



Resale Price Maintenance: the New Regime

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- **Hardcore restriction**
 - blacklisted in VRBE
 - presumed to infringe Art 101(1)
 - presumed “unlikely to fulfill” Art 101(3)
- **But**
 - “undertakings have the possibility” to plead “efficiency defence” in individual cases

- **Parties must**
 - “substantiate that likely efficiencies result”
 - “demonstrate that all the conditions of Art 101(3) are met”
- **“It then falls to the Commission to effectively assess likely negative effects ... before deciding on Art 101(3)”**

- **New product launch**
 - in an introductory period of expanding demand
 - if contractual promotional obligations not effective
- **Short term low price campaigns**
 - 2-6 weeks
 - in a franchise system or similar
- **Experience or complex products**
 - must show RPM creates “the means but also the incentive” to overcome free riding

- US Sup Ct overturned *Dr Miles (1911)* per se standard for RPM
- **Because**
 - per se restraints “always or almost always tend to restrict competition and reduce output”
 - while “it is essentially undisputed that [RPM] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects”

- **The Dissenting Opinion**
 - RPM tends to produce higher consumer prices
 - “How easily can courts identify instances in which the benefits are likely to outweigh potential harms? ... *not very easily.*”
- **American Antitrust Institute**
 - “full-blown rule of reason ... amounts to a rule of *de facto per se* legality”

- **Significant impediments remain**
 - State law
 - Non-US law
 - Potential for more active federal enforcement
 - Legislative repeal possible
- **Few manufacturers implementing new RPM programs yet**

- **Hardcore is not the same as per se**
 - Art 101(3) allows for exemption
- **RPM will often have anticompetitive effects**
 - “The overall balance between benefits and costs is probably close” Scherer & Ross
- **There is insufficient evidence to justify changing the rule**

- **Five economic theories of harm**
 - facilitates supplier collusion
 - protects supplier market power
 - facilitates buyer collusion
 - softens competition between buyers
 - softens systems competition
- **Also *Giovannetti and Stallibrass (2009)***

When the theories of harm work

| | Upstream market power | Downstream market power | Network of agreements |
|---|-----------------------|-------------------------|-----------------------|
| 1. Supplier collusion | X | | X |
| 2. Supplier market power | X | | X |
| 3. Buyer collusion | | X | |
| 4. Softening buyer competition | | X | |
| 5. Softening systems competition | | | X |

- 1. Unilateral market power or concentration upstream**
- 2. Buyer power or concentration downstream**
- 3. Networks of RPM agreements involving a significant proportion of suppliers**

- **“Efficiency defence”**
 - concrete evidence hard to gather
 - “filters” do not address efficiencies
- ***De minimis?***
 - *T-Mobile/BMW*
 - *cf Lubricantes y Carburantes v GALP*
- **Do you feel lucky?**

- **De facto bright line rule?**
- **Thin line between lawful and unlawful behavior in practice**
- **Relatively junior staff often involved**

- **Max RP for suppliers with market power**
- **Double marginalization issue recognized**
- **Analogy with RRP guidance in short term low price offers**

- **Offer targeted compliance training**
- **Create an audit trail for RRP decisions**
- **Limit discussions of retail prices**
- **Develop standard response language**

Thank you!

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