

Resale Price Maintenance Ten Years After *Leegin*

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Overview of Resale Price Maintenance (RPM)

- What is Resale Price Maintenance?
 - A supplier and its distributor/retailer agree on the price (or a minimum price) to be charged by the retailer for the resale of the supplier's products
- Some common business rationales for suppliers to seek a floor under resale prices
 - Incentivize retailers to list or display products → purchase shelf space via guaranteed margins
 - Prevent free-riding
 - Assure retailers that inventory will not be devalued
 - Incentivize retailers to invest in promotional / sales efforts
 - Protect brand value / consumer perceptions of product

Legal Framework under U.S. Federal Law

- Section 1 of the Sherman Antitrust Act
 - “Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal”
- Two elements of a violation
 - Agreement between two or more persons
 - Unreasonable restraint of trade
- Early Supreme Court Cases
 - *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911)
 - *United States v. Colgate & Co.* (1919)
- Modern antitrust revolution
 - *Continental T.V., Inc. v. GTE Sylvania* (1977)
 - *State Oil v. Khan* (1997)
 - “*The primary purpose of the antitrust laws is to protect interbrand competition.*”

The *Leegin* Decision

- Overturned *Dr. Miles* and its *per se* rule against resale price maintenance
 - The Court reviewed the potential procompetitive uses of resale price maintenance
 - In light of those potential procompetitive uses, a *per se* rule is inappropriate
 - Resale price maintenance should be evaluated under the rule of reason
 - Difficult (or impossible) to establish a violation in the absence of market power
- Caution in some unusual circumstances
 - Cat's paw
 - Supplier with market power
 - RPM utilized in connection with horizontal agreement

At the time, *Leegin* was viewed as a decision that would have a far-reaching impact on U.S. business, but

The States Strike Back

- Following *Leegin*, many state attorneys general made clear that they would pursue RPM agreements aggressively under state antitrust laws
 - “*Despite the demands of Leegin, attorneys general will not end their pursuit of RPM cases*”
 - Under many state laws, resale price maintenance agreements were considered *per se* unlawful, in accordance with the rule of *Dr. Miles*
 - Those state laws were not overturned by *Leegin*
- High-profile enforcement actions by several state attorneys general, including California and New York
 - State AG cases typically settled with consent decrees and modest fines
 - State AGs have had mixed success in litigation
 - Follow-on class action cases add to costs and risk of exposure, but are generally difficult for plaintiffs

Changes in Business Conduct after Leegin

- As a result of aggressive state AG enforcement, suppliers typically avoid entering into explicit RPM agreements with retailers
- Instead, suppliers continue to rely on pre-*Leegin* approaches
 - Unilateral *Colgate* policies
 - Minimum Advertised Pricing (MAP) policies
- One significant post-*Leegin* change in conduct:
 - Absence of automatic liability under federal law for inadvertently straying into an agreement facilitates more sensible enforcement of *Colgate* and MAP policies and more natural interactions between supplier and retailer
- With careful counseling, suppliers can generally achieve the benefits of RPM policies through practices that are less likely to be challenged under state law than express RPM agreements



RPM in the EU

RPMs under EU law – Legal framework

- Article 101(1) TFEU covers horizontal and *vertical* restraints of competition.
- **Definition of RPM:** Agreement or concerted practice having as direct or indirect object the establishment of a fixed or minimum resale price (level) to be observed by *buyer*
 - VBER defines RPM as “**hardcore restriction**” (restriction by object \triangleq per se violation)
 - Presumption that RPM is unlikely to fulfill the conditions for an exemption. Efficiency defense available only in few very exceptional cases:
 - Introductory period for promotion of new product
 - Organization of franchise to create uniform distribution format (2 to 6 weeks)
 - Prevent free-riding (high barriers for prove)
 - Agreement on maximum RP may be exempted under VBER if no fixed price is set
 - RPM binding *the seller* may be exempted under the VBER
- **Antonym:** Non-binding resale price recommendation (RRP). Generally permissible or may be exempted under VBER, caution in case of market power
 - Permissible to explain reasons and strategy for RRP but following-up may cross the line

RPMs under EU law – some specifics

- Art. 101(1) TFEU catches agreements and concerted practices between two independent (groups of) companies
 - Wide definition of **agreement**: Faithful expression of joint intention to conduct on the market in a specific way, irrespective of form
 - Unilateral conduct not caught by Article 101(1) TFEU; may be caught by Article 102 TFEU (abuse of a dominant position).* Agreement may occur in case of:
 - General agreement providing that other party adopts unilateral policy change
 - Tacit acquiescence: compliance by implementation of unilateral policy
 - RPMs in “**Agency Agreements**” are not caught, if (significant) financial/commercial risk is borne by principal
 - RPMs in “**Subcontracting Agreements**” are not caught, if subcontractor produces exclusively for contractor using its equipment or technology

* Note: Member State laws (e.g., Germany) catch exercising of unilateral pressure or unilateral attempts to incentivize compliance with RRP

RPMs under EU law – some specifics

- Art. 101(1) TFEU applies on EU and Member State level (harmonization). EC currently shifts attention towards verticals with focus on e-commerce
- **Much more enforcement activity in Members States.** E.g., UK, France
Frontrunner **Germany**
- Some examples (German Bundeskartellamt):
 - 2016: furniture, beers, sweets, coffee (total approx. EUR 260 million against manufacturers and retailers)
 - 2015: pre-fabricated garages (total EUR 11 million against manufacturers)
 - 2015: mattresses (EUR 15.4 million against one manufacturer)
 - 2014: chocolate (total EUR 34.3 million against manufacturers and retailers)
 - 2012: power tools (EUR 8.2 million against one manufacturer)

RPMs under EU law – some specifics

- Some maybe **surprising examples** of conduct (sometimes used in combination):
 - Agreement on when and which products were to be included in or excluded from individual retailer advertising campaigns
 - Systematic reporting of retailers that deviate from RRP to help manufacturer maintaining price level
 - Following up on RRP in case of deviation
 - Incentivizing compliance (e.g., offering financial benefits, incl. marketing subsidies) or penalties for deviation (e.g., delay of supply)
 - Agreement on neutral trade margins with retailer/wholesaler
 - Offering financial cushion following a wholesale price increase
 - Offering retail price calculation tools to retailer following a wholesale price increase



RPM in Asia Pacific

RPM in Asia Pacific

- Most if not all Asia Pacific countries have a competition law
 - All include a prohibition on anticompetitive agreements
 - Applies to vertical agreements, except in Singapore where vertical agreements benefit from an exemption
- Asian jurisdictions by and large apply a rule of reason analysis
 - But most if not all enforcement decisions have been against RPM
- China:
 - Multiple NDRC decisions – do not seem to devote much attention to potential pro-competitive effects
 - Courts: more elaborate decision in *Johnson & Johnson* but still ruling against RPM
 - Lower court decision finds that RPM is not anticompetitive but unclear to what extent it will be a precedent

RPM in Asia Pacific

- Taiwan: no longer a per se prohibition but TFTC recently ruled against RPM
- Hong Kong: HKCC seems to take a hard stance against RPM, but no court cases yet
- Korea: according to amended guidelines, RPM will be illegal, except in exceptional circumstances



Practical Guidance

Practical Legal Dynamics

- While many resale price maintenance agreements are procompetitive, because of inconsistencies in federal, state, and international legal systems, the risks generally outweigh the benefits. Consequently, companies rarely enter into “pure” resale price maintenance agreements.
- However, there are usually other options for achieving similar objectives. Proper legal guidance is essential because the key legal principles often make little business sense.
- A key first step is to assess the business objective?
 - Want to ensure that it is procompetitive – *e.g.*, to facilitate point of-sale services or promote the product.
- With the clear goal in mind, it is usually possible to work with legal counsel to construct a viable mechanism that achieves business objectives with acceptable antitrust risks.

Less Restrictive Alternatives to RPM

- ***Minimum Advertised Prices (MAPs)***
 - Applies only to *advertised* prices, not the prices charged to consumers
- ***Colgate Distribution Plans***
 - Manufacturer unilaterally announces pricing policies
 - Should be implemented pursuant to a carefully drafted written, stand-alone policy
 - Train employees how to respond to the inevitable dealer complaints and limit the number of employees authorized to implement the program
 - Dealer terminations must be consistent (even then may not provide protection in EU)
 - Make sure the company does not inadvertently step over the line into an informal agreement
 - This is what happened in *Leegin*
- **Unilaterally adjust wholesale prices**

Avoid Facilitating Horizontal Agreements

- Make certain that any arrangement is truly unilateral or *vertical*
 - Do *not* enter into or facilitate a horizontal agreement among competing distributors/retailers
 - Do *not* use the arrangement as a device to coordinate prices with competing manufacturers
 - If the arrangement becomes horizontal, it takes the arrangement out of the rule of reason framework and into the *per se* standard, which could result in severe civil and criminal penalties

International Distribution Exchanges

- RPM agreements and other vertical pricing restrictions are subject to a very high degree of scrutiny globally outside the United States
 - The rules and enforcement level vary from country to country, but as a general rule one should assume that RPM agreements are subject to close scrutiny.
 - Generally more aggressive enforcement and higher fines than in the U.S.
- Other vertical restrictions beyond RPM are also subject to scrutiny in many countries, and in many instances practices that are accepted in the U.S. may be considered unlawful abroad.
- Notwithstanding the level of scrutiny, we almost always find that a procompetitive business objective can be achieved through distribution strategies.

Please feel free to contact today's panelists with questions or comments.



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