The Price Point

Newsletter of the ABA Section of Antitrust Law Pricing Conduct Committee

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We are pleased to bring you this issue of Pricing Conduct Committee's newsletter, which focuses on RPM developments around the world. This issue includes articles by Maria Charlotte Troberg and Alden F. Abbott on international RPM standards and by Leslie Milton and Anthony Baldanza on a Canadian RPM suit involving credit card "merchant rules." In addition, this issue includes summaries of recent RPM programs provided by David Gonen (State RPM), Dov Rothman (RPM in the US and Canada) and Ben Van Rompuy (pricing issues facing global sellers).

If you have comments or questions about **The Price Point**, or if you are interested in submitting an article or following a case, please contact the Editor, Mary Marks, at mary.marks@srz.com.

The Pricing Conduct Committee

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New & Noteworthy

CFTC v. Parnon Energy, Inc. (S.D.N.Y. Filed May 24, 2011). On April 21, 2011, Attorney General Eric Holder announced the formation of a Financial Fraud Enforcement Task Force Working Group to focus specifically on fraud in the energy markets. According to the DOJ press release, the Oil and Gas Price Fraud Working Group will "monitor oil and gas markets for potential violations…" and "explore whether there is any evidence of manipulation of oil and gas prices, collusion, fraud, or misrepresentations at the retail or wholesale levels that violates state or federal laws and harms consumers…" and "evaluate developments in commodities markets and examine investor practices…and the role of speculator and index traders…." In furtherance of this mission, on May 24, 2011, the U.S. Commodity Futures Trading Commission filed a civil enforcement action against Parnon Energy Inc., Arcadia Petroleum Ltd., Arcadia Energy (Suisse) SA, James T. Dyer and Nicholas J. Wildgoose, charging them with unlawfully manipulating and attempting to manipulate New York Mercantile Exchange crude oil futures prices from January 2008 to April 2008.

Commonwealth of Kentucky v. Marathon Petroleum Co. LLC (case number 07-CI-751, in the Commonwealth of Kentucky Franklin Circuit Court). In May 2011, Kentucky's attorney general, Jack Conway, accused Marathon Petroleum Co. LLC of price-gouging following the governor's declaration of a state of emergency following heavy rains that caused the Mississippi River to swell and cause massive flooding. The attorney general said that Marathon violated Kentucky's state price-gouging law that prohibits unnecessary price hikes for food, medical supplies, building materials, gas and other post-emergency essentials for 30 days after a state of emergency is declared. The law allegedly allows suppliers to increase prices only if the suppliers' costs have increased. The attorney general alleges that "gas prices jumped 30 cents overnight" since the state of emergency was declared and was not due to rising costs. The attorney general has filed a motion for a temporary injunction that would prevent the company from raising gas prices during the emergency as part of an ongoing lawsuit against Marathon dating back to 2005.

Call for Articles. The Price Point is seeking submissions for Fall 2011 issue. Consistent with the Pricing Conduct Committee's focus, articles on resale price maintenance, predatory pricing, bundled pricing, price squeezes, or other pricing-related topics are welcome, as of course are articles on price discrimination and Robinson-Patman Act issues. Articles should be approximately 3,000 words in length, excluding notes. Submissions are due by September 15, 2011.

The Price Point is published three times a year by the American Bar Association Section of Antitrust Law Pricing Conduct Committee. Members of the Section of Antitrust Law may access past issues through the Pricing Conduct Committee's website. The views expressed in this publication are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Pricing Conduct Committee. If you wish to comment on the contents of **The Price Point**, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654-7598 or to the Editor, Mary Marks.

An International Overview of Recent Developments in the Treatment of Resale Price Maintenance

By Maria Charlotte Troberg and Alden F. Abbott*

Introduction

The anti-competitive or pro-competitive effects of minimum resale price maintenance ("RPM"), and the implications for antitrust law of this diversity of effects, have long been under debate among lawyers as well as economists. In the United States, RPM became a hot topic following the opinion of the U.S. Supreme Court in *Leegin,* [1] where the Court decided by a weak majority to apply the rule of reason to RPM and abandon the long-standing *per se* rule established in *Dr. Miles.*[2] On the other side of the Atlantic, the same issues were discussed as a result of the review and adoption of a new vertical agreements block exemption regulation by the European Commission. [3] Given this increased attention, coupled with the growing internationalization of marketing and distribution practices, the time has become ripe for the assessment of RPM, from a comparative international perspective. In this article we will examine recent developments in the antitrust review of RPM around the world, starting with the US and the EU, then moving on to address other major foreign jurisdictions.

RPM in the US - from *Dr. Miles* to *Leegin*

The essential question posed to the court in *Leegin* was whether to reconsider the nearly 100 year old rule holding vertical minimum RPM agreements illegal *per se* under the Sherman Act. *Leegin*, a leather goods manufacturer, had ceased selling its leather fashion accessories to retailer PSKS, due to the fact that PSKS sold the *Leegin* products below "suggested retail prices." A federal jury found that this termination constituted illegal RPM, and the U.S. Court of Appeals, following the *Dr. Miles* precedent, affirmed the jury's verdict without giving *Leegin* the opportunity to present justifications for its conduct.

The Supreme Court, by a majority of 5 against 4, overturned the *per se* rule of *Dr. Miles* and ruled that RPM agreements in which a manufacturer sets the minimum price for a product should be evaluated under the rule of reason, which requires "the fact finder to weigh all of the circumstances…including specific information about the relevant business" and "the restraint's history, nature and effect." The court recognized that there are circumstances in which RPM can be used to create or maintain market power and other circumstances in which RPM is justified by legitimate business reasons.[4] Despite many strong reactions against the opinion, the court's approach in *Leegin* was perhaps not completely surprising, considering that for the last 30 years, there has been "a consistent trend away from simple *per se* prohibitions in favor of more flexible but potentially more complex inquiries, across the full range of antitrust." [5] In this article, we aim to examine

[*] The views express herein are solely attributable to the authors. They do not necessarily represent the views of the Federal Trade Commission or of any Commissioner of the Federal Trade Commission.

[1] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

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

[3] In April 2010, the European Commission adopted a revised vertical agreements block exemption regulation, Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (April 20, 2010) and accompanying revised guidelines on vertical restraints, Commission Notice for Guidelines on Vertical Restraints (May 19, 2010). The revised vertical agreements block exemption was adopted following a public consultation and it replaced the old vertical agreements block exemption which entered into force for a period of ten years in June 2000. The new regulation and guidelines will be valid for a period of 12 years, expiring on May 31, 2022.

[4] The Supreme Court noted that substantial economic evidence indicates that RPM can have a variety of pro-competitive effects, and thus a *per se* rule would be inappropriate for a scheme that is not always anti-competitive in effect. According to the court, RPM schemes promote "inter-brand competition among manufacturers selling different brands of the same type of product by reducing intra-brand competition among retailers selling the same brand."

[5] Thomas B. Leary and Janet L. McDavid, Should *Leegin* Finally Bury Old Man Miles?, 21 Antitrust 69 (2007). The article also considers the fundamental anomaly and basic inconsistencies in the law of vertical restraints. For a good discussion on the history of RPM in the U.S. and the state of the law after *Leegin*,

whether similar trends are taking place in other jurisdictions around the world, and what similarities and differences can be observed in the treatment of RPM under other antitrust laws.

Post-*Leegin* developments in the US

Before exploring the state of RPM elsewhere, we first briefly survey post-*Leegin* developments in the US. Commentary following the Supreme Court's ruling revealed significant divergences in opinions on the federal and state levels, as well as in the public and private sector. Whereas some agree with the "circumstance-specific" rule of reason analysis dictated by the Supreme Court,[6] there are others who would prefer restoring the *per se* rule of *Dr. Miles*.[7] Furthermore, state enforcement officials have stressed that RPM remains *per se* unlawful under various state antitrust laws despite *Leegin*.

Less than one year after the *Leegin* opinion, Nine West Footwear Corp. ("Nine West") filed a petition with the Federal Trade Commission ("FTC") to reopen and modify an FTC order prohibiting Nine West from establishing and enforcing RPM agreements. Referring to *Leegin*, Nine West argued that the order restricted lawful, pro-competitive activity.[8] In its decision, the FTC concluded that Nine West's "potential use of resale price maintenance is not likely to harm consumers at this time" and therefore lifted the restriction on Nine West to use RPM, but required Nine West to submit periodic reports concerning the effect of any RPM on Nine West's prices and outputs.[9] To illustrate the divergent opinions among state enforcers regarding RPM, it can be noted that several states opposed Nine West's petition and filed comments with the FTC arguing against the petition.[10]

Treatment of RPM under US state antitrust laws

In *Leegin*, 37 states jointly submitted an amicus brief to the Supreme Court, opposing any relaxation of the *per se* rule against minimum RPM.[11] Although the Court declined to adopt this position as a matter of federal law, state courts may still choose to interpret their own antitrust statutes differently. In fact, enforcement officials of several states have emphasized that RPM remains *per se* unlawful under their laws. State laws on RPM agreements vary widely — in this article, we are limited to observing only the most interesting variations in the treatment of RPM under state law.[12] Notably, the New York Attorney General's office has strongly attacked RPM as a *per se* violation of New York's antitrust law, the Donnelly Act.[13] Further, in California, the Attorney General's office in February 2010 issued a settlement in *California v. DermaQuest*.[14] The settlement prohibits DermaQuest from entering into any resale agreements that set the minimum resale price of its products, and it also prohibits various agreements that could increase or otherwise fix the resale price of the company's products. *California v. DermaQuest* illustrates that state attorneys general are actively challenging RPM as *per se* illegal, notwithstanding *Leegin*. (It bears noting, of course, that *California v. DermaQuest* is not a binding judicial precedent, but merely a consent judgment.)

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see also Warren S. Grimes, Path forward after *Leegin*: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints, 75 Antitrust Law Journal 467 (2008).

[6] *See, e.g.,* Christine A. Varney, A Post-*Leegin* Approach to Resale Price Maintenance Using a Structured Rule of Reason, 24 Antitrust 23 (2009): "Although the Supreme Court has not engaged in an abbreviated analysis of vertical restraints, a structured rule of reason is a logical alternative to the *per se* rule of *Dr. Miles*."

[7] Open Letter from Pamela Jones Harbour, Commissioner, Federal Trade Commission, to the Supreme Court of the United States (February 26, 2007).

[8] *In re* Nine West Group Inc., No. C-3937, Petition to Reopen and Modify Order, at *2 (FTC October 30, 2007) (Nine West Petition), ***available at*** http://www.ftc.gov/os/caselist/c3937.shtm.

[9] *In re* Nine West Group Inc., FTC No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000 at *17-*18 (May 6, 2008) (Nine West Order).

[10] The group of states that filed Comments to the Federal Trade Commission opposing Nine West's petition argued, among other things, that "Nine West's activities are 'inherently suspect' because they raise prices for consumers…". *See* Amended States' Comments Urging Denial of Nine West's Petition, at *2,*6 (January 12, 2008), ***available at*** http://www.ftc.gov/os/comments/ninewestgrp/index.shtm. However, it should be noted that in *Leegin*, the Supreme Court explained that evidence of intra-brand price increases alone is not enough to show anti-competitive effects. According to the court, it is inappropriate to rely on pricing effects absent a further showing of anti-competitive conduct, because "the antitrust laws are designed primarily to protect inter-brand competition, from which lower prices can later result." *See Leegin*, 127 S. Ct. at 2718.

[11] *See* Mitnick, Lavelle, Reiss and Smith, at 63.

[12] For a very helpful overview of the developments on RPM under various state laws, *see* Michael A. Lindsay, An Update on State RPM Laws Since *Leegin*, The Antitrust Source (2010).

[13] *See* Robert L. Hubbard, Protecting Consumers Post-*Leegin*, Antitrust 41 (Fall 2007); Jay L. Himes, New York's Prohibition of Vertical Price Fixing, 239 New York Law Journal 4 (January 2008).

[14] *California v. DermaQuest*, No. RG10497526 Sup. Ct. Ca. (February 5, 2010).

Considerations on RPM in Europe

The *Leegin* opinion also stirred debate on the other side of the Atlantic.[15] Many European commentators thought that that the US example of moving to a more effects-based analysis by adopting the rule of reason in *Leegin* indicated that the time had come for a change in the EU as well.[16]

In Europe, RPM has generally been considered to be a "hardcore restriction,"[17] which is presumed to be anti-competitive and considered to have as its object the restriction of competition.[18] Therefore, RPM is expressly prohibited by Article 101(1)(a) of the Treaty on the Functioning of the EU ("Treaty") and is very unlikely to be exempted under Article 101(3) of the Treaty.[19] In 2010, the European Commission adopted the new vertical agreements block exemption regulation and the accompanying guidelines.[20] While the changes set forth in the new regulation and guidelines were relatively limited, the new vertical agreements block exemption regulation does provide for some important clarifications on the legal standards which the European Commission applies to RPM.[21]

As in the US prior to *Leegin*, minimum RPM was considered almost *per se* illegal in the EU under the previous rules on vertical agreements.[22] In other words, RPM, when found, was automatically illegal and no showing of justification was cognizable. Although RPM remains a hardcore restriction under the new rules, the changes brought about by the new regulation and guidelines recognize a similar approach as taken by the Supreme Court in *Leegin*, in that the new vertical agreements block exemption regulation does not label RPM as *per se* illegal, but rather as one of a number of hardcore restrictions, which are "presumptively" illegal.[23] Thus, the new guidelines recognize, as the Court of Justice has ruled, that there may be circumstances in which a previously assumed hardcore restriction may lead to efficiencies and consumer welfare benefits that would warrant an exemption under Article 101(3) of the Treaty.[24] It follows that parties can bring forward evidence in an individual case that the agreement in question may fulfill the conditions of Article 101(3) of the Treaty.[25]

European enforcers have noted that the new EU rules on vertical restraints "mark an evolution and adaptation of the effects based approach to recent market developments."[26] Moreover, the changes in the EU's rules concerning RPM are also held to reflect an attempt to soften the European Commission's approach to RPM.[27] This would more closely align the positions

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[15] *See, e.g.,* Luc Peeperkorn, Resale Price Maintenance and its Alleged Efficiencies, 4 European Competition Journal 201 (2008) (Peeperkorn).

[16] Nikolaos Verras, Resale price maintenance in E.U. competition law: thoughts in relation to the vertical restraints review procedure, The Columbia Journal of European Law Online 40 (2009) (Verras).

[17] The most serious anti-competitive restraints are referred to as "hardcore restrictions."

[18] *See e.g.* Van Bael & Bellis, Competition Law of the European Community, Kluwer Law International, Fourth ed., 226 (2005).

[19] According to Article 101(1)(a) of the Treaty, "[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which…directly or indirectly fix purchase or selling prices or any other trading conditions."

[20] *Supra*, note 3.

[21] Guidelines on vertical restraints, para. 224.

[22] *See* Massimo Motta, Patrick Rey, Frank Verboven and Nikos Vettas, Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic view, available at: http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf (stating that the vertical restraints guidelines, by establishing that "[i]ndividual exemption of vertical agreements containing [such] hardcore restrictions is also unlikely" (guidelines para. 46), imposed a *de facto* regime very close to a *per se* prohibition for hardcore restrictions, such as RPM).

[23] Article 4(a) of the new vertical agreements block exemption regulation. The new guidelines on vertical restraints, in para. 224, provide additional details on the ways in which RPM may restrict competition, for example by facilitating collusion, eliminating intra-brand price competition and reducing pressure on the supplier's margin.

[24] *See* Case C-501/06, *Commission v. GlaxoSmithKline* (October 6, 2009). GlaxoSmithKline, while focused on interstate partitioning, was fundamentally concerned with controlling prices, — *i.e.* RPM, in the broad sense. The new vertical restraints guidelines include an express reference of the possibility of an exemption under Article 101(3) of the Treaty. Paragraphs 63-64 of the guidelines provide some examples of possible efficiencies for hardcore (re)sales restrictions, paragraphs 106-109 describe in general possible efficiencies related to vertical restraints and Section VI.2.10 discusses resale price restrictions. Further, in paragraph 225 of the guidelines, the Commission acknowledges that RPM may also lead to positive effects, for example, in cases of introduction of a new brand, entrance into a new market, supporting short-term low-price advertisement campaigns, or avoiding free-riding between distributors. These efficiencies will be assessed under Article 101(3) of the Treaty and weighed against the likely negative effects on competition. The burden is on the parties to establish that the conditions for an exemption under Article 101(3) of the Treaty are met.

[25] Magdalena Brenning-Louko, Andrei Gurin, Luc Peeperkorn and Katja Viertiö, Vertical Agreements: New Competition Rules for the Next Decade, 2 Antitrust 19 (2010).

[26] *Ibid*.

[27] Verras, at 40.

of the US and EU antitrust enforcers. However, the change in the European Commission's approach to RPM is not going to be radical or immediate, and it remains to be seen to what extent parties will try to defend their strict RPM agreements, and how such defenses will be received.

Recent developments on RPM: EU Member States and Elsewhere

Even though EU competition law applies to all Member States of the EU, with respect to agreements and practices applicable across national borders,[28] it is of interest also to look at how RPM is treated in some national competition law regimes in Europe. In particular, Germany and the UK provide for some notable examples of national enforcement activity.

Germany

In recent years, the German Federal Cartel Office has increased its focus on vertical restraints and investigated RPM practices more rigorously than previously. In April 2009, the Federal Cartel Office fined Microsoft 9 million euros for influencing a German retailer to sell a software suite at a specific price.[29] In two other decisions in the same year, *CIBA Vision* and *Phonak*, the Federal Cartel Office sanctioned companies for illegally enforcing recommended resale prices in violation of German and EU antitrust laws.[30] In 2010, the Federal Cartel Office searched consumer goods producers and retailers on suspicion that there was collusion on end consumer prices.[31] The Federal Cartel Office in 2010 also issued an informal "guidance letter" to clarify its approach to RPM as a result of criticism of inconsistencies in the *CIBA Vision* and *Phonak* decisions.[32] The Federal Cartel Office identified certain distribution practices which are *per se* prohibited, namely determination of retail prices or minimum price levels, agreements of maximum margins or price reductions on a given price level, support of marketing measures of retailers by product specific payments, or rebates granted in consideration of specific promotional prices, among other. Further, it stated that a number of other practices are in a "grey area" in the sense that they are not illegal *per se*, but may be deemed anti-competitive depending on the specific factual circumstances.[33]

UK

Chapter 1 of the UK's Competition Act of 1998 sets forth that agreements or practices are prohibited if they "directly or indirectly fix purchase or selling prices or any other trading conditions." The Office of Fair Trading enforced the prohibition of RPM in the famous case of *Hasbro Toys*, where Hasbro, a manufacturer, and two of the largest catalogue stores in the UK at the time, Littlewoods and Argos, had agreed to fix resale prices of

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[28] EC competition law requires Member States' courts to apply and enforce EC competition law alongside national competition laws when examining agreements that may affect trade between Member States. *See* Council Regulation 1/2003, art. 8, 2003 O.J. (L 1) 1 (EC).

[29] Federal Cartel Office press release of 8th April, 2009, available at: http://www.bundeskartellamt.de. Even though discussions on price between a supplier and a retailer are not always illegal under the German competition rules, the Federal Cartel Office held that Microsoft had gone too far when allegedly agreeing with one of its retailers on a resale price for its popular software "Office Home and Student 2007." Thus Microsoft was fined for price coordination and resale price maintenance.

[30] *See* Federal Cartel Office press releases of 25th September, 2009, and 15th October, 2009, available at: http://www.bundeskartellamt.de. The Federal Cartel Office held in both cases that the price management measures breached Section 1 of the German Act against Restraints of Competition (*Gesetz gegen Wwettbewerbsbeschränkungen*). In *CIBA Vision*, the company's conduct also infringed EU competition law in addition to the German competition rules. In this case, the Federal Cartel Office imposed heavy fines on the market leader in the contact lens business in Germany, CIBA Vision, for having restricted Internet sales of contact lenses and for enforcing its non-binding price recommendations. According to the Federal Cartel Office, CIBA Vision operated a price surveillance and intervention system monitoring the retail prices of Internet sellers. In the case of *Phonak*, the Federal Cartel Office fined one of the leading German manufacturers of hearing aids, Phonak, for having influenced in an anti-competitive manner the resale prices of its products. In 2010, the Federal Cartel Office imposed fines on Garmin, a leading manufacturer of mobile navigation devices, and one of its employees for engaging in resale price maintenance with its distributors. The Federal Cartel Office concluded that Garmin had used a dual-pricing system for Internet sales, according to which Garmin charged higher prices if a distributor made Internet sales below a certain minimum price established by Garmin. Further, if the distributor subsequently raised its Internet price, Garmin retroactively rewarded this with a bonus.

[31] Federal Cartel Office press release of 14th January, 2010, available at: http://www.bundeskartellamt.de.

[32] While the Guidance Letter was addressed to a number of companies in the retail sector, which the Federal Cartel Office had searched in January 2010 on suspicion of illegal resale pricing practices, it also serves as good guidance for other industries. It is the first time that the Federal Cartel Office provided guidance in this way.

[33] Examples of these practices are ongoing discussions of recommended retail prices initiated by the supplier, the supplier's compilation of price comparison lists with a view to dissipate them at the downstream level, and the provision of calculation or pricing manuals or guidelines to retailers.

Hasbro Toys.[34] Hasbro had also entered into price-fixing agreements with ten distributors. However, by providing evidence against the two retailers, Hasbro avoided fines. Littlewoods and Argos were fined a total of around 23 million pounds.[35] In 2010, the Office of Fair Trading imposed its largest ever fine on various tobacco companies and retailers for having an unlawful agreement that infringed Chapter 1 of the Competition Act.[36] The Office of Fair Trading found that the manufacturers and retailers had participated in agreements and/or concerted practices whereby the manufacturers set the retailers' retail prices for its tobacco products which restricted the ability of the retailers to determine the retail price of competing tobacco products. In 2010, the Office of Fair Trading also started to investigate allegations of RPM in the hotel industry. The investigation is focused on allegations that there could be agreements and concerted practices resulting in RPM in the hotel online booking sector.[37]

France

Minimum RPM is treated as a *per se* violation of French competition law as an unlawful trade practice and also as an abuse of dominant position.[38] In the 1989 case of *Lypobar vs. La Croissanterie*, the Paris Court of Appeal ruled that RPM was an abuse of a franchisee's economic dependency.[39] Another more recent illustration of the *per se* approach is the decision in 2005 of the Conseil de la Concurrence condemning "brown goods" manufacturers Panasonic, Philips and Sony for vertical collusion with their wholesalers and retailers. According to the Conseil de la Concurrence, there was evidence that these manufacturers were actively monitoring retailers to ensure that they were in fact following their recommended retail prices and were pushing wholesalers to refuse to supply retailers that were cutting prices.[40] Further, in similar cases, the major perfume manufacturers and retailers, as well as toy manufacturers and retailers, absorbed significant fines for the same practices.[41]

Canada

Canada's Competition Act used to include a *per se* prohibition of RPM, holding that it was a *per se* criminal offense for a supplier of a product to "by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada."[42] However, following the post-*Leegin* developments in the US, Canada's price maintenance rule underwent a major change. The previous longstanding criminal prohibition of RPM was repealed, and replaced with a civilly enforceable provision that enables the Canadian Competition Tribunal to prohibit the practice only if it has an adverse effect on competition. This concept of an adverse effect on competition already exists under the refusal to deal provision of the Canadian Competition Act.[43]

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[34] Decision of the Office of Fair Trading, No. CA98/8/2003, Agreements Between Hasbro U.K. Ltd., Argos Ltd. and Littlewoods Ltd. Fixing the Price of Hasbro Toys and Games, Case CP/0480-01 (November 21, 2003), available at: http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/hasbro3.pdf.

[35] *Ibid*.

[36] The fines imposed amounted to 225 million pounds. *See* decision of the Office of Fair Trading, Case CE/2596-03: Tobacco (April 15, 2010), available at: http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/tobacco.pdf.

[37] Office of Fair Trading press release of 4th April 2011, available at: http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/online-booking.

[38] Code de Commerce [C. Com.] art. L. 420-1 (Fr.).

[39] *Lypobar v. La Croissanterie*, Paris Court of Appeal decision of 10 March 1989. In this case the Court held that a franchisee must be free to set his resale prices, and that "by imposing supply and resale prices, the franchisor destroyed the franchisee's freedom to manage his business and acted as the de facto owner of the business, without the franchisee's consent and in contradiction with the basic obligations stemming from the franchise contract." At the same time, the Court acknowledged that a provision allowing the franchisor to communicate a list of indicative prices to the franchisee was lawful, but only if the franchisee remained free to set his own resale prices and was not obliged in practice to apply the prices communicated by the franchisor. *See* OECD Policy Roundtables: Resale Price Maintenance, OECD Doc. OCDE/GD(97)229 (1997), at 99, available at: http://www.oecd.org/dataoecd/34/53/1920326.pdf (OECD Policy Roundtable).

[40] See Conseil de la Concurrence, decision 05-D-66, December 2005.

[41] The perfume manufacturers (L'Oréal, Chanel, Guerlain, Dior, among other) and retailers (Nocibé, Marionnaud, Séphora) were fined a total of 44 million euro, and the toy manufacturers (Chicco, Lego, among other) and retailers (Carrefour, JouéClub, among other) were fined a total of 37 million euro. *See* Conseil de la Concurrence, decisions 06-D-04 (March 2006, *Perfumes*) and 07-D-50 (December 2007, *Toys*).

[42] Canada Competition Act, R.S.C., c. C-3, s.1, §61(1)(a)(1985). Price maintenance constituted an indictable offence punishable by fines and imprisonment of up to five years.

[43] *See* Omar Wakil and Sue-Anne Fox, Following *Leegin*: Price Maintenance North of the Border, 9 The Price Point 3-6 (Winter 2010).

The 2009 change to Canada's law more closely aligns the US and Canadian standards with regard to RPM. The effect of the legislative change in Canada most likely will be reduced public as well as private enforcement of RPM than prior to the amendments.[44]

However, there have been some recent enforcement activities against RPM by the Canadian Competition Bureau that, in the end of 2010, under the new civil RPM provision, filed an application with the Canadian Competition Tribunal against Visa and MasterCard to strike down restrictive and anti-competitive rules that are imposed on merchants who accept their credit cards.[45] The Competition Bureau alleges that these rules have effectively eliminated competition between Visa and MasterCard for merchants' acceptance of their credit cards, resulting in increased costs to businesses and, ultimately, consumers.[46]

Australia

Under the Australian competition laws, RPM is a *per se* offense. While the *Leegin* decision initiated some discussions on RPM in Australia and a member of the Australian judiciary shortly afterwards indirectly referred to the pro-competitive effects of RPM,[47] the absolute prohibition of RPM in the Australian Trade Practices Act of 1974 still stands.[48] It is, however, generally permissible for a supplier or franchisor to stipulate maximum prices or to recommend prices in so far as the franchisor makes it clear that prices are recommended only. The Australian Competition and Consumer Commission has been rather aggressive in its enforcement of RPM.[49] For instance, in 2011, following an investigation relating to an alleged breach of the prohibition on RPM, Dragon Alliance admitted restricting online retailers from selling Dragon's ski goggles, motor-cross goggles and sunglasses below specified prices, and provided a court-enforceable undertaking to the Australian Competition and Consumer Commission.[50]

Recent developments on RPM in Asia

Korea

In Korea, there have been some interesting recent developments regarding RPM.[51] Whereas RPM practices used to be deemed as *per se* illegal under the Monopoly Regulation and Fair Trade Law by the Korea Fair Trade Commission, an unprecedented ruling by the Korean Supreme Court in November 2010 seems to have changed the situation.[52] In essence, the ruling by the court held that minimum RPM practices should be allowed in limited situations where justified, taking into consideration the total circumstances of the case at hand. According to the court, minimum RPM may be justified and should be allowed where, under specific market circumstances, it promotes inter-brand competition in the relevant market and, thus, increases consumer welfare. It is likely that the ruling by the Korean Supreme Court will change the Korea Fair Trade Commission's

[44] *Ibid*.
[45] *See* Canadian Competition Bureau press release of 15th December, 2010, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03325.html.
[46] *Ibid.*
[47] *Australian Competition and Consumer Commission v. Jurlique International Pty Ltd* [2007] FCA 79 per Spender, J.
[48] The Australian Trade Practices Act prohibits vertical price fixing regardless of its effect on competition. *See* OECD Policy Roundtable, at 95.
[49] *Ibid*. For instance, in 2008, the Federal Court of Australia imposed a penalty on Hobie Cat Australasia Pty Ltd., a kayak and sailboat supplier, for engaging in RPM. *See* Australian Competition and Consumer Commission press release of 28th March, 2008, available at: http://www.accc.gov.au/content/index.phtml?itemId=814387&pageDefinitionItemId=16940.
In 2009, the Federal Court of Australia imposed penalties on Australia's largest manufacturer of aluminium boats for engaging in RPM. According to the Australian Competition and Consumer Commission, the case was "a timely reminder that businesses must allow independent distributors of their products the freedom to determine the prices at which they both advertise and sell. Ultimately, it is the consumer who benefits from such freedom in the market." *See* Australian Competition and Consumer Commission press release of 17th March, 2009, available at: http://www.accc.gov.au/content/index.phtml/itemId/864661.
[50] *See* undertaking by Dragon Alliance South Pacific Pty Ltd. to the Australian Competition and Consumer Commission, available at: http://www.accc.gov.au/content/index.phtml?itemId=974709.
[51] It is also worth noting that the Korea Fair Trade Commission in 2006 enacted the "Guideline on Review of Resale Price Maintenance" based on its own previous decisions, court precedents and decisions of foreign competition authorities on RPM. The Guideline sets forth the specific requirements and rules for liability finding and cites examples. For example, the Guideline names those acts that could be seen as "coercive RPM," which are prohibited under the applicable law, and also sets forth the requirements for "consignment sales," which should be exempted from the RPM regulations. *See* Enactment of "Guideline on Review of Resale Price Maintenance," in Kim & Chang Newsletter: A Quarterly Update of Korean Law & Policy, at 2 (Autumn 2006).
[52] Korean Supreme Court Holds Rule of Reason Analysis Applies to Resale Price Maintenance Practices, in Kim & Chang Newsletter: A Quarterly Update of Legal Developments in Korea, at 6 (Winter 2010/2011).

approach to RPM and that the agency will conduct a more nuanced review, closer to a rule of reason analysis.[53]

Japan

Japan's Antimonopoly Act makes almost all RPM illegal.[54] RPM is treated as an unfair and restrictive trade practice prohibited under Japan's Antimonopoly Act. The Japan Fair Trade Commission has issued numerous cease and desist orders against RPM. In *Wakodo K.K. v. FTC* and *Meiji Shoji K.K. v. FTC*, the Supreme Court held that there are few, if any, justifications for RPM.[55] Recommended resale prices, however, are allowed when they are considered necessary to maintain the uniformity of the network and to facilitate the choice of consumers.[56]

China

China's Anti-Monopoly Law prohibits the fixing of resale prices and, in particular, minimum resale prices.[57] There are, however, exceptions to this strict prohibition against RPM. If an entity can prove that it fixed resale prices in order to fulfill certain objectives set out in the Anti-Monopoly Law, then the conduct may be exempted under the law.[58]

Hong Kong

Interestingly, Hong Kong might take a different approach to RPM from that taken by the Anti-Monopoly Law in its consideration of a "cross-section" competition law. Vertical arrangements other than those imposed by a supplier with substantial market power would be treated as "simply a way of influencing the way in which its product is distributed and marketed."[59]

Treatment of RPM in Latin America

Mexico

Mexico's competition regime essentially sets forth a rule of reason evaluation for both maximum and minimum RPM. Its Federal Law of Economic Competition provides that "relative monopolistic practices" are deemed to be present where acts, contracts or combinations have the effect "to set the prices or other conditions that a distributor or supplier was to abide by when marketing or distributing goods or providing services."[60] The retail book trade has provoked particular interest in Mexico, as a law to promote books and reading, proposed by the Federal Competition Commission, was passed in 2006, amending the related competition laws and allowing publishers and importers to fix retail prices of books.[61]

Brazil

Article 21 of Brazil's competition law, Law No. 8884, contains a lengthy, but non-exclusive, list of acts that are considered unlawful when producing anti-competitive effects. The listed vertical agreements include resale price restraints and other restrictions affecting sales to third parties, including limits on sales volumes and profit margins.[62] Vertically restrictive trade practices are defined as "restrictions imposed by manufacturers/ providers of products and services in a certain market on vertically related markets, downstream or upstream along the production chain," and RPM is mentioned as an example.[63] In 2005, the Administrative Council for Economic Defence fined steel producers ArcelorMittal, Barra Mansa, and Gerdau for alleged cartel behavior, which included RPM allegations (the rebars cartel).[64]

[53] *Ibid*.
[54] *See* Yoshihiko Tsuji, Regulation of Resale Price Maintenance in Japan, 18 New York Law Forum 397 (1972-1973).
[55] (29)6 Minshu 888 and (29)6 Minshu 951, Supreme Court (1975). *See* OECD Policy Roundtable, at 101.
[56] *Ibid*.
[57] The Anti-Monopoly Law, Article 14.
[58] Article 15 of the Anti-Monopoly Law provides for certain objectives, which may exempt the conduct from the law being applied to it, such as RPM being undertaken with the objective of technological improvement or research and development of new products; to raise product quality, lower costs, improve efficiency, standardize product specifications and standards or implement specialization; to raise the business efficiency of small and medium business operators, to fulfill matters involving the public interest, including energy conservation, environmental protection and disaster relief; to alleviate a serious drop in sale quantity or obvious over-production in times of recession, or to protect legitimate interests in relation against foreign trade and economic cooperation.

[59] *See* Francis J. Devlin, Resale Price Maintenance and *Leegin*: Opening Kay's Kloset Opened the Lid on Pandora's Box in Global Competition Law, 31 Houston Journal of International Law 606 (2009).
[60] *Ibid*, at 597.
[61] *Ibid*, at 598.
[62] OECD and the Inter-American Development Bank, Competition Law and Policy in Latin America (2006), at 72, available at: http://www.oecd.org/dataoecd/38/15/37976647.pdf (Competition Law and Policy in Latin America).
[63] *Ibid*, at 73.
[64] CADE, Administrative Process No. 08012.004086/2000-21.

Chile

According to the Chilean competition law, Law No. 19.911 of 2003, RPM is an unlawful anti-competitive arrangement. In the early years, the Prosecutor's Office and the Chilean Antitrust Commission apparently had a *per se* approach to RPM,[65] whereas the current treatment of RPM is somewhat ambiguous. The increased use of economic principles has meant moving away from rules that were clear. According to some academics and government officials, the rule of reason analysis should be applied in all cases, whereas some competition officials have claimed that they are required to prove excess prices or profits, as well as entry barriers, even in price-fixing cases. Other competition officials view cartel s as illegal *per se*, but are less certain about the status of resale price maintenance and unfair competition.[66]

Argentina

The Argentinian competition law, Law. no. 25,156 for the Defence of Competition, does not set forth any *per se* rules. It must be shown that all violations have the requisite harm to the "general economic interest." Sections 1 and 2 of Article I of Law 25,156 set out the standards governing anti-competitive conduct. Although RPM is not specifically prohibited, it is considered to be a violation of Section 1.[67] Argentina's competition law enforcement agency, the National Commission for the Defence of Competition, has enforced the prohibition against RPM, for example, in a case in the cable TV sector in 2001, which involved RPM in the broadcasting of football matches.[68] Two sports television networks, each having rights to televise national football matches, entered into contracts with cable television providers in the Federal Capital and greater Buenos Aires areas, which fixed the prices that the cable operators charged to their customers for receiving these matches. The National Commission for the Defence of Competition ordered the cessation of the conduct and imposed the maximum allowable fines under the pre-1999 competition law, which applied in the case. However, the decision was overturned by a court of appeals and the case is pending before the Supreme Court.[69]

The state of RPM in South Africa

Agreements or arrangements between parties in a vertical relationship are governed by section 5 of the Competition Act in South Africa.[70] While some provisions of the Competition Act allow for balancing anti-competitive effects against pro-competitive gains to determine the lawfulness of an agreement or practice, there is no rule of reason analysis where minimum resale price maintenance is concerned — it is considered *per se* unlawful.[71] The leading South African case on RPM is the *Federal Mogul* decision,[72] in which the Competition Tribunal set out its clear approach towards RPM, confirming that a firm will be regarded as having engaged in the practice of RPM if the reseller or distributor knows the price at which they are expected to on-sell the goods or services and there is a penalty for not complying with the expected or desired price.[73]

Conclusions

As illustrated by this brief overview of the treatment of RPM in various jurisdictions around the world, the attitude of competition authorities and courts towards vertical restraints varies significantly from one country to another and,

[65] Competition Law and Policy in Latin America, at 212.
[66] *Ibid*, at 215.
[67] *Ibid*, at 13.
[68] *Ibid,* at 18. Respondents were Tele Red Imagen S.A. (TRISA), Televisión Satelital Codificada S.A. (TSCSA), Video Cable Comunicación S.A. (VCC), Multicanal S.A. y Cablevisión TCI S.A., decided 12 August 2001.

[69] *Ibid*, at 18. For a more detailed analysis of this case, ***see*** Marcello R. D'Amore, Fijacion Vertical de Precios en el Futbol Codificado: El Caso TRISA-TSCSA, 19 Boletin Latinoamericano de Competencia, 3 (2004).
[70] Competition Act No. 89 of 1998, as amended.
[71] However, the law provides that a supplier may recommend a minimum resale price to the reseller of a good or service; *provided* the supplier makes it clear to the reseller that the recommendation is not binding and the product must have the words "recommended price" appearing next to the stated price.
[72] *Competition Commission of South Africa v. Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others,* Case Number 08/CR/Mar01.
[73] Since the *Federal Mogul* decision, there have been other decisions evaluating RPM, such as *Competition Commission/Northwest Ceramics (Pty) Ltd, Fazel Rhemthula and Italtile Franchising (Pty) Ltd, Italtile Ceramics Ltd, Italtile Ltd* Case No. 90/CR/Dec02, and *Competition Commission/Toyo ta South Africa Motors (Pty) Ltd* [2005] CPLR 430 (CT). After the aforementioned *Toyota* case, the Competition Commission conducted an industry-wide investigation into pricing practices in the motor vehicle industry, which resulted in several consent agreements (subsequently confirmed as orders of Court by the Tribunal) being concluded between the Commission and various respondents, including General Motors, DaimlerChrysler, and the manufacturers of Volkswagen, Citroen and Nissan motor vehicles in South Africa.

within countries, from one time period to another. Even in the US, with the *Leegin* decision, the state of RPM is still uncertain, given remaining flat prohibitions against RPM in major American states. Although support for a case-specific "effects based" approach to RPM appears to be gaining ground in some jurisdictions (undoubtedly reflecting the substantial amount of commentary on the *Leegin* decision), we are far from achieving a global enforcement consensus on the appropriate treatment of RPM. In short, RPM remains a contentious legal question in many jurisdictions. In light of the above-described developments in the treatment of RPM around the world, any business currently considering implementing or altering an RPM policy should consider several issues before doing so. In particular, a multinational corporation doing business in multiple foreign jurisdictions should carefully take into account the antitrust laws in each such jurisdiction, and proceed fully informed and with caution.

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Canada's Commissioner of Competition Launches Civil Resale Price Maintenance Suit against Visa and MasterCard

By Leslie Milton and Anthony Baldanza

In December 2010, Canada's Commission er of Competition (the "Commissioner") filed an application under Canada's new civil resale price maintenance provision seeking to strike down Visa and MasterCard rules (the "Merchant Rules") that allegedly impede or limit the ability of merchants to: discriminate against or discourage the use of particular credit cards in favor of any other credit card, or any other method of payment; apply surcharges on particular credit cards or set prices based on the particular credit card used; and refuse to accept particular credit cards.[1]

This is the first application brought under the civil resale price maintenance provision which was introduced in 2009 contemporaneously with a number of other significant amendments to the Competition Act[2] (the "Act") including the repeal of the former *per se* criminal prohibition on price maintenance. Few, if any, criminal charges had been pursued under the criminal provision over the last decade, although there have been recent private actions, including class actions, claiming damages for alleged violation of the criminal provision.

The new civil resale price maintenance provision, which is contained in section 76 of the Act, grants to the Competition Tribunal (the "Tribunal") discretion to issue an order prohibiting a person from engaging in certain conduct where, among other things:[3]

(1) the person "(a) is engaged in the business of producing or supplying a product;[4] (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or (c) has the exclusive rights and privileges conferred by a patent, trademark, copyright, registered industrial design or registered integrated circuit topography;"

2) the person has engaged in conduct that "directly or indirectly…by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada;" and

(3) "the conduct has had, is having or is likely to have an adverse effect on competition in a market."

If these three elements are proven on a balance of probabilities, then the Tribunal may issue an order prohibiting the person from engaging in the conduct.

The first two elements of section 76 largely track the former criminal resale price maintenance provision. The third element requiring anti-competitive effect is new. The migration from a *per se* offence to a rule of reason approach is consistent with the reasoning reflected in the *Leegin*[5] decision of the U.S. Supreme Court.

Visa and MasterCard provide credit card network services to "card issuers" (who issue cards to consumers) and "merchant acquirers" (who provide credit card processing services to merchants). The Commissioner contends that, pursuant to their agreements with Visa and

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[1] This requirement, also referred as the "Honour All Cards Rule" prevents a merchant from choosing to honour some but not all Visa or MasterCard branded cards, respectively.

[2] Key 2009 amendments to the Competition Act include the following: (i) establishment of a dual-track criminal/civil regime for agreements with competitors; (ii) repeal of criminal price discrimination, predatory pricing, price maintenance (replaced with a new civil price maintenance provision), and discriminator y promotional allowances provisions; (iii) increased criminal fines for a number of offences, including, among others, conspiracy, bid-rigging, and false or misleading representations; (iv) introduction of significant administrative monetary penalties for abuse of dominance; (v) a new U.S.-style merger notification and review regime and increased size-of-transaction notification thresholds; and (vi) a decrease in the amount of time the Commissioner has to challenge a merger transaction after closing (down from 3 years to 1 year).

[3] An application for relief under section 76 may be filed by the Commissioner or by a private party with leave of the Tribunal. The test for granting leave to a private party requires the Tribunal to have "reason to believe that the applicant is directly affected by any conduct referred to in that section [76] that could be subject to an order under that section." (Act, section 103.1(7.1).) Unlike the test for leave to pursue an application for refusal to deal, tied selling or exclusive dealing, there is no requirement to establish that the applicant's business is substantially affected by the conduct. Leave will not be granted in respect of a matter that is already the subject of an application submitted by the Commissioner.

[4] "Product" is defined in the Act to include both an article and a service.

[5] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

MasterCard, acquirers are required to include some or all of the Merchant Rules in their contracts with merchants.[6] The Commissioner alleges that the Merchant Rules imposed by Visa and MasterCard adversely affect competition in the supply of credit card network services in Canada in a number of ways, including (i) influencing upward or discouraging the reduction of the price (commonly referred to as the "Card Acceptance Fee") at which merchant acquirers supply credit card network services to merchants; (ii) preventing or constraining merchants from undertaking actions to foster competition in respect of Card Acceptance Fees (by, for example, refusing to accept credit cards with higher Card Acceptance Fees or applying surcharges to such credit cards); (iii) increasing retail prices for consumers; (iv) reducing competition between Visa and MasterCard, and between them and other credit card networks and within each of Visa's and MasterCard's respective networks; (v) reducing output of lower cost payment methods; and (vi) creating or enhancing barriers to entry by credit card networks. For purposes of considering the competitive effects of the Merchant Rules, the Commissioner has identified the relevant market as the supply of credit card network services in Canada and alleges that each of Visa and MasterCard has market power.

It is noteworthy that merchant rules imposed by Visa, MasterCard and American Express are also the subject of a civil antitrust suit filed by the U.S. Department of Justice and a number of U.S. states in the U.S. District Court in October 2010. In that case, the plaintiffs allege that merchant restraints imposed by the defendants constitute agreements that unreasonably restrain competition in markets for general purpose network card services to merchants, contrary to section 1 of the Sherman Act. Visa and MasterCard have agreed to settlement terms, but American Express continues to contest the suit. Under the proposed settlement, Visa and MasterCard are enjoined from adopting or enforcing rules that prohibit or restrain merchants from: offering a discount or other benefit to customers for using a particular brand or type of general purpose credit card or form of payment; expressing a preference for the use of a particular brand or type of general purpose credit card or form of payment; promoting a particular brand or type of general purpose credit card or form of payment; or communicating to customers the costs incurred by the merchant when a particular brand or type of credit card is used. The proposed US settlement does not address two of the three Merchant Rules targeted by the Commissioner's application, namely, the prohibitions on a merchant applying a surcharge to particular credit cards and refusing to accept particular credit cards.

As in the US, there has also been recent government intervention in this area in Canada, although this has taken the form of a voluntary code of conduct rather than legislation. The voluntary code issued by the Department of Finance (Canada) in April 2010, which has been adopted by both Visa and MasterCard, provides amongst other matters that credit card networks must permit merchants to grant discounts for different methods of payment and to establish discounts that vary across credit card brands. The voluntary code does not however require Visa and MasterCard to permit merchants to impose surcharges on particular credit cards or discounts based on type of card rather than brand, or to choose to honor some but not all of Visa or MasterCard branded credit cards, respectively.

The Commissioner's application follows an investigation launched in April 2009 in response to complaints filed by merchants and their associations. Interestingly, although the investigation was apparently originally pursued as abuse of dominance (section 79 of the Act), the application is based solely on resale price maintenance. The Commissioner's reasons for not pursuing the matter as abuse of dominance have not been made public. A possible explanation is that abuse of dominance requires proof of a greater negative effect on competition than does price maintenance — a substantial lessening or prevention of competition as opposed to an adverse effect on competition. Also, abuse of dominance could necessitate addressing the concept of joint dominance (which has yet to be formally addressed by the Competition Tribunal) and would require the Commissioner to establish that the impugned conduct was performed for an anti-competitive purpose, namely, an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.

However, reliance on the price maintenance provision is not without its challenges. Both Visa and MasterCard have responded to the Commissioner's application

[6] Visa has indicated in its Response to the Commissioner's Application that its Merchant Rules do not include a general restriction on the ability of merchants to discriminate against or discourage the use of particular credit cards in favour of any other credit card or any other method of payment.

arguing, among other things, that the price maintenance provision is inapplicable to their conduct as they do not supply a product for resale and do not impose any restraints on the Card Acceptance Fees charged by acquirers to merchants. Visa and MasterCard also argue that the Commissioner's application ignores the fact that credit card payment systems operate in a two-sided market[7], that the relevant market is broader than proposed by the Commissioner and includes all forms of payment, and that the Merchant Rules have no adverse effect on competition.[8]

The case is currently scheduled to be heard by the Tribunal in April-June, 2012. A decision by the Tribunal in the proceeding will provide important guidance on the scope of the new civil resale price maintenance provision. As the case involves a "network industry," a decision may also provide important insight into the treatment of network effects under Canadian competition law.

In addition to the Commissioner's application, class actions have been commenced in Canada against Visa and MasterCard in respect of the Merchant Rules. As there is no private right of action for damages in Canada for mere breach of a civil provision of the *Act* such as section 76[9], these proceedings are based on alleged breach of the criminal prohibition in the *Act* on agreements between competitors to "fix, maintain, increase or control the price for the supply of a product." At present, these proceedings are still going through the certification process.

[7] In its Response, Visa asserts that the existence of the Visa Network depends on a sufficient number of cardholders who use Visa Cards and a sufficient number of merchants who will accept them. Unlike a traditional one-sided market, Visa Canada states that it must meet the demands of both sets of its customers (card issuers and acquirers). It must offer card issuers sufficient incentives to provide Visa Cards to consumers and encourage cardholders to use them, and it must offer acquirers sufficient incentives to enlist merchants who will accept Visa Cards. Merchants will not accept a credit card unless there are enough cardholders who use it and consumers will not use a credit card unless there are enough merchants who accept it. Visa states that it sets interchange rates (which form part of the total Card Acceptance Fee) for use by acquirers and issuers within the Visa system. According to Visa, interchange is not a "price" that it has an interest in maximizing but rather a tool that it uses to balance demand on both sides of the two-sided market to maximize overall system output. MasterCard has similarly argued that the application ignores the necessity of balancing the interests of both sides of the market and that by focusing solely on merchants, the Commissioner is proposing a remedy that would harm consumers.

[8] The Canadian Bankers Association and Toronto-Dominion Bank sought and have been granted leave to intervene in the proceeding to address an enumerated list of relevant issues in respect of which they have direct experience and the ability to present a unique perspective.

[9] The *Act* establishes a private right of action for damages resulting from conduct that is contrary to certain criminal prohibitions in the *Act* as well as from a failure to comply with an order of the Tribunal. Thus conduct that is contrary to a civil provision of the *Act* will give rise to a private right of action under the *Act* only if the conduct is the subject of an order of the Tribunal, there is a failure to comply with the order, and that failure results in damages.

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Teleseminar Summary: Resale Price Maintenance, Recent State Initiatives: Where Are We Now?

By David J. Gonen

On May 4, 2011, the Pricing Conduct, Joint Conduct, and State Enforcement Committees sponsored a teleconference on challenges to resale price maintenance (RPM) agreements under state law. State enforcers from New York and California, as well as private antitrust practitioners, engaged in a lively discussion of recent cases and state anti-RPM enforcement in general. James Calder, a partner in the New York office of Katten Muchin Rosenman LLP, moderated the discussion. Participating on the panel were: Bob Hubbard, Assistant Attorney General, Antitrust Bureau, New York Attorney General's Office; Jonathan Eisenberg, Deputy Attorney General, Antitrust Law Section, California Attorney General's Office; and Alicia Downey, a partner in the Boston office of Bingham McCutchen LLP. The moderator and each panelist spoke solely on his or her own behalf and were *not* expressing any opinions or positions of their respective law firms, clients, or state agencies.

Mr. Calder provided an overview on why RPM has become a difficult area in which to advise clients. Until a few years ago, federal and state RPM law were roughly equivalent in that RPM was *per se* illegal under both. However, as a result of the U.S. Supreme Court's decision in *Leegin*,[1] RPM claims brought under federal law have been evaluated under the rule of reason. Yet *Leegin* did not change state law, and some state attorneys general may continue to challenge RPM practices as *per se* illegal under state statutes. This has created a quandary for businesses and antitrust counselors, as the legal risk from RPM may be low under federal law (depending on the particular manufacturer's market share) but high under state law.

Summary of Bob Hubbard's Comments on the History and Current Status of Enforcement at the State Level

Mr. Hubbard reviewed the status of enforcement by states against what he and Mr. Eisenberg insisted on calling resale price *fixing* (RPF). He first noted that State AGs have a long history of prosecuting these restraints and obtaining recovery for consumers. Cases have involved consumer electronics, shoes, pharmaceutical chemicals, compact discs, and other products. State AGs also have been active in Supreme Court advocacy, having opposed the Department of Justice's position that vertical restraints should be deemed *per se legal* in *Monsanto*,[2] as well as making amicus appearances in *State Oil Co. v. Khan*[3] and in *Leegin* itself.

RPF cases were difficult to bring even before *Leegin*. Scrutiny of vertical restraints had been steadily eroding since *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[4] in which the Court applied the rule of reason to all non-price vertical restraints. In *Monsanto* the Court placed limits on how an agreement on resale price may be inferred from communications between a manufacturer and distributors. Subsequently, in *Business Electronics Corp. v. Sharp Electronics Corp.*,[5] the Court construed what constituted a vertical price restraint quite narrowly. RPF was the last *per se* illegal vertical restraint, until the 5-4 decision in *Leegin*.

Immediately following *Leegin*, three states (NY, MI, and IL) settled pending RPM litigation against Herman Miller, and one state (NC) settled an RPM case against an oil jobber. In addition, Nine West, which was subject to an FTC consent decree covering RPM, petitioned the FTC to be released from injunctive relief provisions barring it from entering into RPM agreements, arguing that subjecting it to the *per se* rule would harm its competitiveness. The states submitted comments to Nine West's application for modification and argued for a truncated analysis of RPF under federal law where if prices increase, the party imposing restraint should be required to demonstrate an offsetting procompetitive effect.

Mr. Hubbard reported that RPF appears to be more pervasive than in the past. Although

[1] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

[2] *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984).

[3] 522 U.S. 3 (1997).

[4] 433 U.S. 36 (1977).

[5] 485 U.S. 717 (1988).

states have lost their ability to challenge RPF in the most efficient and effective way, they have not lost their antipathy to it because they view it as a cause of price increases (18-27% in a DOJ study, similar results in other studies). Post *Leegin*, states have three options: (1) overrule *Leegin* legislatively; (2) try to apply the federal antitrust rule articulated in Justice Kennedy's opinion and push for some type of truncated or inherently suspect rule of reason analysis; or (3) use state law. On the legislative front, state AGs from 41 states put forth a letter in 2009 that supports overturning *Leegin*. A bill passed House and Senate committees during the last term and has been reintroduced this term, although it does not appear to be high on the agenda of any member of Congress. State AGs have not pursued federal claims under *Leegin*, although private parties have done so. In the Fifth Circuit, the remand of *Leegin* ended in dismissal for failing to meet a market power screen under the rule of reason. The Eleventh Circuit affirmed a district court's dismissal of an action against Tempur-Pedic, rejecting the plaintiff's market definition as implausible under *Twombly*.[6]

State law cases have been brought by private parties as well as state AGs.[7] One of the cases against *Leegin* was remanded to state court in Kansas and has reached the Kansas Supreme Court, where the Kansas Attorney General weighed in and advocated for a *per se* rule. No opinion has yet been issued. California enforcers reached two settlements against firms imposing RPF on their dealers. On the state legislative front, Maryland passed a statute making RPF illegal *per se*.[8]

New York commenced an action against Tempur-Pedic, not under the state's antitrust law, but under a separate statute,[9] which the state contends bans prohibitions on discounting. The trial court disagreed and held that the statute did not make RPF agreements illegal, only unenforceable, and also found that there was no contract provision restraining resale price. The New York AG's appeal of that decision is pending.

Summary of Jonathan Eisenberg's Comments on Anti-RPF Enforcement in California

Mr. Eisenberg summarized the state of the law of vertical price fixing in California and described his office's anti-RPF enforcement efforts. California's Cartwright Act condemns price fixing and price manipulation in broad language, making no distinction between horizontal and vertical price fixing.[10] The statute provides for private and public enforcement and makes available treble damages, injunctive relief, attorney's fees for the plaintiff(s) only, prejudgment interest, and costs of suit. The statute has been interpreted on the question of vertical price fixing multiple times by the California Supreme Court and lower California state courts, and it is clear that vertical price fixing, like horizontal price fixing, is a *per se* offense in California.[11] Accordingly, a private plaintiff or prosecutor has a strong likelihood of prevailing in a vertical price fixing case. Mr. Eisenberg likened it to "shooting fish in a barrel."

RPF currently affects a significant number of California businesses and consumers and has been the subject of a strongly-worded press release by California Attorney General Kamala D. Harris. The California Attorney General's Office receives confidential complaints about vertical price fixing from members of the public and is itself on the lookout (*e.g.*, where companies post their RPF policies online) for RPM situations. Confidential informants alerted the AG to the RPF practices of cosmetics/cosmeceutical manufacturers DermaQuest, Inc. and Bioelements, Inc. California's subsequent actions against those two companies, in 2010 and 2011, are the first that the AG has brought post-*Leegin*. Both of the companies had multiple written contracts with retailers containing RPM provisions. Both cases were settled, resulting in permanent injunctions, attorney's fees for the AG's Office, and monetary penalties assessed under state unfair competition law.[12]

[6] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[7] For a comprehensive review, *see* Michael A. Lindsay, *Overview of State RPM*, Antitrust Source, April 2011, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-lindsaychart_4-20f.authcheckdam.pdf.
[8] Md. Code Ann., Com. Law § 11-204(a) (2009).
[9] New York Gen. Bus. Law § 369-a.

[10] Cal. Bus. & Prof. Code §§ 16720 *et seq.*
[11] *See, e.g.*, *Mailand v. Burckle*, 20 Cal. 3d 367, 377 (1978).
[12] *California v. Bioelements, Inc.*, 2011-1 Trade Cases (CCH) ¶ 77,306 (Cal. Super. Ct., Riverside Cty., Jan. 11, 2011) (final judgment including permanent injunction, entered by stipulation); *California v. DermaQuest*, Inc., 2010-1 Trade Cases (CCH) ¶ 76,922 (Cal. Super. Ct., Alameda Cty., Feb. 23, 2010) (same).

Summary of Alicia Downey's Comments on the Implications of Divergent Approaches to RPM Under Federal and State Law

Ms. Downey remarked on the dilemma companies face as a result of the divergent approaches to RPM under federal law and the law of a just a handful of states. She noted that the vast majority of state antitrust statutes are worded similarly to the Sherman Act and, when and if put to the test in an RPM case, they would most likely be interpreted in a manner consistent with *Leegin*. She questioned whether the perceived evils of RPM justified a situation in which the threat of enforcement from only two or three states might discourage the deployment of an otherwise legal and procompetitive RPM-based distribution system.

Ms. Downey commented on the apparent lack of any clearly articulated principles to guide clients regarding when or why state enforcement actions may be brought against RPM agreements. The fact that enforcement actions to date have targeted companies in so many different industries makes it difficult to understand and predict for clients which industries are of concern to regulators, and why some companies are targeted and not others. And while the enforcers identify a "higher price" as the harm caused by RPM, the price is only higher than the discounted price that a reseller might otherwise choose to set in the absence of RPM. The RPM-mandated price, therefore, might match the market price for a product or it might even be below market price, and yet the enforcers would find that scenario offensive and illegal. There does not appear to be any requirement to show that an entire market or industry has been "locked up" by RPM, so that competition in the form of discounted, reasonably substitutable products is non-existent. It also appears that just a single complaint might spur an action against RPM practices that the majority of resellers support and to which consumers are largely indifferent.

Ms. Downey pointed out that many companies have concluded, based on empirical market research, that there are legitimate market objectives that can be achieved through RPM. For certain types of products, companies want to avoid pitting retailers against each other in a race to the bottom on price for a number of legitimate reasons, including brand positioning, preventing free riding, and providing sufficient compensation, through higher margins, to incentivize resellers to promote the company's product over competing brands without the risk of losing sales to a more aggressive competing reseller. In light of these procompetitive aspects of RPM, it is difficult to explain to clients why some state enforcers view RPM as problematic in all instances, especially when implemented by a manufacturer without market power.

Mr. Hubbard responded that these procompetitive effects were frequently claimed but never proved. He remains skeptical of the claim that higher prices are ever good for consumers and believes that there are alternative ways to address the free rider problem without charging consumers more. Mr. Eisenberg similarly acknowledged that there are economists who assert procompetitive rationales for RPF in some circumstances, but he too is skeptical that such benefits ever actually manifest themselves. Moreover, the negative price effects from RPF are obvious and well-documented. Accordingly, he believes that the *per se* standard is the appropriate legal rule, both substantively and for reasons of administrability.

Ms. Downey argued that the asserted "higher prices" effect from RPM is not an antitrust harm when it does not flow from a reduction in competition. The *per se* rule risks condemning prices that are simply non-discounted (*i.e.*, market prices). Where there is consumer choice, the consumer simply will not purchase the product if the price is too high.

Mr. Eisenberg responded that under RPF pricing is not set by free market competition. Price is rigged by private agreement, and because supply and demand has been interfered with, there is no sure way to know whether the price is at "market" level. Making consumers pay more and realize less consumer surplus is at the heart of antitrust concerns.

Discussion

Market power requirement — Mr. Calder asked whether RPM can interfere with supply and demand and cause harm in the absence of manufacturer market power. Mr. Hubbard's view is that where a manufacturer can set a price that sticks, so the consumer pays more but for that restraint, that is enough market power to show some level of anti-competitive effect. Mr. Eisenberg agreed and added that having to go through a market analysis in every RPF case would make it difficult to bring cases and surely result in many false negatives.

Reliance on *Leegin* — Given the divergence between federal and state law, Mr.

Calder asked whether it is prudent for businesses to rely on *Leegin*. Mr. Hubbard responded that if a business is not operating in a state that diverges from *Leegin*, then the primary concern is federal exposure. But national distributors should not ignore state law. Mr. Eisenberg added that RPF is extremely risky in California. Mr. Calder observed that, given their significance, New York and California as a practical matter may be setting the law for the rest of the country.

***Colgate* policies** — Mr. Calder asked whether state AGs would pursue cases where there is evidence of a *Colgate*[13] unilateral policy, but no affirmative agreement on the part of distributors to adhere to an RPM policy. Mr. Eisenberg noted that a California appellate court has held that *Colgate* policies do not violate the Cartwright Act,[14] and that holding is binding on California trial courts unless the California Supreme Court or another California appellate court addresses the question differently.

MAP policies and MSRPs — Mr. Calder asked whether MAP policies and having an MSRP are safe. Mr. Hubbard does not believe that any state AG takes the position that a mere suggested resale price, with no agreement or enforcement, violates any state law. However, state AGs would not ignore MAP policies if the product is widely available, the sales price appears restrained, and otherwise the impact appears to be large and harmful. This requires assessing the nature of the restraint and whether it affects merely advertising or also impacts the price at which the product is sold. In the MAP litigation over compact discs, the record labels and the state AGs disputed whether certain practices were merely advertising. In the New York AG's action against Tempur-Pedic, the company argued that it was only restraining advertising, not price. In a private action in the Southern District of New York, the company argues that posting a price on Internet cannot be advertising in the traditional sense. Mr. Eisenberg agreed that MAP can be a little more difficult than RPF for prosecutors and courts to evaluate, but can at least sometimes be equivalent to RPF. The California AG has not taken a position on MAP versus RPF policies.

Exclusivity — Mr. Calder asked whether exclusive territories arguably create a monopoly that could be as anti-competitive as RPM. Mr. Hubbard responded that New York challenged exclusivity on beer distribution and was not successful. Exclusive territories are much more difficult to challenge, and enforcers consider the probability of success before bringing an enforcement action. There is fair amount of literature saying exclusive territories align retailer and manufacturer incentives such that the risk of overcharging is lowered. Mr. Eisenberg concurred. Under California law, vertical non-price restraints are generally evaluated under the rule of reason, so the state AG is probably less likely to bring such cases (without completely ruling them out) as opposed to *per se* cases, which proceed much faster with a higher likelihood of success. Ms. Downey pointed out that exclusive territories eliminate intra-brand competition, yet that practice is treated under the rule of reason. Mr. Eisenberg asserted that there are established reasons in economic literature and jurisprudence to treat non-price restraints differently than price restraints. But Ms. Downey contended that with an exclusive territory, nothing except the presence of inter-brand competition prevents a retailer from charging higher prices, which seems inconsistent with the reasons articulated for *per se* treatment of RPM, which must also necessarily account for inter-brand competition.

Brand positioning — Mr. Calder asked whether RPM could be a legitimate means of positioning a brand as a premium product, thereby preserving its cachet and image. Mr. Hubbard responded that manufacturers can maintain brand position through setting their wholesale price, but employing RPF for brand positioning raises prices and causes concern. Mr. Eisenberg believes that there are other legitimate ways for a product to acquire prestige. If a product is more expensive to produce, superior to alternatives, or cleverly marketed, then it should be possible to command a higher price without fixing the price. He pointed out that *Leegin* did not mention brand positioning as a potential procompetitive benefit of RPF.

Inter-brand versus intra-brand competition — Mr. Hubbard claimed that RPF removes desired price competition that would deliver greater consumer surplus. Ms. Downey challenged that claim, arguing that RPM does not remove inter-brand price competition because no manufacturer can set RPM at a level that would cause consumers to turn to another brand. RPM is one type of distribution that will send a product to market with objectives set by the manufacturer, and the manufacturer is aware that competing firms may not utilize RPM. Mr. Hubbard categorized this reflexive rejection of intra-brand

[13] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).
[14] *Chavez v. Whirlpool Corp*., 93 Cal. App. 4th 363, 369 (2001).

competition as a "theological" argument. He cited to New York's fair trade laws, which permitted RPF only where there was inter-brand competition. Yet, consumers still paid 15-30% more under those laws and New York repealed its fair trade laws in response. Moreover, the same argument could be applied to horizontal price fixing. Instead of asking whether customers were willing to pay the price that was set, the correct measure is to compare the price but for the restraint to the price with the restraint. That difference is the amount of damages to the consumer. Ms. Downey argued that horizontal price fixing necessarily involves a reduction in competition, which is not true of RPM. Mr. Eisenberg responded that RPF does in fact involve a reduction in intra-brand competition, and the only argument is whether that reduction is offset by an increase in inter-brand competition. Mr. Eisenberg further stated that there seem to be many industries in which makers or marketers of different brands of goods are adopting RPF, and that buyers experience such situations in the same way as horizontal price fixing; buyers have hard times finding low-price alternative goods.

Impact on businesses in the state — Ms. Downey queried whether AGs in states with strict anti-RPM enforcement consider the possibility that manufacturers will choose to simply stop distributing their products there, which would have a harmful effect on in-state retailers. Mr. Hubbard felt that retailers generally like to decide on their own resale prices. Moreover, the job of state AGs is to enforce the laws. The proper forum for arguing that RPF should not be illegal would be the state legislature. Mr. Eisenberg stated that California's antitrust laws are focused on stopping anti-competitive practices affecting California businesses and citizens, such that it does not matter if a lawbreaker harming California businesses or citizens is physically located in California; California law can reach that lawbreaker in either case. He also doubts that the Cartwright Act would cause companies to choose to stop doing business in California, a large consumer market.

Internet retailers — Audience member Pete Barile submitted a question about RPM's impact on competition from Internet retailers and, specifically, whether it prevents an efficient retailer from passing its savings on to consumers. Mr. Hubbard pointed to department stores, big box stores, and internet retailers as examples of innovations that were spurred by the ability to discount prices. But RPF constrains such innovation by retailers. Mr. Eisenberg observed that he has seen many RPF agreements that are specifically directed at Internet sales, probably in at least some cases due to complaints from brick-and-mortar retailers. In this way, RPF unfortunately restricts market entry by new efficient retailers. Ms. Downey commented that from a supplier's standpoint, some of these "efficient retailers" are those who disregard the manufacturer's own marketing objectives.

Commoditization of products — Ms. Downey noted that some manufacturers have seen the commoditization of products that previously had cachet or were viewed as premium products. Unrestrained discounting can change consumer perception and cheapen once-valuable brands. Mr. Eisenberg fundamentally disagreed that maintaining premium prices over time is of antitrust concern, arguing that capitalism is supposed to work to lower prices over time. A fine new product comes out that sells well and can command a high price, but over time competitors catch up and through such competition the old product can become less expensive and even commoditized. Manufacturers still make profits, but there is material progress and new innovations are developed, not forestalled. Mr. Hubbard added that the point of competition is to bring down market price. Price should be set by what consumers are willing to pay, not by what the manufacturer and retailer agree to charge. Ms. Downey questioned why, merely by selling a product to a retailer for the retailer to market, the manufacturer must necessarily give the retailer a "right" to discount and ultimately commoditize the product. Mr. Eisenberg responded that in the free market if the manufacturer is able to command a high wholesale price for the product, that is probably because the product is worth it, and the retailer would not be able to commoditize it.

Consumer versus non-consumer goods — An audience member asked whether the likelihood of enforcement depends in part on whether the product at issue is a good sold to consumers versus one sold to sophisticated purchasers. Mr. Hubbard responded that consumer products are much more likely to interest state enforcers. Mr. Eisenberg would not rule out protecting other purchasers who have been victimized.

Penalties — An audience member asked about the penalties that may be assessed against a business that is prosecuted for engaging in RPM. Mr. Eisenberg explained that California's Cartwright Act provides for treble damages and California's Unfair Competition Law provides for fines up to a maximum $2,500 per violation. In both *Bioelements* and *DermaQuest*, the settlement figures were negotiated based on confidential company financial data on California sales.

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Teleseminar Summary: Resale Price Maintenance Following *Leegin*: US and Canadian Perspectives

By Dov Rothman

On May 16, 2011, the Economics, International, and Pricing Conduct committees of the ABA Antitrust Section and the Economics and Law Committee of the Competition Law Section of the CBA presented a teleconference on resale price maintenance (RPM). Richard Elliot, a partner in the Competition & Foreign Investment Review practice at Davies Ward Phillips & Vineberg, moderated the discussion. The panelists were Michael Baye, a professor of economics at Indiana University; Meg Guerin-Calvert, a founding director of Compass Lexecon; and Roger Ware, a professor of economics at Queens University.

RPM is a practice in which a manufacturer and a retailer enter into an agreement about minimum resale prices. Prior to the Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, RPM was considered *per se* illegal in the United States under Section 1 of the Sherman Act. The Supreme Court ruled in *Leegin* that RPM arrangements should be evaluated under the rule of reason. In Canada, RPM was a *per se* criminal offense until that country's Competition Act decriminalized it and introduced a "market effects" approach in 2009.

The panelists began by discussing how the Supreme Court's *Leegin* ruling was based on its finding that RPM could be pro- or anti-competitive and that "it cannot be stated with any degree of confidence" that RPM "always or almost always [restricts] competition."

The panelists noted that RPM could: (a) stimulate interbrand competition by reducing intrabrand competition, (b) increase interbrand competition by facilitating market entry for new firms and brands, or (c) increase interbrand competition by encouraging retailer services that would not otherwise be provided.

The panelists discussed the example of a manufacturer who sells to "brick and mortar" and online retailers. A potential customer can walk into a brick and mortar retailer, take a look at a product, potentially talk to a salesperson about the product, and then purchase the product from an online retailer at a lower price. This may reduce the incentives of the brick and mortar retailer to provide point-of-sale services or even to stock a product. An RPM agreement potentially minimizes the extent to which an online retailer can free ride off the brick and mortar retailer. This can encourage retailers to provide point-of-sale services that benefit consumers.

The panelists also explained how RPM can increase interbrand competition by reducing intrabrand competition. An RPM agreement restricts price competition among retailers selling the same product (*i.e.*, restricts intrabrand competition) and retailers may respond to an RPM agreement by providing more point-of-sale services (*i.e.*, by competing more on non-price factors). This may make a manufacturer's product more competitive relative to other brands thereby increasing interbrand competition.

The panelists also discussed the Supreme Court's concern that RPM could: (a) be used to facilitate a manufacturer or a retailer cartel, (b) discourage a manufacturer from cutting prices to retailers, (c) be abused by a dominant retailer seeking to forestall innovation in distribution or (d) be abused by a powerful manufacturer seeking to provide incentives to retailers not to sell the products of smaller rivals or new entrants.

For example, the panelists explained that a dominant retailer could push a manufacturer to impose an RPM agreement to restrain competition from lower-cost retailers if lower-cost retailers are discouraged from entering a market if they cannot compete by setting lower prices.

The discussion then turned to the empirical evidence on the competitive effects of RPM. It was noted that historically a relatively small proportion of studied cartel activity has involved alleged collusion between manufacturers and retailers and that many industries where RPM has been imposed could reasonably be characterized as competitive—that is, they have low barriers to entry, multiple competitors, and so on. The panelists also noted that there is limited evidence on whether RPM is used to facilitate cartels and that it is often hard to see how RPM would enable manufacturers to do things that they could not otherwise do to collude. Furthermore, it was noted that spurious evidence about RPM is a concern because it can be difficult to establish whether RPM actually harms consumers, even in those instances where it is associated with higher prices.

Also, the pro-competitive effects of RPM are often hard to quantify and measure.

The panelists then turned to the implications of the Supreme Court's ruling and the Canadian Competition Act's change going forward. For Canada, it was noted that it is still too early to tell how Canadian practices will change. In the US, the panelists explained that the Supreme Court did not attempt to describe how the rule of reason would apply to RPM, and instead suggested that lower courts could "devise rules over time for offering proof."

The panelists also noted that much about how a rule of reason approach will or should be implemented still needs to be determined—for instance, Who will have the burden to prove the case? Will plaintiffs need to show evidence of anti-competitive effects? Will defendants need to show evidence of pro-competitive effects?

The panelists referenced a recent speech by Christine Varney, the Assistant Attorney General for Antitrust at the U.S. Department of Justice, in which she suggested a "structured rule of reason" approach where under certain scenarios the plaintiffs and/or defendants would be required to make specific *prima facie* showings relevant to determining whether an RPM arrangement was potentially pro- or anti-competitive.

The panelists discussed the case of Nine West, which in 2000 had entered into a consent decree with the FTC that barred it from "fixing, controlling or maintaining the resale price" for 10 years. (*In re Nine West Group, Inc., No. C-3937*) Following the Supreme Court's ruling in *Leegin*, Nine West asked the FTC to modify the decree. In considering Nine West's request, the FTC considered issues such as the relevant market, market share, Nine West's market power, whether Nine West had implemented RPM at the request of retailers, and whether services and brand promotion would improve as a result of Nine West's RPM. The FTC agreed to modify the decree based on this analysis.

The panelists also discussed a case in which Babies "R" Us was alleged to have used its dominant position to push manufacturers into RPM arrangements with retailers to sell the manufacturers' goods at or above certain prices. In upholding the plaintiffs' claims, the court found that the plaintiffs had adequately defined the relevant market, had showed the anti-competitive effect of the defendants' conduct on the relevant market, and had showed a causal nexus between the defendants' actions and the plaintiffs' decreased sales and higher prices in the market.

Finally, the panelists emphasized the importance of asking whether potential pro- or anti-competitive purposes for RPM could apply in specific cases. All were skeptical that the source of an RPM agreement (manufacturer or retailer) could be used to assess its competitive implications. The panelists agreed that the source of an RPM agreement can be relevant to dismissing underlying theories, but should not be used as a bright-line test.

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Spring Meeting Program Summary: The Price is Right – Or is It?

By Ben Van Rompuy*

Firms holding a dominant position increasingly need to take account of the restrictions imposed by antitrust laws of multiple jurisdictions. While dominant firms that price below some measure of cost face the prospect of liability for "predatory pricing" in certain jurisdictions, some jurisdictions may impose liability on dominant firms that price "excessively" above cost. Moreover, different jurisdictions use different standards and analytical frameworks to judge particular price restraints by dominant firms. These approaches are not always mutually consistent. So is it "higher" or "lower"? Pricing yourself right at the global level has become a complex and challenging task.

On March 31, 2011, a panel of distinguished speakers addressed this issue at the ABA Section of Antitrust Law Spring Meeting. The panelists included Andreas Mundt (President of the German Bundeskartellamt), Howard Bergman (University of Minnesota Law School), Jorge Padilla (LECG), and Paul Lugard (Tilburg University). The session was moderated by Norman Armstrong, Jr. (Deputy Director of the FTC's Bureau of Competition) and chaired by Cynthia Lagdameo (Counsel for International Antitrust of the FTC's Office of International Affairs).

At the outset, Andreas Mundt applauded the important convergence efforts that have been achieved in this area within the International Competition Network (ICN). The ICN recommendations on assessing dominance have led to best practices adopted in several jurisdictions. Currently work is being conducted on a unilateral conduct workbook chapter on assessing dominance to give more practical guidance. Mundt did stress, however, that complete harmonization is not realistic. The diverging standards for anti-competitive unilateral conduct, including price restraints, follow from the legacy of state monopolies in many jurisdictions, as well as from diverging economic conditions. Hence, different jurisdictions have different needs.

Focusing on the US and EU antitrust law regimes, the panel kicked off the discussion by explaining generally the standards and the analytical framework used to assess five different price policies. On the basis of a hypothetical case study, the panel covered predatory pricing, loyalty discounts, bundled discounts, price squeeze, and "excessive" pricing.

While recognizing many similarities between the US and EU approaches, the panelists also highlighted several substantial differences. Notable differences discussed included the role of intent in analyzing unilateral conduct cases, the relevance of recoupment in predatory pricing cases, and the analysis of defenses in loyalty discount cases (and the need in the EU to show indispensability).

Another noted area of divergence relates to high (or "unfair") pricing. Paul Lugard explained that in the EU a dominant firm may abuse its position by charging unfair prices. In practice, the law has been used to prohibit excessive prices that are deemed too high. Lugard noted the concept of unfair pricing is not well developed and there remains a large degree of ambiguity regarding the question when a price constitutes an excessive price and is therefore "unfair."

Panelists lauded the European Commission's 2009 Guidance Paper on enforcement priorities in unilateral conduct cases, noting that it sets out a rigorous effects-based approach to exclusionary conduct. However, some of the panelists raised concerns that many of the concepts in the paper are difficult to implement in practice, particularly from the perspective of small and younger agencies with scarce resources (few human resources and few or no economists on staff). This may in part explain why there are fewer unilateral conduct cases and why some jurisdictions and courts find a formalistic jurisprudence more attractive than a rigorous effects-based analysis.

Confronted with differing standards, what can dominant firms do to ensure the compatibility of their global pricing strategy with antitrust laws? Jorge Padilla answered this question by identifying six key practical pointers. First, a dominant firm should clearly identify the goals it wants to achieve with a given pricing policy. Second, it should rigorously and systematically review whether the objectives could be obtained by a pricing policy that is less complex and less risky from an antitrust viewpoint. The best review is to start from zero and decide which discount and rebate schemes should be maintained and which ones should be renegotiated or phased out. Third, a dominant firm should investigate its costs. Padilla pointed out that a dominant firm generally has little information about its costs — including long-run incremental costs or avoidable costs that are used as the relevant benchmarks for price-cost tests in several jurisdictions. This lack of information increases the risk of inadvertently infringing antitrust laws. Fourth, a dominant firm should have a good understanding of how its customers are likely to react to price changes. Awareness of customers' attitude towards price volatility and price discrimination could reduce exposure to abusive discrimination allegations. Fifth, a dominant firm should carefully consider whether bundled discounts are worthwhile. Bundling can help the firm to leverage its best-selling products and increase the sales of less attractive offerings. Yet it may not be profitable (*e.g.* when bundles are replicated by competitors, profits may fall). Moreover, it is important to keep in mind that, in many jurisdictions, bundled discounts may be deemed anti-competitive. Sixth, a dominant firm should coordinate its wholesale and retail pricing decisions. These decisions are often set by different departments without much internal communication.

According to Padilla, these practical pointers are as helpful for making good commercial decisions as they are for avoiding infringement of antitrust laws. He pointed out that many (dominant) firms set prices according to poorly designed pricing policies based on commercial "intuition" or "historical" practice. The need to comply with antitrust laws thus represents an ideal opportunity for dominant firms to rethink their pricing policies.

Reacting to Padilla's advice, Howard Bergman noted that you must consider the firm's limited resources. Obtaining information about costs is an expensive exercise. And even if you would be able to compile all the information, Bergman stressed, there is no guarantee that the data is reliable. He therefore suggested an alternative, less cumbersome set of three questions as guidance for dominant firms. First, what is the goal of the pricing policy? Second, what is the benefit of the pricing policy for customers and consumers? Third, what is the impact of the pricing policy on consumers?

All panelists supported the underlying key message, however. The insightful discussion of the EU and US standards and analytical approaches illustrated how antitrust laws of different jurisdictions may impose different limits to the pricing policies of dominant firms. While this understandably frustrates dominant firms, the appropriate business response is rational and pro-active.

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