



Recent Trends and Developments in Competition Law and Policy 2013 Resale Price Maintenance

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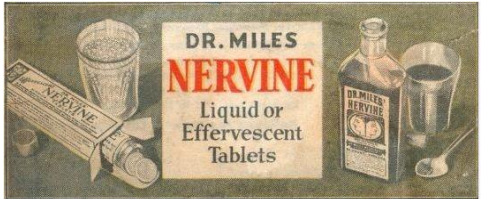
RPM...the bad, the good, and the...?



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International Conference on "Resale price maintenance – an issue for the European agenda?"
12th September, 2008 Palais Niederösterreich, Vienna



Leading one client to say to me...

“The difference in RPM between what is permitted and what is prohibited is understood only by lawyers and people from Mars”



Case Study 1

- Retailers of books that priced below a certain level were refused supply by publishers.
- Publishers justified the RPM by saying that fewer books would be sold, fewer titles would be published, without this price floor.
- A “network” of RPM agreements existed industry-wide, thus nearly every publisher and retailer was involved.
- Vote! Legal RPM?

Case Study 1 - UK

RESULT:

- No – illegal! The UK “Net Books Agreement” case.
- RPM was banned in the books sector in 1997.
- In 2007, the UK found that post-RPM ban, more books published, more titles published, new entry at retail level occurred, and RPM could facilitate collusion at publisher and retail level.
- But the UK authorities acknowledged it is difficult to measure the effect of RPM on prices...the economic analysis is “ambiguous”



Case Study 2

- A shoe manufacturer imposed RPM obligations on its retailers.
- The manufacturer justified its RPM by saying that RPM in shoe retailing:
 - Increased the services offered by retailers, including training of sales staff on customer care, shoe fitting, shoe fashion advising;
 - Which in turn increased demand for its products (increased inter-brand competition);
 - Helped the manufacturer maintain its brand image and deterred free-riding by discounters.
- The manufacturer had a low market share (around 10%), retailers are also fragmented.
- But while service and sales may have increased, so did the prices of the manufacturer's shoes.
- Vote! Legal RPM?

Case Study 2 - USA

RESULT:

- Yes – legal! The US FTC “Nine West” case in May 2008.
- Because:
 - The manufacturer lacked a strong market position;
 - There was no evidence of collusion at any level;
 - The minimum RPM would increase service provision and output – focussed on inter-brand competition and service.
- BUT – the FTC did require the manufacturer to file periodic reports so it could monitor prices.



Case Study 3

- A pet food manufacturer forced its distributors to increase the sale prices of pet food to the level of its recommended or minimum retail price.
- Compliance with these set prices was regularly monitored by the manufacturer.
- The manufacturer argued that its RPM was justified because its competitors were using unfair commercial practices to gain an advantage and because illegal imports were driving down prices.
- Prices increased significantly in some cases.
- The manufacturer had a very low market share (less than 5%) and there was no collusion among the retailers.
- Vote! Legal RPM?

Case Study 3 - Czech Republic

RESULT:

- No - illegal! – Czech “Candy” pet food case - 2011.
- UOHS found that the RPM led to a significant increase in prices (in some cases by more than 20%) and a reduction of the number of e-shops offering pet food supplied by the manufacturer.
- Justifications were insufficient to overcome consumer harm.



Case Study 4

- A manufacturer of pharmaceutical products authorised its distributor to sell its products in certain geographic areas with a minimum resale price.
- The manufacturer discovered that the distributor had acquired distributorship in an unauthorised geographic area by bidding at a price that was below the minimum resale price.
- It then withheld the supplier's deposit, terminated its distributorship in several locations and eventually terminated supply entirely.
- Vote! Legal RPM?

Case Study 4 - China

RESULT:



- Yes! The “Johnson & Johnson” case - 2012
 - The first instance court ruled in favour of the manufacturer, finding that the supplier had failed to prove that the RPM agreement had restrained or excluded competition.
- No!
 - The appeal court ruled that while negative effects needed to be proved (like rule of reason), and inter-brand competition was key (like Nine West), here the manufacturer did not prove anticompetitive effects outweighed the negative effects on competition, or that RPM was necessary to achieve the manufacturer’s aims (like Art 101(3) indispensability).



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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

