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RPM Under EU Competition Law: Some Considerations From a Business and Economic Perspective

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I. INTRODUCTION

Resale or retail price maintenance ("RPM") refers to an agreement between an upstream and a downstream firm in a vertical value chain concerning the retail level price. RPM refers either to a maximum, a minimum, or a fixed price that retailers agree to charge their customers.[2]

At first sight it may seem counterintuitive for a manufacturer to enter into an agreement that seemingly only aims at guaranteeing the retailer a certain margin that cannot be competed away and that the manufacturer may potentially have forfeited. Indeed, RPM arrangements can not only be counter-intuitive but also anticompetitive, particularly when they function as the tip of the iceberg of a hub-and-spoke horizontal collusion system.

In light of the controversial legal debate on how to characterize RPM from a competition point of view, section II briefly describes the evolution of EU policy and the current legal situation concerning. Section III contains an overview of the main efficiency justifications advanced in the economic literature, focusing on horizontal and vertical externalities but also on the particularities of the so-called Veblen goods. Section IV draws on both previous sections in discussing nuances that can already be identified in the Commission's most recent guidelines and that may be indicative of a coming more economic approach also regarding RPM. In light of the economic literature and the efficiency justifications acknowledged in the guidelines, the concluding section hints at the possibility that the times of RPM as hardcore restraint may soon be over and that, meanwhile, the time may be ripe, under certain circumstances, for a successful efficiency defense of certain RPM practices under Article 101(3) TFEU.

II. RPM AS HARDCORE RESTRAINTS UNDER EU LAW

RPM has usually been treated under EU law as a hardcore restriction on competition. This approach was reflected in the EU Commission's assessment of individual resale price maintenance practices prior to the adoption of Regulation 67/67,[3] under Regulation 67/67, and in

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[2] Although maximum RPM agreements are a common practice and raise a variety of interesting issues, they will not be addressed in this overview.

[3] *See Commission Regulation No 67/67, O.J. 57/849* (regarding exclusive dealing).

the subsequent block exemptions,[4] as well as under Article 4(a) of the recent Block Exemption Regulation on Vertical Restraints.[5]

The Commission´s most recent *VRBER* and the *Guidelines on Vertical Restraints* unambiguously characterize RPM arrangements as hard-core restrictions.[6] Also, besides straightforward price-fixing, the *Guidelines on Vertical Restraints* indicate, in a relatively thorough manner, additional indirect means through which an RPM agreement will be achieved—fixing maximum discounts, linking the granting of rebates to the observance of a given price level, etc.[7]

Interestingly, although the Commission indicates in its *Guidelines on Vertical Restraints* that "hard-core restrictions may be objectively necessary in exceptional cases,"[8] the Commission does not include RPM among the examples of possible ancillary restraints indicated in the *Guidelines*.[9] That said, through the European Court's development of the notion of commercial ancilliarity, it should be possible for a manufacturer to argue that a restriction, which is necessary for the realization of a legitimate commercial purpose, should fall outside Article 101(1).[10]

III. EFFICIENCY JUSTIFICATIONS AND LEGITIMATE BUSINESS RATIONALES FOR RPM

A. Preliminary Considerations

In light of the European Union's emphasis on anticompetitive effects, and given limited space, this overview will focus on the efficiency-enhancing arguments for RPM. Standard neoclassical theory allows for different efficiency justifications with respect to RPM, since the latter can be a solution to certain problems that can be broadly classified into horizontal- and vertical-externality problems.[11] The economic literature on vertical restraints in general, and on RPM in particular, has been framed in terms of principal-agent relationships where the principal, typically the manufacturer, imposes constraints on the agent, typically the retailer selling the manufacturers product. It is in this sense that RPM is a vertical restraint even if the externalities that are internalized through RPM can be horizontal or vertical.

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[4] *See Commission Regulation (EEC) No 1984/83, O.J. L 173/5 (1990)* (regarding exclusive purchasing), *Commission Regulation (EEC) No 4087/88, 0.J.L 359/46 (1988)* (regarding franchise agreements), *Commission Regulation (EEC) No 2790/1999, O.J. L 336/21 (1999),* in particular at Articles 4 and 5.

[5] *See Commission Regulation (EU) No 330/2010 of 20 April 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*, OJ L 102, 23.4.2010 (the "VRBER"), at pp. 1–7.

[6] *See*, in particular, the reference to "fixed or minimum sale price," at Article 4(a) *VRBER*. *See* further *Guidelines on Vertical Restraints,* at ¶¶48 and 223.

[7] *See Commission notice - Guidelines on Vertical Restraints*, Official Journal C 130, 19.05.2010, p. 1 (the "Guidelines on Vertical Restraints"), at ¶48. Please note that the *Guidelines on Vertical Restraints* also expressly set out the circumstances under which an RPM agreement entered into with an agent will be considered to constitute a hard-core restraint (*See Guidelines on Vertical Restraints*, at ¶49).

[8] *See Guidelines on Vertical Restraints*, at ¶60.

[9] *See Guidelines on Vertical Restraints*, at ¶¶60 ff.

[10] *See*, *e.g.*, Case 26/76 *Metro SB-Grossmärkte v Commission* [1977] ECR 1875; Case 258/78 *LC Nungesser KG v Commission* [1982] ECR 2015 and Case T-112/99 *Métropole télévision v Commission* [2001] ECR II-2459

[11] *I.e.*, externalities arising either between competing firms (horizontal externalities) or between firms on different levels of the value chain (vertical externalities). *See*, *e.g.*, V. Verouden, *Vertical Agreements: Motivation and Impact*, 3 ISSUES IN COMPETITION L. & POL'Y 2008, 1813-1840 (2008).

In the following the problems of horizontal externalities between companies on the same level of the value chain are analyzed. These horizontal externalities can be addressed vertically by the manufacturer. Subsequent to the treatment of horizontal externalities, the possibly more intuitive case of vertical externalities within a vertical chain is then discussed.

Finally, falling outside the realm of classical demand theory, the role of Veblen or luxury goods is considered. To the extent that higher prices are detrimental only to those consumers that stop to purchase at the higher price, but positively affect those who continue to purchase at the higher price, the effects analysis of RPM in the context of Veblen goods may substantially deviate from the standard analysis, something that has only partially been incorporated in current antitrust thinking under the heading of image theory.

B. Horizontal Externalities: The Three Guises of the Free-Rider Argument

The free-rider problem describes the problem associated with horizontal externalities between firms operating on the same level of the value chain.

1. Pre-sales Efforts

The classic example of a free ride is the externality between retailers when they compete on other dimensions than price alone. Complex technical products, for example, may require extensive pre-sales service that the manufacturer would like retailers to offer. Such services, however, drive up the price of the product and thereby create incentives for customers to get pre-sales service at a particular retailer to help them make up their minds only to eventually purchase online or at some other retailer not offering this service, but offering the good at a lower price. Taken to a logical conclusion, no retailer may decide to offer these services, a result that would have negative consequences both for the manufacturer and the customers.

This free-rider problem can be addressed by RPM, eliminating the possibility of undercutting the price of the product, as RPM allows the retailers a certain margin that can be invested in higher pre-sales efforts. RPM could also eliminate intra-brand competition but increase inter-brand competition, through higher pre-sales efforts. As a result RPM could have a positive impact on consumers and manufacturers, and retailers would be able to cover their higher costs by higher revenues.

Several arguments against the free-rider justification have been advanced. It has been argued that perhaps not all products require extensive pre-sales service and, even if they do, retailers may sometimes have different means of competing. Therefore, the higher margin may not be used in higher pre-sales effort but rather to offer free shipping services or lower prices on complementary products.[12]

2. Entry

Another efficiency justification is that entry of a new product or brand may be substantially facilitated with RPM. The argument is equivalent to the pre-sales efforts

[12] *See*, *e.g.*, L. Peeperkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 EUR. COMPETITION J. 201-212 (2008); M.K. Perry & R.H. Porter, *Can Resale Price Maintenance and Franchise Fees Correct Sub-Optimal Levels of Retail Service*, 8 INT'L J. INDUSTRIAL ORG., 115-141 (1990) and B. Klein & K.M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms,* 31(2) J. L. & ECON. 265-297 (1988).

justification for RPM except that the effort is now no longer directed at explaining features of the product but at the opportunity costs of carrying the new, so far unknown, brand and to advertise it so that consumers accept the brand.[13] Subsequent to the introductory phase, other retailers could now offer the product at lower prices. RPM could avoid free-riding on the costly efforts undertaken to introduce the brand. Absent RPM, this free-riding would be anticipated by all retailers with the result that market entry of new products or brands could be delayed or entirely unsuccessful.

3. Quality Signaling

A similar free-riding problem arises in the context of quality signaling. If a high quality store offers a product, that store's reputation could be used as a signal for the quality of the product. Obviously the same product could also then be offered by other, lower quality stores, that would free-ride on the quality certification of the first store.[14]

As with the pre-sales efforts arguments, this efficiency justification applies only to a specific set of unknown brands and products where consumers cannot discover the quality of the product from previous purchases—otherwise the quality certification through certain stores is no longer needed. As discussed for the pre-sales efforts, margins obtained under RPM could also be used to divert sales from high quality stores by offering complements at lower prices or bundling products. Quality certification may also be achieved by selective distribution systems.

C. Vertical Externalities: Four Types of Incentive Problems

The incentive problem describes the problem associated in relationships between firms operating on different vertical levels of the value chain. These vertical problems have as common origin the misalignment of incentives on firms active on different levels of the value chain.

1. The Double Marginalization Problem

The classic example for such an incentive problem is double marginalization,[15] which can arise whenever competition on the different levels of the value chain is not perfect but characterized by monopolistic or oligopolistic structures where firms exercise market power.[16] The simplest case is the one of two monopolists, a manufacturer and a retailer. Both firms will sell at a mark-up to their marginal cost, neglecting the negative pecuniary externality on the respective other firm. This pecuniary vertical externality results in sub-optimally low quantities associated with high prices.

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[13] *See*, *e.g.,* B. S. YAMEY, THE ECONOMICS OF RESALE PRICE MAINTENANCE, (1954); F.G. Mathewson & R.A. Winter, *The Law and Economics of Resale Price maintenance*, 13 REV. INDUSTRIAL ORG., 57-84 (1983); P.M. Ippolito & T. R. Overstreet, *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works*, 39 J. L. & ECON. 285-328 (1996).

[14] *See* H.P. Marvel & S. McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 15, 346-359, (1984).

[15] *See* Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347-352 (1950). *See* further P. BELLEFLAMME & M. PEITZ, INDUSTRIAL ORGANIZATION MARKETS AND STRATEGIES, at pp. 434 ff (2010).

[16] A manufacturer will generally be keen on as much competition as possible on the downstream level as the lower the mark-up on that level, the larger the sales and therefore also the profits of the manufacturer.

Both firms and consumers would be better off by internalizing the respective externalities as prices would decrease and quantities, as well as firm profits, would increase. RPM can solve the double marginalization problem as the manufacturer can set the final retail price under RPM that an integrated firm (automatically internalizing the externalities) would set. As the double marginalization problem is driven by the incentive to add a mark-up, this result can, however, also be achieved by a maximum price, which would allow firms to offer lower prices.[17]

2. Other Problems of Non-aligned Incentives

Winter discusses a similar incentive problem, pointing at the fact that a manufacturer will naturally be more interested in increasing total sales than retailers who may be quite content to simply divert sales from other retailers.[18] As a result, and from the perspective of the manufacturer, retailers will not concentrate sufficient effort on non-price related aspects that may be relevant to increasing the total sales of a product, and will focus too much on price competition. Retailers may therefore not provide the appropriate price service mix.

Winter discusses this problem based on two consumer groups that are differentiated based on their opportunity costs with respect to time. From the perspective of the manufacturers it would be optimal to invest in measures to reduce shopping time, as this is the only way these consumers will purchase at all. Retail competition, however, results in prices that are not sufficiently high to sustain such investments, something that could be addressed by RPM.

In a similar model, Klein showed that retailers may provide less effort than required from a manufacturer's perspective due to the fact that any additional advertisement efforts on a particular product will divert sales away from other products in the retailer's portfolio produced by other manufacturers.[19] High sales efforts on one product therefore also imply lower sales on substitutes also offered for sale by that retailer.

Both models assume (i) a certain degree of homogeneity between retailers and (ii) that competition is mainly for price-sensitive consumers, conditions that are not always fulfilled.[20] RPM does not, therefore, always increase consumer welfare as the optimal price/service combination is not driven by marginal consumers but determined mostly by infra-marginal consumers.[21] An alternative to RPM in these models could be the use of different product/price bundles targeted at different consumer groups.

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[17] *See*, *e.g.*, P. Rey & T. Vergé, *Economics of Vertical Restraints*, HANDBOOK OF ANTITRUST ECONOMICS, 353-389 (Buccirossi, ed. 2008).

[18] *See* R. A. Winter, *Vertical Control and Price vs. Non-Price Competition*, 108 QUARTERLY J. ECON. 61-76 (1993).

[19] *See* B. Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, 76 ANTITRUST L. J., 431-481 (2009).

[20] *See* M. Lao, *Resale Price Maintenance: A Reassessment of Competitive Harms and Benefits*, MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW, (Drexel *et al.* eds. 2011).

[21] *See* for example M. MOTTA, COMPETITION POLICY: THEORY AND PRACTICE (2004).

3. The Optimal Inventory Problem

With fluctuating demand under uncertainty, RPM can induce more appropriate inventory holding by retailers.[22] If demand declines, the value of retailer inventories would decline and may force the retailers to sell their stock at lower prices. As a result, retailers will hold inefficiently low stocks. RPM would eliminate an inventory devaluation, which would allow retailers to hold efficient stock levels benefitting the manufacturer and, under certain circumstances, also consumers.[23] An example of an alternative to RPM that could address this problem are return policies similar to those used, for instance, in the newspaper industry.

4. The Contract Compliance Problem

Not all services that a manufacturer would like the retailer to provide can be specified contractually. RPM can be used as an instrument to induce the retailer to provide these services, as already discussed. RPM insures higher retailer margins and the threat to stop sales to that retailer may therefore be sufficient to incentivize the retailers to provide the contractually unspecified services as long as these can be monitored. Again, however, the welfare effects are ambiguous and will depend on the exact shape of the demand curve.[24]

D. Veblen Goods

The third category of justifications for RPM lies outside the classical realm of demand theory where the amount demanded increases with a decrease in the price of the good, and vice versa, *i.e.*, the law of demand. The most famous example of a good violating the postulates of the law of demand is a Giffen good.[25] Of interest in the context of RPM is, however, the less well-known category of Veblen goods.[26] Typical Veblen goods are, *inter alia*, luxury cosmetics, luxury cars, designer handbags, and high-class wines.

Following Leibenstein[27] it is helpful to distinguish between the price paid for the good and its conspicuous price, *i.e.*, the price that others think the person paid for the good and which determines the conspicuous utility of the good. As demand for the product ultimately depends

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[22] *See* R. Deneckere, H.P. Marvel, & J. Peck, *Demand Uncertainty, Inventories, and Price Maintenance*, 111 QUARTERLY J. ECON. 885-913 (1999).

[23] *See* R. Deneckere, H.P. Marvel, & J. Peck, *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 AMER. ECON. REV. (1997) Constant prices may avoid the loss of utility associated with the non-availability of the product but also implies that consumers do not benefit from lower prices. Which effect dominates is an empirical question.

[24] *See*, *e.g.*, W. S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARVARD L. REV., 983-1002 (1985).

[25] A Giffen good describes an inferior good whose demand increases with increases in price. The classical but controversial example given by Robert Giffen was the Irish potato famine in the 19th century where potatoes were considered the Giffen good. As potato prices rose, people responded by purchasing more potatoes as they were the largest *and* cheapest component in their diet. Unable to substitute for other products, people had to cut consumption of meat and vegetables so as to be able to afford a sufficient amount of potatoes. As the price of potatoes increased, demand also increased. That said, the question remains whether this is a move along the same demand curve and therefore a violation of the law of demand or whether the demand curve shifted out.

[26] Named after Thorstein Veblen who first described the underlying effects in his work THE THEORY OF THE LEISURE CLASS (1899).

[27] *See* H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers Demand*, 64 QUARTERLY J. ECON. 183-207 (1950).

on the conspicuous utility derived, and as it is not possible to maintain the pretense of a high conspicuous price when, in fact, the real price has been eroded by discounts, RPM may have a role to play in the context of Veblen goods.

Any retailer of a Veblen good has an interest in lowering the actual price for the good as the impact on the conspicuous price, which is an essential part of the overall image of the brand, is marginal in comparison to the gains to the retailer that can be achieved with such a reduction. As this is equally true for every other retailer, the actual price may be eroded down to marginal cost, *i.e.*, the wholesale price fixed by the manufacturer, in case of a competitive market. If that is the case, consumers will relatively quickly equate the conspicuous price with the actual price—destroying the brand.

This in itself would not be problematic if the manufacturer chooses the appropriate wholesale price, as even a perfectly competitive market outcome would foresee prices equal to marginal cost and not below. But without RPM, retailers may still use the good as a loss-leader, thereby pricing below the wholesale price. To the extent that it becomes known that Veblen goods are not uniformly sold at prices equaling the conspicuous price, but also below, this may erode the conspicuous price and thereby the brand image.

An additional interesting twist in the context of an effects analysis of RPM for Veblen goods is that the usual weighing between, for example, the added consumer welfare of additional services provided under RPM and the reduction in consumer welfare due to the associated higher prices at least partially disappears. Depending on how the conspicuous price enters the utility function of consumers, at least those consumers that continue to purchase at the higher price may not be harmed at all even if they have no interest in the additional services provided. As a result, the weighing of pro- and anticompetitive effects, and in particular the impact on consumer welfare, may crucially depend on whether the product is a Veblen good or not.

IV. NUANCES IN THE 2010 GUIDELINES ON VERTICAL RESTRAINTS

The Commission has taken note of some of the arguments highlighted in the preceding sections. Although RPM remains a hard-core restraint, *i.e.* a restriction of competition by object, the Commission's *Guidelines on Vertical Restraints* make it clear that "undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case."[28] Consequently, RPM agreements can, in principle, be exempted under Article 101(3) TFEU where four cumulative conditions are met. More specifically, the agreement must:

1. contribute to improving the production or distribution of goods or to promoting technical or economic progress;
2. while allowing consumers a fair share of the resulting benefit;
3. without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

[28] *See Guidelines on Vertical Restraints*, at ¶223. *See* further, in the context of vertical restraints, Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS*, judgment of 13 October 2011, at ¶47.

4. without affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

The Commission indicates in its *Guidelines on Vertical Restraints* that it will be particularly willing to take into consideration the following types of efficiencies; "supplier driven" RPM agreements relating to the launching of a new product (see Section A below), franchising (Section B); and the prevention of free-riding (Section C).[29]

A. The launching of a new product. According to the European Commission, in Article 101(3):

> where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to take into account the manufacturer's interest to promote the products. RPM may provide the distributors with the means to increase sales efforts and, if the distributors on this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers.[30]

However:

i. If the RPM meets the requirements of Article 101(3) then it will be, by definition, necessary in order to introduce the new products since it will not contain "concerned restrictions which are not indispensable to the attainment of these objectives." If that is the case its effects are arguably better captured by either an adequate analysis of the counterfactual or, providing the RPM agreement is proportionate to the legitimate need, by the doctrine of ancillary restraints. The need to resort to the counterfactual when determining whether a restriction of competition by object has taken place was first enshrined in the landmark case *Société Technique Minière*.[31] In the words of the CJEU:

> The Competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute.[32]

The European Courts have consistently referred to the abovementioned case law in a number of cases.[33] In the words of the European Commission:

> The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions.34

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[29] *See Guidelines on Vertical Restraints*, at ¶225.

[30] *See Guidelines on Vertical Restraints*, at ¶225.

[31] *See* Case 56/65 *Société Technique Minière* [1966] ECR 337. Note, moreover, the *Societé Technique Miniêre* case. *See*, as regards the analysis of the counterfactual, THE EC LAW OF COMPETITION, ¶3.165 (J. Faull & A. Nikpay eds. 2007); O. ODUDU, THE BOUNDARIES OF EC COMPETITION LAW. THE SCOPE OF ARTICLE 81, at 89 (2006); R. WHISH & D. BAILEY, COMPETITION LAW, at 127 *(*2012); COMPETITION LAW: EUROPEAN COMMUNITY PRACTICE AND PROCEDURE, at ¶2-2-008 (G. Hirsch, F. Montag, & Jürgen Säcke, eds. 2008), and V. Korah, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE, ¶¶ 2(4)(4)(2)(1) and 8(1)(3), (2007).

[32] *See* Case 56/65 *Société Technique Minière* [1966] ECR 337, at p. 250.

[33] *See*, *e.g.*, Case T-328/03 O2 [2006] II – 1234, at ¶. 68. Case 31/80 *NV L'Oréal v. PVBA "De Nieuwe AMCK"* [1980] ECR 3775, at ¶19 and Case C-7/95 P *John Deere Ltd v. Commmission* [1998] ECR I-3111, at ¶76.

ii. Moreover, one cannot but wonder why an agreement which at least in some circumstances "induces [distributors] to expand overall demand for the product and make the launch [a] success, also for the benefit of consumers" should be considered as anticompetitive by its object.

iii. Last but not least, provided the agreement is indeed conducive to an increase in output that benefits consumers, why artificially limit the exception to the introduction of a new product?

B. Franchising. According to the Commission: "[s]imilarly, refixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform, distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit consumers."[35] It is again not clear why these effects are not better appraised through an adequate application of the doctrines of the counterfactual or the doctrine of ancillary restraints.

C. The Service/Free-riding Argument. According to the European Commission's *Guidelines on Vertical Restraints*,

> in some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. **RPM may help to prevent such free-riding at the distribution level.** [36]

However, the Commission subjects it to the following caveat:

> [t]he parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free-riding services and that the pre-sales services overall benefit consumers as a part of the demonstration that all the conditions of Article 101(3) are fulfilled.[37]

However, despite assertions of the EU Courts as to the availability of an Article 101(3) TFEU defense for all types of infringements of Article 101(1) TFEU, including those deriving from a restriction by object, the Commission appears to be skeptical as to the availability of this defense for RPM arrangements.[38]

Moreover, the Commission has included in its *Guidelines on Vertical Restraints* a reference to the fact that RPM agreements are "unlikely to fulfil the conditions" for an Article

[34] *See Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004, p. 97–118, at ¶17 (the "Guidelines on Article 81(3)"). *See* further ¶18 of the same *Guidelines on Article 81(3)*, where the Commission asks itself: (i) whether "the agreement restricts actual or potential competition that would have existed without the agreement" and (ii) whether "the agreement restricts actual or potential competition that would have existed in the absence of the contractual restraint(s)."

[35] *See Guidelines on Vertical Restraints*, at ¶225.

[36] *See Guidelines on Vertical Restraints*, at ¶225.

[37] *See Guidelines on Vertical Restraints*, at ¶225 (emphasis added).

[38] *See*, *e.g.*, Case T-17/93 *Matra Hachette v. Commission* [1994] ECR II-00595, at¶85.

101(3) TFEU defense and expressly reminds the reader that "[i]t is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled."[39] It should be highlighted that this provision is arguably unnecessary given the general rules regarding burden of proof applicable to possible infringements of Article 101.[40]

As if the Commission felt that its skepticism towards the beneficial aspects of RPM had not been sufficiently stressed, the initial paragraph of the *Guidelines* concerning the appraisal of Article 101(3) ends with the surprising statement that "[i]t **then** falls to the Commission to effectively assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled."[41]

V. CONCLUSION

In principle, parties trying to establish the legality of an RPM agreement under EU law appear to be in for an uphill battle. This uphill battle may, moreover, be fought under the threat of antitrust fines. The set of economic arguments briefly summarized above are, however, sufficiently compelling to think that the state of RPM in antitrust is still in flux. Also, the current rules on vertical restraints indicate that the time may be ripe for bringing a successful defense of RPM under Article 101(3) TFEU.

Irrespective of whether it is considered appropriate to classify RPM as a hardcore infringement under Article 101 TFEU or not, there seems to be agreement that a more serious economic analysis of the potential pro- and anticompetitive effects of the restraint is warranted.[42] This position implies the recognition, embryonically found in the *Guidelines*, that RPM cannot always and everywhere be characterized as anticompetitive.

Nevertheless, the current status of RPM seems more in line with a presumption that RPM is typically associated with important anticompetitive effects. To the extent that this view no longer corresponds to reality, regulators have to ensure that their policy is commensurate with the standard of legality.

Moreover, the characterization of RPM as a hard-core restriction is arguably inconsistent with the Commission's own description of the recent evolution of EU Competition law. This can be seen in the case law on Article 102 TFEU. It is noticeable that in recent judgments, such as *Deutsche Telecom v Commission*[43] and *Telia Sonera*,[44] the CJEU has clearly endorsed an effects-

[39] *See*, *e.g.*, *Guidelines on Vertical Restraints*, at ¶223.

[40] *See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, Official Journal L 001, 04/01/2003 P. 0001 – 0025, at Article 2.

[41] *See Guidelines on Vertical Restraints*, at ¶223 (emphasis added).

[42] It should be highlighted that declassifying minimum RPM arrangements as "restrictions by object" would not be tantamount to making *any* RPM arrangement *per se* lawful. Scholars who tend to emphasize more the negative effects of RPM arrangements include S. Salop, *The Economics of Vertical Restraints*, TRADE REGULATION. CASES AND MATERIALS, ¶¶607 ff (R. Pitofsky, H.J. Goldschmidt, & D. Wood, eds. 2010); R. Pitofsky, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK. THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST, at ¶304 (2008); and William Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARVARD L. REV., 983-1002 (1985).

[43] *See* Case C-280/08 *Deutsche Telecom v Commission,* [2010] ECR I-000, at ¶¶250-261.

based approach holding that, for a conduct to be considered abusive, it should be convincingly demonstrated that there have been or will be adverse effects on consumers.[45] In fact, this is how the Commission interprets its own *Guidelines on Vertical Restraints*. See, *e.g.*, *Guidelines on Article 101(3)*, in accordance to which "[the] methodology [suggested in these guidelines] is based on the economic approach already introduced in the guidelines on vertical restraints, horizontal cooperation agreements and technology transfer agreements."[46]

There is a host of promising new empirical economic research in the making that should bolster the theoretical foundations for the argument that a one-size-fits-all approach to RPM is not sustainable and may entail inefficiencies and negative welfare effects. The current *VRBER* and *Guidelines on Vertical Restraints* do not sufficiently recognize this but have laid the foundation for a more coherent approach to RPM in the near future.

[44] *See* Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-000, at ¶¶ 60-77.

[45] *See, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal C 045, 24/02/2009 P. 0007 - 0020, at ¶5.

[46] *See, Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty*, Official Journal C 101, 27.04.2004, p. 97-118, at ¶5.