result, Regulation 2790/1999 is premised on the proposition that vertical restraints are only capable of producing negative effects if the supplier has market power. Most, if not all, member states of the EU have adopted similar approaches. For instance, in The Netherlands, non-hardcore vertical restraints may benefit from the regime established by Regulation 2790/1999, while RPM is considered a hardcore violation. However, the detection and prosecution of RPM has a relatively low priority. Outside the EU, US and Canada, RPM itself has attracted varying degrees of attention. Canada continues to follow the per se approach to RPM. Section 61(1)(a) of the *Competition Act*[7] creates an indictable criminal offence punishable by fine and/or imprisonment. There have, however, been repeated calls for reform of the law in Canada. Most recently, the Competition Policy Review Panel[8] recommended that RPM should be de-criminalised and treated as a civil matter.[9] The U.S. Supreme Court decision in *Leegin* has been a further impetus for reform, as it highlights the lack of symmetry in the treatment of RPM between Canada and its largest trading partner. There is, however, no current timetable for reform in this area.

While the area of vertical restraints has shown a remarkable trend towards convergence among key jurisdictions, significant divergences remain. Moreover, there is a very real danger that divergences among those jurisdictions, as a result of the *Leegin* judgment, will increase. This would, in particular, occur if prominent, non-US jurisdictions would chose to depart from the *Leegin* doctrine and continue to subject RPM to a per-se treatment. In BIAC's view, such divergent approaches may chill pro-competitive conduct of (international) businesses as those firms would be forced to tailor their distribution networks to fundamentally different rules. Potentially more important, however, would be the fact that the process of convergence and growing acceptance that consumer surplus should be the guiding principle of antitrust enforcement would be severely compromised.

BIAC does not take the position that RPM should be per-se legal, or that RPM should be subjected to a cursory rule of reason analysis that would essentially be meaningless. On the contrary, it suggests that courts and agencies would, when confronted with RPM, take as a starting point that RPM would generally serve pro-competitive purposes, without however turning a blind eye to the possibility that RPM may, as is accepted in economic literature, in exceptional circumstances lead to negative effects. BIAC believes that the elements that the US Supreme Court has identified in *Leegin*, such as the existence of market power, the origin of the restraint and the number of suppliers employing RPM would serve as useful starting points towards a realistic and robust framework of analysis of RPM arrangements.

2. The Potential Pro- and Anticompetitive Effects of RPM as Identified in the Economic Literature

Early in the history of antitrust law, commentators tended to take a hostile view of vertical restraints, including RPM. Then, in the 1960s and 1970s a number of commentators commonly associated with the "Chicago School" postulated the view that RPM may improve interbrand competition by eliminating inefficiencies in individual supplier's distribution structures. In particular, Telser pointed out that, where the demand for a manufacturer's product depend on services (such as presale demonstration) provided by its retailers, the demand for the manufacturer's product may be sub-optimal because some dealers may

6 Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

7 *Competition Act*, R.S., 1985, c. C-34.

8 Competition Policy Review Panel, *Compete To Win* (June 2008), *available at* www.competitionreview.ca.

9 *Id.* at 58.

chose to free-ride on the provision of (demonstration) services by other retailers and offer the products for a lower price.[10] As a result, the former retailers would be discouraged to provide those services, which would in turn lead to a suboptimal level of demand and consumer surplus. In this situation RPM may, by eliminating intra-brand price competition, remove the scope for free-riding and thereby serve to restore the incentives of dealers to offer services, which would then stimulate demand and consumer welfare. On this interpretation, the imposition of RPM is unambiguously beneficial for consumers. Later, Comanor and others have – without challenging the basic rationale of RPM provided by Telser – pointed out that the precise welfare gains of RPM depend on the preferences and presence of both marginal and infra-marginal customers and the precise nature of the shift of the demand curve brought about by the provision of services in the case at hand.[11] Already at an earlier stage, it had been established that in situations where both the supplier and the retailer have some degree of market power, the corresponding successive margins cause the retail price to exceed (and output to be lower than) the optimal level[12] and that the imposition of a vertical restraint such as RPM could eliminate the double marginalisation problem and lead to lower prices and increased output.[13]

Over time various theories have been developed to supplement Telser's free-riding theory. One such approach is the proposition that high-end dealers may certify the quality of the products that they carry and that RPM may serve as a means to avoid free-riding by other, lower-cost retailers on the product certification provided by high-quality dealers.[14] Other pro-competitive rationales for RPM rely on the risk insurance character of RPM. In particular, RPM may protect dealers against uncertainties associated with the demand (and possible lower prices) for their products and provide an incentive to actually carry and stock those products to the benefit of consumers.[15] In the same vein, RPM may grant the retailer ability to earn some retail mark-up as a compensation for taking the risks associated with the new product launch.[16] A similar argument can be made with regard to the penetration of new markets, where RPM may be a way of compensating retailers for the risk taken when selling an existing product in a different geographical region or to a new group of customers.[17]

It is important to note that, in *Leegin*, the US Supreme Court has explicitly acknowledged the potential of RPM to bring about beneficial effects for consumers. In that regard, it pointed to the views of a

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10 Lester G. Telser, *Why Should Manufacturers Want Free Trade?* 3 J.L. & ECON. 86 (1960).

11 William S. Comanor, *Vertical Price Fixing, Market Restrictions and the New Antitrust Policy*, 98 Harv. L. Rev. 983 (1985). *See also*, Roger D. Blair, *The Demise of* Dr. Miles*: Some Troubling Consequences*, 53 Antitrust Bulletin 133 (2008).

12 Joseph Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950).

13 It is striking that the catalogue of potential justifications for vertical restraints included in the EC Guidelines on Vertical Restraints do not list the elimination of double marginalisation as one of the potential justification for the imposition of vertical restraints. The reason for this position seems to be that double marginalisation is considered " rather hypothetical." See Luc Peeperkorn, *The Economics of Verticals*, Competition Policy Newsletter, 10, Number 2 (1998). Recently, it has been argued that RPM is an inefficient and disproportionate means to eliminate double mark-ups and that a two-part tariff would be a (less restrictive) alternative. See Luc Peeperkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 European Competition Journal 201 (2008).

14 Howard P. Marvel and Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 13 RAND J. ECON. 346 (1984).

15 Howard P. Marvel & Raymond Deneckere & James Peck, *Demand Uncertainty, Inventories and Resale Price Maintenance*, 111 Q. J. ECON. 885 (1996).

16 See generally, Verouden, *Essays in Antitrust Economics*, CentER Dissertation Series (2001).

17 Howard P. Marvel & Stephen McCafferty, *supra*, note 14.

number of leading commentators[18] and specifically noted the potential of RPM to combat free-riding on promotional services and product certification provided by high-quality dealers.[19] Significantly, it added that RPM can encourage retailer services (and thus stimulate demand to the benefit of consumers) even in the absence of free-riding.[20] It situated those characteristics of RPM against the background of the general observation that vertical restraints that reduce intra-brand competition may in fact enhance inter-brand competition.[21] And in addition to the justifications mentioned under paragraphs 0 and 0 above, the Supreme Court noted that RPM may contribute to more diversity in the sense that it would give consumers more options to choose between "low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[22] Moreover, when discussing the potential for increased market entry for new products and brands, the Supreme Court added that RPM may be particularly important to a dynamic economy.[23]

The dissenting minority in *Leegin* did not disagree with the basic proposition that RPM may produce pro-competitive effects. On the contrary, it acknowledged these benefits, but declined to overrule the per-se standard of analysis as established by *Dr. Miles* essentially for the following five reasons. First, it noted that RPM may deprive consumers of lower prices as a result of the elimination of intra-brand competition. Second, it felt that empirical research shows that RPM has in the past, in fact, led to higher prices.[24] Third, it expressed doubts as to the frequency with which RPM would in practice lead to beneficial effects, by, for example, eliminating free-riding problems that would be serious enough to warrant intervention. Fourth, it argued that the current large low-price retailers would not exist without the per-se rule governing RPM. And fifth, it noted the costs of litigation and questioned the ability of courts to adequately distinguish between the "good" and "bad" RPM cases. Nonetheless, the dissent conceded that the per-se rule perhaps "should be slightly modified to allow an exception for the more easily identifiable and temporary condition of "new entry." Thus, while the dissent takes a radically different approach with respect to the appreciation of RPM in specific cases and the practical consequences of abandoning the per-se rule, it does take the view –as did the majority of the Supreme Court does- that RPM may produce both pro-and anticompetitive effects.

It stands to reason that for RPM to be welfare –enhancing, the claimed justification must be real and be supported by the facts of the case. For instance, the free-riding rationale of RPM critically relies on the assumption that in a specific case pre-sale services are important to consumers and that those services are susceptible to free-riding. This suggests that the free-riding rationale for RPM may be stronger where complex and new products are involved. Also, this particular justification for RPM may be weaker where retailers can charge customers separately for the services that they provide. Similarly, product certification free-riding may not be likely if the clientele of the high-quality retailers tend not to be the clientele of the

18 Leegin, *supra* note 1, p. 9.

19 *Id.*, p. 10-11.

20 *Id.*, p 12. To explain this position, the Supreme Court relied on transaction cost economics that demonstrate that RPM may be an efficient means to stimulate dealers to provide services where a comprehensive contract with the dealer cannot be made or enforced. *See also*, Frank Matthewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. INDUS. ORG. 57 (1998).

21 Leegin, *supra* note 1, p. 10.

22 *Id.*, p. 10.

23 *Id.*, p. 11.

24 Elevated prices convey little, if any, information on the pro-or ant-competitive nature of RPM. See also *infra* paragraph 14.

low-priced retailers.[25] Similar observations apply to other claimed justifications for RPM: whether RPM is applied to counter a specific externality and can reasonably be deemed to successfully do so, depends on the facts of the case and may require a detailed study.

A recent article has attempted to cast further doubt over a number of the justifications for RPM identified in the economic literature and cited by the Supreme Court.[26] For instance, it claims that RPM may only in rare circumstances be successful in stimulating the provision of dealer services in a free-riding context as the "dominant strategy" for retailers under RPM remains not to invest in promotion, but to look for means to attract customers that are not susceptible to free-riding.[27] Similarly, this article takes the view that RPM may not be effective in providing insurance against decreasing resale prices, because it would not take away another uncertainty, namely the possibility that retailers would have to keep their stocks for a longer period. And while the article – in a similar manner as the dissenting minority in *Leegin*- acknowledges that there might exceptionally be a RPM justification to facilitate market entry, it nonetheless suggest that that means is still disproportionate because manufacturers may compensate dealers for the investments they have made with a view to introducing a new brand or enter a new market. As set out below under point [ ], BIAC takes the view that firms should be able to support their efficiency claims in a reasonable manner. Agencies and courts on the other hand should exercise discipline in evaluating those claims and refrain from too quickly "second guessing" business decisions and taking the position that the same positive effects could be attained by less restrictive means.

It is not disputed that different vertical restraints may in many circumstances produce similar effects.[28] This applies in particular to those vertical restraints that each limit intra-brand competition. Among these, RPM and the imposition of exclusive territories are often mentioned as largely interchangeable. Against this background it is noteworthy that the treatment and regulation of these restraints nonetheless differ significantly. For instance, in the EU, RPM is, to date, considered a hard-core restraint, while exclusive territories are block-exempted under Regulation 2790/1999 and, if they do not meet the conditions of that regulation, are subject to a type of rule of reason analysis under Article 81 paragraphs 1 and 3 EC. This implies that suppliers' freedom to adopt the vertical restraint that may best resolve the specific externality that they wish to address is severely limited. This is all the more serious as these two restraints differ significantly in terms of their risk insurance properties, which may be important when suppliers wish to attract enough retailers to distribute their products.[29]

Next, there does not seem to be a fundamental dispute with regard to the possible effects of RPM on consumer surplus. Where RPM is imposed to remedy a vertical coordination problem, such as double marginalisation, or free-riding by competing retailers, the effects are generally likely to be positive,

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25 *See*, F.M. Scherer & David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 552 (3d ed. 1990). Moreover, quality certification may sometimes also be achieved through product information or advertising by the manufacturer himself.

26 Peeperkorn (2008), *supra* note 13.

27 *Id.*, p. 209. Peeperkorn also disputes the findings of Matthewson & Winter *supra* note 20.

28 Howard Marvel & Stephen McCafferty, *Comparing Vertical Restraints*, 48 J. ECON. & BUS. 473 (1996); and David Reiffen, *On the Equivalence of Resale Price Maintenance and Quantity Restrictions*, 17 INT. J. INDUST. ORG. 277 (1999).

29 Vincent Verouden, *Resale Price Maintenance Under Cost Uncertainty: A Note on "The Logic of Vertical Restraints", in* ESSAYS IN ANTITRUST ECONOMICS 149 (2001). Verouden notes that exclusive territories generally have poor risk properties as exclusive distributors are faced with substantial fluctuations in their profits when cost and demand conditions change, while RPM may provide good insurance under uncertain demand situations. He concludes that the nature of market uncertainty determines the supplier's choice whether of not to use vertical restraints at all and the ranking of the preferred restraints.

although this may depend on the preferences of marginal and infra-marginal customers.[30] Sadly, however, the mechanics of RPM are often poorly understood: the rationale for RPM – as is the case for exclusive territories and other intrabrand restraints – is to protect dealers from intrabrand competition and this implies that RPM is intrinsically capable of leading to price rises. But that does not mean in and of itself that RPM lowers consumer welfare. On the contrary, RPM may raise prices, but may on balance be efficiency-enhancing because it increases output. Thus, elevated prices alone are an unreliable indicator and are not instructive in distinguishing between RPM that does increase output and RPM that does not. Similarly, elevated prices may be the side-effect of pro-competitive RPM, or be the result of a retailer (or manufacturer) coordination.[31] Still, the concern that RPM results in higher consumer prices and is for that reason only anti-competitive is voiced frequently.[32] The concern over higher prices as a result of RPM is also abundantly clear in the dissenting opinion in *Leegin* and in calls to revoke the *Leegin* judgment by enacting legislation that would ban RPM.[33]

By the same token, there seems to be consensus on the basic proposition that RPM may exceptionally give rise to negative effects since it may affect inter-brand competition in a number of ways. In particular, RPM may facilitate horizontal price arrangements at the manufacturer level, or between retailers. Under the latter scenario, retailers force suppliers to impose RPM as a way of circumventing the ban on horizontal price arrangements among themselves.[34] RPM has also been associated with the desire of suppliers to maintain collusion, in particular because RPM would make it easier to detect cheating on the price fixing arrangement by participating suppliers.[35] Moreover, such an argument presumes a lack of competitive constraint posed by alternative brands in the downstream market. As Marvel notes, "[t]he number of cases in which RPM can plausibly be alleged to have facilitated a manufacturer cartel can be counted on one's fingers." [36] In *Leegin*, the Supreme Court explicitly appreciated these risks, but decided that these risks do not justify the continuation of the per-se rule for RPM.

Finally, there is relatively little empirical literature on the actual effects of RPM and available studies suggest that the rationales behind RPM are pro-competitive.[37] Reviewing this body of literature, the US Supreme Court in *Leegin* concluded that those studies cast doubt on the conclusion that RPM meets the

30 *See, supra* 11. Note however that vertical restraints that are imposed with a view to eliminating vertical coordination problems or other externalities may also allow for a better exploitation of monopoly power.

31 Howard Marvel, *Resale Price Maintenance and the Rule of Reason*, The Antitrust Source, June 2008, *available at* http://www.abanet.org/antitrust/at-source/08/06/Jun08-Marvel6=26f.pdf; and Paul Lugard, *Note on Leegin Creative Leather Products Inc., v. PSKS Inc.*, MARKT & MEDEDINGING (2007), nr 5/6, pp. 156-162. *See also*, Peeperkorn, *supra* note 26. Marvel notes that "the possibility that prices "may" rise does not mean that retail prices must increase. The effects of RPM on prices will depend on the nature of the demand shift that higher margins elicit. The manufacturer may choose to offset the margin increase by lowering its wholesale price." Moreover, interbrand competition may have a price depressing effect on retail prices.

32 *See, e.g.*, the submission of 27 states in the Nine West case as noted by Marvel, *supra* note 31, *available at* http://www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf.

33 See *e.g.* the statements made at the hearing of the U.S. Senate Committee on the Judiciary held on 31 July 2007, *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=2893.

34 It is argued that dealer-imposed RPM requires that retailers must be in a particular strong position vis-à-vis the supplier(s) as those suppliers generally do not favor high margins at the distribution level.

35 Bruno Jullien & Patrick Rey, *Resale Price Maintenance and Collusion* (2001) (CEPR Discussion Paper 2553), *available at* http://www.cepr.org/pubs/new-dps/dplist.asp?dpno=2553.

36 Marvel, *supra* note 31.

37 For an overview, *see, Leegin*, *supra* note 1, p. 10.

criteria for per se treatment. Significantly, the dissenting minority in *Leegin* did not dispute this, but argued that those insights are not new and do not warrant overturning the Supreme Court's judgment in *Dr. Miles*.

3. The Appropriate Standard of Analysis of RPM

Before turning to the question of which standard would be the appropriate standard for RPM, it is useful to briefly discuss the difference between the US-style per se standard as opposed to the treatment of a restraint as a "hardcore" restriction of competition under EU law. This is relevant because if, as recently has been argued, the European categorisation as hardcore restriction leaves considerably more room for evaluating the pro-competitive effects of RPM that in the case of other hardcore violations, there conceivably would be much less need for EC competition law (as well as the laws of the member states) to "remove RPM from the list of hardcore restrictions."[38] Put differently, it has been suggested that the more flexible analysis of hardcore restrictions under European antitrust would in whole or in part obviate the need to formally adhere to the Supreme Court's ruling in *Leegin*. There are two reasons why this reasoning is at least partly flawed. First, although there is remarkable little discussion in Europe regarding the question of which restrictions (apart from classic horizontal cartels) are restrictions "by object," it is nonetheless clear that the rationale of those hardcore restrictions is substantially similar to US per se prohibitions. This is for example confirmed by the Notice on the application of article 81(3) of the Treaty.[39] This implies that the decisive factor for labelling a restriction as a hardcore restriction under European competition law is the "experience" that those restraints invariably or in the great majority of cases have a negative impact on consumer welfare. Second, while – in contrast to US law – it is theoretically possible to demonstrate that a hardcore restraint on balance brings about positive effects, it is highly unlikely in practice that courts will actually clear hardcore RPM arrangements.[40] In the past, the EC Commission has already held that RPM arrangements do not meet the indispensability test.[41] In sum, BIAC takes the position that in practical terms, labelling RPM as a "hardcore" restriction, or a "restriction by object" is substantially similar to subjecting RPM under the per-se standard of analysis under US law. As a consequence, the considerations that have lead the U.S. Supreme Court to overturn the *Dr. Miles* doctrine, apply in principle mutatis mutandis to the European antitrust law.

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38 Peeperkorn, *supra* note 26.

39 Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97. Paragraph 21 states that "Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have *such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market*. This presumption is based on the serious nature of the restriction and on *experience showing that restrictions of competition by object are likely to produce negative effects on the market* and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question."

40 One main reason is the requirement that restrictions of competition must be "indispensable" within the meaning of Article 81(3) EC. It is submitted that, if RPM is to remain a hardcore restriction, agencies and courts are more likely to take the view that exclusive territories or other restraints produce less restrictive effects. *See also,* Peeperkorn, *supra* note 26. Incidentally, in *Leegin*, The Supreme Court held that RPM may in some circumstances be the most efficient restraint. See Leegin, *supra* note 1, p. 12.

41 See for instance Commission Decision of 22 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/24.510 - GERO-fabriek) and Commission Decision of 5 July 2000 relating to a proceeding under Article 81 of the EC Treat (Case COMP.F.1/36.516 – Nathan Bricolux).

BIAC submits that the per-se standard -or the characterisation of RPM as hardcore restriction- is no longer appropriate. Instead, it takes the position that the a priori distinction between vertical price and non-price restraints is not defensible and that RPM should be governed by a standard that allows for a fuller and proper evaluation of the claimed efficiencies, as well as possible negative effects. To be sure: BIAC does not believe that all RPM arrangements are pro-competitive, nor does it defend a rule of reason analysis that would lead to de facto legality of RPM. The following reasons militate in favour of abandoning the per-se, or "hardcore" approach, or at least to give serious considerations to amending the standard of per-se illegality that is currently applicable in a great number of jurisdictions outside the US.

First, the economic insights underlying the Supreme Court's judgement in *Leegin* provide a strong and convincing case to abandon the per-se analysis of RPM in other jurisdictions as well. Indeed, under European competition law, the rationales that underpin hardcore restraints are largely similar to the ones underlying the US per se standard. In this respect, it is undisputed that RPM may bring about positive effects which cannot be factored in under a per se or hardcore standard. BIAC acknowledges the scepticism among some commentators about the frequency with which RPM serves pro-competitive purposes and the concern that claimed efficiencies may not be real. But even if those concerns would be true, in BIAC's view, RPM simply does not meet the threshold criterion for hardcore restrictions.[42] Incidentally, it appears that even among proponents of a relatively strict rule, there is a belief that RPM may, in specific circumstances enhance consumer welfare.

Second, treating RPM as any other vertical restraint would restore the symmetry in treatment between the various different vertical restraints that often produce similar effects, in particular exclusive territories and RPM, without removing RPM from scrutiny by competition agencies and courts.

Third, continuation of a per-se type of analysis is likely to result in significant over-enforcement, Type 1 errors and chilling effects on potentially pro-competitive conduct. BIAC submits that it is likely that the inefficiencies that are associated with a continuation of the per se standard largely outweigh the costs of enforcement that would arise under a rule of reason standard of analysis.

Fourth, the continuation of a per-se type of analysis for RPM would run counter to the increased reliance on economics in the application of antitrust law and the concept of consumer welfare as the guiding principle in the enforcement of antitrust law. This would particularly be the case in Europe, the individual member states of the EU and other jurisdictions where this trend is evident.

Fifth, it would be unwise to maintain the per-se standard of analysis for reasons associated with the potential of RPM to facilitate horizontal price cartels. Not only are those effects likely to be infrequent, but such an approach would also imply a radically different -and unjustified an irrational- different evaluation of RPM than the US Supreme Court has prescribed. Moreover, there is no evidence that antitrust enforcement directed against horizontal collusion (facilitated by RPM) is not applicable and would not be effective. And finally, such approach would be inconsistent with the potential of other vertical restraints, in particular exclusive territories, to also have negative effects on interbrand competition.

Sixth, continuation of the per-se treatment of RPM in key jurisdictions outside the US would lead to a significant divergence that may give rise to inefficiencies in distribution of companies that are active in multiple markets. Moreover, such a divergence would come at a critical point in time where key jurisdictions differ in significant respects in the area of unilateral conduct and may detract from the legitimacy and effectiveness of antitrust enforcement in general.

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42 In this respect, it should be noted that even among proponents of a relatively strict standard for RPM, there is a shared belief that RPM may in specific circumstances be beneficial to facilitate market entry.

Seventh, at least in Europe, following the Supreme Court in *Leegin* would be consistent with earlier US precedents in the field of vertical restraints that the EC Commission has followed based on similar economic principles.[43]

Eighth, while any additional practical experience, empirical and theoretical research and other insights into RPM would be useful, it is not likely that those insights will greatly alter the current insights that the Supreme Court has taken into account when it laid down its judgment in *Leegin* and that, more generally are now available. It may therefore not be realistic to expect that much more will become known about the effects of RPM over time[44].

4. How Could a Rule of Reason Analysis of RPM be Structured?

BIAC appreciates that from an enforcement perspective a per-se or "hardcore" treatment of RPM offers advantages in terms of clarity, speed and enforcement costs savings. However, in light of the economic evidence available, BIAC is of the opinion that these approaches are likely to result in over-enforcement and inefficiencies and, as set out above, give rise to a number of additional disadvantages. As a consequence, BIAC favours a framework of analysis that takes account of all facts that may be relevant for deciding whether, in the case at hand, RPM produces negative effects for consumers.

While the analysis under the rule of reason standard may be challenging at times, BIAC is confident that the rule of reason analysis could over time be operationalised and be tailored to the specific nature of RPM that the vast majority of "bad" RPM cases could be filtered out. BIAC is however not convinced that the evaluation of RPM arrangements under the rule of reason standard requires specific structural modifications, such as the reversal of the burden of proof, or the introduction of a presumption of illegality in specific circumstances, for instance where it is found that RPM is induced by retailers.

Because the principal concerns associated with RPM are of a horizontal nature, it seems advisable to tailor the inquiry under a rule of reason framework to the existence of manufacturer and dealer cartels and, perhaps to the more general question whether the RPM practice at issue affects interbrand competition in some other manner. This part of the analysis is in many instances likely to be relatively straightforward and would focus on the conventional factors that are indicative of horizontal restraints of competition, in particular the nature of the products, the number of suppliers applying RPM and the degree of market power that these parties have, the market coverage of RPM and other relevant factors. Since, as the Supreme Court acknowledged in *Leegin*, there is a greater likelihood of a retailer cartel if RPM originates at the dealer level, an inquiry into the source of RPM would also be relevant at this stage. The purpose of this part of the analysis would be to postulate and prove a plausible theory of harm to interbrand competition.

Next, if no plausible theory of horizontal harm is found, a useful filter might be the degree of market power held by the supplier employing RPM. If the supplier is held not to hold a sufficient degree of market power, the agreement is unlikely to produce any (other) harm. If, however, a sufficient degree of market power is found, it would be prudent to enter into a more detailed analysis. That analysis should concentrate

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43 The EC Commission has adopted both the Supreme Court's decisions with regard to exclusive territories as set out in the *Sylvania* judgment (*Supra* note 5.) and maximum resale price maintenance, as laid down in the *Kahn* judgment (*Supra* note 4.). In both cases, the US Supreme Court mandated the rule of reason standard as opposed to the per-se standard that had applied to those practices.

44 This observation would still hold if, for instance, future US practice would show that the vast majority of RPM cases would pass the rule of reason standard.

on the claimed efficiency justification and the conditions necessary therefore.[45] Next, it would be necessary to establish that the actual market facts are consistent – or, perhaps more appropriate: not be inconsistent – with the claimed efficiencies. In this respect, BIAC agrees that (elevated) prices may not convey any useful indication. Increased output, on the other hand, would provide a relatively strong indication supporting the beneficial nature of the restraint at hand.[46]

5. Conclusions

In many cases RPM is likely to have pro-competitive effects. The negative effects associated with RPM are likely to arise only infrequently and, if they occur, are predominantly of a horizontal nature.

A per-se or hardcore approach can on theoretical grounds not be defended. Moreover, economic research militates against the application of these methods of analysis. Moreover, the (continued) application per-se or hardcore approach is moreover likely to result in over-enforcement and (further) inefficiencies.

Divergent standards of legality among key jurisdictions in the field of RPM may bring about inefficiencies, in particular for international businesses and may lessen the legitimacy of antitrust enforcement in general.

The analysis of RPM under a rule of reason framework of analysis should first and foremost concentrate on the existence of a plausible theory of harm to interbrand competition that is consistent with market facts. If no such theory is established, market power may be a useful indicator. If market power is found to exist, the enquiry should proceed to a detailed analysis of the claimed efficiencies and a (further) study of plausible effects in the market place.

Observed elevated prices alone are an intrinsically unreliable indicator of the effects of RPM. Output expansions on the other hand support the conclusion that the RPM arrangement at hand is pro-competitive.

45 This part of the analysis may demonstrate, for instance, that the services offered by the supplier's retailers do not lend themselves to free-riding.

46 This corresponds to the approach suggested by Marvel and McCafferty. *See*, Howard Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & Econ. 365 (1985); and Marvel, *Resale Price Maintenance and the Rule of Reason*, *supra* note 31.

SUMMARY OF DISCUSSION

by the Secretariat

Chairman Frédéric Jenny opened the roundtable by emphasising the extent of disagreement among countries with regard to their approaches to resale price maintenance ("RPM"). Some country contributions assert that there is no economic evidence that there are positive aspects to RPM. In contrast, others claim that there is evidence of benefits, efficiencies or even pro-competitive effects.

A delegate from Austria reported on a recent RPM conference in Vienna. Some of the conclusions were:

- Policies towards RPM are probably the most complained-about practices of competition authorities;

- It has not been possible to study the effects of RPM in the EU (or the US) because RPM has been (and still is in the EU) largely illegal. The US *Leegin* case might provide a natural experiment of the effects of changing policies towards RPM. There needs to be more empirical work, at least as a tool for prioritizing the case load of enforcement agencies.

- Most of the national competition agencies represented at the conference seemed to favour the current approach. They feared that the administrative burden of a move to a rule-of-reason approach would be too high, and could not be justified as the pro-competitive effects of RPM remain unclear. It is possible that a common understanding could be reached on the merits of including some kind of analysis of market shares in the investigation/enforcement process.

The Chairman started with submissions that emphasized the pro-competitive effects of RPM and the importance of pursuing a rule-of-reason approach to those problems. The US contribution reviewed the main theoretical arguments regarding the possible positive effects of RPM. The chairman invited the US to describe the empirical evidence showing that – at least in some cases – RPM tends to increase competition and/or have efficiency benefits.

A delegate from the US noted that that are many theories of pro-competitive benefits of RPM, but two are worth focusing on. One is related to the provision of point-of-sale services. This is the traditional free rider argument that if a retailer makes an investment to provide education or other point-of-sale services the consumer can use those services and then purchase from a discounter who doesn't provide those services, leading to an under-provision of point-of-sale services. RPM helps the retailers and the manufacturer avoid that problem.

An alternative argument is that the manufacturer may want to induce the retailer to have a stronger interest in the manufacturer's product. If the retailer is allocating scarce display space, and if it earns 1 dollar/unit from product A and 1.25 dollars/unit from product B, the retailer will devote more or better space to product B. Under this approach RPM is a device for enhancing the margin of the retailer. This can improve inter-brand competition.

Regarding empirical evidence, the delegate noted:

- It is simply not credible that a company with a low (single-digit) market share is harming the market as a whole when it carries out almost any practice on a unilateral basis. If a company with, say, 5% of the market is engaging in RPM, that strongly suggests it is not harming the market and is seeking some other goal - either a competitively benign or potentially beneficial goal.

- The double marginalization problem is well-known. Every manufacturer would like a retailer to resell the product for as low a price as possible, since that will, in general, expand demand. Therefore there must be a rational reason for a manufacturer to impose minimum RPM. Eliminating double marginalization is a rational reason for imposing maximum RPM, and it is based on robust theoretical concerns and not on esoteric or unlikely assumptions.

- In addition some empirical studies are cited in a paper by the FTC which notes that the anticompetitive harms that were mentioned were not even alleged in the majority of cases. One specific study involving Corning suggested that when Corning eliminated its RPM programme, it lost market share relative to others. This suggested that the elimination may not have been beneficial to consumers.

On the other hand, many of the empirical studies that try to measure anti-competitive harm from RPM are unreliable. It is important to look at the studies carefully to examine whether, for example, they are measuring the nominal price of the particular product or the market-wide price? Are they looking at the quality-adjusted price? Have they considered whether a price increase could be the result of a change in demand?

In addition, in assessing whether there should be a *per se* prohibition on RPM, it is necessary to take into account the possibility that prohibiting RPM will push firms to engage in exclusive dealing or exclusive territory arrangements that eliminate all competition from a territory. (RPM, in contrast, does not rule out non-price competition).

The delegate mentioned an anecdote from the deliberations during the *Leegin* proceedings. Representatives of plaintiffs complained that if the *per se* rule for RPM is eliminated they would never be able to prove their case. That, the delegate stated, is evidence that there is no anti-competitive harm from RPM. At the least there should be no *per se* rule. In addition, it suggests that there should be a presumption of legality; the plaintiff should bear the burden of proving that there is an anti-competitive harm. There are reasons to believe that RPM can be harmful under some circumstances and, under the rule-of-reason approach, if the harm is proved the RPM can be condemned.

In response to a question from the EC, the US clarified that the double marginalization rationale for RPM only applies when there is imperfect competition at both the manufacturing and the retailing level and, in this case, the manufacturer will seek to impose a maximum resale price.

The Chairman summarized Mexico's contribution, which asserts that RPM may have several objectives – some with neutral or even positive effects on the competitive process, so Mexico falls in the group of those countries that believe RPM should be handled under a rule-of-reason rather than a *per se* approach. In addition, in 18 cases investigated by the Mexican competition authority (the "CFC"), no evidence of anti-competitive harm was found. The chairman asked whether the experience of the CFC shows that the application of the rule-of-reason in these cases required enormous resources or was unduly burdensome?

A delegate from Mexico pointed out that under Mexican law, if some minimum conditions are met, anybody can bring a case to the CFC, which then has the obligation of bringing the case to a conclusion. The 18 cases referred to in the contribution were not cases the CFC would have chosen to bring.

There is no doubt that the *per se* approach is much more straightforward for the enforcing agency, as it is much easier for investigators to prove that there is an RPM agreement than to prove its effects. This applies to any vertical restraint – they are always much harder to prove under a rule-of-reason. In fact that is probably an argument for having a rule-of-reason – if the anti-competitive effects are difficult to demonstrate the behaviour should probably not be *per se* illegal.

The delegate described a case involving pro-biotic milk drinks. A Korean company introduced these drinks into Mexico with two different distribution channels: traditional retail supermarkets and door-to-door selling. It offered each distribution channel a different wholesale price but it insisted on having the same resale price for both channels so it could develop them in parallel. One of the supermarkets (which faced the lower retail margin) brought a case arguing that it was anti-competitive. The CFC found that there was no market power whatsoever because there were very low barriers to entry. Traditional yoghurt and dairy companies could very easily enter this market, which they have done since with success. Since there was no market power there was no possibility of abuse of dominance. The defendant company argued there were efficiencies - which was not really necessary - but they didn't sound plausible.

When the primary competition concern is vertical, it makes sense to use a rule-of-reason approach. If the primary concern is horizontal there remains scope for the CFC to apply Article 9 of the Mexican Competition Act which is a *per se* prohibition against cartels.

The fact that these 18 cases didn't pass the rule-of-reason filter indicates that the filter is working. This is not to suggest that RPM is always pro-competitive. But the CFC should only intervene when there is harm. The burden of proof should fall on the competition authority, except where there is collusion, but that is rare.

So, in short, in regard to the application of rule-of-reason, the CFC is required by the law to apply this approach, it is not that hard to do, and there is merit in this approach.

The Chairman found Hungary's submission interesting because Hungary harmonized its domestic law to the EU law in 1996. This implied a switch from the rule-of-reason approach for RPM to a largely *per se* approach. Yet it seems that the change in standard has not had a large impact on the way the competition agency treats RPM. Hungary reports that "the latest decision elaborates on the effects of RPM agreements and applies an effects-based interpretation though it does not explicitly and generally overrule the per se approach". The contribution mentions one case of RPM which was found not to have restricted competition. Can Hungary be consistent with the EU law while apparently applying a rule of reason approach?

A delegate from Hungary explained that the case in question concerned a network of distribution contracts for an energy drink called Bomb. The contracts involved were between the producer of the drink and certain hotels, restaurants and catering facilities. No other retail outlets were involved. There were around 300 contracts involved. Some 30 of them included some form of RPM provisions. One of them included a maximum RPM provision. All of the other contracts involved tailored RPM prices that were different for hotels, restaurants and catering facilities. In addition to these contracts with hotels and restaurants, the producer had contracts with other retail outlets with no RPM provisions. In this case, there was neither a dominant position nor any substantial market power. The Competition Council concluded that this behaviour was not a restriction on competition.

This case was an outlier. The general practice of the Hungarian competition agency is to harmonize its practice to that of the EU. There is a presumption that RPM is generally a restriction on competition but it can be exempted if certain criteria are fulfilled.

The Chairman then stated that Spain's contribution rebels against the orthodox view in the EU. The contribution states "The experience of the Spanish competition agency leads us to conclude that [RPM] may only have negative effects when the undertakings have enough size and strength as to influence the market and inter-brand competition is weak. Also we think that [RPM] clauses may in many cases enhance efficiency and be pro-competitive". The Comicion Nacional de la Competencia ("CNC") favors a rule of reason approach. The Chairman asked Spain to describe the experiences that led to this view.

A delegate from Spain responded that they are not proposing a *per se* legality approach to RPM clauses, but rather that such cases, like other abuse of dominance cases, should analysed on the basis of their effects on competition. Spain is looking into its doctrine on RPM and other so-called "hard core" restrictions in the context of the review of the EC block exemption regulation.

CNC has the impression that in some cases it may have over-enforced Article 1 (or Article 81 of the European Treaty) because of a strict interpretation of Article 4 of the block exemption regulation. Article 4 of the block exemption regulation doesn't say that agreements containing RPM clauses necessarily fall within the prohibition of the Spanish Article 1 or 81 of the EC Treaty - rather it establishes that such agreements can't be granted an exemption and they should be looked into more carefully. The guidelines state that the legality of such agreements is unlikely. In practice, both the Spanish competition agency and the Spanish courts have tended to interpret these provisions as stating that agreements containing RPM clauses were illegal. But the CNC has moved away from that interpretation. RPM clauses may have both competitive and anticompetitive objectives and effects. These effects should be analysed in order to determine whether they contravene Article 1 or 81 of the EC Treaty. Neither *per se* legality nor *per se* illegality approaches are adequate.

Next, the Chairman quoted from BIAC's contribution: "In many cases RPM is likely to have pro-competitive effects and negative effects associated with RPM are likely to arise only infrequently and if they occur are predominantly of a horizontal nature". BIAC calls for harmonisation, noting that "different standards of legality among key jurisdictions in the field of RPM may bring about inefficiencies in particular for international businesses and will lessen the legitimacy of antitrust enforcement in general". In effect, BIAC calls for universal adoption of the rule-of-reason approach – but wouldn't that make enforcement more complex and less predictable, undermining legal certainty for businesses?

BIAC replied that, overall, a rule-of-reason analysis does more justice to the nature of RPM than a *per se* approach. RPM is not always pro-competitive, so a *per se* presumption of legality is not appropriate, rather RPM should be treated just like any other vertical restraint.

In some jurisdictions (such as the EU), a *per se* or "hard core restriction" approach is still applied. Given the rationale underlying the *Leegin* decision, it is difficult to explain to businesses why some agencies take the position that in some cases these restraints can be good while other jurisdictions take a very harsh approach. This doesn't improve the standing of competition law in the eyes of the business community.

BIAC is not arguing that the rules on RPM should be the same in all jurisdictions (there may be specific or historical reasons why the rules may be different in a specific country) but BIAC believes that overall RPM should be treated as a non *per se* restriction.

The delegate made three other points:

1. Elevated prices are not a reliable indicator of anticompetitive effects;

2. The claim is sometimes made that the situation in Europe is slightly different than the situation in the US was prior to *Leegin* because in Europe RPM is a "hard core restriction," which is different from *per se* illegality. Practically speaking, a hard core restriction under the EC law is almost identical – or at least very similar – to a *per se* violation under US law. Everything that the US Supreme Court said in *Leegin* should apply to Europe.

3. Under Article 81(3), a vertical restraint must be indispensable to achieve particular efficiency benefits. Switching to a rule-of-reason analysis, or at least abandoning the *per se* analysis, would not help much if agencies or courts would come to the conclusion that RPM is never indispensable for attaining the pro-competitive purpose of the arrangement.

The delegate mentioned that RPM has been an indictable offence in Canada for many years. Earlier this year a report of a consultative panel appointed by the government recommended that RPM be subject to a rule-of-reason and effects analysis. The government has not taken action yet. This change is essential because it's nearly impossible for businesses that provide retail distribution across the US/Canada border to have one set of pricing and flexibility in the US and another in Canada. Businesses do not understand why they have to change their methodology when they move from Detroit to Windsor.

A delegate from Russia reported that they share the mainstream view that RPM should be treated under the rule of reason or effects-based approach. Although the term rule-of-reason is not formally used in Russia, the approach is de facto applied to some extent.

The delegate described two recent cases involving the markets for cars and gasoline. In the car market an RPM agreement between automobile producers and auto dealers was operating in the Moscow area. However, this did not represent a substantial competitive concern, due to very high inter-brand competition. In this case the retail price itself wasn't fixed at a certain level for each particular car; instead, limits were set. The dealer could raise the price within those limits subject to the fluctuation of supply and demand. There were no substantial competitive concerns.

Conversely, in the oil market RPM was used to maintain a collusive price. The oil refineries imposed a requirement on wholesalers regarding the price at which the wholesalers could resell the gasoline to retailers. This practice was designed to maintain the price above the competitive price and to lessen competition between retail gasoline outlets. The Russian competition authority has brought around 26 cases alleging anti-competitive agreements and maintaining retail prices. Quite substantial fines have been imposed.

Invited speaker Professor Howard Marvel gave a presentation in which he noted that, RPM's trade-offs are well understood by economists. On the "pro" side, RPM may be a way for manufacturer or a supplier to obtain adequate and appropriate distribution for its products. RPM can establish a property right to allow dealers to profit from their demand-enhancing activity. In addition, RPM can encourage dealers and distributors to choose inventory holdings that the manufacturer finds appropriate. The inventory question showed up in the contribution from Poland where there is a discussion of the problem of getting adequate distribution of Harry Potter books and how RPM may have been used for that purpose. The same issue is faced by 3M. 3M has roughly 500,000 items in their catalogue that they are trying to get on retail shelves. One of the largest US retailers, Sam's Club, has only 4900 items on their shelves across all areas. RPM can be a tool to encourage a retailer to stock an item. There may be other mechanisms as well, but it's not clear you wouldn't get in just as much trouble for trying those, as 3M found out. On the "anti" side, RPM can facilitate a manufacturer cartel. In addition, it can be imposed on reluctant manufacturers by powerful distributors, thereby facilitating a retailer cartel.

Professor Marvel said it is fair to say that no serious economist doubts the pros. The cons can be regarded as rare and hence the balance would be in favour of allowing RPM in many circumstances.

Marvel emphasized he was speaking of "minimum RPM" not "maximum RPM". He could see no objection to maximum RPM, since it's very unlikely to be harmful.

The trade-off between the pros and cons may look different to enforcers. This in part is due to the fact that the explanation of RPM as a protection for pre-sale services can often seem a convenient fiction. If you ask an expert to find a pre-sale service, he'll find one whether there is one there or not. In the Levi Strauss case in the US, the claim was that RPM protects the investment in fitting rooms (the idea that buyers would try on jeans in a fancy store and then go somewhere else to buy them - which seems a bit odd). There is a similar problem with the inventory argument. The claim in the Levis case was that buyers would try on jeans at a shop carrying a full inventory of all sizes, but then would buy elsewhere at a discounter with a smaller range – but again, that seems odd.

It is sometimes said that RPM is bad because it raises prices. This view is too narrow. There is very little evidence for (and some against) these price effects. The supplier in an RPM case has a strong incentive to make sure the final retail price does not increase.

Can RPM delay the emergence of new retailers? The evidence seems to suggest no. Toys 'R Us was an example of a retailer that took over a market that was dominated by department stores, where RPM was imposed. When toy manufacturers found ways to reach kids directly (which in the US means Saturday morning cartoons), they decided they didn't need the department stores.

In regard to the *Leegin* case, Marvel noted that in the US prior to the *Leegin* case RPM was (a) *per se* illegal and (b) widely practiced. The change in US treatment in practice is not nearly as strong as may be thought. Moreover, if *Leegin* were to lose its case its prospects would likely be extraordinarily grim. How do we know? We can examine what happened to those firms that settled with the authorities and gave up their RPM. For example, take the case of Salton Inc, the manufacturer of the George Foreman grill (which every American citizen wanted to buy at one point). It is now essentially a zombie company because it couldn't engage in RPM. Nine West, a shoe company with a 20% market share, saw its shares halved. Keds' market share fell dramatically. The reaction to having no ability to protect your margins was often vertical integration. Stores like the Gap emerged as fully integrated alternatives to RPM.

The current battleground for retailers and RPM is bricks and mortar versus the internet. RPM will not stop the emergence of on-line retailing. Toys 'R Us is an example of the dynamism that emerges from new retailing techniques.

In the US, RPM has existed in many forms for a number of years. For example, Microsoft engaged in RPM for Windows 95 through something called "minimum advertised prices" - you could sell Windows 95 for any price you wanted, as long as you didn't tell anyone. Disney movies are handled under the same approach.

In the US the *per se* approach didn't really make life simpler for enforcement, in part because so many enforcement agencies and rivals sought to characterize other policies as RPM. For example, they claimed that a firm implementing exclusive territories was doing so for the purpose of RPM. Also in the US, there was a policy of allowing a firm to announce a resale price –as long as that price was not written into agreements, it was legal. But an economist would ask: why would a supplier increase margins except to secure something from the distributors? It was nonsensical, but nonetheless it was an adjustment that emerged because a rule of reason wasn't in place.

The Chairman pointed to the "alliance" of competition agencies from the US to Russia, from Mexico to Spain and Hungary, together with the academics and the business community – all claiming that the rule of reason is the proper way to treat RPM.

On the other hand, the EC contribution describes the current treatment of RPM in the EU as a "hard core restriction". It is unclear whether a hard core restriction is the same as *per se* illegality in the US, but a hard core restriction is illegal unless the party brings forward substantiated claims for efficiencies. The EC contribution is adamant on two points which directly contradict what is said in the US contribution. It states first that "the direct effect of RPM is a price increase"; it adds "if this was not the case the agreement would be ineffective". In contrast the US contribution states: "pro-competitive theories about why firms may adopt RPM make no prediction on whether RPM leads to higher or lower prices".

The second point made in the EC contribution is that: "RPM doesn't take away the underlying free rider problem" and "it can be questioned whether RPM is an efficient instrument for addressing this specific potential free rider problem". Again, in contrast, the US contribution states that "RPM provides a mechanism for mitigating the effect of this free rider problem".

The EC started by noting that it is currently reviewing its rules. This debate will help the EC to better adapt the rules to new thinking, facts, and figures.

What the EC has is an effects-based approach - however there is a presumption that RPM will have a negative effect on competition and that offsetting efficiencies will be less likely. This is the reverse of the normal practice where first the authority has to show the negative effect before the defendant is asked to demonstrate any outweighing efficiencies. With RPM cases, as long as the defendant doesn't come forward with efficiencies, negative effects will be presumed. Our experience is that companies don't bring any credible efficiencies.

So why was RPM singled out? The first thing to note is that vertical restraints aren't all the same. They differ very much in their propensities, likelihood and even type of possible positive and negative effects - for example, RPM is not associated with foreclosure unlike many other vertical restraints. However RPM is different in that it is linked to a potential for facilitating collusion. This point is well brought out in the UK paper. It is not sufficient to say that vertical restraints can be either beneficial or harmful and therefore we need a rule of reason. Instead we have to have specific arguments for specific vertical restraints, such as RPM. That is one of the big shortcomings of the current economic literature. It discusses vertical restraints in general and doesn't give much help to development of policies for specific vertical restraints.

The potential negative effects of RPM aren't limited to collusion (the OECD background paper only lists the potential to enhance collusion either upstream or downstream as a possible negative effect). There are many other sources of harm mentioned in the UK paper which deserve attention.

All RPM agreements end up increasing the price. The whole purpose of an RPM agreement is to not allow some or maybe all retailers from lowering price, which they would otherwise want to do. Without RPM at least some prices will be lower. The counter-argument is that prices will be higher, but this will be outweighed by offsetting efficiencies such as higher levels of service.

The efficiency arguments in favour of permitting vertical restraints in general don't work very well with RPM. For example, there is the argument that RPM allows a retailer to spend more on services such as pre-sales promotion, on which otherwise they may be free riding. But will the retailer spend the extra margin on improving pre-sales service? If you are a retailer you will spend this extra margin on services

where you expect no free riding – you may give more post-sales services, you may bundle your product – anything which benefits you directly and not your retailing rivals.

Another argument is that RPM is necessary to induce retailers to hold sufficient stocks. But can this be solved in other ways? We see manufacturers who have a problem convincing retailers to, for example, hold a sufficient range of books, simply promising retailers to take back the unsold stocks – a direct and practical solution without the need to exclude price competition. But also, more generally, why would we expect RPM to induce retailers to hold larger stocks? In the absence of RPM, if times turn bad the retailer may be left with stocks which it can't sell except at a discount. In the presence of RPM, prices will not go down, but the retailer will have to hold its stock much longer. The retailer is not much better off –with RPM the retailer faces the risk of being forced to hold stocks for longer instead of selling them quicker at a lower price. It is not clear that RPM is the solution to the problem of inducing retailers to hold a suitable range.

What about the argument that RPM may help entry by new retailers? The concern here is that the first retailer in a new market may have to make some sunk initial investments to develop the market. Later retailing entrants can then "free ride" on that investment. What is the most efficient way to solve that problem? It is not to disallow all competition for the future but for the upstream manufacturer to offer a specific benefit such as a temporarily lower price, or a lump sum to the first retailer who has the specific extra task of opening the market.

In general, then, RPM is a blunt instrument which is not effective at achieving the efficiencies which may be in general associated with these vertical restraints. At the end of the 1990s the concern was that the negative effects are potentially more serious, the positive effects are unlikely and therefore the decision was to reverse the burden.

What has been the practice? The EC held a meeting of the European Competition Network to discuss RPM cases and the conclusion was that RPM is not always used to achieve the efficiencies that are usually mentioned, but rather to support resale restrictions (such as restrictions of the form 'you have to sell at least at a price X and you can't resell outside your territory'). The member states didn't report cases where there were real efficiencies. There was one argument that RPM may be necessary for a manufacturer to prevent the manufacturer's product being used as a loss leader - because being a loss leader in one market chain may result in delisting from other supermarket chains and therefore may endanger the distribution of your product.

Another argument that we often hear is that it is necessary to sustain the image of the product. Apparently a lot of manufacturers think that their product is like what the economists call a 'Giffen good'. But in practice, the number of goods where customers truly get benefit by paying more instead of paying less is very limited. The EC does not exclude the possibility that they may find such a case but would rather ask the firm to first show that the goods are truly Giffen goods instead of requiring the authority to show a negative effect.

The delegate concluded by noting that there may be a role for a rule-of-reason of some kind to assist with prioritization of enforcement resources. Sometimes cases arise that are so small that you don't want to bother to deal with them. Some kind of rule-of-reason may be useful to have the practical possibility to drop cases when you don't expect big harmful effects, where there are other possible enforcement actions to undertake.

The US, in response, made the following points.

In regard to the EC's comment that RPM is unlawful because it can facilitate collusion, the delegate noted that telephone and emails can also facilitate collusion but we don't presume that they are unlawful. The fact that something can facilitate collusion is not enough to change the burden of proof – we also need to expect that it will routinely be used to facilitate collusion. The empirical evidence for that is actually quite rare.

Secondly, the EC said that RPM necessarily induces a price increase. But RPM may not even increase the price of the product since the manufacturer could lower his wholesale prices. But even if the price for that brand goes up, if that firm has a small market share, overall market prices do not go up and consumers can turn to other alternatives.

The EC also made the point that retailers will not necessarily be induced to pursue desirable outcomes but will instead simply keep the extra margin. That is not quite right. The retailer has an incentive to spend the extra margin on actions that will enhance demand for the product. But the retailer will not make that investment if there is a risk that discounters will siphon off the value of that investment. Moreover, if the manufacturer is trying to induce the retailer to display the product in the first place, there is a very direct incentive – to ensure that every unit of sale has a margin sufficient to induce the retailer to put a particular product on display rather than another brand.

Once the manufacturer has sold the product to the retailer, the manufacturer's incentive is for the retailer to maximize the volume of sales – which is aligned with the consumer's interest. Particularly if the manufacturer has a large market share, there is reason to believe that any action by the manufacturer to raise retailer margins is pro-competitive.

Professor Marvel equated the position of the EC with the view that the manufacturer doesn't know what he/she is doing and that it is up to competition authorities to step in. The EC claims that if RPM were allowed the retailer will not do anything beneficial but will pocket the money. In effect the EC is saying: "Manufacturer, you're an idiot. Why did you do that?" But the manufacturer keeps coming back for more. If there are no offsetting efficiencies a higher retailer margin leading to higher retail prices reduces final sales for the manufacturer - and yet the manufacturers keep coming back to say: "Hey, please let me kick myself in the head by raising my prices so I'll sell less and get nothing back for it whatsoever". Maybe the EC is arguing that competition authorities should protect suppliers from their own foolishness? But why are they repeatedly so foolish?

Invited speaker Professor Bruno Jullien noted that RPM increases the margin of the distributor. But to determine the effect on retail prices you would have to determine the counterfactual – the retail price without RPM (which depends on both the wholesale price and competitors' prices). Making that comparison is delicate and is what the rule of reason is supposed to do. If you don't do this exercise you're going to conclude that RPM is bad for retail prices because you fixed all the other prices. But if you allow yourself to think about what would be the potential effect on the other prices the analysis would perhaps be more productive.

A delegate from Belgium agreed that there may be a case for RPM in luxury goods, for instance, (and there might be good reasons to have an exemption from the hard core restriction concept for luxury goods). But in a number of jurisdictions it would become very difficult to fight horizontal cartels effectively if we give up the prohibition on RPM. RPM is often the handle by which you can provoke companies to seek leniency. Without leniency, straightforward horizontal cartels are very often (especially with limited resources) difficult to fight.

A delegate from Russia noted that applying a rule-of-reason or effects-based approach to RPM analysis doesn't mean that RPM cases shouldn't be investigated. There are some practices that are only

used to achieve anti-competitive outcomes. For example, suppose that setting high monopoly prices is a practice which, by itself, is illegal. There are other practices – such as predatory pricing that are only useful for obtaining anti-competitive outcomes and establishing monopoly prices. As a result, in many jurisdictions predatory pricing is illegal *per se*. Now, looking at RPM, is it only used to achieve anti-competitive results? The answer is no, since it can also serve as a means for achieving pro-competitive outcomes. The *per se* doctrine is not applicable to RPM analysis, which should, rather be addressed on a rule-of-reason or effects-based doctrine.

A delegate from the EC agreed with the logic that, in principle, a manufacturer has an interest in making retailers compete to sell at a low price. But there are credible theories of harm in RPM cases.

The delegate agreed that there is a problem of the correct counterfactual, but emphasized that the first and immediate outcome of RPM is a prevention of the retail price being lowered. In cases of alleged predation we often argue that the lower price is at least a direct benefit to consumers - and therefore we have to be cautious before attacking lowering prices. In the same way, when you see cases where the first and direct effect is that the price will go up or will not be lowered, you should be more concerned. There are very often good alternatives to RPM. In the case of free riding why not give exclusive territories with a maximum price? This solves the free riding problem without raising the retail price.

On the point that higher margins are an inducement for retailers to stock the manufacturer's product on their shelves – the problem is that the incentives of the retailer are still not aligned with the manufacturer. The retailer may use this extra margin in ways that directly benefit him and not the manufacturer. A floor under retail prices is not an efficient mechanism to achieve that type of retail promotion or retail presence.

The Chairman commented that this still doesn't answer the question why manufacturers keep on insisting on RPM if they don't get anything in return.

The Chairman then moved on to Turkey, whose contribution mentions an RPM case – involving a movie producer (Warner Bros) that agreed with movie theatres to fix the price of tickets. Why did Warner Bros engage in this practice? Was it to attract a larger number of movie theatres to show their films?

A delegate from Turkey reported that, according to their block exemption, agreements which set maximum or recommended selling prices are legal as long as they don't transform into agreements on fixed or minimum selling prices directly or indirectly as the result of encouragement of the parties. This position is quite similar to the EU regulation on vertical agreements.

Warner Bros was fixing the prices of cinema tickets across Turkey with an aim to equalize the ticket prices of all cinemas within the same region or city. The Competition Board decided that this practice is a clear violation of Article 4 of the Act on restrictive agreements. Article 4 prohibits, among other things, the fixing of the purchase or selling price of goods or services. In the same decision it was further stated that WB was abusing its dominant position for the same conduct arising from its dominance in the film distribution market and they were using this dominant position in the distribution of movies to restrict competition in the movie theatres market.

The idea behind the conduct of WB was the prevention of price competition among rival movie theatres in order to increase the revenue of WB across Turkey. In Turkey, film distributors enter into revenue sharing agreements with the movie theatres that they work with – that is, they receive a certain amount of the returns earned by the movie theatres for the projection of the films. Price competition among movie theatres implies a reduction of the total revenue of WB. However WB terminated its conduct during

the course of the investigation. This was found to be a mitigating factor by the Competition Board. Although a fine was imposed, it was a reduced fine.

Professor Jullien observed that RPM is part of the debate among economists on vertical restraints. This is a debate that has been active for a long time and is still on-going. There are a lot of things we still don't know and it is not going to be resolved in the next few years.

Jullien discussed the pros and cons of the various arguments about RPM.

On the "pro" side there is the well-known literature on the impact of RPM or vertical restraints on downstream competition. First, there are several ways to achieve many of the same objectives as RPM (such as encouraging pre-sales service or encouraging retailers to stock products). Other tools can achieve these objectives. Still, these tools are not all equivalent - some are more efficient than others. If we ban RPM we will have an efficiency loss in some cases but not all.

Second, the interest of the vertical structure is not always aligned with the interest of the consumers and it's very difficult to know when it is aligned or not. It is necessary to carry out a very detailed case study to understand whether a particular RPM practice is going to be detrimental or beneficial for consumers. This would suggest the need for a rule-of-reason approach.

It is often said that we have very little evidence that RPM is used to enhance collusion, but the evidence we're looking at is cartel evidence. Of course in a world where RPM is *per se* illegal we shouldn't expect to see cartels using RPM. To use RPM would be too dangerous for them; instead they should rely on very innocuous practices so as not to raise any risks of being investigated. So it's not surprising that we don't find evidence. What we need is empirical studies of the functioning of markets when there is no cartel to see if we get real effects of RPM or not.

What is the effect of RPM on upstream competition? Of course if vertical structures are competing RPM would be pro-competitive. But there remains this concern about collusion. Jullien's work on collusion with Patrick Rey shows that indeed it's not straightforward that RPM can be used to enhance collusion, but it's possible. RPM facilitates collusion by enhancing transparency. There are costs of using RPM but nevertheless it permits collusive practices that were not possible without it.

France has provided some very good cases for the study of price restrictions because of some intricate laws that were used in France until recently. Work done by Rey and others points to the fact that if we have competing vertical structures we don't have much effect. But if we have interlocked structures – meaning multiple manufacturers selling to multiple big retailers – things are quite different. When you give a high margin to the retailer you may still get this margin back through the franchise fee. Now by combining complex contracts with RPM you may use high levels of margin at a retail level and get the profit through various other dimensions of the contract. The result of the analysis is that in some cases combining RPM with complex contracts may lead to the monopolization of the industry.

There are economists in Toulouse who have started to investigate this possibility empirically. They have investigated the market for water in France over the last 10 years. This is not a case of a cartel but a normal industry where the French law results in an outcome that looks very much like RPM. The conclusion is that in the case of the distribution of water in France the outcome can be described as RPM with complex contracts and high margins at the retail level, which is precisely the situation under which the outcome is very high prices. This is a case where we should have serious concerns.

In regard to downstream competition there is not a good case for *per se* illegality. But the impact of RPM on various collusive dimensions is very specific to RPM. The same effects don't arise with other types of practices, such as quotas or exclusive territories. There are cases which are more intricate

involving interlocking contracts where there may be a problem with RPM. It is going to be very hard to solve these problems, since they don't involve a single firm but rather several firms using RPM collectively. The only way to address such cases with existing laws would be to run a case based on collective dominance and RPM which would seem to be a real challenge.

The Chairman pointed out that in several contributions the concern with RPM was not so much the effect on competition but more the perceived high level of prices or the perceived lack of freedom of retailers brought about by RPM. For example, Switzerland reports that RPM is one of the reasons for the higher price level in Switzerland compared to other European countries. They note: "Against this background the Competition Commission considers RPM to be a severely anti-competitive vertical restraint". In fact, RPM is considered to be so severely anti-competitive that the presumption of illegality can't be overturned even if there is evidence that inter-brand competition has been increased. Is there evidence in Switzerland that RPM may indeed be contributing to high prices?

A delegate from Switzerland made three points:

First, the perceived isolation of the Swiss market is behind this policy. The legislators included in the law a presumption that both RPM and restrictions on parallel imports are presumed to remove effective competition. In practice, all RPM cases are imports related. The delegate was not aware of any RPM case which was purely internal to Switzerland. The isolation of the Swiss market results in a monopoly situation for the importers or the distributors in Switzerland and is likely to be a reason for higher prices. In the past, in European distribution agreements the Swiss market was often singled out. With this provision in the law Switzerland has ensured that there are Europe-wide distribution agreements which also apply for the Swiss market.

In order to rebut that presumption, a mere showing that there is interbrand competition would not be enough. Inter-brand competition is certainly necessary but the Competition Commission would like to see additional efficiency effects alleged, such as opening up the market.

In practice, the focus of competition concern in Switzerland is generally not on the producer or the manufacturer but on the distributor or retailer as Prof. Jullien has pointed out. In the past, distributors with market power or cartels of retailers would approach the producer and ask for RPM so that the retailers could work quietly and compete on quality rather than on prices. One interesting case involved a discounter in the food sector who wrote to a producer requesting a price for its non-discount competitor at least 10% higher than the price it receives.

The Chairman next observed that in Japan, RPM is regarded as an unfair practice because "it is one of the most basic matters in a firm's business activities that it independently determines its own sale price in keeping with the conditions in a market, and moreover this secures competition among firms and consumer choice". It seems that the primary reason for preventing RPM in Japan is that it limits the freedom of some economic operators.

A delegate from Japan agreed that in principle RPM is illegal in Japan. It is similar to *per se* illegal. The reason for this is that the choice of the price is supposed to be the most important business decision and RPM would take away this freedom of decision-making from retailers and eventually harm consumers. There is one interesting aspect of the treatment of RPM in Japan. The JFTC guidelines on distribution systems and business practices say that RPM is illegal unless there are "justifiable grounds". And in some cases, companies claimed they had "justifiable grounds" such as "Their market share was small" or "Their product was used as a loss leader by supermarkets". In the first case, the Supreme Court pointed out that the particular market, which was the powdered baby milk market, was very differentiated and customers had loyalty to specific brands. So the company's argument was rejected. In the second case, the court again

said the company's argument was not persuasive enough because "justifiable grounds" meant that it should be justifiable from the standpoint of protecting the competitive process, not from the standpoint of a company who was practicing RPM. So far, Japan has no cases where such arguments have been accepted by the court.

The Chairman noted that the contribution from Germany clearly states that the pro-competitive benefits of RPM are not sufficiently established. Germany supports the current EU approach and takes a firm stand against the possible introduction of a rebuttable presumption in favour of the legality of RPM, saying that it would be a step in the wrong direction. The basis of the German contribution is that "the above mentioned arguments in favour of and against RPM show that RPM may generate efficiencies but also make it very clear that these efficiencies are often not sufficient to outweigh the severe restrictions in price competition which it causes".

Furthermore, Germany emphasises the fact that RPM can increase prices and thereby reduce consumer surplus. In contrast, the US contribution says that "even if the available evidence established that RPM led to a higher retail price for a product, it would still be inappropriate to conclude on that basis that consumers had been harmed. If the higher retail price created an incentive on the retailer to provide valuable services or higher quality, consumers could be better off, and evidence that sales had increased despite the price increase would suggest that they are". Is Germany putting too much emphasis on the price and forgetting about the quality or the services that are included with the product through the RPM mechanism?

A delegate from Germany replied that the submissions and the discussion so far show that the pros and cons of RPM are based more on theory than on scientific knowledge. The view of Germany is very close to the view of the European Commission – that the current treatment of RPM under EC law strikes a good balance.

In Article 81, RPM is treated as anti-competitive. This is not equivalent to a *per se* rule – since European agencies and courts could not and would not exclude expert testimony demonstrating the pro-competitive effects of RPM. On the contrary, if a company comes forward with such evidence, agencies and courts have to analyze the alleged efficiencies under Article 81(3). This would involve exploring, for example, whether consumers get a fair share of these efficiencies and whether the pro-competitive effects outweigh the negative effects of fixing the price. If RPM leads to valuable services or higher quality, consumers could indeed be better off, even if prices are higher. If that was the case the RPM would not be held to violate Article 81.

Given the fact that there is still considerable uncertainty with respect to positive effects of RPM and given the severe negative effects of RPM, the burden to demonstrate the effects in particular cases should, in the view of Germany, remain with a firm that wants to restrict the freedom of a retailer to set its own prices.

The Chairman pointed out that Romania is another country that is aligned with the EU position and in which RPM is per se illegal. The Romanian contribution is extremely sceptical of the argument that retailers, when provided with higher margins through RPM, would actually deliver higher levels of service. Romania says the retailers would probably pocket the money instead.

A delegate from Romania agreed that there is no guarantee that RPM will ensure that retailers provide services subject to free-riding such as pre-sales services. Instead, the retailer may choose to offer free or discounted supplements to the product or attractive credit terms or any other services they can find that will appeal to customers. In the opinion of the Romanian competition authority, it is unrealistic to hope that the introduction of RPM will automatically cause retailers to provide the services desired by the

manufacturers, absent explicit contractual restrictions on all forms of non-price competition. For this reason the authority supports the view of the EC and the German delegates that RPM doesn't take away the underlying free riding problem.

The delegate went on to describe a case involving RPM which showed how RPM can sometimes be used as a tool for collusion between suppliers or distributors provided that the upstream market is concentrated. In that case the applicant came to the authority with several distribution contracts asking for individual exemptions from Article 5 (1) of the Romanian competition law, which is the equivalent of Article 81 (1) of the EC Treaty. Unfortunately, the party couldn't prove that they met the exemption criteria. Instead, those contracts contained certain anti-competitive clauses, which led to the refusal of the individual exemption.

During the investigation the authority carried out a dawn raid on the premises of one of the distributors. The authority found written agreements between 4 distributors which were overlapping in territory and had the object of fixing the minimum resale price. It is very important to underline that the market in this case was an asymmetric oligopoly market. The manufacturer periodically issued a list of recommended maximum prices to be used by the distributors when selling its products. The recommended resale prices were covering prices that were uniform and fixed by the distributor. This finding, together with the fact that the supplier was in a dominant position and the market was an asymmetric oligopoly, made the authority believe that collusion would very likely take place between suppliers on the Romanian market for personal care.

The Chairman returned to the question whether, if RPM were addressed under the rule of reason, it would be too difficult for competition authorities to demonstrate the anti-competitive effects. Finland argues that efficiencies have to be analysed on a case-by-case basis (it is not sufficient to argue that RPM will in general bring efficiencies). On the other hand, it says that "if there were a presumption of legality and the competition authority had to show the actual anti-competitive effects in order to make a negative decision in an RPM case the task would be very difficult and consume a lot of resources". Isn't this an unbalanced approach?

In Finland, a delegate from that country explained, RPM is viewed as a hard core restriction, but the illegality is nevertheless a rebuttable presumption, and the door for an efficiency defence is left open. There are many theories of harm arising from RPM. RPM can cause harm through horizontal effects, by facilitating cartel formation among manufacturers. It can also facilitate the exercise of market power by foreclosing smaller rivals or new entrants from the shelf space of dealers. It can also lead to inefficiencies in upstream production since providing a large margin to retailers might keep them from bargaining over the wholesale price.

With this in mind, the competition authority is very cautious about changing the existing law to *per se* legality, at least before more convincing empirical evidence on the pro-competitive effects are available. The authority's future strategy is to be cautious when choosing which cases to take to court. Without a theory of harm there are no grounds for allocating the resources of the authority or imposing fines.

Next, the Chairman noted that the Czech Republic's submission takes a negative view on economic theories of RPM, which (loosely summarizing) "don't prove anything". The submission also says that it would be very difficult for the competition agency to prove the existence of anticompetitive effects. Is this because these effects are not there?

A delegate from the Czech Republic explained that for a while the Czech competition authority was quite lenient toward RPM. Then they realized that this practice was widespread in the economy, and they had to decide whether to engage in further investigation or not. The authority read all the economic

theories and tried to find evidence that they were proven in reality. The fact is that the anticompetitive effects aren't proven by natural experiments in the Czech Republic.

It wouldn't be difficult for a competition agency to prove the negative effects on competition from RPM. It's clearly possible to demonstrate them but it's costly. These costs can be so substantial that, due to the need for prioritization, the competition agency would refrain from enforcing the ban on RPM. This is the main reason why the current European system on hard core restrictions – with the presumption of illegality together with a possibility to rebut these presumptions – is most appropriate. Even the most optimistic reports say that the majority of cases of RPM are anticompetitive.

Turning to the next part of the roundtable, the Chairman noted that even if you keep the *per se* illegality or the presumption against RPM, in a number of countries it's clear that prioritization is used to weed out cases that may not be so interesting, where there is a feeling that probably there is not much competitive harm - to focus only on those cases where there is *a priori* a stronger expectation of competitive harm.

This is certainly the case in the Netherlands, which in its contribution discusses prioritization and how it dismisses complaints that don't seem likely to raise a competition problem. Is this the right approach, rather than shifting to different presumptions that would allow us to reconcile economic sense and a rather strict legal rule?

A delegate from the Netherlands emphasized that any policy choice in regard to RPM should be based on empirical evidence. Generally speaking *per se* illegality is an appropriate choice only if there is theoretical or empirical evidence that certain conduct will almost always be anticompetitive. In the case of RPM, theoretical economics doesn't provide us with conclusive grounds concerning the correct policy choice. Certain economic theories suggest that RPM can be anticompetitive; other theories suggest that RPM is pro-competitive. It's essential to have empirical evidence regarding the typical effects of RPM.

Unfortunately, we have found little guidance in existing empirical studies. That is why the NMA stresses the necessity of open discussion and more empirical work. Of course, for the time being, the Dutch legislation is very close aligned to the EU legislation framework and the block exemption. The NMA is not actively looking for different ways to handle its cases.

In regard to priority setting, the NMA deals with RPM questions in the same way it does with other cases. Cases are prioritized on the basis of their economic impact, consumer harm, effectiveness and efficacy of the intervention of the agency, and the gravity of the infringement. In conducting case prioritization the NMA makes use of analysis which weighs these criteria against each other. This allows the NMA to assess the strategic importance of each case and to steer and structure its total case portfolio. As a result, in RPM cases, where there is evidence of ample inter-brand competition or where there is no sign or evidence of a horizontal cartel the NMA is unlikely to prioritize the case because of the expected absence of consumer harm.

The Chairman noted that the UK contribution is concise but includes a very interesting set of theoretical analytical propositions on RPM and, more importantly for this debate, derives from the economic analysis prioritization criteria for RPM cases.

A delegate from the UK explained that the OFT uses prioritization principles in all its enforcement work to determine which cases to take forward. One of the key principles is the impact that the OFT can have through its intervention. Obviously, in order to assess the impact there needs to be a theory of harm.

While generally excellent in describing the economic theory, the delegate felt that neither the debate in *Leegin* nor the Secretariat paper gave sufficient weight to the burgeoning EC literature on RPM which

Bruno Jullien talked about earlier – including papers from Toulouse and also some important papers from the UK. In particular, there was insufficient mention of the points about restoring market power and the impact of RPM in dampening competition across the system - in particular when there are interlocking chains. The literature in the past has rather focused on the effect upstream or downstream, without looking at the effect on the system as a whole, which seems to be where the literature is going now.

The prioritization filters set out in the UK submission should be viewed as disjunctive negative filters. If all the answers to the questions are no, the OFT would be unlikely to bring a case. If any answer to a question is yes, the OFT might bring a case but not necessarily – more work and thinking is required.

The OFT has suggested three criteria:

1. Is there significant unilateral upstream market power? If there isn't, there is unlikely to be any plausible theory of harm from enabling the upstream party to extract its full monopoly rent (a restoring-the-market power story).

2. Is there evidence of a network of RPM agreements involving a number of upstream suppliers and do the suppliers jointly account for a significant share of the upstream market? If the answer to that question is no, it's unlikely that there will be a plausible theory of harm from RPM facilitating upstream collusion or indeed dampening system competition.

3. Is there evidence that the RPM agreements are retailer instigated rather than instigated by the upstream supplier? Relevant evidence here might include whether the retailers that have engaged in RPM have a degree of bargaining power with respect to the upstream suppliers; whether they jointly have a degree of downstream market power (i.e., is it worth their while to take a role in both initiating and monitoring the RPM?). If the RPM agreements are not retailer instigated, it's unlikely that there would be a plausible theory of harm from RPM facilitating downstream collusion or deliberately foreclosing downstream entry.

The US Supreme Court in *Leegin* also highlighted three factors that the lower courts might like to take into account when assessing RPM, and they are similar to the criteria above. There are a couple of differences too. The Supreme Court in *Leegin* suggested that you need to look at the number of upstream suppliers engaged in RPM – the OFT thinks it is also important to look at their joint market share. Also, while the OFT agrees with the Comanor and Scherer view (that feeds into the *Leegin* criteria) that it matters whether the RPM is retailer-instigated or supplier-instigated, the OFT considers that it is not always easy to work out when this is the case. For example, if a retailer complains that another retailer is free-riding, is not offering certain services and instead is offering a lower price – is that a manufacturer instigated RPM that the retailer wants to see others abiding by? Or is it a retailer instigated RPM? It is also important to look at the degree of retailer buyer power, which wasn't included as one of the elements in the *Leegin* criteria.

Turning to France, the Chairman noted that its contribution analyses the various possible theoretical effects of RPM. It also presents the Council's practice in a number of cases. One recent case has attracted much attention. It involved the toy company Lego, which was accused of having imposed RPM. Lego, in its defence, asserted that there were benefits in terms of efficiency, such as avoiding the double marginalization that might arise if Lego could not align distributors' incentives with its own. The Council rejected this defence, stating that cases in which there is a double-marginalization problem are cases in which there is little competition among producers, little competition between retailers, and producers have a strong bargaining position vis-à-vis distributors. But if it is true that there are little or no efficiency benefits in such a case, isn't it also true that there are little or no anticompetitive effects?

A delegate from France agreed that there is a paradox. On the one hand, the Competition Council rejected the efficiency defence offered by Lego on the basis that the problem of double marginalization arises when there are few producers and distributors, yet in this case we have an oligopolistic market structure upstream and downstream. Nevertheless, the Council still condemned the RPM.

The delegate noted that he would try to reconcile this decision with the criteria that were suggested by both the US and the UK. Three criteria were proposed:

1. The number of players involved in the market with RPM agreements. If there are only a few there is little chance of competition problems.

2. Whether the RPM originated with the producer or the distributor. If it originated from the producer, it is likely to be implemented for reasons of efficiency; if it originated with the distributor it is more likely a result of a desire to reduce the intensity of competition.

3. Existence of bargaining power or of market power on the side of producer.

What is interesting about this toy case is that it was completely representative of the kind of situation just described by Bruno Jullien – where there is an interlocking market structure with several producers selling to several distributors and there is oligopolistic competition both upstream and downstream.

In regard to the third condition, in the case of the toy market, the relevant market structure is a differentiated oligopoly at the level of the producer and the distributor that brings together both the large hypermarkets such as Carrefour or Auchan and the large retailers specialized in the toy sector such as Toys 'R' Us. The bargaining power of producers varies greatly from one distributor to another. With respect to the large food hypermarkets, the toy producers have little bargaining power while they have a lot more with respect to the specialised retailers, so the conclusion on this third condition is rather ambiguous.

Turning to the other conditions, the picture is a little clearer. First, was the RPM practice widespread or not? Lego was in a special situation because it was the only producer not relying on the French legislation about selling at a loss. All the major toy manufacturers, such as Mattel, Playmobil, Meccano, Ravensburger, Hasbro, were involved in agreements similar to RPM with all the distributors, both general and specialized. On the question of whether or not the RPM practice was widespread, the answer was clearly positive.

Finally, did the practice originate with the producers or distributors? The Council did not have hard evidence to determine whether it was the producers or the distributors who were behind the practice. But, in contrast, there was clear evidence that the distributors played a very active role in monitoring the agreement: they watched each other and they informed producers if another distributor deviated from the imposed price. Deviations were reported to producers who then intervened at the request of distributors to enforce the agreement. It is clear that distributors had a keen interest in the price clauses and they watched very carefully to ensure that that these clauses were respected.

We can see that – especially in markets with interlocking vertical structures – the RPM agreements supported a fairly widespread collusive agreement between producers and distributors. In this toys case, where the market structure is a bit complex, had we imposed the screening test proposed by both the US and UK delegations we might have had an ambivalent response to the question of bargaining power, and a positive response to the two other criteria. In this case, despite the existence of competition in the upstream and downstream markets, the case probably fell on the side where RPM is problematic.

The Chairman observed that two countries seem to be moving from a presumption of illegality to a rule-of-reason approach. The first is Chinese Taipei which has a prohibition for both minimum and

maximum RPM, but there is a proposal to amend Article 18 of the Competition Law which will explicitly accept a rule-of-reason approach to RPM rather than the presumption of illegality that exists now. The Chairman asked about the motivation for this change and how the proposal has been received by the business and legal communities.

A delegate from Chinese Taipei replied that the current position on RPM in Chinese Taipei is straightforward and very strict: under no circumstances can a firm propose any kind of justification for the use of minimum or maximum RPM. This position began to change in early 2007 when new Commissioners were introduced to the Commission.

There are two driving forces behind this amendment. The first is complaints from business. The complaints contend that the very strict regulation of RPM has forced businesses to abandon marketing mechanisms that might be efficient for them and for the consumer. For example, the cosmetics industry alleged that the RPM regulation had forced them to invest in opening outlets in department stores, which are subject to free-riding from discounters that import the products from other countries. A textbook supplier complained that they need to use RPM to ensure a minimum profit for bookstores located in remote areas in Chinese Taipei, so as to ensure they stock the textbooks.

The second reason for the amendment is the changing position in the US Supreme Court, beginning with the *Sylvania* case and then *Leegin*. The framework of these cases (which applies to vertical restraints more generally, not just RPM) was permeating the thinking of the Commission.

There remains a lively debate within our Commission about how to change the law. There are at least three proposals for how to revise Article 18:

- To apply the rule-of reason-approach to maximum RPM but retain the status quo for minimum RPM. The Commission is more confident about the benefit that might arise from maximum RPM, since the consumer will benefit immediately by lower prices.

- To adopt an approach very similar to the US approach – the Commission would introduce a market share threshold and then conduct an investigation of the pro- and anti-competitive effects.

- A compromise between the first two approaches - RPM is basically illegal but we allow the company to propose a commercial justification for further review. This kind of amendment might open the door for the Commission to undertake a full blown rule-of-reason analysis.

This proposal is still a draft and it needs to be approved and ratified by the Congress. The wording of the basic principle will be hotly debated. They will probably want to maintain the status quo – that is, to maintain RPM as a *per se* illegal practice.

If we are weighing the cost of the rule-of-reason approach, we need to take into account the costs arising from the use of the *per se* illegal rule – in particular the risk of "false positives" – of deterring pro-competitive behaviour.

Regarding the *Yoplait* case, Yoplait reduced the wholesale cost of yogurts to downstream distributors in the hope they might promote their brand. They imposed maximum RPM on the distributors to make sure that the benefits from cost reductions could be enjoyed by customers instead of being captured by the distributors themselves. But, under the current law, the agency only has to check if there is an agreement that is enforced. If so, the agreement is illegal. But, under the revised Article 18, the Commission will first consider the level of market power. There are likely to be substitutes for Yoplait in Chinese Taipei. In addition, consumers benefit from lower prices - maximum RPM reduces the prices to consumers.

Sometimes maximum RPM is a complement to other types of vertical restraint which together form part of the optimal distribution mechanism (such as exclusive territories). In the Yoplait case, the supplier imposed a local monopoly area for each distributor. It might be necessary for them to impose some kind of maximum RPM in order to avoid the double marginalization problem. If the law is amended there might be a totally different outcome.

The Chairman reported that Korea has a strict *per se* rule against RPM but there is a lot of criticism of this rule. Does it come from the business community, the legal community, economists, the commissioners? In addition, Korea has RPM on books. The UK contribution makes the case that abolishing RPM on books has developed the book business and benefited the book sellers. The Chairman asked Korea if it thinks RPM on books is a wise thing given the kind of evidence we have in the British contribution.

A delegate from Korea noted that it doesn't formally distinguish between *per se* illegal and rule-of-reason but RPM is regarded as almost always illegal so it may be thought of as a *per se* illegal approach. Some lawyers and economists have argued for a change to the rule-of-reason.

Regarding RPM on books, the empirical study from the UK is quite helpful and useful. The FTC has tried to reduce the scope for exemptions to RPM. Historically the scope was wider than it is now. That empirical study provides good reasons to reduce the scope even further.

The Chairman recalled a roundtable on books held at the OECD many years ago. Two contributions, in particular, stood out. Sweden reported that in 1981 they abolished RPM for books and the outcome was wonderful for the publishing businesses because the booksellers have become more specialized, they've differentiated themselves, the price of books has gone down and there are many more publications than there used to be, and so on. The next contribution was from France which reported that in 1981 they imposed RPM on books, and the outcome was wonderful since the number of booksellers has not diminished and there were more books available since, as a result of the huge margins, the retailers work hard to push books and to do all kind of good things for the publishers.

A delegate from Sweden added that the liberalization of book prices is still a success.

The Chairman noted that Poland also considers that there might be merit in a review of the way they treat RPM – but even more than a review of the theoretical models, there is a need for good and thorough empirical analysis of cases. What sort of evidence does Poland think would be useful?

A delegate from Poland replied that the most useful information would be an analysis of the experience of other countries in cases where RPM turned out to be either very bad or benign. The delegate emphasized the importance of undertakings producing credible justifications for the use of RPM. No matter what the internal thinking of the Polish competition authority, that thinking will not have a great impact on the decision-making practice when credible evidence provided by undertakings shows clearly that the RPM is benign or pro-competitive.

A delegate from the UK also discussed the possible role of more empirical work. In particular, there could be value in looking at the impact of vertical integration across many jurisdictions, where there are variations in legal arrangements and the use of RPM over time. When it comes to identifying the positive and negative effects of vertical practices - or in fact any practices – it is often quite difficult to identify causal effects by looking at before and after experiences. That lesson comes out plainly from the Chairman's reminiscences on the removal of RPM in books.

Another possible question to answer is how consumers trade off price and quality effects. If we are interested in quantifying the efficiencies it is not enough to say that prices go up but also service levels go

up - there have to be at least some consumers who prefer that new price-quality combination for there to be positive effects from RPM.

Another approach is to directly estimate demand curves and see how they change as a result of allowing or not allowing RPM. It might be useful to look at a border region or a state where regulation has changed. There is one nice study on the effect of the removal of advertising restrictions which applied in Rhode Island but which didn't apply in Massachusetts – there were differences in responses in pricing and quantities depending on which side of the border you looked at. This kind of study seems suitable for both agencies and academics. The delegate noted he looked forward to seeing the output over the next few years.

The Chairman reflected that just trying to gather evidence on what happened to prices, market shares, and service levels might give some preliminary indications about what we would be able to interpret. There are all kinds of complexities in this kind of empirical work, but even evidence such as whether firms that are prohibited from engaging in RPM tend to see their market share decrease would be a useful first indicator. We could try to do an ex post analysis of the decisions that were taken where we have the data.

A delegate from the US agreed with the earlier comment that the EU standard for assessing RPM is more liberal than the previous US standard in that it allowed efficiencies to be considered. The question in the *Leegin* case was whether evidence on efficiencies could be presented at all, or whether it is irrelevant. The issue now is how much more information does one want to examine and how to look at it. The answer to this question does depend heavily on assumptions or empirical work about actual effects. In the case of the FTC, a series of evaluations that took place in the late 70's-early 80's were influential. They looked at previous cases in which the FTC's presumption was that the behaviour was always offensive. The outside economists found that sometimes it was pro-competitive and sometimes it was anticompetitive. The conclusion, in a report written by Jack Kirkwood and others, was that there was no basis for a rule of *per se* legality just as clearly there was no basis for rule of *per se* illegality. The study published by the FTC in 1984 was a formative basis for rethinking the appropriate rule.

One thing that came out of this analysis was that there was a great deal of experimentation going on - manufacturers and retailers were continually looking at different strategies. You don't want to inhibit that experimental process. You could establish guidelines and principles which say, for example, that if you have a fragmented manufacturing and retailing sector, there are unlikely to be competition concerns.

A delegate from the EC expressed gratefulness for Prof. Jullien's presentation and the UK paper where it is stressed that the potential to enhance collusion is specific to RPM which should be taken into account in the balancing. The fact that in the US RPM was not (in the past) often used to cover up or help a cartel is not surprising because if RPM is *per se* illegal the cartel would be stupid to use RPM. The delegate shared the view expressed that permitting RPM may enhance collusion.

The delegate noted that Prof. Jullien mentioned that RPM may be the most efficient way to achieve certain vertical efficiencies. The delegate asked Prof Jullien to name one or two efficiencies for which RPM is the most efficient way to achieve those benefits for consumers.

Prof. Jullien replied that when there are competing structures upstream anything that is good for efficiencies is good for consumers.

There are basically three types of restrictions that are used: exclusive territories, quantity forcing, and RPM (and non-linear tariffs). These restrictions don't all play the same role. When the environment is complex enough you need enough all three instruments to solve all the potential problems. In some

circumstances RPM is dominated by a combination of other instruments, but overall it is not clear whether RPM is dominated or not.

Prof. Marvel returned to a comment by the EC regarding the need to consider if there are alternatives to RPM. One possible alternative that was proposed was exclusive territories combined with maximum prices. Does the EC mean to propose that we should tell the supplier: "Don't suppress intra-brand price competition. It would be much better if you suppressed all intra-brand competition - whether price or non-price - by having exclusive territories"? In this case there will be such a mess on your hands that you'd better impose maximum RPM to protect against high prices from the grant of these exclusive territories you've set up. The EC seems to be suggesting that the more restrictive approach is the one that the supplier ought to be taking. Should a competition authority be telling firms that it knows how they ought to run their businesses?

Prof. Marvel noted that a delegate from Japan said that the most important thing a retailer does is to set his price. In fact what the retailer often does is set his inventory - to decide what and how much he's going to carry and how to go about selling that product. One of the suggestions made by Japan was that the manufacturer could easily relieve the retailer of that responsibility by taking unsold returns or by providing the inventory on consignment, for example. This takes away the retailer's ability to choose one major aspect of his role – the decision as to what to carry and what inventories to hold. This seems to be more prescriptive than is necessary.

RÉSUMÉ DES DISCUSSIONS

Par le Secrétariat

Frédéric Jenny, Président du Comité de la concurrence, ouvre la Table ronde en soulignant l'importance des différences d'approche entre les pays vis-à-vis des prix de vente imposés. Certains pays affirment, dans leurs contributions, qu'aucun élément économique ne prouve que les prix de vente imposés ont des aspects positifs. D'autres, en revanche, estiment qu'il existe des preuves que les prix de vente imposés ont des avantages, permettent des gains d'efficience et ont même des effets proconcurrentiels.

Un délégué de l'Autriche rend compte d'une conférence sur les prix de vente imposés qui s'est récemment tenue à Vienne. Cette conférence a notamment abouti aux conclusions suivantes :

- Les mesures relatives aux prix de vente imposés sont probablement les pratiques des autorités de la concurrence les plus contestées.

- Il n'a pas été possible d'étudier les effets des prix de vente imposés dans l'Union européenne (ou aux États-Unis) parce que ces prix étaient (et, en ce qui concerne l'UE, restent) dans une large mesure illégaux. L'affaire *Leegin*, aux États-Unis, pourrait constituer un exemple réel des conséquences d'un changement d'approche vis-à-vis des prix de vente imposés. Il faudrait conduire d'autres travaux empiriques, ne serait-ce que pour que les organismes chargés de faire respecter le droit de la concurrence disposent d'un outil pour établir un ordre de priorité des affaires à traiter.

- La plupart des autorités nationales de la concurrence représentées à la conférence étaient apparemment favorables à l'approche actuelle. Elles ont invoqué le fait que l'adoption d'une approche reposant sur la règle de raison risquait d'avoir pour corollaire des contraintes administratives trop importantes et ne se justifiait pas puisque les effets proconcurrentiels des prix de vente imposés restaient à établir. Il est possible que les pays parviennent à un consensus sur l'intérêt d'intégrer une forme d'analyse des parts de marché au processus d'enquête/d'application du droit de la concurrence.

Le Président commence par les contributions qui mettent en avant les effets proconcurrentiels des prix de vente imposés et l'intérêt d'adopter une approche reposant sur la règle de raison vis-à-vis de cette pratique. La contribution des États-Unis présente les principaux arguments théoriques à l'appui des effets potentiellement positifs des prix imposés. Le Président invite les États-Unis à présenter les éléments empiriques qui démontrent que – à tout le moins dans certains cas – les prix de vente imposés tendent à accroître la concurrence et/ou à permettre de réaliser des gains d'efficience.

Un délégué des États-Unis fait observer qu'il existe de nombreuses théories sur les effets proconcurrentiels des prix de vente imposés mais que seules deux d'entre elles méritent réellement l'attention. La première est liée à la fourniture de services sur le point de vente. Il s'agit là du traditionnel argument de l'opportunisme, selon lequel si un distributeur réalise des investissements pour offrir des conseils ou des services sur le point de vente, le consommateur risque de consommer ces services puis d'acheter le produit à un vendeur au rabais qui ne les propose pas, ce qui entraîne une insuffisance de

l'offre de services sur le point de vente. Les prix de vente imposés aident les distributeurs et le producteur à éviter ce problème.

L'autre argument est que le producteur peut vouloir renforcer l'intérêt du distributeur pour le produit qu'il fabrique. Si le distributeur n'alloue qu'un espace restreint à la présentation du produit et s'il ne gagne qu'un dollar par unité du produit A contre 1.25 dollar par unité du produit B, il risque de consacrer davantage d'espace au produit B. Selon ce raisonnement, les prix de vente imposés sont un moyen d'améliorer la marge du distributeur. Ils sont susceptibles d'intensifier la concurrence intermarques.

En ce qui concerne les éléments empiriques, le délégué fait observer :

- Qu'il n'est tout simplement pas crédible d'affirmer qu'une entreprise détenant une faible part de marché (moins de 10 %) porte préjudice au marché dans son ensemble lorsque la quasi-totalité de ses pratiques sont unilatérales. Si une entreprise qui détient, par exemple, 5 % du marché, pratique des prix de vente imposés, il y a tout lieu de penser qu'elle ne porte pas préjudice au marché et poursuit un autre objectif – qui n'a pas d'effets anticoncurrentiels, voire a des effets positifs sur la concurrence.

- Que le problème de la double marginalisation est un problème bien connu. Tout producteur souhaite que le distributeur vende son produit au prix le plus faible possible, une telle pratique ayant en général pour effet d'accroître la demande. Par conséquent, pour qu'un producteur impose un prix minimum, il faut qu'il ait une raison rationnelle. L'élimination de la double marginalisation constitue une raison rationnelle d'imposer un prix maximum et repose sur des considérations théoriques solides, non sur des hypothèses fantaisistes ou aléatoires.

- Qu'en outre, un rapport de la *Federal Trade Commission* (FTC) cite des études empiriques et souligne que dans la majorité des affaires, les effets anticoncurrentiels potentiels mentionnés n'étaient même pas invoqués. Il ressort même d'une étude concernant le groupe Corning qu'en supprimant son système de prix de vente imposés, le groupe a perdu des parts de marché par rapport à ses concurrents. Cette suppression n'a donc peut-être pas eu d'effets positifs pour les consommateurs.

D'un autre côté, bon nombre des études empiriques qui visent à mesurer les effets anticoncurrentiels des prix de vente imposés ne sont pas fiables. Il importe de les analyser soigneusement et de se demander, par exemple, si elles mesurent le prix nominal du produit en cause ou le prix moyen du marché, si elles tiennent compte du prix corrigé de la qualité ou encore si elles cherchent à déterminer si une hausse du prix peut s'expliquer par une variation de la demande.

En outre, pour déterminer si une interdiction *per se* des prix imposés est souhaitable, il faut tenir compte du fait qu'une telle interdiction est susceptible d'inciter les entreprises à se tourner vers des pratiques de distribution exclusive ou d'exclusivité territoriale, qui ont pour effet d'éliminer la concurrence sur un territoire donné (tandis que les prix de vente imposés n'excluent pas la concurrence fondée sur d'autres déterminants que le prix).

Le délégué rapporte une anecdote tirée des délibérations de l'affaire *Leegin*. Les représentants des plaignants ont avancé que la suppression de la règle *per se* appliquée aux prix de vente imposés les priverait définitivement de la possibilité de justifier leur plainte. Selon le délégué, cette anecdote apporte la preuve que les prix de vente imposés n'ont pas d'effets anticoncurrentiels et qu'il ne faut donc, à tout le moins, pas imposer de règle *per se*. Elle plaide également en faveur d'une présomption de légalité ; la charge de la preuve de l'existence d'effets anticoncurrentiels doit incomber au plaignant. Il existe des raisons de penser que les prix imposés peuvent, dans certaines situations, être préjudiciables et

l'application de la règle de raison peut aboutir à leur interdiction dès lors que la preuve du préjudice est apportée.

En réponse à une question de la Commission européenne (CE), le délégué des États-Unis précise que l'argument de la double marginalisation ne vaut qu'en situation de concurrence imparfaite, au niveau tant de la production que de la distribution, et que, dans ce cas, le producteur cherche à imposer un prix maximum.

Le Président résume la contribution du Mexique, dont il ressort que les prix de vente imposés peuvent répondre à plusieurs objectifs – parmi lesquels certains ont des effets neutres, voire positifs, sur le processus concurrentiel ; le Mexique fait donc partie des pays qui plaident en faveur de l'application de la règle de raison de préférence à une règle *per se*. En outre, dans 18 affaires examinées par l'autorité mexicaine de la concurrence (CFC), aucun élément prouvant l'existence d'effets anticoncurrentiels n'a été retrouvé. Le Président demande si l'expérience de la CFC montre que l'application de la règle de raison à ces affaires a mobilisé des ressources considérables ou a été d'une lourdeur injustifiée.

Un délégué du Mexique précise que le droit mexicain permet, dès lors que certaines conditions minimales sont remplies, à quiconque de porter une affaire devant la CFC, qui est alors tenue de statuer. Les 18 affaires citées dans la contribution ne sont pas des affaires dans lesquelles CFC aurait choisi d'intervenir.

Il ne fait aucun doute que l'approche *per se* est plus simple à mettre en œuvre par les autorités de la concurrence, puisqu'il est beaucoup plus facile pour les autorités chargées de l'enquête de prouver l'existence de prix imposés que de prouver leurs effets. Ce constat vaut pour toute restriction verticale – les restrictions verticales sont toujours beaucoup plus difficiles à prouver en appliquant la règle de raison. En réalité, cette difficulté plaide probablement en faveur de l'application de la règle de raison – si les effets anticoncurrentiels sont difficiles à démontrer, le comportement en cause ne doit probablement pas être illicite *per se*.

Le délégué cite une affaire relative à des boissons lactées probiotiques. Une entreprise coréenne a introduit ces boissons sur le marché mexicain en utilisant deux canaux de distribution différents : la distribution traditionnelle en supermarchés et la vente en porte-à-porte. Elle a pratiqué un prix de gros différent selon le canal, mais a exigé que le prix de détail soit le même pour les deux circuits de manière à pouvoir les développer en parallèle. L'un des supermarchés (dont la marge de détail était la plus faible) a engagé une procédure pour effets anticoncurrentiels. La CFC a conclu à l'absence de pouvoir de marché, les barrières à l'entrée étant très faibles. Les producteurs traditionnels de yaourts et de produits laitiers pouvaient très facilement entrer sur le marché, ce qu'ils ont, depuis lors, fait avec succès. En l'absence de pouvoir de marché, il ne pouvait pas y avoir abus de position dominante. L'entreprise défenderesse a invoqué l'existence de gains d'efficience – ce qui n'était pas réellement nécessaire – mais cet argument n'a pas semblé crédible.

Lorsque l'on craint en premier lieu des restrictions de concurrence verticales, il semble cohérent d'opter pour la règle de raison. Lorsque les craintes portent d'abord sur l'existence de restrictions horizontales, la CFC peut être fondée à appliquer l'article 9 de la loi mexicaine sur la concurrence, qui est une interdiction *per se* des ententes.

Le fait que les 18 affaires citées n'aient pas passé le filtre de la règle de raison montre que ce filtre fonctionne. Cela ne signifie pas pour autant que les prix imposés soient toujours proconcurrentiels. Cependant, la CFC ne devrait intervenir qu'en cas de préjudice. La charge de la preuve doit incomber à l'autorité en charge de la concurrence, sauf en cas de collusion, ce qui est rare.

Pour résumer, la CFC est tenue par la loi d'appliquer la règle de raison, ce qui ne pose pas de problèmes insurmontables et présente un intérêt.

Le Président indique trouver la contribution de la Hongrie intéressante, ce pays ayant harmonisé sa législation nationale avec le droit communautaire en 1996. À cette fin, la Hongrie a dû rompre avec la règle de raison au profit d'une approche qui est, dans une large mesure, une approche *per se*. Or, il semble que ce changement ait été sans incidence majeure sur la pratique de l'autorité en charge de la concurrence vis-à-vis des prix imposés. La Hongrie précise que « la décision la plus récente décrit les effets des accords de prix imposés et repose sur une interprétation fondée sur les effets de ces prix, même si elle n'exclut pas expressément et de manière générale l'approche *per se* ». La contribution cite une affaire dans laquelle il a été conclu à l'absence d'effets restrictifs de concurrence des prix de vente imposés. Le Président demande si la Hongrie peut respecter le droit de l'UE alors qu'elle applique apparemment une approche fondée sur la règle de raison.

Un délégué de la Hongrie explique que l'affaire en question concernait des contrats de distribution pour une boisson énergétique commercialisée sous le nom de Bond. Les contrats concernés liaient le producteur de la boisson et certains hôtels, restaurants et établissements de restauration. Aucun autre point de vente n'était concerné. L'affaire portait sur quelque 300 contrats, parmi lesquels une trentaine prévoyait une forme quelconque de prix de vente imposé. L'un de ces contrats comportait une clause de prix maximum. Tous les autres contrats prévoyaient des prix de vente imposés personnalisés, différents pour les hôtels, les restaurants et les établissements de restauration. Outre ces contrats avec les hôtels et restaurants, le producteur avait conclu, avec d'autres points de vente, des contrats qui ne prévoyaient pas de prix imposés. En l'espèce, il n'y avait ni position dominante, ni pouvoir de marché substantiel. Le Conseil de la concurrence est parvenu à la conclusion que ce comportement ne constituait pas une restriction à la concurrence.

Cette affaire constitue une exception. En règle générale, l'autorité de la concurrence hongroise cherche à harmoniser sa pratique avec celle de l'UE. En principe, les prix de vente imposés sont présumés constituer une restriction à la concurrence, mais peuvent faire l'objet d'une exemption si certains critères sont remplis.

Le Président explique ensuite que la contribution de l'Espagne exprime une opposition vis-à-vis de la vision orthodoxe qui prévaut au sein de l'UE. L'Espagne déclare que « l'expérience de l'autorité espagnole de la concurrence l'amène à conclure que [les prix de vente imposés] ne peuvent avoir des effets négatifs que lorsque l'entreprise est suffisamment grande et puissante pour influencer le marché et lorsque la concurrence intermarques est faible. En outre, les clauses [de prix de vente imposés] sont souvent susceptibles d'améliorer l'efficience et d'avoir des effets proconcurrentiels ». L'autorité nationale de la concurrence (*Comicion Nacional de la Competencia*, CNC) est favorable à l'approche fondée sur la règle de raison. Le Président demande à l'Espagne de décrire les situations qui l'ont conduite à cette position.

Un délégué de l'Espagne répond que l'Espagne ne préconise pas de retenir le principe de la légalité *per se* des clauses de prix de vente imposés, mais propose plutôt que ces affaires soient, comme les autres affaires d'abus de position dominante, analysées sur la base de leurs effets sur la concurrence. L'Espagne examine actuellement, dans le cadre de la révision du règlement européen d'exemption par catégorie, sa doctrine relative aux prix de vente imposés et autres restrictions dites « injustifiables ».

La CNC pense qu'elle a peut-être, dans certaines affaires, appliqué de manière excessive l'Article 1 (ou l'Article 81 du Traité instituant la Communauté européenne, Traité CE) en raison d'une interprétation stricte de l'Article 4 du règlement d'exemption par catégorie. Cet article ne dispose pas que les accords qui contiennent des clauses relatives aux prix de vente imposés tombent automatiquement sous le coup de l'interdiction prévue par l'Article 1 du texte espagnol ou l'Article 81 du Traité CE – il dispose que ces

accords peuvent faire l'objet d'une exemption et doivent être examinés de manière plus précise. Les lignes directrices précisent que la légalité de ces accords est peu probable. Dans la pratique, l'autorité espagnole de la concurrence a, tout comme les tribunaux espagnols, généralement interprété ces dispositions comme signifiant que les accords qui contiennent des clauses de prix de vente imposés sont illégaux. Toutefois, la CNC a rompu avec cette interprétation. Ces clauses peuvent avoir à la fois des effets et objectifs proconcurrentiels et anticoncurrentiels. Il convient donc d'analyser ces effets pour déterminer s'il y a contradiction avec l'Article 1 ou l'Article 81 du Traité CE. L'approche reposant sur la légalité *per se* et celle reposant sur l'illégalité *per se* sont, l'une comme l'autre, inadaptées.

Le Président cite ensuite la contribution du Comité consultatif économique et industriel auprès de l'OCDE (BIAC) : « Dans bon nombre de situations, les prix de vente imposés sont susceptibles d'avoir des effets proconcurrentiels, tandis que leurs effets négatifs sont rares et essentiellement de nature horizontale ». Le BIAC plaide en faveur d'une harmonisation, faisant observer « que l'application de règles de légalité différentes dans les principales juridictions en matière de prix de vente imposés risquait d'être source d'inefficiences, en particulier pour les entreprises multinationales, et d'affaiblir la légitimité de l'application du droit de la concurrence en général ». Le BIAC plaide en faveur de l'adoption universelle de l'approche reposant sur la règle de raison – il est toutefois permis de se demander si cette adoption ne rendrait pas l'application du droit de la concurrence plus complexe et moins prévisible, entraînant ainsi une insécurité juridique pour les entreprises.

Le BIAC répond que, globalement, la règle de raison est plus adaptée à la nature des prix de vente imposés que l'approche *per se*. Les prix de vente imposés n'étant pas toujours favorables à la concurrence, présumer leur légalité *per se* n'est pas une solution satisfaisante ; il convient plutôt de les traiter comme toute autre restriction verticale.

Certaines juridictions (comme l'UE), continuent d'adopter une approche *per se* ou de considérer la pratique de prix imposés comme une « restriction injustifiable ». Compte tenu de la logique qui sous-tend l'arrêt *Leegin*, il est difficile d'expliquer aux entreprises pourquoi les autorités de certaines juridictions estiment que, dans certains cas, ces restrictions peuvent être positives, tandis que celles d'autres juridictions ont une approche très restrictive. Cette situation n'améliore pas l'image que les milieux d'affaires ont du droit de la concurrence.

Le BIAC ne défend pas l'argument selon lequel les règles relatives aux prix de vente imposés devraient être les mêmes dans toutes les juridictions (un pays peut avoir des raisons spécifiques ou historiques d'appliquer des règles différentes) mais estime que dans l'ensemble, il convient de ne pas traiter les prix de vente imposés comme une restriction de concurrence *per se*.

Le délégué aborde trois autres points :

1. Des prix élevés ne constituent pas un indicateur fiable de l'existence d'effets anticoncurrentiels.

2. On avance parfois que la situation qui prévaut en Europe est légèrement différente de celle qui prévalait aux États-Unis avant l'affaire *Leegin* parce qu'en Europe, les prix imposés constituent une « restriction injustifiable », ce qui est différent d'une restriction illégale *per se*. Dans les faits, une restriction injustifiable aux termes du droit communautaire est quasiment assimilable – ou, du moins, très similaire – à une violation *per se* aux termes du droit des États-Unis. Tout ce que la Cour suprême a déclaré dans l'affaire *Leegin* devrait donc s'appliquer à l'Europe.

3. Aux termes de l'Article 81, paragraphe 3, une restriction verticale doit être indispensable à la réalisation de gains d'efficience spécifiques. Opter pour une analyse reposant sur la règle de raison ou, du moins, rompre avec l'approche *per se*, n'aurait guère d'intérêt si les autorités de la

concurrence ou les tribunaux parviennent à la conclusion que les prix imposés ne sont jamais indispensables pour atteindre l'objectif proconcurrentiel de l'accord.

Le délégué fait observer qu'au Canada, les prix imposés constituent une infraction pénale depuis des années. Au début de l'année, un comité consultatif nommé par le gouvernement a rendu un rapport dans lequel il recommande de soumettre les prix de vente imposés à une analyse reposant sur la règle de raison et sur leurs effets. Le gouvernement n'a jusqu'à présent pris aucune mesure. Ce changement est essentiel parce qu'il est quasiment impossible aux entreprises de distribution qui opèrent de part et d'autre de la frontière entre les États-Unis et le Canada de respecter certaines conditions en matière de fixation des prix et de souplesse aux États-Unis et des conditions différentes au Canada. Les entreprises ne comprennent pas qu'elles doivent changer leurs pratiques entre Detroit et Windsor.

Un délégué de la Russie indique partager l'opinion majoritaire, selon laquelle il convient d'adopter, vis-à-vis des prix de vente imposés, une approche reposant sur la règle de raison ou sur une analyse des effets. Bien que le terme « règle de raison » ne soit pas officiellement utilisé en Russie, dans la pratique, cette approche est employée dans une certaine mesure.

Le délégué évoque deux affaires récentes, l'une concernant le marché automobile et l'autre celui des carburants. Sur le marché automobile, un accord de prix de vente imposés avait été conclu entre des constructeurs et des concessionnaires de la région de Moscou. Cet accord ne posait toutefois pas de problème de concurrence majeur, la concurrence intermarques étant très forte. En l'espèce, le prix de détail lui-même n'était pas fixé à un niveau précis pour chaque automobile, mais des limites étaient fixées. Les concessionnaires pouvaient augmenter les prix dans le cadre de ces limites en fonction de l'évolution de l'offre et de la demande. Cette situation ne posait pas de problèmes importants sur le plan de la concurrence.

À l'inverse, sur le marché des carburants, les prix imposés étaient utilisés pour fixer les prix de manière concertée. Les raffineries imposaient des conditions aux grossistes concernant le prix auquel ces derniers pouvaient revendre le carburant aux détaillants. Cette pratique visait à maintenir les prix au-dessus du prix de concurrence et à limiter la concurrence entre distributeurs de carburant. L'autorité russe de la concurrence à engagé des procédures concernant 26 affaires relatives à des accords anticoncurrentiels et à la pratique de prix imposés. Des amendes élevées ont été imposées.

Le Professeur Howard Marvel, intervenant invité, fait observer que les avantages et inconvénients des prix imposés sont bien connus des économistes. En ce qui concerne les avantages, les prix imposés peuvent constituer un moyen, pour un producteur ou un distributeur, de distribuer ses produits de manière satisfaisante. Ils peuvent créer un droit de propriété permettant aux revendeurs de retirer des bénéfices des mesures qu'ils prennent pour accroître la demande. En outre, les prix imposés sont susceptibles d'encourager revendeurs et distributeurs à choisir un niveau de stock satisfaisant pour le producteur. La question des stocks est également évoquée dans la contribution de la Pologne, qui comporte une réflexion sur la recherche d'un moyen satisfaisant de distribuer les livres Harry Potter et sur l'utilisation qui aurait pu être faite des prix imposés à cette fin. Le groupe 3M est confronté au même problème. Le catalogue de 3M contient environ 500 000 références, que le groupe cherche à distribuer. Sam's Club, qui compte parmi les plus grands détaillants aux États-Unis, ne propose que 4 900 produits, toutes catégories confondues. Les prix imposés peuvent constituer un outil pour encourager un détaillant à avoir un produit dans son stock. D'autres mécanismes peuvent être utilisés, mais, comme l'a constaté 3M, rien ne prouve que leur utilisation n'entraîne pas autant de problèmes. En ce qui concerne les effets anticoncurrentiels, les prix imposés peuvent faciliter les ententes entre producteurs. En outre, s'ils sont imposés par des distributeurs puissants aux fabricants contre leur gré, ils sont de nature à faciliter une entente entre distributeurs.

Il semble juste d'affirmer qu'aucun économiste sérieux ne met en doute les avantages des prix imposés. Les inconvénients pouvant être considérés comme rares, la balance penche en faveur d'une autorisation des prix de vente imposés dans de nombreux cas.

Howard Marvel insiste sur le fait que ses propos concernaient l'imposition de « prix minima ». Il ne voit aucune objection à formuler à l'encontre de la pratique de prix maxima, dont les effets préjudiciables sont très improbables.

Les autorités chargées de faire respecter le droit de la concurrence peuvent avoir un avis différent sur l'arbitrage entre avantages et inconvénients des prix imposés. Cette différence s'explique en partie par le fait que justifier les prix imposés en avançant qu'ils protègent les services avant-vente peut souvent être perçu comme un argument fallacieux. Si l'on demande à un spécialiste de trouver un service avant-vente, il le trouvera, qu'il existe ou non. Dans l'affaire Levi Strauss, aux États-Unis, l'argument était que les prix de vente imposés protègent l'investissement dans les cabines d'essayage (à savoir l'argument selon lequel les acheteurs pourraient essayer un jean dans une boutique et aller ailleurs pour l'acheter – ce qui semble un peu étrange). L'argument des stocks pose le même problème. Dans l'affaire Levis, l'argument était que les acheteurs risquaient d'essayer des jeans dans une boutique ayant toutes les tailles en stock, puis d'aller les acheter chez un discompteur ayant un stock plus réduit – ce qui est aussi une idée fantaisiste.

Les prix imposés sont parfois accusés d'entraîner une hausse des prix. Il s'agit là d'une vision étriquée. Il existe très peu d'éléments prouvant cet effet sur les prix (et il existe des preuves du contraire). En cas de prix imposé, le fournisseur est fortement incité à veiller à ce que le prix de détail final n'augmente pas.

La pratique de prix imposés peut-elle différer l'arrivée sur le marché de nouveaux détaillants ? D'après les éléments dont on dispose, la réponse à cette question semble négative. Ainsi, Toys 'R Us est un exemple de distributeur qui s'est imposé sur un marché dominé par les grands magasins, sur lequel existaient des prix imposés. Lorsque les fabricants de jouets ont trouvé des moyens de toucher directement les enfants (c'est-à-dire, aux États-Unis, à travers les dessins animés diffusés le samedi matin), ils ont décidé qu'ils n'avaient plus besoin des grands magasins.

Concernant l'affaire *Leegin*, Marvel fait observer qu'aux États-Unis, avant cette affaire, la pratique des prix de vente imposés était (a) illégale *per se* et (b) très répandue. Dans la pratique, le changement d'approche des États-Unis est loin d'être aussi radical qu'on pourrait le penser. En outre, si *Leegin* avait été débouté, ses perspectives auraient vraisemblablement extrêmement sombres. Il suffit, pour le comprendre, d'examiner ce qui est arrivé aux entreprises qui ont conclu une transaction avec les autorités et ont renoncé à imposer des prix de vente. Ainsi, le cas de Salton Inc., fabricant du grill George Foreman (qu'à une époque, tout Américain voulait avoir chez lui), est édifiant. Salton Inc. est désormais au bord de la faillite pour n'avoir pas pu pratiquer de prix imposés. Nine West, un fabricant de chaussures qui détenait une part de marché de 20 % a vu cette part diminuer de moitié. De même, la part de marché de Keds a chuté de manière spectaculaire. Une entreprise qui n'a aucune possibilité de protéger ses marges réagit souvent par une stratégie d'intégration verticale. Des grands magasins comme Gap sont nés d'une stratégie d'intégration verticale mise en œuvre de préférence à la pratique de prix imposés.

Actuellement, pour les détaillants et la pratique de prix imposés, le contexte est celui de la lutte qui oppose la distribution en magasin et la distribution via Internet. La pratique des prix imposés n'arrêtera absolument pas la montée en puissance de la distribution en ligne. Toys 'R Us est emblématique du dynamisme que peuvent induire les nouvelles méthodes de distribution.

Aux États-Unis, la pratique des prix imposés existe sous de nombreuses formes depuis des années. Ainsi, Microsoft l'a utilisée pour Windows 95 à travers un mécanisme dit de « prix minima annoncés » –

les distributeurs pouvaient vendre Windows 95 au prix qu'ils souhaitaient à condition de ne pas le dire. Cette approche a également été adoptée pour les films Disney.

Aux États-Unis, l'approche *per se* n'a pas réellement simplifié l'application du droit de la concurrence, en particulier parce que bon nombre d'autorités chargées de faire respecter ce droit et beaucoup de concurrents ont cherché à qualifier de pratique de prix imposés des pratiques qui n'en étaient pas. Ainsi, ils ont prétendu qu'une entreprise qui appliquait une politique d'exclusivité territoriale le faisait pour appliquer des prix imposés. De même, aux États-Unis, la politique était de permettre à une entreprise d'annoncer un prix de vente – cette pratique était légale, dès lors que ce prix n'était pas fixé dans un accord. Toutefois, un économiste pourrait poser la question suivante : pourquoi un fournisseur augmenterait-il les marges, si ce n'est pour obtenir un avantage de la part des distributeurs ? Cette situation était absurde, mais a existé en raison de l'absence de règle de raison.

Le Président souligne la « convergence » des autorités de la concurrence des États-Unis, de la Russie, du Mexique, de la Hongrie et de l'Espagne ainsi que des chercheurs et des milieux d'affaires – tous considèrent la règle de raison comme l'approche à adopter vis-à-vis de la pratique de prix de vente imposés.

En revanche, il ressort de la contribution de la Commission européenne que la pratique de prix imposés au sein de l'UE est actuellement traitée comme une « restriction injustifiable ». S'il n'est pas évident que l'on puisse assimiler la notion de restriction injustifiable à celle d'illégalité *per se* aux États-Unis, il est certain qu'une restriction injustifiable est illégale, sauf si la partie en cause apporte la preuve qu'elle permet des gains d'efficience. La contribution de la Commission est catégorique sur deux points en totale contradiction avec les vues exprimées dans la contribution des États-Unis. Elle affirme d'une part que « la pratique des prix imposés a pour effet direct une hausse des prix » et ajoute que « si tel n'était pas le cas, l'accord ne produirait aucun effet ». Au contraire, selon la contribution des États-Unis, « les théories proconcurrentielles sur les raisons susceptibles d'inciter les entreprises à pratiquer des prix imposés ne font pas de pronostic sur la question de savoir si la pratique des prix imposés se répercute à la hausse ou à la baisse sur les prix. »

Le deuxième argument avancé dans la contribution de la Commission européenne est que « la pratique de prix imposés n'empêche pas l'opportunisme » et « qu'il est permis de se demander si les prix imposés sont réellement un instrument efficace pour remédier à ce risque d'opportunisme ». Sur ce point également, il ressort au contraire de la contribution des États-Unis que « les prix de vente imposés constituent un moyen d'atténuer le problème de l'opportunisme ».

La Commission européenne commence par faire observer que ses règles sont en cours de réexamen. Le débat lui permettra de mieux adapter ses règles aux nouvelles conceptions ainsi qu'aux nouvelles données factuelles et chiffrées.

L'approche adoptée par la CE est fondée sur l'analyse des effets – toutefois, cette approche présume que les prix imposés ont un effet négatif sur la concurrence, tandis que les gains d'efficience susceptibles de les compenser sont moins probables. Cette position prend le contre-pied de la pratique normale, qui veut que l'autorité ait d'abord à démontrer l'existence d'effets négatifs avant que le défendeur ait à prouver l'existence de gains d'efficience supérieurs à ces effets. Dans les affaires relatives aux prix imposés, il y a présomption d'effets négatifs tant que le défendeur n'apporte pas la preuve de l'existence de gains d'efficience. D'après l'expérience de la Commission, il est rare que les entreprises apportent des éléments crédibles dans ce sens.

Pourquoi la pratique de prix imposés fait-elle l'objet d'un traitement particulier. Il convient d'abord de souligner que les restrictions verticales ne sont pas toutes les mêmes. Elles sont très différentes les unes

des autres en termes de propension, de probabilité, voire d'effets positifs et négatifs potentiels – par exemple, contrairement à beaucoup d'autres restrictions verticales, la pratique de prix imposés n'induit pas de verrouillage du marché. Toutefois, elle se démarque des autres restrictions dans la mesure où elle a le pouvoir de faciliter la collusion. Cet aspect est clairement abordé dans la contribution du Royaume-Uni. Il ne suffit pas de reconnaître que les restrictions verticales peuvent avoir des effets bénéfiques ou négatifs et que, par conséquent, la règle de raison s'impose. Il faut au contraire élaborer des arguments spécifiques pour les différentes restrictions verticales, dont la pratique de prix imposés. C'est là que réside l'une des principales lacunes de la littérature économique actuelle. Elle porte sur les restrictions verticales en général et ne facilite guère l'élaboration de politiques visant des restrictions verticales spécifiques.

Les effets négatifs potentiels des prix imposés ne se limitent pas à la collusion (le document de référence de l'OCDE ne mentionne, parmi les effets négatifs potentiels, que le pouvoir de renforcer la collusion en amont ou en aval). Le Royaume-Uni cite beaucoup d'autres causes de préjudice qui méritent l'attention.

Tous les accords de prix imposés entraînent, *in fine*, une hausse des prix. Un tel accord a précisément pour objet d'empêcher certains, voire tous les détaillants de baisser les prix, comme ils souhaiteraient le faire en l'absence d'accord. En l'absence de prix imposés, certains prix au moins seraient plus faibles. Le contre-argument est que les prix seront certes plus élevés, mais que cet effet est contrebalancé par des gains d'efficience, comme la meilleure qualité des services.

Les arguments relatifs à l'efficience, avancés en faveur de l'autorisation des restrictions verticales en général, ne sont pas très probants en ce qui concerne la pratique de prix imposés. Au nombre de ceux invoqués en faveur des prix imposés figure le fait que ces prix permettent au détaillant d'investir davantage dans des services tels que la promotion avant-vente, qui, dans d'autres circonstances, pourraient faire l'objet d'opportunisme. Reste toutefois à savoir si le détaillant consacrera sa marge supplémentaire à l'amélioration de ces services. En toute logique, il risque de la consacrer à des services qui ne sont a priori pas menacés par un comportement opportuniste – par exemple en investissant davantage dans les services après-vente ou en liant son produit –, en d'autres termes à des services dont il retirera directement des avantages et qui ne profiteront pas à ses concurrents.

L'autre argument avancé est que la pratique des prix imposés est nécessaire pour inciter les détaillants à détenir des stocks suffisants. On peut toutefois se demander si cet objectif ne pourrait pas être atteint par d'autres moyens. Certains fabricants ont des difficultés à convaincre les distributeurs d'avoir, par exemple, un nombre suffisant de livres différents, en leur promettant simplement de reprendre les stocks invendus – ce qui constituerait une solution directe et concrète, ne nécessitant pas d'exclure toute concurrence par les prix. En outre, de manière plus générale, on peut se demander pourquoi la pratique de prix imposés est censée inciter les détaillants à détenir davantage de stocks. En l'absence de prix imposés, si l'activité ralentit, le détaillant risque de se retrouver avec des stocks qu'il ne peut espérer vendre qu'en pratiquant un rabais. En cas de prix imposés, les prix ne baisseront pas, mais le détaillant sera obligé de conserver son stock beaucoup plus longtemps. Sa situation n'est guère meilleure – en présence de prix imposés, il risque de devoir conserver des stocks plus longtemps au lieu de les vendre plus rapidement à un prix plus faible. Il n'est donc pas évident que la pratique de prix imposés soit la solution idéale pour inciter les détaillants à avoir un assortiment suffisant.

Quant à l'argument selon lequel la pratique de prix imposés est susceptible de favoriser l'entrée de nouveaux détaillants sur le marché, il repose sur l'idée que le premier détaillant qui entre sur un nouveau marché risque de devoir réaliser des investissements de départ irrécupérables pour développer le marché. Les détaillants qui entrent ultérieurement sur le marché peuvent profiter de cet investissement sans contrepartie. Reste à savoir quel est le moyen le plus efficient de remédier à ce problème. La solution n'est pas d'empêcher toute concurrence à l'avenir, mais consiste en ce que le fabricant situé en amont offre un

avantage particulier, par exemple un prix temporairement plus bas, ou une somme forfaitaire au premier détaillant, qui a pour mission supplémentaire l'ouverture du marché.

Par conséquent, en règle générale, la pratique de prix imposés est un instrument peu efficace, ne permettant pas réellement de réaliser les gains d'efficience qui peuvent généralement découler de ces restrictions verticales. À la fin des années 90, on craignait que les effets négatifs des prix imposés puissent être plus graves, que leurs effets positifs soient peu probables, si bien qu'il a été décidé d'inverser la charge de la preuve.

Quelle initiative concrète a été prise ? La Commission européenne a organisé une réunion du Réseau européen de la concurrence afin d'examiner les affaires de prix imposés ; il en est ressorti que les prix imposés ne sont pas toujours utilisés pour réaliser les gains d'efficience habituellement invoqués, mais plutôt pour créer des restrictions à la revente (par exemple du type « le détaillant doit vendre au moins au prix X pour pouvoir revendre à l'extérieur de son territoire »). Les États membres n'ont pas décrit d'affaires dans lesquelles de réels gains d'efficience avaient été réalisés. Un argument, selon lequel les prix imposés pouvaient être nécessaires à un fabricant pour empêcher que son produit ne soit vendu à un prix d'appel, a été avancé – parce que le fait qu'un produit soit un produit d'appel dans une chaîne de distribution peut l'exclure des autres chaînes de supermarchés et, par conséquent, compromettre sa distribution.

La nécessité de soutenir l'image du produit est un autre argument souvent avancé. Apparemment, beaucoup de fabricants considèrent leur produit comme ce que les économistes appellent un « bien de Giffen ». Toutefois, dans la pratique le nombre de produits dont les consommateurs retirent plus d'avantages quand leur prix augmente que lorsqu'il baisse est très limité. La CE n'exclut pas l'éventualité de telles situations mais juge préférable de demander à l'entreprise de commencer par prouver que les biens en cause sont réellement des biens de Giffen plutôt que de demander à l'autorité de démontrer l'existence d'un effet négatif.

Le délégué conclut en faisant observer que l'application, sous une forme ou une autre, de la règle de raison pourrait utile à la hiérarchisation des priorités pour l'utilisation des ressources disponibles pour faire appliquer le droit de la concurrence. Certaines affaires ont un enjeu tellement faible qu'elles ne valent pas la peine d'être traitées. L'application d'une forme quelconque de règle de raison permettrait de ne pas instruire une affaire lorsque l'existence d'effets très négatifs est improbable et lorsque d'autres mesures peuvent être prises pour faire respecter le droit.

En réponse, les États-Unis font les observations ci-après.

En ce qui concerne l'idée avancée par la CE, selon laquelle les prix imposés sont illicites parce qu'ils sont susceptibles de favoriser la collusion, le délégué fait observer que le téléphone et la messagerie électronique peuvent également faciliter la collusion, mais ne sont pas pour autant présumés illicites. Le simple fait qu'un acte soit de nature à faciliter la collusion ne suffit pas à justifier une inversion de la charge de la preuve – il faut également que cet acte risque d'être utilisé régulièrement pour faciliter la collusion. Or, les éléments empiriques qui le prouvent sont très rares.

Deuxièmement, selon la CE, les prix imposés induisent une hausse des prix. Or, il est possible qu'ils n'entraînent même pas de hausse du prix intramarque puisque le fabricant peut abaisser son prix de gros. En outre, même si le prix augmente pour la marque en cause, si l'entreprise détient une petite part de marché, les prix du marché en général n'augmentent pas et les consommateurs peuvent opter pour d'autres marques.

La CE a également affirmé que les détaillants ne cherchent pas systématiquement à atteindre un objectif louable et peuvent préférer choisir de conserver la marge supplémentaire. Or, cette affirmation n'est pas tout à fait exacte. Le détaillant est incité à consacrer sa marge supplémentaire à des activités destinées à accroître la demande du produit. Toutefois, il ne réalise pas cet investissement s'il craint qu'un discompteur n'en détourne la valeur à son profit. En outre, si le fabricant veut encourager le détaillant à mettre son produit en avant, il dispose d'un moyen incitatif très direct – veiller à ce que chaque unité vendue rapporte au détaillant une marge suffisante pour qu'il mette en avant un produit particulier de préférence à une autre marque.

Une fois que le fabricant a vendu le produit au détaillant, il veut que ce dernier maximise le volume des ventes – ce qui va également dans le sens de l'intérêt du consommateur. En particulier, si le fabricant détient une grosse part de marché, il existe des raisons de penser que toute mesure prise pour améliorer la marge du détaillant est proconcurrentielle.

Selon le Professeur Marvel la position de la CE revient à considérer que le fabricant ne sait pas ce qu'il fait et qu'il appartient aux autorités de la concurrence d'intervenir. La CE prétend que si la pratique de prix imposés était autorisée, le détaillant ne prendrait aucune mesure positive et se contenterait d'engranger les bénéfices. En réalité, la CE dit au fabricant « c'est insensé, pourquoi avoir agi ainsi ? » Pourtant, le fabricant persévère. En l'absence de gains d'efficience susceptibles de contrebalancer les effets négatifs, toute hausse de la marge du détaillant entraînant une augmentation des prix de détail réduit les ventes finales au détriment du fabricant – pourtant, le fabricant persévère, demandant qu'on l'autorise à se nuire en augmentant ses prix pour pouvoir vendre moins sans rien obtenir en contrepartie. Peut-être la CE défend-elle l'idée que les autorités de la concurrence devraient protéger les fournisseurs de leur propre déraison ? Dans ce cas, on peut se demander pourquoi ils réitèrent un comportement aussi insensé.

Le Professeur Bruno Jullien, intervenant invité, fait observer que la pratique de prix imposés entraîne une hausse de la marge du distributeur. Toutefois, pour apprécier son impact sur les prix de détail, il faut déterminer le contrefactuel – le prix qui serait pratiqué en l'absence de prix imposés (qui dépend à la fois du prix de gros et des prix pratiqués par les concurrents). C'est cette comparaison, qui est un exercice délicat, que la règle de raison est censée faire. En se dispensant de cet exercice, on arrive à la conclusion que la pratique des prix imposés a un effet négatif sur les prix de détail, parce que l'on a fixé tous les autres prix. Mais si l'on s'autorise à penser à ce que serait l'effet potentiel sur les autres prix, l'analyse devient peut-être plus fructueuse.

Un délégué de la Belgique reconnaît que dans le secteur des produits de luxe, par exemple, la pratique de prix imposés se justifie peut-être (et qu'il pourrait y avoir de bonnes raisons d'appliquer une exemption du concept de restriction injustifiable pour les produits de luxe). En revanche, dans certaines juridictions, si l'interdiction des prix imposés était supprimée, il deviendrait très difficile de lutter efficacement contre les ententes horizontales. La pratique de prix imposés est souvent le moyen qui permet d'inciter une entreprise à demander la clémence. En l'absence de politique de clémence, il est très souvent difficile de lutter contre les ententes horizontales simples (en particulier quand on dispose de moyens limités).

Un délégué de la Russie relève que l'application de la règle de raison à l'analyse de la pratique de prix imposés n'implique pas de renoncer à enquêter sur les affaires en lien avec cette pratique. Certaines pratiques visent exclusivement à entraver la concurrence. Par exemple, supposons que la fixation de prix de monopole élevés soit, en elle-même, une pratique illicite. D'autres pratiques – comme les prix d'éviction – ont pour seul objectif la recherche d'effets anticoncurrentiels et l'établissement de prix de monopole. Par conséquent, dans beaucoup de juridictions, la pratique de prix d'éviction est illégale *per se*. La question se pose maintenant de savoir si la pratique de prix imposés a pour seul objectif la recherche d'effets anticoncurrentiels. La réponse à cette question est négative, puisque cette pratique peut également servir des objectifs proconcurrentiels. L'approche *per se* n'est pas applicable à l'analyse de la pratique des

prix imposés, qu'il convient plutôt d'effectuer en appliquant la règle de raison ou une approche reposant sur l'analyse des effets.

Un délégué de la CE exprime son accord avec le raisonnement selon lequel un fabricant a en principe intérêt à inciter les détaillants à se faire concurrence pour vendre à un prix faible. Toutefois, il existe des théories crédibles à l'appui des effets négatifs de la pratique de prix imposés.

Le délégué reconnaît l'existence d'un problème concernant la définition d'un contrefactuel satisfaisant, mais souligne que la pratique de prix imposés a d'abord et directement pour effet d'empêcher la baisse du prix de détail. En cas d'allégation de pratique de prix d'éviction, on avance souvent que le niveau plus faible du prix constitue au moins un avantage direct pour les consommateurs – si bien qu'il faut être prudent avant d'attaquer la baisse des prix. Selon la même logique, dans les situations où l'application de prix imposés a d'abord et directement pour effet de faire augmenter les prix ou d'en empêcher la baisse, il y a davantage matière à s'inquiéter. Il existe souvent des solutions satisfaisantes pour remplacer la pratique de prix imposés. Ainsi, en cas de comportement opportuniste, pourquoi ne pas concéder des territoires exclusifs avec un prix maximum ? Cette solution résoudrait le problème de l'opportunisme sans entraîner de hausse du prix de détail.

Concernant l'argument selon lequel des marges plus élevées sont de nature à inciter les détaillants à présenter le produit du fabricant sur leurs linéaires, le problème est que les motivations du détaillant restent en décalage avec celles du fabricant. Le détaillant risque de vouloir utiliser cette marge supplémentaire d'une manière qui lui profite directement, à lui et non au fabricant. Par conséquent, fixer un prix de détail minimum n'est pas une solution efficace pour obtenir ce type de promotion des ventes ou de présence commerciale.

Le Président relève que ces arguments n'apportent toujours pas de réponse à la question de savoir pourquoi les fabricants persistent à vouloir appliquer des prix imposés s'ils n'en retirent aucun avantage en retour.

Le Président se tourne ensuite vers la Turquie, dont la contribution cite une affaire relative à la pratique de prix imposés – impliquant une société de production cinématographique (Warner Bros) qui avait passé, avec les exploitants de salles de cinéma, un accord fixant le tarif des tickets. Qu'est-ce qui a motivé Warner Bros ? L'entreprise espérait-elle inciter davantage d'exploitants à projeter ses films ?

Un délégué de la Turquie répond que, conformément à l'exemption par catégorie accordée à la Turquie, les accords qui fixent des prix de vente maxima ou conseillés sont licites à condition de ne pas se transformer en accords de prix de vente fixe ou minimal directement ou indirectement à la suite de mesures d'encouragement des parties. Cette position est la même que celle du règlement européen sur les restrictions verticales.

Warner Bros fixait le prix des tickets de cinéma dans l'ensemble de la Turquie afin que tous les cinémas d'une même ville ou d'une même région appliquent les mêmes tarifs. Le Conseil de la concurrence a estimé que cette pratique constituait une violation évidente de l'Article 4 de la loi sur les accords de restriction de concurrence. L'Article 4 interdit notamment de fixer le prix d'achat ou de vente de biens ou services. Dans la même décision, il est en outre indiqué qu'à travers ce comportement, Warner Bros abusait de sa position dominante sur le marché de la distribution de films et utilisait cette position pour restreindre la concurrence sur le marché des salles de cinéma.

À travers ce comportement, Warner Bros entendait prévenir la concurrence par les prix entre salles de cinéma concurrentes afin d'augmenter ses revenus dans l'ensemble de la Turquie. En Turquie, les distributeurs de films passent des accords de partage des revenus avec les exploitants de salles avec

lesquels ils travaillent – ils perçoivent un certain montant sur les bénéfices réalisés par les salles de cinéma au titre de la projection des films. L'existence d'une concurrence par les prix entre salles de cinéma entraîne une réduction du revenu total de Warner Bros. Toutefois, l'entreprise a mis fin à ce comportement durant l'enquête. Cette initiative a été considérée comme une circonstance atténuante par le Conseil de la concurrence. Une amende a été imposée, mais était d'un montant réduit.

Le Professeur Jullien fait observer que la question des prix imposés fait partie intégrante du débat entre économistes au sujet des restrictions verticales. Ce débat, qui existe de longue date, est toujours d'actualité. Bon nombre de problèmes restent méconnus et ne seront pas résolus à brève échéance.

Bruno Jullien revient sur les arguments qui plaident pour ou contre la pratique des prix imposés.

Parmi les premiers, figure la littérature bien connue sur l'impact de la pratique de prix imposés ou des restrictions verticales sur la concurrence en aval. Premièrement, il existe plusieurs moyens d'atteindre les mêmes objectifs que ceux poursuivis par les prix imposés (encourager les services avant-vente ou inciter les détaillants à avoir des produits en stock par exemple). D'autres instruments peuvent permettre d'atteindre ces objectifs. Cependant, ces instruments ne sont pas tous équivalents – certains sont plus efficients que d'autres. Interdire les prix imposés entraîne des pertes d'efficience dans certains cas, mais pas dans tous.

Deuxièmement, les intérêts de la structure verticale ne coïncident pas toujours avec l'intérêt des consommateurs et déterminer s'il y a coïncidence ou non est un exercice très difficile. Il faut conduire une étude de cas très précise pour comprendre pourquoi une forme spécifique de prix imposés va avoir des effets positifs ou négatifs sur les consommateurs. Cette nécessité semble justifier l'adoption d'une approche fondée sur la règle de raison.

On avance souvent que les éléments prouvant que des prix imposés sont appliqués pour renforcer la collusion sont très peu nombreux, mais les éléments recherchés sont ceux qui prouvent l'existence d'une entente. À l'évidence, dans un contexte d'illégalité *per se* des prix imposés, on ne peut pas s'attendre à ce que les cartels aient recours à la pratique des prix imposés. Recourir à cette pratique serait trop dangereux, et ils préfèrent se tourner vers des pratiques qui ne présentent aucun danger pour ne pas risquer de déclencher une enquête. Il n'est donc pas surprenant que l'on ne dispose pas d'éléments probants. Pour savoir s'il est ou non possible de déterminer les effets réels des prix imposés, c'est en réalité d'études empiriques sur le fonctionnement de marchés sur lesquels il n'existe pas d'ententes que l'on a besoin. .

Quel est l'effet des prix imposés sur la concurrence en amont ? À l'évidence, si les structures verticales sont en concurrence, les prix imposés sont proconcurrentiels. Reste toutefois les interrogations au sujet de la collusion. En effet, d'après les travaux sur la collusion de Bruno Jullien et Patrick Rey, il n'est certes pas évident que les prix imposés puissent être utilisés pour renforcer la collusion, mais cela reste possible. La pratique des prix imposés facilite la collusion en renforçant la transparence. L'application de prix imposés a un coût, mais permet des pratiques de collusion qui ne seraient pas possible sans elle.

La France fournit d'excellents exemples pour l'étude des restrictions concernant les prix en raison de la complexité des lois appliquées jusqu'à une période récente. Les travaux de Patrick Rey et d'autres chercheurs montrent que lorsque les structures verticales sont en concurrence, les effets observés sont limités. Il en va en revanche tout autrement en présence de structures interdépendantes – lorsque plusieurs producteurs vendent à plusieurs gros distributeurs. Lorsqu'un fabricant consent une marge élevée au détaillant, il peut récupérer cette marge via la redevance de franchise. S'il associe des contrats complexes et des prix imposés, il peut appliquer une marge de détail élevée et en retirer les bénéfices à travers

diverses autres dimensions du contrat. Cette analyse montre que dans certains cas, l'association des prix imposés et de contrats complexes peut conduire à une monopolisation du secteur.

Certains économistes de Toulouse ont commencé à effectuer des travaux empiriques sur cette éventualité. Ils se sont intéressés au marché de l'eau en France ces dix dernières années. Il ne s'agit pas d'un marché cartellisé, mais d'un secteur normal que la législation française a fait ressembler de très près à un secteur appliquant des prix imposés. Il ressort de ces travaux que le secteur de la distribution de l'eau en France peut être décrit comme associant des prix imposés, des contrats complexes et des marges de détail élevées, situation qui aboutit très précisément à des prix très élevés. Il s'agit là d'un cas qui devrait être considéré comme très préoccupant.

Du point de vue de la concurrence en aval, il n'existe pas d'arguments en faveur de l'illégalité *per se*. Toutefois, l'impact de la pratique de prix imposés sur diverses dimensions de la collusion est très spécifique. Les mêmes effets sont observés concernant d'autres types de pratique, comme l'application de quotas ou la concession de territoires exclusifs. Certaines affaires sont plus complexes, impliquant plusieurs contrats interdépendants et pouvant poser un problème lié à la pratique de prix imposés. Ces problèmes risquent d'être très difficiles à résoudre, puisqu'ils n'impliquent pas une mais plusieurs entreprises, qui recourent ensemble aux prix imposés. Dans le contexte législatif actuel, la seule manière de traiter ces affaires serait de les aborder sous l'angle de la position dominante collective et de la pratique collective de prix imposés, ce qui promet d'être très difficile.

Le Président souligne que les préoccupations exprimées dans plusieurs contributions ne portent pas tant sur l'effet des prix imposés sur la concurrence que sur le fait que cette pratique est perçue comme ayant pour corollaire des prix élevés et une absence de liberté des détaillants. Ainsi, la Suisse affirme que la pratique de prix imposés est l'une des raisons expliquant que les prix soient plus élevés en Suisse que dans d'autres pays d'Europe. La Suisse déclare « Dans ce contexte, la Commission de la concurrence estime que la pratique de prix imposés est une restriction verticale qui a des effets anticoncurrentiels très importants ». En réalité, cette pratique est considérée comme tellement anticoncurrentielle que la présomption d'illégalité ne peut pas être renversée, même s'il est prouvé que la concurrence intermarque s'est accrue. Le Président demande si la Suisse dispose d'éléments prouvant que la pratique de prix imposés contribue réellement au niveau élevé des prix.

Un délégué de la Suisse fait valoir les trois arguments suivants.

Premièrement, c'est l'isolement perçu du marché suisse qui sous-tend cette politique. Le législateur a intégré à la loi une présomption d'entrave de la concurrence, concernant à la fois la pratique de prix imposés et les restrictions aux importations parallèles. Dans la pratique, toutes les affaires de prix imposés sont liées à des importations. Le délégué indique ne pas avoir connaissance d'affaires relatives à la pratique de prix imposés strictement internes à la Suisse. L'isolement du marché suisse se traduit par une situation de monopole pour les importateurs ou les distributeurs et contribue vraisemblablement à expliquer que les prix soient plus élevés. Par le passé, le marché suisse faisait souvent l'objet d'un traitement spécifique dans les accords de distribution européens. En introduisant cette présomption dans la législation, la Suisse a permis que des accords de distribution applicables à l'échelle de l'Europe le soient également au marché suisse.

Pour combattre cette présomption, il ne suffit pas de démontrer l'existence d'une concurrence intermarques. La concurrence intermarques est à l'évidence nécessaire, mais la Commission de la concurrence exige que d'autres gains d'efficience soient invoqués, par exemple l'ouverture du marché.

Dans la pratique, en Suisse, comme l'a souligné le Professeur Jullien, c'est au niveau du distributeur ou détaillant, plus qu'à celui du producteur ou fabricant, qu'un problème de concurrence se pose.

Autrefois, les distributeurs qui disposaient d'un pouvoir de marché ou les cartels de détaillants demandaient au producteur d'appliquer des prix imposés pour pouvoir travailler tranquillement et se faire concurrence sur la qualité plutôt que sur les prix. Ainsi, une affaire dans laquelle un discompteur alimentaire a écrit au producteur pour lui demander d'imposer à son concurrent non discompteur un prix au moins 10 % supérieur à celui reçu est une illustration intéressante.

Le Président fait ensuite observer qu'au Japon, la pratique de prix imposés est considérée comme une pratique déloyale « parce que le fait de fixer ses propres prix de manière indépendante en fonction de la situation d'un marché est un des volets les plus élémentaires de l'activité d'une entreprise et permet, de surcroît, de garantir la concurrence et le choix du consommateur ». Apparemment, c'est d'abord parce que la pratique de prix imposés entrave la liberté de certains agents économiques que le Japon cherche à l'empêcher.

Un délégué du Japon confirme qu'en principe, la pratique de prix imposés est illicite *per se* au Japon. La raison en est que le choix du prix est censé être la décision la plus importante dans le cadre du fonctionnement d'une entreprise et que l'application de prix imposés priverait les détaillants de cette liberté de décision et serait, *in fine*, préjudiciable aux consommateurs.

Le Président souligne qu'il ressort clairement de la contribution de l'Allemagne que les effets proconcurrentiels des prix imposés ne sont pas suffisamment établis. L'Allemagne est favorable à l'orientation actuelle de l'UE et est fermement opposée à l'éventuelle introduction d'une présomption réfragable en faveur de la légalité de la pratique des prix imposés, estimant qu'une telle introduction représenterait un pas dans la mauvaise direction. Le raisonnement exprimé par la contribution allemande repose sur l'idée que « les arguments pour et contre la pratique de prix imposés présentés ci-dessus montrent certes cette que pratique peut entraîner des gains d'efficience mais indiquent aussi clairement que ces gains ne sont pas supérieurs aux graves restrictions à la concurrence par les prix qu'elle induit ».

De plus, l'Allemagne insiste beaucoup sur le risque de hausse des prix et, par conséquent, de réduction du surplus du consommateur, associé à l'application de prix imposés. *A contrario*, les États-Unis estiment, dans leur contribution, que « même si l'on disposait d'éléments prouvant que les prix imposés ont entraîné une hausse du prix de détail d'un produit, il n'y aurait pas lieu d'en déduire que les consommateurs ont été lésés. S'il a incité le détaillant à offrir des services utiles ou à améliorer la qualité, le niveau plus élevé du prix de détail a pu avoir des effets positifs pour le consommateur, ce qui pourrait être démontré s'il est établi que les ventes ont augmenté malgré le prix plus élevé ». Le Président demande si l'Allemagne n'accorde pas trop d'importance au prix en oubliant l'impact du mécanisme de prix imposés sur la qualité et les services proposés avec le produit.

Un délégué de l'Allemagne répond que les contributions et commentaires présentés jusqu'à présent montrent que les arguments en faveur et en défaveur des prix imposés reposent davantage sur la théorie que sur des connaissances scientifiques. La vision de l'Allemagne est très proche de celle de la Commission européenne – à savoir que le traitement actuellement réservé à la pratique de prix imposés en droit communautaire constitue un bon compromis.

Dans l'Article 81, les prix imposés sont considérés comme anticoncurrentiels. Ce traitement n'est pas nécessairement équivalent à une règle *per se* – les autorités et tribunaux européens ne peuvent et ne veulent pas exclure un témoignage d'expert prouvant les effets proconcurrentiels des prix imposés. Au contraire, si une entreprise présente les preuves de tels effets, les autorités et les tribunaux sont tenus d'analyser les gains d'efficience invoqués au regard de l'Article 81, paragraphe 3. Cela suppose d'examiner, par exemple, si une part équitable de ces gains d'efficience revient aux consommateurs et si les effets proconcurrentiels des prix imposés sont supérieurs à leurs effets négatifs. Si elle aboutit à la fourniture de services utiles ou à une amélioration de la qualité, la pratique de prix imposés est effectivement bénéfique

pour le consommateur, même si les prix sont plus élevés. Si tel est le cas, elle n'est pas considérée comme une violation de l'Article 81.

Compte tenu de l'incertitude considérable qui entoure les effets positifs de la pratique des prix imposés et de la gravité de ses effets négatifs, l'Allemagne considère que, dans chaque cas d'espèce, c'est à l'entreprise qui souhaite restreindre la liberté d'un détaillant de fixer ses propres prix de vente qu'il incombe d'apporter la preuve des effets de cette pratique.

Le Président note que la Roumanie a aussi une position conforme à celle de l'UE et que la pratique de prix imposés y est illicite *per se*. La contribution de la Roumanie exprime un profond scepticisme vis-à-vis de l'argument selon lequel les détaillants auxquels on proposerait une marge plus élevée l'utiliseraient pour améliorer leurs services. La Roumanie estime qu'ils préfèreraient probablement empocher l'argent.

Un délégué de la Roumanie confirme que rien ne prouve que la pratique de prix imposés garantit que les détaillants vont offrir des services exposés à un risque d'opportunisme, comme les services avant-vente. Au contraire, un détaillant peut choisir d'ajouter au produit un supplément gratuit ou moins cher ou d'offrir des formules de crédit intéressantes ou d'autres services dont il pense qu'ils vont attirer les consommateurs. Selon les autorités roumaines de la concurrence, il est illusoire d'espérer qu'en l'absence de restrictions contractuelles expresses à d'autres formes de concurrence que la concurrence par les prix, l'application de prix imposés incitera automatiquement les détaillants à proposer les services que les producteurs souhaitent qu'ils offrent. C'est la raison pour laquelle les autorités roumaines sont d'accord avec la vision des délégués de la CE et de l'Allemagne, selon laquelle la pratique de prix imposés n'élimine pas le risque d'opportunisme.

Le délégué décrit ensuite une affaire de prix imposés qui montre que cette pratique est parfois utilisée à des fins de collusion entre fournisseurs et distributeurs lorsque le marché d'amont est concentré. En l'espèce, le requérant a présenté à l'autorité de la concurrence plusieurs contrats de distribution et lui a demandé des exemptions individuelles de l'application de l'Article 5 (1) de la loi roumaine sur la concurrence, qui est l'équivalent de l'Article 81 du Traité CE. Malheureusement, il n'a pas pu prouver qu'il remplissait les critères requis pour bénéficier d'une exemption. Ces contrats contenaient au contraire des clauses anticoncurrentielles, ce qui a conduit au rejet des demandes d'exemptions individuelles.

Dans le cadre de l'enquête, l'autorité a effectué une visite surprise dans les locaux de l'un des distributeurs. Elle a trouvé des accords écrits entre quatre distributeurs ; les territoires se chevauchaient et les accords avaient pour objet la fixation du prix de vente maximum. Il est très important de préciser que dans cette affaire, le marché était un oligopole asymétrique. Le fabricant émettait régulièrement une liste de prix maxima recommandés, que les distributeurs devaient appliquer. Les prix recommandés concernaient des prix uniformes et fixés par le distributeur. Cette découverte, la position dominante du fournisseur et le fait que le marché était un oligopole asymétrique ont conduit l'autorité de la concurrence à penser qu'il y avait très probablement collusion entre fournisseurs sur le marché roumain des produits d'hygiène personnelle.

Le Président revient à la question de savoir si, dans l'hypothèse d'une application de la règle de raison à la pratique des prix imposés, les effets anticoncurrentiels seraient trop difficiles à démontrer par les autorités de la concurrence. La Finlande estime que les gains d'efficience doivent être analysés au cas par cas (il ne suffit pas d'affirmer que les prix imposés entraînent en général des gains d'efficience). D'un autre côté, elle précise que « s'il y avait présomption de légalité et si l'autorité de la concurrence devait démontrer l'existence d'effets anticoncurrentiels réels pour pouvoir rendre une décision négative dans une affaire de prix imposés, sa tâche serait très difficile et mobiliserait beaucoup de ressources ». N'y a-t-il pas là deux poids, deux mesures ?

Un délégué de la Finlande, explique que dans ce pays, la pratique de prix imposés est considérée comme une restriction injustifiable, mais que la présomption d'illégalité est réfragable et qu'il est possible d'invoquer l'argument des gains d'efficience. Il existe beaucoup de théories sur les effets préjudiciables des prix imposés. Ils peuvent être préjudiciables à travers des effets horizontaux, s'ils facilitent les ententes entre fabricants. Ils peuvent également faciliter l'exercice d'un pouvoir de marché en empêchant des concurrents plus petits ou des nouveaux entrants d'accéder aux linéaires des distributeurs. Ils peuvent également entraîner des pertes d'efficience au niveau de la production d'amont, dans la mesure où le fait d'offrir une marge élevée aux détaillants risque de les dissuader de négocier le prix de gros.

Compte tenu de ces éléments, l'autorité de la concurrence est très prudente vis-à-vis d'une modification de la législation actuelle en faveur d'un principe de légalité *per se*, du moins tant qu'on ne dispose pas d'éléments empiriques plus convaincants sur les effets proconcurrentiels. À l'avenir, l'autorité se montrera prudente dans le choix des affaires à porter devant le tribunal. En l'absence d'argument prouvant les effets préjudiciables, il n'est pas justifié de mobiliser les ressources de l'autorité ou d'imposer des amendes.

Le Président relève ensuite que la contribution de la République tchèque exprime une opinion négative sur les théories économiques relatives aux prix imposés, qui (schématiquement) « ne prouvent rien ». Selon la contribution, il serait également très difficile pour l'autorité de la concurrence de prouver l'existence d'effets anticoncurrentiels. Le Président demande si ces difficultés sont dues à l'absence de tels effets.

Un délégué de la République tchèque explique que l'autorité tchèque de la concurrence s'est, pendant un certain temps, montrée plutôt tolérante vis-à-vis des prix imposés. Elle a ensuite réalisé que cette pratique était répandue et qu'elle devait prendre une décision sur le point de savoir si elle devait, ou non, mener une enquête. Elle a lu toutes les théories économiques en la matière et a essayé de rechercher des éléments prouvant que ces théories se vérifiaient dans la réalité. Le fait est qu'en République tchèque, l'expérience ne corrobore pas l'existence d'effets anticoncurrentiels.

Concernant le point de savoir s'il serait difficile pour une autorité de la concurrence d'apporter la preuve des effets négatifs des prix imposés sur la concurrence, il est évident que cela serait possible, mais coûteux. Ce coût peut être tel que, par nécessité d'établir un ordre de priorité pour l'affectation des ressources, l'autorité peut décider de ne pas prendre de mesures pour faire respecter l'interdiction des prix imposés. Il s'agit là de la première raison pour laquelle l'approche européenne des restrictions injustifiables – présomption d'illégalité réfragable – est l'approche la plus adaptée. En effet, même les rapports les plus optimistes indiquent que dans la majorité des cas, les prix imposés ont des effets anticoncurrentiels.

Passant à la partie suivante de la Table ronde, le Président souligne que, même si l'on conserve le principe de l'illégalité *per se*, ou une présomption défavorable aux prix imposés, un certain nombre de pays hiérarchisent à l'évidence les priorités pour éliminer les affaires qui risquent de ne pas être intéressantes, lorsque les autorités pressentent que les effets anticoncurrentiels sont probablement limités – afin de se concentrer sur les affaires dans lesquelles, *a priori,* les effets anticoncurrentiels sont plus importants.

Tel est sans nul doute le cas des Pays-Bas, qui, dans leur contribution, examinent la question de la hiérarchisation des priorités et expliquent que les plaintes qui semblent peu susceptibles de soulever un problème de concurrence ne sont pas retenues. Le Président demande s'il s'agit là de l'approche à adopter, plutôt que d'opter pour des présomptions différentes, qui permettraient de concilier bon sens économique et règle juridique stricte.

Un délégué des Pays-Bas souligne que toute politique vis-à-vis de la pratique de prix imposés doit être fondée sur des données empiriques. De manière générale, l'illégalité *per se* n'est une bonne solution que si des données théoriques ou empiriques prouvent que certains comportements ont quasi systématiquement des effets anticoncurrentiels. Dans le cas des prix imposés, l'économie théorique n'offre pas d'éléments probants sur lesquels se fonder pour choisir la politique adaptée. Certaines théories montrent que les prix imposés peuvent être anticoncurrentiels, d'autres qu'ils sont proconcurrentiels. Il est essentiel de disposer de données empiriques sur les effets spécifiques des prix imposés.

Malheureusement, les études empiriques existantes n'offrent que peu d'indications. C'est la raison pour laquelle l'autorité néerlandaise de la concurrence (NMA) insiste sur la nécessité d'engager un débat ouvert et de conduire d'autres travaux empiriques. Pour l'instant, la législation néerlandaise est évidemment très proche de la législation communautaire et du règlement d'exemption par catégorie. La NMA ne se mobilise pas particulièrement pour chercher d'autres modes de traitement des affaires.

En ce qui concerne la hiérarchisation des priorités, la NMA traite les affaires de prix imposés comme les autres affaires. Elle définit un ordre de priorité sur la base de l'impact économique des affaires, du préjudice causé au consommateur, de l'efficacité de l'intervention de l'autorité et de la gravité de la violation. À cette fin, elle cherche à apprécier le poids relatif de ces différents critères. Elle peut ainsi évaluer l'importance stratégique de chaque affaire et gérer et structurer l'ensemble des affaires qu'elle a en charge. Ainsi, dans les affaires de prix imposés, en présence d'éléments prouvant que la concurrence intermarques est importante ou en l'absence de signe ou de preuve d'entente horizontale, il est probable que la NMA ne considère pas l'affaire comme prioritaire, le risque de préjudice au consommateur étant faible.

Le Président fait observer que la contribution du Royaume-Uni, pour concise qu'elle soit, contient des propositions théoriques très intéressantes pour l'analyse de la pratique de prix imposés et, ce qui est encore plus intéressant dans l'optique du débat en cours, s'appuie sur l'analyse économique pour définir des critères utilisables afin de hiérarchiser les affaires de prix imposés.

Un délégué du Royaume-Uni explique que l'autorité de la concurrence (OFT) applique des principes de hiérarchisation des priorités à l'ensemble de l'activité qu'elle met en œuvre pour faire respecter le droit, afin de sélectionner les affaires dans lesquelles une intervention est nécessaire. Au nombre des principaux principes figure l'impact que son intervention peut avoir. À l'évidence, pour évaluer cet impact, une théorie du préjudice est nécessaire.

Selon le délégué, s'ils présentent un grand intérêt en termes de description de la théorie économique, le débat qui a eu lieu dans l'affaire *Leegin* et le document de référence du Secrétariat n'accordent l'un et l'autre pas suffisamment d'importance à la littérature européenne de plus en plus abondante sur les prix imposés évoquée par Bruno Jullien – notamment aux publications des chercheurs de Toulouse et à d'autres études importantes de chercheurs du Royaume-Uni. Ils accordent en particulier une place insuffisante aux arguments relatifs à la restauration du pouvoir de marché et à l'impact des prix imposés en termes de réduction de la concurrence dans l'ensemble du système – notamment en présence de chaînes interdépendantes. Par le passé, la littérature s'intéressait plutôt aux effets en amont ou en aval, sans analyser les effets sur le système dans son ensemble, aspect vers lequel les auteurs semblent maintenant s'orienter.

Les filtres utilisés pour définir un ordre de priorité, présentés dans la contribution du Royaume-Uni, doivent être considérés comme des filtres négatifs disjonctifs. Si les réponses aux questions sont toutes négatives, il est peu probable que l'OFT intervienne. Si la réponse à une question, quelle qu'elle soit est affirmative, une intervention est probable, mais pas systématique – d'autres travaux et analyses s'imposent.

L'OFT propose trois critères :

1. Existe-t-il un pouvoir de marché unilatéral substantiel en amont ? Dans la négative, il est peu probable qu'il y ait une théorie plausible sur l'existence d'un préjudice lié à la possibilité pour la partie située en amont d'extraire l'intégralité de sa rente de monopole (cas de restauration du pouvoir de marché).

2. Y a-t-il des signes de l'existence d'un réseau d'accords de prix imposés impliquant plusieurs fournisseurs situés en amont et les fournisseurs représentent-ils, ensemble, une fraction significative du marché d'amont ? Dans la négative, il est peu probable qu'il y ait une théorie plausible sur l'existence d'un préjudice lié au fait que les prix imposés faciliteraient la collusion en amont ou entraveraient la concurrence au sein du système.

3. Existe-t-il des éléments prouvant que les accords de prix imposés sont conclus à l'initiative du détaillant plutôt que du fournisseur d'amont ? Ces éléments peuvent être par exemple l'existence ou non d'un pouvoir de négociation des détaillants parties à l'accord vis-à-vis des fournisseurs ; le fait qu'ils aient, ou non, ensemble, un pouvoir de marché en aval (il s'agit en d'autres termes de savoir s'ils ont un intérêt à être à la fois à l'initiative de l'accord et à surveiller son application ?). Si les accords de prix imposés ne sont pas conclus à l'initiative du détaillant, il est peu probable qu'il y ait une théorie plausible sur l'existence d'un préjudice lié au fait que les prix imposés faciliteraient la collusion en aval ou empêcheraient sciemment toute entrée sur le marché d'aval.

Dans son arrêt *Leegin*, la Cour suprême des États-Unis a également souligné trois facteurs que les tribunaux inférieurs pourraient vouloir prendre en compte lorsqu'ils instruisent des affaires de prix imposés et ces facteurs sont les mêmes que les critères définis ci-dessus. On observe également deux différences. Dans l'arrêt Leegin, la Cour suprême propose d'examiner le nombre de fournisseurs d'amont concernés par les prix imposés – l'OFT estime qu'il est également important d'apprécier la part de marché qu'ils détiennent ensemble. Par ailleurs, tout en étant d'accord avec les vues de Comanor et Scherer (sur lesquelles reposent les critères), selon lesquelles il importe d'examiner si les prix imposés sont appliqués à l'initiative du détaillant ou du fournisseur, l'OFT estime que cela n'est pas toujours facile à déterminer. Ainsi, si un détaillant prétend qu'un autre a un comportement opportuniste, n'offre pas certains services et préfère demander un prix plus faible, est-on en présence d'un prix imposé à l'initiative du fabricant que le détaillant souhaite voir respecter par ses concurrents ? Ou est-on en présence d'un prix imposé à l'initiative du détaillant ? Il importe également d'apprécier le pouvoir d'acheteur du détaillant, qui n'est pas pris en compte dans les critères définis dans l'arrêt *Leegin*.

Le Président passe ensuite à la France, observant que sa contribution analyse les divers effets théoriques possibles des prix imposés. Elle décrit également la pratique du Conseil de la concurrence dans plusieurs affaires. Une affaire récente a fait couler beaucoup d'encre. Elle concernait le fabricant de jouets Lego, accusé d'avoir appliqué des prix imposés. Lego a fait valoir l'existence d'effets positifs en termes d'efficience, tels que l'élimination de la double marginalisation qui existerait si Lego ne pouvait pas faire coïncider les motivations des distributeurs avec les siennes. Cet argument n'a pas emporté la conviction du Conseil, qui a estimé que les cas dans lesquels la double marginalisation pose un problème sont des cas où il y a absence de concurrence entre les producteurs et entre les distributeurs et où les producteurs ont un fort pouvoir de négociation vis-à-vis des distributeurs. Or, s'il est vrai que les effets positifs en termes d'efficience sont limités ou inexistants en pareil cas, n'est-il pas également vrai que les effets anticoncurrentiels sont eux aussi limités voire inexistants ?

Un délégué de la France reconnaît l'existence d'un paradoxe. D'un côté, le Conseil de la concurrence a rejeté l'argument de l'efficience avancé par Lego au motif que le problème de la double marginalisation

ne se pose que lorsque les producteurs et les distributeurs sont peu nombreux ; or, en l'espèce, le marché d'amont et le marché d'aval sont oligopolistiques. Pourtant, le Conseil a condamné la pratique de prix imposés.

Le délégué tente de mettre en rapport cette décision avec les critères proposés par les États-Unis et le Royaume-Uni. Ces critères sont au nombre de trois :

1. Le nombre d'acteurs sur le marché concerné par les accords de prix imposés. S'il est limité, il est peu probable que des problèmes de concurrence se posent.

2. La question de savoir qui, du producteur ou du distributeur, est à l'origine de la pratique de prix imposés. Si c'est le producteur, les prix imposés sont vraisemblablement appliqués pour des raisons d'efficience ; dans le cas contraire, il est plus probable qu'ils visent à réduire l'intensité de la concurrence.

3. L'existence d'un pouvoir de négociation ou de marché du côté du producteur.

Cette affaire présente l'intérêt d'être parfaitement représentative du type de situation que vient de décrire Bruno Jullien – une structure de marché interdépendante, dans laquelle plusieurs producteurs vendent à plusieurs distributeurs et où il y a une concurrence oligopolistique en amont comme en aval.

En ce qui concerne la troisième condition, dans le cas du marché du jouet, la structure de marché en cause est un oligopole différencié au niveau du producteur et du distributeur qui comprend à la fois des hypermarchés comme Carrefour et Auchan et des grands distributeurs spécialistes du jouet comme Toys 'R' Us. Le pouvoir de négociation des producteurs varie considérablement selon les distributeurs. Il est limité vis-à-vis des hypermarchés alimentaires, tandis qu'il est beaucoup plus important vis-à-vis des distributeurs spécialisés. Par conséquent, en ce qui concerne la troisième condition, il n'est pas possible de se prononcer de manière univoque.

En ce qui concerne les deux autres conditions, la situation est un peu plus claire. Premièrement, l'application de prix imposés était-elle, ou non, une pratique répandue ? Lego se trouvait dans une situation particulière parce qu'il était le seul producteur à ne pas appliquer la législation française sur la revente à perte. Tous les autres grands fabricants de jouets, comme Mattel, Playmobil, Meccano, Ravensburger, Hasbro avaient conclu des accords comparables à des accords de prix imposés avec tous les distributeurs, généralistes comme spécialistes. Par conséquent, la réponse à la question de savoir si l'application de prix imposés était une pratique répandue est indéniablement affirmative.

Enfin, qui, des producteurs ou des distributeurs, est à l'origine l'application de prix imposés ? Le Conseil ne disposait pas de preuves tangibles pour trancher cette question. En revanche, il disposait d'élément prouvant clairement que les distributeurs jouaient un rôle très actif dans le suivi de l'application de l'accord : ils se surveillaient mutuellement et, si l'un d'entre eux n'appliquait pas le prix imposé, ils en informaient le producteur. Des cas de non-respect ont été signalés aux producteurs, qui sont intervenus, à la demande des distributeurs, pour faire respecter l'accord. À l'évidence, les distributeurs avaient un réel intérêt au respect des clauses de prix et veillaient de près à ce qu'elles soient appliquées.

Il apparaît donc – en particulier sur les marchés caractérisés par des structures verticales interdépendantes – que les accords de prix imposés constituaient la base d'un accord de collusion à relativement grande échelle entre producteurs et distributeurs. Dans cette affaire concernant le marché du jouet, dont la structure est un peu complexe, si l'on avait appliqué le test proposé par les délégations des États-Unis et du Royaume-Uni, on aurait obtenu une réponse équivoque à la question relative au pouvoir de négociation et une réponse positive aux deux autres questions. En l'espèce, malgré l'existence de

concurrence sur les marchés d'amont et d'aval, l'affaire fait probablement partie de celles dans lesquelles l'application de prix imposés pose un problème.

Le Président fait observer que deux pays semblent s'orienter de la présomption d'illégalité vers l'application de la règle de raison. Le premier est le Taipei chinois, où les prix minima et maxima sont interdits mais où il a été proposé d'amender l'Article 18 de la loi sur la concurrence, pour qu'il autorise expressément l'application de la règle de raison aux prix imposés plutôt que la présomption d'illégalité appliquée actuellement. Le Président demande ce qui a motivé ce changement et comment la proposition a été accueillie par les milieux d'affaires et la communauté juridique.

Un délégué du Taipei chinois répond que la position actuelle du Taipei chinois vis-à-vis des prix imposés est simple et très stricte : une entreprise ne peut en aucun cas faire valoir un quelconque motif pour justifier la pratique de prix imposés minima ou maxima. Cette position a toutefois commencé à évoluer début 2007, lorsque de nouveaux membres ont intégré la Commission de la concurrence.

Deux grandes raisons sous-tendent cet amendement. Il est d'abord motivé par les plaintes des entreprises. Les entreprises se plaignent de ce que la législation très stricte appliquée à la pratique de prix imposés les a obligées à renoncer à des mécanismes de commercialisation potentiellement efficients, pour elles et pour les consommateurs. Les entreprises du secteur cosmétique, par exemple, ont avancé que la réglementation sur les prix imposés les avait contraintes à investir dans l'ouverture de points de vente dans les grands magasins, exposés à un risque d'opportunisme de la part de discompteurs qui importent les produits d'autres pays. Un fournisseur de livres a invoqué le fait qu'il avait besoin d'appliquer des prix imposés pour garantir un bénéfice minimum aux librairies implantées dans des régions reculées du Taipei chinois, afin de garantir qu'ils aient des livres en stock.

La deuxième raison de l'amendement est le changement de position de la Cour suprême des États-Unis, d'abord avec l'affaire *Sylvania*, puis avec l'affaire *Leegin*. Les principes retenus dans ces affaires (qui ne concernent pas seulement les prix imposés, mais les restrictions verticales en général) ont influencé les conceptions de la Commission.

La question du contenu de l'amendement continue de susciter un vif débat au sein de la Commission. On dénombre au moins trois propositions sur la manière de réformer l'Article 18 :

- Appliquer la règle de raison aux prix imposés maxima, mais opter pour le *statu quo* en ce qui concerne les prix imposés minima. La Commission est plus convaincue des avantages que peuvent avoir les prix maxima, qui profitent directement au consommateur, sous forme de baisse des prix.

- Adopter une approche très proche de celle des États-Unis – la Commission introduirait un seuil de parts de marché et examinerait ensuite les effets proconcurrentiels et anticoncurrentiels

- Opter pour un compromis entre les deux premières approches – les prix imposés seraient considérés comme illégaux, mais les entreprises pourraient invoquer des raisons pour les justifier en vue d'un réexamen de leur situation. Ce type d'amendement pourrait ouvrir à la voie à la Commission pour entreprendre une véritable analyse basée sur la règle de raison.

Cette proposition est au stade de projet et doit encore être approuvée et ratifiée par le Congrès. La formulation des principes de base fera l'objet d'un débat animé. Il est vraisemblable que la solution adoptée sera celle du *statu quo* – la pratique des prix imposés restera illégale *per se*.

L'appréciation du coût d'une approche fondée sur la règle de raison suppose de tenir compte du coût qu'induit la règle de l'illégalité *per se* – en particulier du risque de « faux positifs » – du fait qu'elle empêche un comportement concurrentiel.

En ce qui concerne l'affaire *Yoplait*, le groupe a diminué le prix de gros auquel il vendait ses yaourts aux distributeurs situés en aval, espérant qu'ils feraient la promotion de sa marque. Il leur a imposé un prix maximum pour s'assurer que les bénéfices résultant de la réduction du prix de gros profiteraient aux consommateurs et ne seraient pas conservés par les distributeurs eux-mêmes. Or, aux termes de la législation actuelle, la Commission est seulement tenue d'examiner si un accord est appliqué. Dans l'affirmative, cet accord est illégal. En revanche, en vertu de l'Article 18 révisé, la Commission commencera par apprécier le degré de pouvoir de marché. Il y a probablement des produits substituables aux yaourts Yoplait au Taipei chinois. En outre, les consommateurs profitent de prix plus bas – l'application de prix maxima entraîne une baisse des prix pour les consommateurs. Il arrive que l'application de prix maxima vienne en complément d'autres restrictions verticales, ces restrictions constituant, ensemble, un mécanisme optimal de distribution (territoires exclusifs par exemple). Dans l'affaire Yoplait, le fournisseur a imposé un monopole local à chaque distributeur. En pareil cas, il peut être nécessaire d'imposer un prix maximum pour éviter le problème de la double marginalisation. Si la loi est amendée, l'issue pourrait être tout autre.

Le Président rapporte que la Corée applique une interdiction *per se* stricte des prix imposés, mais que cette règle est très critiquée. Il souhaite savoir si ces critiques viennent des milieux d'affaires, de la communauté juridique, des économistes ou de l'autorité de la concurrence. En outre, la Corée applique des prix imposés aux livres. La contribution du Royaume-Uni défend l'idée selon laquelle la suppression des prix imposés pour les livres a entraîné une croissance de ce marché et a profité aux libraires. Le Président demande à la Corée si, à la lumière des arguments avancés par le Royaume-Uni, l'application de prix imposés aux livres lui semble une stratégie pertinente.

Un délégué de la Corée répond ne pas faire formellement la différence entre illégalité *per se* et règle de raison ; les prix imposés étant presque toujours illégaux, l'approche de la Corée peut être considérée comme reposant sur l'illégalité *per se*. Certains juristes et économistes ont plaidé pour l'application de la règle de raison.

S'agissant de l'application de prix imposés aux livres, l'étude empirique du Royaume-Uni apporte un éclairage utile. La FTC a essayé de réduire le champ d'application des exemptions de la règle des prix imposés. Par le passé, ce champ était plus large que maintenant. Cette étude empirique donne de bonnes raisons de le réduire encore davantage.

Le Président fait référence à une Table ronde sur les livres organisée par l'OCDE il y a longtemps. Deux contributions, en particulier, s'étaient démarquées des autres : la Suède avait indiqué que la suppression, en 1981, des prix imposés pour les livres s'était révélée extrêmement profitable pour le secteur de l'édition parce que les libraires étaient devenus plus spécialisés et s'étaient différenciés, que le prix des livres avait baissé et que le nombre de titres publiés avait fortement augmenté etc. L'autre contribution était celle de la France, qui avait indiqué que l'introduction, en 1981, de prix imposés pour les livres s'était révélée extrêmement profitable, parce que le nombre de libraires n'avait pas diminué et que le nombre de titres proposés avait augmenté du fait que les marges énormes des détaillants les avaient incités à prendre des mesures de promotion des livres et autres initiatives positives pour les éditeurs.

Un délégué de la Suède fait observer que la libéralisation du prix des livres reste une réussite.

Le Président observe que la Pologne estime également qu'elle aurait peut-être intérêt à revoir sa politique vis-à-vis des prix imposés – mais, plus encore qu'une analyse des modèles théoriques, c'est une

analyse empirique rigoureuse et complète de cas d'espèce qui serait nécessaire. Le Président demande des précisions sur le type d'éléments qui pourraient être utiles.

Un délégué de la Pologne répond que l'information la plus utile serait une analyse de l'expérience d'autres pays concernant des affaires dans lesquelles les prix imposés se sont révélés très préjudiciables ou neutres. Le délégué insiste sur l'importance de la présentation, par les entreprises, d'arguments crédibles pour justifier l'application de prix imposés. La position interne de l'autorité polonaise de la concurrence, quelle qu'elle soit, n'a guère d'impact sur le processus de décision si les entreprises présentent des éléments crédibles prouvant clairement que la pratique de prix imposés est proconcurrentielle ou neutre.

Un délégué du Royaume-Uni évoque également le rôle que pourraient jouer d'autres travaux empiriques. Il pourrait, en particulier, être utile d'examiner l'impact de l'intégration verticale dans un grand nombre de juridictions, les situations où il y a un changement dans le cadre juridique, ainsi que d'étudier l'évolution de l'utilisation des prix imposés dans le temps. Lorsqu'on examine les effets positifs et négatifs des pratiques verticales – et, en réalité, de toute pratique – il est souvent très difficile de déterminer les facteurs qui sont à l'origine de ces effets sur la base d'une étude avant-après. L'exemple de la suppression des prix imposés pour les livres, rappelé par le Président, est édifiant à cet égard.

L'autre question à laquelle il faudrait peut-être répondre porte sur le point de savoir comment les consommateurs arbitrent entre l'effet sur le prix et l'effet sur la qualité. Si l'on veut mesurer les gains d'efficience, il faut constater, non seulement l'augmentation des prix, mais aussi celle de la qualité – il faut que certains consommateurs au moins préfèrent cette nouvelle combinaison entre le prix et la qualité pour que les prix imposés aient des effets positifs.

Il est également possible d'estimer directement les courbes de demande et d'examiner leur évolution selon que les prix imposés sont ou non autorisés. À cette fin, il peut être utile d'étudier la situation d'une région ou d'un État voisin, dans lequel la réglementation a changé. Il existe une étude remarquable sur la suppression de restrictions à la publicité appliquées dans l'État de Rhode Island et pas dans celui du Massachusetts – on observait des réactions différentes en termes de prix et de quantités d'un État à l'autre. Ce type d'étude semble répondre aux besoins des chercheurs comme à ceux des autorités de la concurrence. Le délégué indique en attendre les résultats au cours des années à venir.

Le Président fait observer que le simple fait d'essayer de recueillir des données sur les effets sur les prix, les parts de marché et le niveau des services pourrait donner une première indication sur ce qu'il serait possible d'interpréter. Les travaux empiriques de ce type sont particulièrement complexes, mais des données indiquant, par exemple, si les entreprises qui n'ont pas le droit d'appliquer des prix imposés voient leur part de marché diminuer pourraient constituer de premiers indicateurs utiles. Lorsque ces données sont disponibles, une analyse *ex-post* des décisions prises pourrait être conduite.

Un délégué des États-Unis indique être d'accord avec le commentaire sur le fait que la règle appliquée par l'UE vis-à-vis des prix imposés est plus libérale que celle auparavant appliquée par les États-Unis, dans la mesure où elle autorise l'analyse des gains d'efficience. Dans l'affaire *Leegin*, la question portait sur la possibilité ou non de présenter des éléments prouvant les gains d'efficience. Aujourd'hui, le problème est plutôt de savoir quelle quantité de données est nécessaire et comment les examiner. La réponse à cette question dépend beaucoup des hypothèses ou des travaux empiriques sur les effets réels des pratiques. Dans le cas de la FTC, des études effectuées à la fin des années 70 et au début des années 80 ont joué rôle important. Elles portaient sur un ensemble d'affaires antérieures dans lesquelles la FTC avait toujours présumé que le comportement était anticoncurrentiel. L'économiste extérieur a constaté que le comportement était bénéfique dans certains cas et préjudiciable dans d'autres. La conclusion, présentée dans un rapport de Jack Kirkwood, en a été qu'il n'existait pas plus de fondement pour l'application d'une

règle de légalité *per se* que pour l'application d'une règle d'illégalité *per se*. Cette étude, publiée par la FTC en 1984, a servi de base pour définir la règle appropriée.

Cette analyse a notamment révélé que beaucoup d'expérimentations étaient menées – les fabricants étudiaient en permanence de nouvelles stratégies. Il n'est pas souhaitable de faire obstacle à ce processus expérimental. On pourrait envisager d'élaborer des lignes directrices et des principes directeurs précisant, par exemple, que si le producteur et le détaillant opèrent sur un marché fragmenté, il est peu probable qu'un problème de concurrence se pose.

Un délégué de la CE salue l'intervention du Professeur Jullien et la contribution du Royaume-Uni, en ce qui concerne l'idée selon laquelle le pouvoir de renforcer la collusion est un effet spécifique aux prix imposés et devrait être pris en compte dans la comparaison des effets proconcurrentiels et anticoncurrentiels. Le fait qu'aux États-Unis, la pratique des prix imposés n'était (dans le passé) pas souvent utilisée pour dissimuler ou faciliter une entente n'est pas surprenant, puisque dès lors que les prix imposés étaient illégaux *per se*, il aurait été stupide de la part du cartel d'y avoir recours. Le délégué partage l'idée, exprimée précédemment, selon laquelle le fait d'autoriser les prix imposés risque de renforcer la collusion.

Il relève que le Professeur Jullien a précisé que les prix imposés étaient parfois la manière la plus efficiente de réaliser certains gains d'efficience verticale. Il lui demande de citer un ou deux exemples dans lesquels les prix imposés sont le meilleur moyen d'obtenir ces effets positifs pour les consommateurs.

Le Professeur Jullien répond qu'en présence de structures en concurrence sur le marché d'amont, tout ce qui est source de gains d'efficience est positif pour les consommateurs.

Trois grandes formes de restrictions sont utilisées : les territoires exclusifs, les quotas et les prix imposés (et les tarifs binômes). Ces restrictions ne jouent pas toutes le même rôle. Lorsque l'environnement est suffisamment complexe, ces trois instruments doivent être appliqués à un degré assez important pour résoudre tous les problèmes potentiels. Dans certains cas, la pratique de prix imposés est dominée par l'association d'autres instruments, mais dans l'ensemble, cette domination n'est pas facile à déterminer clairement.

Le Professeur Marvel revient sur un commentaire du délégué de la CE concernant la nécessité d'examiner si d'autres solutions que les prix imposés sont envisageables. Au nombre des solutions proposées figure la concession de territoires exclusifs associée à l'application de prix maxima. La CE propose-t-elle de conseiller au fournisseur de ne pas supprimer la concurrence intramarque par les prix parce qu'il serait beaucoup mieux de supprimer toute concurrence intramarque – fondée sur les prix et sur d'autres déterminants – en concédant des territoires exclusifs ? Dans ce cas, les conséquences seraient telles qu'il vaudrait mieux imposer des prix maxima pour empêcher les hausses de prix induites par les territoires exclusifs. La CE semble préconiser l'adoption, par le fournisseur, de la solution la plus restrictive. Appartient-il réellement à une autorité de la concurrence de dire aux entreprises qu'elle sait comment elles devraient mener leurs affaires ?

Le Professeur Marvel note qu'un délégué du Japon a déclaré que la fixation du prix était la décision la plus importante d'un détaillant. En réalité, bien souvent, la décision du détaillant porte sur le niveau de son stock – il décide de la nature et de la quantité des biens qu'il va proposer et de la manière dont il va les vendre. Le Japon a notamment souligné que le fabricant pouvait facilement décharger le détaillant de cette décision en reprenant les stocks invendus ou en fournissant le stock en consignation, par exemple. Une telle solution prive le détaillant d'un des aspects majeurs de son activité – le choix de ce qu'il va proposer à la vente et des stocks qu'il va conserver. Cette proposition semble excessivement prescriptive.