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Resale Price Fixing after the Revision of the EU Vertical Regime—a Comparative Perspective**

Abstract. The paper analyses and evaluates, from a comparative perspective, the recent developments in the treatment of resale price fixing (RPF) in EU competition law. It inquires whether, as to the treatment of RPF, EU competition law is in line with US antitrust after the changes introduced by the 2010 regulatory package; and demonstrates that considerable differences exist. The paper concludes that the 2010 revision of the rules on vertical restraints somewhat refined but did not reform the law on RPF. The new rules ignore the transaction costs and realities of competition assessment and balancing. It is submitted that in EU competition law the main problem is that, conceptually, the question of RPF has been pushed in the pigeonhole of Article 101(3). The paper argues that the Notice on Agreements of Minor Importance should be amended so as to cover agreements containing RPF where market share is low.

Keywords: comparative antitrust law, intra-brand restraints, resale price fixing, resale price maintenance (RPM), vertical restraints

A) Introduction

Probably, one of the most controversial substantive issue facing antitrust/competition law is the treatment of resale price fixing (RPF).¹ It is noteworthy that this is one of the questions where the world's two leading antitrust jurisdictions fundamentally diverge.

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¹ In this paper, the term resale price fixing or RPF will be used to designate fixed and minimum resale prices. Resale price maintenance (RPM) has been the traditional designation of supplier practices concerning resale prices, however, in both EU and US antitrust law, maximum and recommended resale prices are subject to effects-analysis and normally lawful; hence, in the scholarship the controversy focuses on fixed and minimum resale prices. The approaches of US antitrust and EU competition law regarding maximum resale price fixing and recommended resale prices roughly coincide. The latter two kinds of arrangements are to be examined under the rule of reason in US antitrust law, while in EU competition law they are declared lawful if neither the supplier's, nor the buyer's market share exceeds 30% and even above this threshold they can be condemned only if they have anti-competitive effects. For US law see *United State v Colgate & Co.*, 250 U.S. 300 (1919); *Albrecht v Herald Co.*, 390 U.S. 145 (1968). For EU law see Article 3 of Regulation 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 [2010] L 102/1. (BER); Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

In 2007, in *Leegin*,² a highly divided Supreme Court, in a four-to-five judgment, overruled the century old *per se* illegality of RPF (established in *Dr. Miles*),³ from this on, RPF is to be scrutinized under the rule of reason. It is to be added that US antitrust law tempered the treatment of RPF long before *Leegin*: the Supreme Court's holding in *Monsanto*⁴ (1984) effectively enabled producers to maintain prices by establishing that the concept of RPF-agreement does not cover situations where a producer terminates price-cutters because of discounting, even if this happens after non-discounting dealers' complaining to the producer.

In the EU, the regulatory regime of vertical restraints was revised in 2010: a new block exemption regulation (BER)⁵ and new Guidelines on Vertical Restraints⁶ were adopted. Nonetheless, the policy towards RPF, in essence, did not see a considerable change: the *per se* condemnation under Article 101(1) TFEU⁷ was maintained, while the new BER—similarly to the old one—excludes agreements involving RPF from the benefit of the block exemption. Albeit the new Guidelines set out that, though it is improbable, RPF-agreements might meet the conditions of individual exemption under Article 101(3),⁸ theoretically, this has always been possible, and still, no formal decision has ever granted an individual exemption to RPF.

The economic literature reveals how complicate the economic evaluation of RPF is. Asking categorically whether RPF is efficient or not (good or not from an economic point of view) is like asking the childish question: are white horses faster than black horses? RPF is sometimes efficient, sometimes not; like white horses are sometimes faster than black horses and sometimes not. Actually, it was this “it depends” characteristic that led the Supreme Court in *Leegin* to overrule the *per se* illegality of RPF. The economic scholarship is replete with theories against RPF (e.g. dealer-cartel,⁹ manufacturer cartel,¹⁰ exclusion of the emergence of new cost-effective methods of distribution¹¹) and for RPF (e.g. dealer

² *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 127 S.Ct. 2705 (2007).

³ *Dr. Miles Medical Co. v John D. Park & Sons Co.*, 220 U.S. 373. (1911).

⁴ *Monsanto Co. v Spray-Rite Service Corp.*, 465 U.S. 752, 762–763 (1984).

⁵ Article 3 of the BER.

⁶ Guidelines on vertical restraints. OJ [2010] C 130/1. (*Guidelines on Vertical Restraints*).

⁷ Article 101(1) of the Treaty on the Functioning of the European Union, hereafter: *Article 101(1)*. Before 1 December 2009, the number of this Article was Article 81(1), and before 1 May 1999 it was Article 81(1). In this paper, the new numbers introduced by the Treaty of Lisbon (applicable as from 1 December 2009) are used, including the texts of the quotations.

⁸ Article 101(3) of the Treaty on the Functioning of the European Union, hereafter: *Article 101(3)*. Before 1 December 2009, the number of this Article was Article 81(3), and before 1 May 1999 it was Article 81(3). In this paper, the new numbers introduced by the Treaty of Lisbon (applicable as from 1 December 2009) are used, including the texts of the quotations.

⁹ See Posner, R. A.: *Antitrust Law. An economic perspective*. Chicago, 1976. 148; Bork, R. H.: *The antitrust paradox. A policy at war with itself*. New York, 1978. 282.

¹⁰ See Hovenkamp, H.: *Federal Antitrust Policy. The law of competition and its practice*. St. Paul, 1999. 443–445.

¹¹ See Peepkorn, L.: Resale Price Maintenance and its Alleged Efficiencies. *European Competition Journal*, 4 (2008) 1, 208.

service,¹² protecting different channels of distribution,¹³ quality certification,¹⁴ tackling distribution risks attached to uncertain demand¹⁵).

It is needless to rehearse these here;¹⁶ however, some fundamental propositions may be extracted. First, while, in general, it is more probable than not that RPF has anti-competitive effects, RPF is not always or almost always anticompetitive. Second, only the careful analysis of the intricacies of the case may reveal whether the anti- or the pro-competitive effects are prevalent. Third, one of the basic rules of thumb is that RPF may not raise concerns if there is no market power (in practical terms: if the market share is low); in such cases there is a strong presumption for the absence of competitive harm and for the enhancement of competition. Fourth, the empirical evidence concerning RPF is very scarce but the available surveys suggest that horizontal collusion is not prevalent in cases involving resale price fixing.¹⁷

The purpose of this paper is to analyse and evaluate, from a comparative perspective and in the context of the recent developments of US antitrust, the treatment of RPF in EU competition law.

¹² See Telser, L. G.: Why Should Manufacturers Want Fair Trade? *Journal of Law and Economics*, 3 (1960), 86. Cf. Bowman, W.: The Prerequisites and Effects of Resale Price Maintenance. *University of Chicago Law Review*, 22 (1955), 825; Yamey, B. S.: *The Economics of Resale Price Maintenance*. London, 1954. *Contra* Grimes, W.: Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited. *California Law Review*, 80 (1992), 1015. (Asserting that RPM may expose consumers to excessively aggressive promotion and makes them enter unwise purchases.)

¹³ See Shaffer, G.: Rendering Alternative Offerings Less Profitable with Resale Price Maintenance. *Journal of Economics and Management Strategy*, 3(4) (1995), 639. (Giving an explanation for RPM in cases where free-riding is not a problem.)

¹⁴ See Marvel, H. P.–McCafferty, S.: Resale Price Maintenance and Quality Certification. *Rand Journal of Economics*, 15 (1984) 3, 346.

¹⁵ Rey, P.–Tirole, J.: The Logic of Vertical Restraints. *American Economic Review*, 76 (1986), 921; Gilbert, R. J.–Klemperer, P.: *An Equilibrium Theory of Rationing* (Working Paper, February 1993); Marvel, H. P.: The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom. *Antitrust Law Journal*, 63 (1994), 73–77. (“RPM will thus be most desirable when without it retailers would be reluctant to hold adequate inventories for fear of dramatically lower prices in the event of low demand. This explanation for RPM is most compelling when demand is highly variable and when inventories are either perishable or costly to hold over to future demand periods.”); Deneckere, R.–Marvel, H. P.–Peck, J.: *Demand Uncertainty, Inventories, and Resale Price Maintenance* (Working Paper, Ohio State University, June 1994).

¹⁶ For an overview on these see Nagy, Cs. I.: A vizonteladási ár rögzítésének megítélése az amerikai, az EU és a magyar versenyjogban: kihasznált és kihagyott lehetőségek. (The view of resale price fixing in the U.S., the EU and the Hungarian competition law: utilized and missed opportunities.) In: *Verseny és Szabályozás 2011* (eds: Valentiny, P.–Kiss, F. L.–Nagy, Cs. I.). Budapest, 2012. 59–69.

¹⁷ See Ostlund, H. J.–Vickland, C. R.: *Fair Trade and the Retail Drug Store (1940)*; Thomas Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* (Bureau of Econ., Fed. Trade Comm’n 1983), 80; Ippolito, P. M.: Resale Price Maintenance: Empirical Evidence from Litigation. *Journal of Law and Economics*, 34 (1991), 263. See also Ornstein, S. I.: Resale Price Maintenance and Cartels. *Antitrust Bulletin*, 30 (1985), 401. (Concluding that hints of a cartel were present in less than a third of the RPF cases.); Kleit, A. N.: *Efficiencies without Economists: the Early Years of Resale Price Maintenance*. *Southern Economic Journal*, 59 (1993), 597. (Reaching a similar conclusion regarding RPF’s use as a cartelization tool.)

The paper's first part examines EU competition law's approach towards RPF, including the recent developments entailed by the 2010 rules on vertical restraints. The second part inquires whether, as to the treatment of RPF, EU competition law is in line with US antitrust after the changes introduced by the 2010 regulatory package. It is concluded that the treatment of RPF is far harsher in the EU than in the US. The third part evaluates the approach of EU competition law from a comparative perspective and concludes that the 2010 revision of the rules on vertical restraints somewhat refined but did not reform the law on RPF.

B) EU competition law on RPF after the 2010 revision—brave new world?

The EU competition law's analysis of restrictive agreements is built up along the following questions:

- does the agreement violate Article 101(1),
- does it fall into the safe harbour of one of the block exemption regulations,
- does it benefit from an individual exemption under Article 101(3)?

The new rules on vertical restraints left the answers to the first two questions untouched; as amplified below, only the treatment under Article 101(3) was slightly refined (but not reformed).

As to the question whether the agreement falls foul of Article 101(1), i.e. does it restricts competition, the new rules leave the automatic condemnation of RPF under Article 101(1) untouched: RPF keeps being regarded as anti-competitive by object, irrespective of market share and, hence, as *per se* violating Article 101(1).

As to the question of block exemption, the old provision was preserved word for word: RPF is regarded as a hardcore restraint and its inclusion in the distribution contract deprives the entire agreement of the benefit of the block exemption. It is to be noted that RPF is not merely black-listed but it is hardcore. The difference between the two categories is that in case of a hardcore restraint the entire agreement loses the benefit of the block exemption, while in case of black-listed restraints this loss is restricted to the stipulation concerned.

As to the question of individual exemption, the 2010 *Guidelines on Vertical Restraints* completed the old provisions with a list of examples where RPF might be in conformity with Article 101(3). Theoretically, RPF has never been outright excluded from the possibility to meet the requirements of Article 101(3), albeit there has been no formal decision granting individual exemption to it. The 2010 *Guidelines* complete this theoretical proposition with some general examples, where RPF may entail efficiency benefits relevant from the perspective of Article 101(3).

I. RPF under Article 101(1): automatic condemnation preserved

EU competition law's approach has always been very hostile towards RPF. Under EU law, while maximum resale price fixing and recommended prices are not hardcore restrictions and are to be condemned only if they have anticompetitive effects,¹⁸ the fixing

¹⁸ The ECJ granted leave to a price recommendation system in *Pronuptia* holding that “although provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition, that is not the case where the franchisor simply provides franchisees with price guidelines, so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices.” Case 161/84 *Pronuptia*

of concrete or minimum resale prices is anti-competitive by object under Article 101(1).¹⁹ This means that RPF *per se* violates Article 101(1), irrespective of the market context. Besides the customary economic arguments against RPF, EU law's approach has been influenced also by the purpose of market integration (single market imperative).²⁰ RPF is often used as a tool to back a system of territorial protection by maintaining more or less uniform prices in different Member States, thus impeding the inter-state flow of goods.²¹

In *SA Binon & Cie v SA Agence et messageries de la presse*,²² in an Article 234 reference, the ECJ ruled that RPF agreements "constitute, of themselves, a restriction of competition"²³ (i.e. they are anti-competitive by object).²⁴ The automatic condemnation of RPF under Article 101(1) was confirmed in *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*.²⁵ In *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*²⁶ the ECJ subjected recommended prices to an effects-analysis but declared that RPF is regarded automatically as restrictive.²⁷ In accordance with this judicial practice, the Commission's decisional practice is replete with cases where the anti-competitive nature of RPF was

de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis ECR [1986] 353, para 25. The ECJ has not ruled on maximum resale prices, yet. Likewise, the Commission also takes a more relaxed view with regard to recommended prices and maximum price fixing. See *Guidelines on Vertical Restraints*, paras 226–229; Case COMP/B-1/38348 *Repsol CPP SA* OJ [2004] C 258/03, paras 18–20.

¹⁹ See Gulati, B.: Minimum Resale Price Maintenance Agreements—and the Dilemma Continues. *The Competition Law Review*, 8 (2012) 2, 133; Kneepkens, M.: Resale Price Maintenance: Economics Call for a More Balanced Approach. *European Competition Law Review*, 28 (2007) 12, 656. (Stating that in practice RPF is "subject to a *per se* prohibition.")

²⁰ See Korah, V.–O'Sullivan, D.: *Distribution Agreements under the EC Competition Rules*. Oxford, 2002. 105; Ritter, L.–Braun, W. D.: *European Competition Law: a Practitioner's Guide*. The Hague, 2005. 269–270; Alese, F.: Unmasking the Masquerade of Vertical Price Fixing. *European Competition Law Review*, 28 (2007) 9, 525.

²¹ As shown by several Commission decisions. See e.g. 77/66/EEC *GERO-fabriek* OJ [1977] L 16/8, para II(3)(c); 2002/190/EC *JCBOJ* [2002] L 69/1, paras 168–172.

²² Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015.

²³ Or as the authentic French version of the judgment says: "*sont en elles-mêmes restrictives de concurrence*".

²⁴ The ECJ held that RPF comes under Article 101(1)(a) "directly or indirectly fix purchase or selling prices or any other trading conditions". Para 44 ("[P]rovisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article 101(1) which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty.")

²⁵ Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, paras 12–15. (Condemning the fixing of the minimum 'resale' price in a technology transfer agreement concerning plant breeders' rights.)

²⁶ Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

²⁷ Para 25.

established,²⁸ and the “soft law” documents issued by the Commission also follow this approach.²⁹

This approach was fully maintained in the 2010 *Guidelines on Vertical Agreements*.³⁰

The judicial and decisional practice has been at fault for a comprehensive explanation on why RPF is treated as anti-competitive by object, albeit some hints were given. One reason could be the elimination of intra-brand price competition; in *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, the ECJ referred to the dealer-cartel theory.³¹

The Commission’s 2010 *Guidelines on Vertical Restraints* contain a detailed list of the competition risks resale price fixing may bring forth:³² first, it may facilitate collusion between suppliers, second, it may facilitate collusion between dealers, third, “it may more generally soften competition between manufacturers and/or between retailers”, fourth, “the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand”, fifth, “it may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem”, sixth,

²⁸ 73/322/EEC *Deutsche Philips GmbH* OJ [1973] L 293/40, para 2(b); 77/66/EEC *GERO-fabriek* OJ [1977] L 16/8, para II(3)(c) (Here RPF was also used as a device to partition the common market.); 80/1333/EEC *Hennessy-Henkell* OJ [1980] L 383/11, para 20 (Asserting that RPF “has the object of limiting (...) [the distributor’s] freedom to fix resale prices, prevents the exclusive dealer from fixing them freely on the basis of the conditions obtaining on the market.”); 97/123/EC *Novalliance/Systemform* OJ [1996] L 47/11, para 101; 2001/135/EC *Nathan-Bricolux* OJ [2001] L 54/1, para 72 (Expressly characterizing RPF as anti-competitive by object.); 2002/190/EC *JCBOJ* [2002] L 69/1, paras 168–172 (Here RPF was also used as a device to partition the market.); Case COMP/37.975 *PO/Yamaha* Commission decision of 16.07.2003 (unpublished but available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37975/en.pdf>), paras 88, 127, 137, 144 and 155–156 (Designating RPF as restrictive by object and “obvious restriction of competition.”); 2001/711/EC *Volkswagen* OJ [2001] L 262/14, paras 71 and 74 (Sating the there was no need to show effects as RPF is anti-competitive by object.); 2001/135/EC *Nathan-Bricolux* OJ [2001] L 54/1, paras 86 and 88 (Designating RPF as restrictive by object.). This approach was taken by the Commission from the beginning of EU competition law. See Korah, V.–O’Sullivan, D.: *Distribution Agreements under the EC Competition Rules*. Oxford, 2002. 105–106.

²⁹ Guidelines on the application of Article 81(3) of the Treaty. OJ [2004] C 101/97. para 23 (*Guidelines on Article 101(3)*); Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty establishing the European Community (de minimis). OJ [2001] C 368/13. para 11(2) (*Notice on Agreements of Minor Importance*).

³⁰ *Guidelines on Vertical Restraints*, paras 48 and 223.

³¹ Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, para 15 (Asserting that the parallel employment of RPF clauses in different agreements entails that “those agreements have the same effects as a price system fixed by a horizontal agreement.”).

³² Contrary to the *Old Guidelines on Vertical Restraints* of 2000 (Guidelines on vertical restraints. OJ [2000] C 291/1.) that failed to demonstrate with compelling arguments that RPF is ‘always or almost always’ anti-competitive and, in para 112, pointed only to two main negative effects: “(1) a reduction in intra-brand price competition, and (2) increased transparency on prices. (...) Increased transparency on price and responsibility for price changes makes horizontal collusion between manufacturers or distributors easier, at least in concentrated markets. The reduction in intra-brand competition may, as it leads to less downward pressure on the price for the particular goods, have as an indirect effect a reduction of inter-brand competition.”

it “may be implemented by a manufacturer with market power to foreclose smaller rivals”, seventh, RPF “may reduce dynamism and innovation at the distribution level”.³³

It is welcome that the Commission in the 2010 *Guidelines* got rid of the argument that one of the main risks of RPF is that it reduces intra-brand competition;³⁴ intra-brand competition has no independent significance if inter-brand competition is effective.

While RPF agreements may bring forth all the above repercussions, they do not necessarily bring them forth. By way of example, price-transparency-induced horizontal concerns emerge only if RPF is widely practiced in the industry and the market is susceptible of tacit coordination; as far as the risk of price increase is concerned, RPF relates to the price of *a particular brand* and *not to the market price*; hence, the increase of the market price is not necessary. All in all, these examples suggest that RPF is *not always* risky but it may raise concerns *under certain circumstances*. Accordingly, the circumstances of the case at stake must be taken into account in order to ascertain whether these potential negative effects are, indeed, present.

II. RPF in the block-exemption regulations

All block exemption regulations on vertical agreements, unequivocally, characterize RPF as hardcore and exclude it from the safe harbour of the block exemption. It is to be noted that resale price fixing may be accomplished both directly and indirectly (through practices having tantamount effects).³⁵

Article 4 of the 2010 BER repeats the Old BER's³⁶ provision and characterizes RPF as hardcore, depriving it of the benefit of the block exemption.

³³ Para 224.

³⁴ Cf. *Old Guidelines on Vertical Restraints*, para 112.

³⁵ It is essential to stress that in EU competition law RPM also covers resale price maintenance “achieved through indirect means.” *Guidelines on Vertical Restraints*, para 48 (“However, RPM can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause. The same indirect means and the same ‘supportive’ measures can be used to make maximum or recommended prices work as RPM. However, the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM.”). See Case 86/82 *Hasselblad (GB) Limited v Commission* [1984] ECR 883, para 49 (In this case a clause enabled the producer to control dealers' advertisements as regards selling prices and empowered it to prohibit such advertisements.).

³⁶ Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. OJ [1999] L 336/21. (*Old BER*).

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

Article 4 of the MVB³⁷ repeats the above provision regarding the motor vehicle sector.

Hardcore restrictions

1. The exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the distributor's or repairer's ability to determine its sale price, without prejudice to the supplier's ability to impose a maximum sale price or to recommend a sale price, provided that this does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

The same language is used in Article 4(2)(a) of the TTBER.³⁸

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

III. RPF under Article 101(3): the chances of an individual exemption

If an agreement falls foul of Article 101(1), and is not covered by a block exemption, it may still escape competition law condemnation if meeting the requirements of Article 101(3). The General Court declared in *Matra Hachette* "that, in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be

³⁷ Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector. OJ [2002] L 203/30 (*MVB*). It is to be noted that the *New MVB* (Regulation 461/2010 of 27 May 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 in the motor vehicle sector. OJ [2010] L 129/52). extended the scope of the BER to the motor vehicle aftermarket (purchase, sale or resale of spare parts for motor vehicles and provision of repair and maintenance services for motor vehicles), while the MVB remains applicable to the purchase, sale and resale of new motor vehicles until 31 May 2013.

³⁸ Regulation 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements. OJ L 123, 27.4.2004, 11–17 (*TTBER*).

exempted, provided that all the conditions laid down in Article 101(3) of the Treaty are satisfied”.³⁹ Nonetheless, both the judicial and decisional practice,⁴⁰ as well as the Commission’s “soft law” instruments⁴¹ suggest that Article 101(3) is a theoretically always,

³⁹ Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para 85. See also *Guidelines on Article 101(3)*, para 46 (“Article 101(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 101(3) are covered by the exception rule.”). See also Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, paras 21 and 39.

⁴⁰ In *Hennessy-Henkell*, the Commission considered that although the exclusivity would encourage the distributor to invest thus ensuring a wider distribution of the products, it asserted that the fixing of the resale price by the German distributor deprived the exclusivity of the chance to be exempted under Article 101(3), as the fixed prices forestalled that the benefits resulting from the improvements in distribution introduced by the exclusivity would be passed on to the consumers. 80/1333/EEC *Hennessy-Henkell* OJ [1980] L 383/11, paras 28, 30 and 32 (“For such improvement to be effective, however, the exclusive dealer would have to be able to fix resale prices freely on the basis of the cost price of the products purchased from the manufacturer and by adapting his profit margin to the sales policy determined by him on the basis of the conditions obtaining on the market. This requirement is essential if Hennessy products are to penetrate the German market better, and to combat competition from other brands.”) (“Nor can it be concluded that a fair share of the benefits which could result from exclusive distribution is being set aside for consumers. An improvement in distribution should be accompanied, particularly, by a reduction in sales prices to consumers, whereas (...) [the distributor] is not free to take a decision on this, and it is clear from the manner in which the agreement has been applied that Hennessy has prevailed upon Henkell to fix higher prices than those which ought to have ensued from the agreement.”) (“By contrast, the restriction of the concessionaire’s freedom to fix his resale prices, contained in Article 6, cannot be regarded as indispensable to the attainment of the objectives of the agreement, even if the products in question are considered, as Hennessy considers them, to be luxury products.”) The Commission also refused the argument that RPF was necessary for preserving the luxurious image of the brand. The Commission apparently proceeded from the proposition that the chief benefit of the improvement of distribution could be the decrease of the price of the product in question and RPF is by its very nature incapable of producing such effects. In *Yamaha* the Commission used a very unconditional language characterizing both RPF and absolute territorial protection as arrangements that cannot meet the requirements of Article 101(3) by their very nature; a language going far beyond the fact pattern of the case. Case COMP/37.975 *PO/Yamaha* Commission decision of 16.07.2003 (unpublished but available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37975/en.pdf>), para 175 (“The Agreements in question were not notified. If such agreements had been notified, they could not have been exempted individually from the application of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement, since the conditions necessary for granting an exemption are not met due to the nature of the restrictions of competition. Territorial protection and resale price maintenance are hardcore restrictions that do not meet the cumulative conditions of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement. They do not contribute to improving the production or, in this case, the distribution of goods, nor are consumers allowed a share of the resulting benefit.”).

⁴¹ *Guidelines on Article 101(3)*, paras 46 and 79 (“However, severe restrictions of competition are unlikely to fulfil the conditions of Article 101(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 101(3). They neither create objective economic benefits nor do they benefit consumers. (...) Moreover, these types of agreements generally also fail the indispensability test under the third condition.”) (“Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable.”).

practically almost never open haven for agreements containing RPF.⁴² This proposition remained valid also after the adoption of the 2010 *Guidelines on Vertical Restraints*, although these do contain the siren song of a substantial analysis.

The fixing of concrete or minimum resale prices has only an improbable chance to meet the requirements of individual exemption under Article 101(3).⁴³ The perspective for the latter is, in short, theoretically always, practically almost never realistic:⁴⁴ theoretically, all agreements, including vertical covenants fixing the resale price, are fit for individual exemption, whilst practically they are scarcely able to deserve it. Furthermore, the stance that RPF agreements automatically violate Article 101(1) with a theoretical and moderate chance for individual exemption under Article 101(3) is conceptually flawed: while Article 101(3) accommodates (productive) efficiency arguments, all theories advocating RPF argue that it may enhance rivalry, which is a value to be examined under Article 101(1).

In *SA Binon & Cie v SA Agence et messageries de la presse*,⁴⁵ interestingly, the ECJ did not say that it would be highly unlikely for RPF to fulfil the conditions of Article 101(3) but ruled that the Commission was to take account of the factors mentioned by the undertaking concerned.⁴⁶ Nevertheless, it is rather doubtful whether any relevant conclusion could be extracted from the neutral language of the judgment. At all events, until the entry into force of Regulation 1/2003/EC on 1 May 2004, the Commission had monopoly over the application of Article 101(3),⁴⁷ and it had never ever granted individual exemption to an RPF covenant.⁴⁸ Subsequently, the application of EU competition law, including Article

⁴² See Korah, V.-O'Sullivan, D.: *Distribution Agreements under the EC Competition Rules*. Oxford, 2002. 233. (Noting that "[i]n brief, although *Matra Hachette* suggests that no restriction of competition is beyond exemption, there appears to be no real possibility of redeeming the so-called 'hardcore' restraints, and their inclusion in any distribution arrangement—even one which would otherwise satisfy the conditions for exemption under Regulation 2790/99—exposes the parties to serious risk of fines and nullity. Businesses would be well advised simply to avoid such restraints entirely.")

⁴³ Kneepkens, M.: Resale Price Maintenance: Economics Call for a More Balanced Approach. *European Competition Law Review*, 28 (2007) 12, 656. (Stating that in practice RPF is "subject to a *per se* prohibition.")

⁴⁴ See Jones, A.: Resale Price Maintenance: a Debate about Competition Policy in Europe. *European Competition Journal*, 5 (2009) 2, 501–502.

⁴⁵ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, [1985] ECR 1015.

⁴⁶ Para 46 ("If, in so far as the distribution of newspapers and periodicals is concerned, the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the Commission must take account of those factors when examining an agreement for the purposes of Article 101(3).").

⁴⁷ Regulation 17, Article 9(1).

⁴⁸ See Whish, R.: *Competition Law*. Oxford, 2009. 637; Gulati, B.: Minimum Resale Price Maintenance Agreements—and the Dilemma Continues. *The Competition Law Review*, 8 (2012) 2, 133. Nonetheless, the Commission in *Volkswagen*, while finding that the conditions of Article 101(3) were not met, refrained from condemning RPF in general (stressing that the requirements of an individual exemption were not met *in this case*) and seriously examined the justifications proffered by Volkswagen. 2001/711/EC *Volkswagen* OJ [2001] L 262/14, para 95 ("Resale price maintenance does not contribute to improving the production or (in this case) the distribution of goods. Although, according to Volkswagen AG, it is intended to improve the profitability of German Volkswagen

101(3), was decentralized; nonetheless, it is scarcely conceivable that this provision would be interpreted otherwise in practice, especially as the formation of competition policy, contrary to enforcement, remained essentially centralized.

It is noteworthy that in Newspaper distribution contracts in Belgium—AMP the Commission did send a comfort letter (but not a formal decision!) for an RPF arrangement and expressly came to the conclusion that it met the requirements of Article 101(3).⁴⁹ In this case it was the essential characteristic of the market that the products (newspapers and magazines) had an extremely short life-span and the scheme was based on a sale or return system. Nevertheless, it is submitted that the dealers in this case were possibly acting as agents, as they did not acquire title over the periodicals and all the risks of non-sale were borne by the producer. The Commission noted that “[i]t is therefore economically acceptable in the distribution system concerned that the operator who incurs the main economic risk should control the selling price.” This circumstance may have influenced the Commission’s analysis considerably. It is to be noted that under EU competition, similarly to US antitrust,⁵⁰ law agency agreements, normally, fall outside the scope of Article 101(1). “The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal.”⁵¹

The new rules introduced by the 2010 *Guidelines on Vertical Restraints* expressly highlight that albeit the hardcore restrictions enumerated in Article 4 of the BER, including resale price fixing and minimum resale price fixing, are presumed to violate Article 101(1) and not to meet the conditions of Article 101(3), this presumption is rebuttable, and the parties may have an improbable but not unrealistic chance to survive on the basis of individual exemption.⁵² Although the inclusion of RPF into the agreement “gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3)”, the “undertakings have the possibility to plead an efficiency defence under Article 101(3) in an

dealers and help them attain or maintain the standards of service prescribed by Volkswagen AG, and hence could, according to this argument, contribute to safeguarding as many dealerships as possible, there is no evidence to suggest that safeguarding individual dealerships which under normal competitive conditions would not be viable would appreciably improve the distribution of goods or that this alleged improvement might offset the disadvantages of the restriction of competition. Furthermore, there is not the slightest guarantee that the larger profits earned by Volkswagen dealers as a result of their refusing to grant discounts on the purchase of new VW Passat cars will be used to safeguard dealerships.”)

⁴⁹ Cases IV/C-2/31.609 and 37.306, XXIXth *Report on Competition Policy* 161 (1999).

⁵⁰ See *United States v Arnold Schwinn Co.*, 388 U.S. 365, 380 & 3101 (1967).

⁵¹ *Guidelines on Vertical Restraints*, para 13.

⁵² *Guidelines on Vertical Restraints*, para 47 (“The Block Exemption Regulation contains in Article 4 a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation. Including such a hardcore restriction in an agreement gives rise to the presumption that the agreement falls within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to demonstrate pro-competitive effects under Article 101(3) in an individual case. In case the undertakings substantiate that likely efficiencies result from including the hardcore restriction in the agreement and that in general all the conditions of Article 101(3) are fulfilled, this will require the Commission to effectively assess the likely negative impact on competition before making the ultimate assessment of whether the conditions of Article 101(3) are fulfilled.”).

individual case.”⁵³ Until this point the 2010 *Guidelines*, essentially, do not depart from the *Old Guidelines* of 2000: it has always been possible to plead an efficiency defence under Article 101(3). This possibility remains also under the 2010 *Guidelines* highly exceptional, which is, notwithstanding the above theoretical contingencies, to be regarded as practically prohibited.

The foregoing proposition is underpinned by the conceptual placement of the treatment of RPF, i.e. it is to be analysed under Article 101(3). The uncertainty entailed by this is boosted by the BER, which does not simply black-list RPF but pronounces it to be hardcore. Namely, if an agreement contains a black-listed clause (as enumerated in Article 5 of the BER), the agreement itself does not lose the block exemption but this exclusion is limited to the incriminated contractual provision. On the other hand, if an agreement contains a hardcore restraint (as enumerated in Article 4), the entire agreement loses the block exemption’s safe harbour. Accordingly, the enterprise testing RPF under Article 101(3) risks not simply the RPF clause but the entire distribution agreement’s competition law compliance.

The virtual novelty of the 2010 *Guidelines on Vertical Restraints* is that they provide examples on when RPF could meet the requirements of Article 101(3); they list three cases where efficiency benefits may be present. First, RPF may be an efficient means of introducing and promoting a new product:

Most notably, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer’s interest to promote the product. 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.⁵⁴

It is to be stressed that the footnote attached to the above provides that the supplier may resort to RPF only if it is not practical to impose on all dealers effective promotion requirements by contract.

Second, a coordinated short-term low price campaign in a franchise system or similar distribution system applying a uniform distribution format may also justify the application of “fixed resale prices, and not just maximum resale prices”.⁵⁵

Third, pre-sales services, especially in case of experience or complex products, may also justify RPF, if necessary for tackling the free-rider problem.

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-

⁵³ Para 223.

⁵⁴ Para 225.

⁵⁵ Para 225.

riding at the distribution level. The 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 between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.⁵⁶

Notwithstanding the 2010 *Guidelines*' above siren song, it is expected that the fixing of the resale prices and minimum resale prices will remain rather risky from a competition law point of view, without having any secure leaning as to when it may be practiced. Namely, the burden on undertakings pleading an efficiency defence under Article 101(3) is extremely high and, besides the above three examples, the 2010 *Guidelines* seem to offer only a little more than what was offered by the *Old Guidelines* of 2000: RPF is unlikely to fulfil the requirements of an individual exemption but theoretically this is possible. Accordingly, EU competition law saw only a minor refinement and not a comprehensive reform.

C) Is EU competition law in line with US antitrust after the 2010 review of the rules on vertical restraints?

It has always been tempting to equate the treatment of RPF under EU law with the rule of reason analysis of US antitrust; after the 2010 *Guidelines* it could be argued that this is *a fortiori* true: RPF, theoretically, has always been capable of meeting the requirements of Article 101(3), and this was made express in the 2010 *Guidelines*. It is unquestionable that there is a certain parallel in the sense that the rule of reason implies a substantive analysis, while RPF is not outright excluded from the possibility to benefit from Article 101(3). However, putting an equality sign between the rule of reason analysis envisaged by the Supreme Court in *Leegin* and the Article 101(3) scrutiny of RPF is like saying that monkeys and horses are completely the same because both have four legs and eat grass! The divergence between the rules of reason and the Article 101(3) analysis can be traced back to two principal reasons.

First, under EU law, the concept of "agreement" embraces a much wider range of supplier practices than in US antitrust. In US antitrust, due to the Supreme Court's judgment in *Monsanto* in 1984, breaking off business relations with a dealer because of non-compliance with the producer's pricing expectations is not an agreement on prices, even if the foregoing occurs after the complaining of a rival dealer. On the other hand, in EU law, it is highly risky if the producer discusses pricing issues with the distributor and puts pressure on it. Second, the rule of reason and the Article 101(3) analysis differ considerably as regards the allocation of the burden of proof and the standard of proof. As a matter of practice, the full-blown analysis under the rule of reason and the restricted scrutiny under Article 101(3) diverge very significantly.

While in US antitrust law the *per se* illegality of RPF was utterly abolished in *Leegin* (in 2007), in *Monsanto* (in 1984) the Supreme Court confined the application of *per se* illegality to agreements that relate positively to the resale price, i.e. prior announcements to terminate in case of discounting, communication between the producer and non-discounting dealers and agreements to terminate the price-cutter were not covered by *per se* illegality.

⁵⁶ Para 225.

Accordingly, the virtual divergence between US antitrust and EU competition law, in this regard, started 23 years before *Leegin*.

The permissive approach followed by US antitrust law as to tacit agreements may be explained with the tradition-based *Colgate* doctrine⁵⁷ and the favourable position taken regarding intra-brand vertical restraints; the latter had remarkable influence on the way the term “agreement” was defined in vertical cases.

EU competition law contains two theories for condemning vertical tacit agreements: “continuous business relationship” and “tacit acquiescence (assent)”.⁵⁸ Pursuant to the old reading of the first theory, if there is a permanent business relationship between the parties, even a genuine unilateral producer declaration may become part of the parties’ vertical relationship, thus, coming within the purview of Article 101.⁵⁹ In *Volkswagen*,⁶⁰ *EU courts refused the old reading and took a definite stance establishing that the “continuous business relationship” theory works only if the framework distribution agreement virtually authorizes the producer to render certain decisions and make them part of the parties’ business relationship. Though no express authorization is required, the power conferred on the producer should not be visionary.*

The second theory of EU competition law, i.e. “tacit acquiescence (assent)”, has its counter-part in US antitrust. Nevertheless, in the latter the concept of tacit acquiescence has a rather limited scope and significance. In EU law, partially due to the long-lasting reign of the approach that grasped the “continuous business relationship” theory as one requiring only visionary authorization, there has been no coercive need to elaborate the theory of tacit acquiescence; indeed, cases interpreting this theory are quite rare. Thus, several questions of interpretation are still open. One thing remains certain: silence infers no consent. Nonetheless, it is questionable whether actual distributor compliance attached to the producer’s call reveals an agreement according to Article 101. The ECJ’s Volkswagen judgment suggests an affirmative answer. On the other hand, in US antitrust, the actual compliance of the dealers does not implicate an agreement. According to the Colgate doctrine, a producer is free to announce in advance the behaviour he expects from the dealers and to terminate non-complying traders. The fact that almost all dealers act in conformity with the producer’s contemplated strategy does not prove the existence of an

⁵⁷ *United State v Colgate & Co.*, 250 U.S. 300 (1919).

⁵⁸ Nagy, Cs. I.: A vertikális megállapodás mint a kartelltilalom küszöbfogalma: összehasonlító jogi elemzés és értékelés (The vertical agreements as the antitrust threshold concept: Comparative legal analysis and evaluation). *Versenytükör*, 7 (2011) 1, 20–35.

⁵⁹ See Joined Cases 100 to 103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR 1825, paras 79–80; Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium SA and others v Commission* [1979] ECR 2435, paras 28–30; 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* [1983] ECR 3151, paras 38–39 and 46; Joined Cases 25/84 and 26/84 *Ford-Werke AG and Ford of Europe Inc. v Commission*, [1985] ECR 2725, paras 6 and 20–25; Case C-277/87 *Sandoz prodotti farmaceutici SpA v Commission* [1990] ECR I-45; Joined Cases C-2/01 and C-3/01 *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23, paras 140 and 142. On the EU judicial practice see also Broberg, M.–Jakobsen, P. S.: The Concept of Agreement in Article 81 E.C.: on the Manufacturers’ Right to Prevent Parallel Trade within the European Community. *European Competition Law Review*, 23 (2002) 3, 128; Lianos, I.: Collusion in Vertical Relations under Article 81 EC. *Common Market Law Review*, 45 (2008), 1037.

⁶⁰ Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, on appeal Case C-338/00 *Volkswagen AG v Commission* [2003] ECR I-9189.

agreement. Post-*Colgate* case-law made it clear that not only public but also private communication having concrete addressees may come under the immunity of unilateralism; what is more, recurrent warnings may also avoid Section 1 scrutiny if their frequency, intensity and the subsequent conduct of the dealer do not result in a coerced agreement.⁶¹

Not only embraces the EU concept of agreement a much wider range of supplier practices but, as noted above, the Article 101(3) analysis is, in numerous regards, more burdensome for the defendant than the rule of reason. It is submitted that after *Leegin* the two regimes are far from being in line with each other, notwithstanding the fact that the European approach towards RPF is said to have changed and a “full-blown” inquiry is promised under Article 101(3).

First, under the rule of reason the plaintiff has to show a *prima facie* case (competitive harm or market power);⁶² on the other hand, in EU competition law RPF is a *per se* violation of Article 101(1) and, hence, the burden of proof (the burden to prove that the conditions of Article 101(3) are met) automatically shifts on the defendant. Second, the inquiry of the justifications and the balancing of the pros and cons of RPF—taking into account the present conceptual location of RPF, which exiles it to Article 101(3)—are far more burdensome for defendants than the treatment they can expect on the other side of the Atlantic. Article 101(3) focuses on (productive) efficiency benefits, while the potential merit of RPF is that it may intensify rivalry. Furthermore, it is also to be taken into account that the status of justifications under the rule of reason and Article 101(3) is different. The application of the latter is almost, though not completely, exceptional, where the defendant faces a very high standard of proof and has to assume all uncertainties and risks of evaluation. What is more, a rather detailed set of substantiated and empirically verifiable evidence is to be submitted in order to succeed. On the other hand, in respect of the rule of reason, the general perception is that plausible and reasonably substantiated allegations of justification can save the defendant.⁶³ This may be due to the circumstance that in the US more than 90% of the antitrust matters are litigated in civil procedure where the usual standard of proof is preponderance of evidence (balance of probabilities) and this applies also to the proof of justifications. Finally, it is to be noted that in EU competition law there has been no formal decision granting leave to RPF under Article 101(3).

D) Conclusions and evaluation

Both US antitrust and EU competition law share the general proposition that the application of automatic condemnation should be restricted to practices that, due to their nature, are always or almost always anti-competitive without the perspective of a redeeming virtue. Economic theory shows that RPF is in several cases reasonably justifiable. Economic scholarship provides several examples where the producer’s endeavour to maintain prices is socially beneficial because it enhances competition. Accordingly, the *per se* condemnation

⁶¹ *Frey & Son v Cudahy Packing Co.*, 256 U.S. 208, 41 S.Ct. 451 (1921); *Russell Stover Candies, Inc. v FTC*, 718 F.2d 256, 257 (1983); *Monsanto Co. v Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *World of Sleep, Inc. v La-Z-Boy Chair Co.*, 756 F.2d 1467, 1475–1476 (1985).

⁶² See *National Collegiate Athletic Ass’n v Board of Regents of the University of Oklahoma*, 468 U.S. 85, 109 (1984); *FTC v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

⁶³ Areeda, Ph.: The Rule of Reason—A Catechism on Competition. *Antitrust Law Journal*, 55 (1986), 582.

of RPF is not justified, and those instances are to be singled out where there is no competitive harm, either because there are no anti-competitive repercussions (e.g. the market position of the parties is trivial) or because they are outweighed by pro-competitive effects (e.g. the RPF handles a market failure).

It is submitted that in EU competition law the main problem is that, conceptually, the question of RPF has been pushed in the pigeonhole of Article 101(3). While the latter is certainly the proper floor for measuring productive efficiency arguments, several of the supporting theories of RPF stress that in some cases RPF may actually increase the intensity of competition in terms of rivalry. For instance, the enhanced services provided by the retailers may increase the demand for the product and thus trigger competitive pressure on competing products; producers may have access to distribution channels not available for them in the absence of RPF etc. These theories, in fact, argue that RPF increases rivalry but, by way of example, normally reveal no cost-savings. Another rule of thumb regarding RPF is that it cannot interfere with the proper functioning of the competitive process if there is no market power, an issue also belonging to the analysis under Article 101(1).

As the economic criticism against the present state of EU law and the impact of *Leegin* is growing, EU competition law is being compelled to address the problem of RPF. There is a danger (and this danger became a reality in the 2010 *Guidelines on Vertical Restraints*) that the analysis of RPF will be forced into Article 101(3)'s bed of Procrustes,⁶⁴ which is, however, not the proper field of examining it. As noted above, Article 101(3) focuses, or rather should focus, on questions of (productive) efficiency, while the vast majority of economic justifications for RPF assert that it increases rivalry, i.e. the intensity of competition. The currently effective BER and the *Guidelines on Vertical Restraints* (both adopted in 2010) foreshadow this approach and seem to turn this danger into reality: while the new BER and the new *Guidelines*, similarly to the old ones, consider RPF as hardcore and anticompetitive by object, the 2010 *Guidelines* expressly encourage undertakings to test RPF agreements under Article 101(3) and declare that the exemptibility of such arrangements is an exceptional but not a completely unrealistic perspective. In other words, RPF as such is not *per se* illegal—a notion unknown for EU competition law anyway, since theoretically every agreement has the chance to meet the requirements of Article 101(3)—and it can be regarded as lawful if it fulfils the requirements of individual exemption.⁶⁵ Nevertheless, this escape-hatch seems to drive RPF onto a field where it cannot win the battle: Article 101(3) deals with productive efficiency, a benefit normally not attributed to RPF.

⁶⁴ See Peeperkorn, L.: Resale Price Maintenance and its Alleged Efficiencies. *European Competition Journal*, 4 (2008) 1, 204, 212. (Asserting that it can be argued that the hardcore approach of EU competition law is “in a way an application of what is described (...) [in *Leegin*] by the Supreme Court.”) (“One could conclude that the *Leegin* judgment provides the US authorities and courts with the possibility of applying the same policy towards RPM as is currently applied in the EU, though it remains to be seen how US policy will develop.”); Jones, A.: Resale Price Maintenance: a Debate about Competition Policy in Europe. *European Competition Journal*, 5 (2009) 2, 513. (Arguing that the Commission could be encouraged to consider the pro-competitive merits of RPM under Article 101(3).); Van Doorn, F.: *Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach*. (November 6, 2009) (available at SSRN: <http://ssrn.com/abstract=1501070>), 1, 23–24.

⁶⁵ Para 47 of the Commission's *Guidelines on Vertical Restraints* encourages hardcore restrictions to try to meet the conditions of Article 101(3). This siren song is repeated specifically regarding RPF in para 223 of the *Guidelines on Vertical Restraints*.

Although the 2010 *Guidelines on Vertical Restraints* suggest that undertakings should test their RPF agreements under Article 101(3), the 2010 BER, inconsistently, discourages them from this: it maintains the approach of the Old BER of 1999 and it does not simply exclude RPF from the block exemption but regards it as hardcore. As noted above, if an agreement contains a black-listed clause (as enumerated in Article 5 of the BER), the agreement itself does not lose the block exemption but this exclusion is limited to the incriminated contractual provision. On the other hand, if an agreement contains a hardcore restraint (as enumerated in Article 4 of the BER), the entire agreement loses the block exemption's safe harbour. Accordingly, testing an RPF clause under Article 101(3) risks not simply this clause but the entire distribution agreement, thus unnecessarily raising the stakes. If EU competition law really wanted to open the door to the substantive analysis of RPF, why was it not blacklisted (instead of being designated as hardcore)? Today, if an undertaking inserts RPF into a distribution agreement, it runs the risk of losing the block exemption for the entire agreement.

As noted above, one of the strongest arguments for RPF is that if implemented by a small supplier and it is not widespread in the industry (there are no cumulative effects), it is simply not capable of being harmful; an argument that does not fit Article 101(3); on the other hand, this argument suggests that instead the *Notice on Agreements of Minor Importance* should be amended so as to cover agreements containing RPF if market share is low.⁶⁶

The 2010 regulatory package of vertical restraints ignores the transaction costs and realities of competition assessment and balancing. The Article 101(3) assessment is very expensive and time-consuming, and definitely needs specialized expertise. If individual exemption under the notification system amounted to a torture,⁶⁷ this is the truer in respect of self-assessment under Article 101(3). Such resources normally pertain to big enterprises; nevertheless, these are the ones where a stringent RPF policy would be justified. On the other hand, normally, the Article 101(3) assessment requires, subjectively, much higher efforts and induces, proportionally, higher transaction costs in case of undertakings the market power of which is smaller. Although it is normally the small enterprises that, due to the low market share, should be allowed to fix the resale price, they are also the ones that shrink from the Article 101(3) assessment due to the high legal and analysis expenses. It is to be noted that legal costs emerge not only in the phase of the preliminary self-assessment but also in case a competition procedure is launched subsequently.

The status of (relative) territorial protection⁶⁸ demonstrates the mistreatment of RPF. The most important argument for territorial protection is the free-rider theory. The story of

⁶⁶ The approach that RPFs of minor importance cannot raise competition concerns and are, hence, in accord with competition law appears, for instance, in Section 13 of the Hungarian Competition Act (Law No LVII of 1996), which regards RPF below 10% market share as *de minimis* and, thus, lawful.

⁶⁷ See Whish, R.: *Competition Law*. Oxford, 2009. 114.

⁶⁸ In order to distinguish absolute territorial protection (exclusivity) from relative territorial protection, the concept of active/passive sales was developed in EU competition law. A passive transaction is a sale for which the dealer made no efforts: these are the unsolicited orders addressed to it; on the other hand, active transactions are sales that are entailed by the distributor's endeavours. Location clauses, areas of primary responsibility and restrictions on advertisements are considered as restraints on active sales. An outright prohibition on export, i.e. forbidding both active and passive sales, amounts to an absolute territorial protection, while the mere exclusion of active sales qualifies as relative territorial protection. See Regulation 1983/83 OJ [1983] L 173/1, Article 2(2)(c) (The

the parasite dealer intruding in the field cultivated by the local distributor and free-riding on its investments is so picturesque that EU competition law waives the claim to inquire in detail whether free-riding is a real problem in the particular case, whether the territorially competent trader would assume distributorship, whether it would take on the efforts and expenses of promotion on the optimal level or whether there would be under-investment. Here, competition law is satisfied with that it regards these restraints as lawful in the absence of market power (according to the BER under 30% market share), and presumes that they are justified and follow a legitimate end. In other words, EU competition law accepts that *in abstracto* these restraints aim at tackling the free-rider problem and does not analyse whether this consideration is present *in concreto*. Several agreements involving territorial protection would fail if it were required to be proved in detail under Article 101(3) that the restraint's purpose and actual effect is the tackling of the free-rider problem, the supplier would find no trader to deal with the merchandise, the dealer would not be incited to promote the merchandise and, hence, there would be under-investment in the promotion efforts and, finally, there is no alternative and less restrictive method to handle free-riding.

Interestingly, while RPF is unexceptionally contrary to Article 101(1) and is to be analysed on a case-by-case basis, even absolute territorial protection (the biggest vertical evil of EU competition law) is granted an exception under Article 101(1). The 2010 *Guidelines on Vertical Restraints* provide that even an absolute territorial protection clause may be lawful for two years if it is necessary for penetrating a new market.⁶⁹

All in all, the fact that there is a conceptual escape-hatch for RPF in the form of Article 101(3) appears to be rather a disadvantage: in US antitrust law the compelling economic criticism concerning the status of RPF resulted in the comprehensive revision of the law; in EU competition law the perspective of such a fundamental re-thinking of the features and consequences of RPF seems to be delayed or even impeded by the opportunism enabled by Article 101(3). This is what the 2010 *Guidelines on Vertical Restraints* seem to have done: only a minor refinement, not a comprehensive reform.

regulation defined active sales as follows: "the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch, and from maintaining any distribution depot."). See also *Guidelines on Vertical Restraints*, para 51 ("[T]he Commission interprets 'active' and 'passive' sales as follows: 'Active' sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory. 'Passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.")

⁶⁹ Para 61. A similar provision was included also in the *Old Guidelines on Vertical Restraints*, para 119(10).