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RPM
Resale *Policy* Maintenance?

A prospective discussion on the European policy view towards resale price maintenance (RPM) in vertical distribution agreements with a transatlantic dimension.

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SUMMARY

This thesis is inspired by two thoroughly debated developments in the competition/antitrust law *transatlantic* arena and more specifically in the field of a price-related vertical restraint known as resale price maintenance (RPM). This restraint, loosely defined, encompasses the predetermination of minimum or fixed retail prices by a manufacturer in a vertical distribution agreement.

The first development occurred in the United States in June of 2007, when the US Supreme Court in the *Leegin*¹ judgment declared that RPM would no longer be dealt with under the per se rule and be perceived as restrictive of competition by very nature, but would instead be subject to a more lenient approach under the rule of reason. The second development is occurring in Europe as we speak and consists of the entry into force, in June of 2010, of the Commission's newly adopted Verticals Regulation. Up to this date, RPM has virtually been untouched by the Commission's more modernized, economic approach towards vertical restraints *in general*. This specific restraint has consistently been perceived as a high-risk practice and has thus been approached stringently under the relevant EU regime. The primary question triggered by these developments is *why* this decisive change in approach has occurred in the US. Also, *has* this change left or *should* it leave a transatlantic trace in the European RPM regime? Finally, *where* is Europe headed policy-wise on this topic post-*Leegin* and June 2010, and *why*? These issues have constituted the focal point of this thesis.

In essence, the transformation on US level has substantially been influenced by developments in economic thinking addressing the competitive potential of RPM. Beyond this, the change in direction has firmly been based on factors particular to the US antitrust system. Although the new Verticals Regulation in Europe shows signs of a more progressive, nuanced approach towards this restraint, any future changes in this context will be subtle and cautious. There is still substantial economic and ultimately also legal uncertainty regarding the *actual* and *overall* impact of this restraint on competition. If overly drastic policy measures are taken towards a more lenient RPM approach, this element of uncertainty increases the risk of harm on competition and consumer welfare. At the same time, the acknowledgment that RPM *does* have pro-competitive potential in certain instances also increases the risk that the up-to-date stringent approach towards this restraint in Europe gradually become outdated and in need of reevaluation. So, what could constitute the European golden mean on this topic as of June 2010 and 10 years on?

¹ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 127 S.Ct. 2705 (2007).

SAMMANFATTNING

Detta arbete är inspirerat av två flitigt debatterade skeenden inom den *transatlantiska* konkurrensrättsliga arenan och mera specifikt inom ramen för en prisrelaterad vertikal begränsning känd som prisbindning. Denna begränsning, enkelt definierad, går ut på förbestämmandet av minimipriser eller fasta priser av en tillverkare i ett vertikalt distributionsavtal.

Det första skeendet ägde rum i Förenta Staterna i juni 2010, då den amerikanska Högsta Domstolen i sitt *Leegin* avgörande slog fast att prisbindning inte längre skulle bedömas under den s.k. per se regeln och uppfattas som konkurrensbegränsade i sig, men skulle istället vara föremål för ett mildare synsätt under den s.k. rule of reason. Det andra skeendet pågår i Europa i skrivande stund och består av ikraftträdandet, i juni 2010, av Kommissionens nyligen antagna Vertikala Förordning. Fram tills nu har prisbindning praktiskt taget varit oberörd av Kommissionens mera moderniserade, ekonomiska synsätt på vertikala begränsningar *generellt*. Denna specifika begränsning har genomgående uppfattats som ett hög-risk beteende och har således varit föremål för ett strikt synsätt i den relevanta europeiska regimen. Den primära frågan som har uppstått i ljuset av dessa skeenden är *varför* denna bestämda ändring i synsätt har inträffat i Förenta Staterna? Därutöver, *har* denna ändring lämnat eller *borde* den lämna några transatlantiska spår i den europeiska prisbindningsregimen? Slutligen, *vart* är Europa policymässigt på väg i detta område efter *Leegin* fallet och juni 2010 och *varför*? Dessa frågor utgör brännpunkten i detta arbete.

I grund och botten har förändringen på amerikansk nivå väsentligen framletts av utvecklingen i ekonomiskt tänkande kring den konkurrensmässiga potentialen av prisbindning. Därutöver, har förändringen haft fast grund i faktorer som är specifika för det amerikanska konkurrenssystemet. Trots att den nya Vertikala Förordningen i Europa har visat tecken på ett mera progressivt, nyanserat synsätt i förhållande till denna begränsning, kommer framtida förändringar att ske i långsam takt och med försiktighet. Det råder fortfarande betydande ekonomisk och även då juridisk osäkerhet vad gäller den *reella* och *övergripande* inverkan av denna begränsning på konkurrensen. Om alltför drastiska policyåtgärder tas mot ett mildare synsätt på prisbindning, ökar risken för att konkurrensen och konsumentvälfärden tar skada. Samtidigt ökar erkännandet av att prisbindning *kan* ha konkurrensrättsliga fördelar i vissa instanser, risken att det fram tills nu gällande, strikta synsättet på prisbindning i Europa successivt kommer att bli föråldrat och i behov av att utvärderas på nytt. Alltså, vad kan komma att utgöra den europeiska gyllene medelvägen i detta ämne från och med juni 2010 och 10 år framåt?

PREFACE

First and foremost I would like to thank my parents Jan and Chrystalla and my siblings Maria-Corina and Jan-Fredrik for all their support and encouragement.

Also, I would like to extend gratitude and thanks to my supervisor Henrik Norinder for all the inspiration and the good advice which he has given me during these past five months.

Last but not least, I would like to thank Per for being there.

ABBREVIATIONS

AAI	American Antitrust Institute
ABA	American Bar Association
CF	Consumer Focus
CFI	Court of First Instance
EC Treaty	European Community Treaty
ECJ	European Court of Justice
ECLF	European Competition Lawyers Forum
EU	European Union
FCA	French Competition Authority
FTC	Federal Trade Commission
NCA	Netherlands Competition Authority
RPM	Resale price maintenance
SME	Small and medium sized enterprises
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States

TABLE OF EQUIVALENCE

Art 81 EC	Art 101 TFEU
Art 81(1) EC	Art 101(1) TFEU
Art 81(2) EC	Art 101(2) TFEU
Art 81(3) EC	Art 101(3) TFEU
CFI	General Court
EC	TFEU

1 INTRODUCTION

1.1 Subject background

In June of 2007, the US Supreme Court decided upon a paramount case in the field of antitrust law and more specifically in the field of price-related vertical restraints. The judgment was also the last in a series of cases, all demonstrating a U-turn in the approach towards both price and non-price related vertical restraints. The Court in *Leegin*² namely overturned an almost century long precedent and decided that resale price maintenance (hereinafter RPM) - minimum or fixed retail prices predetermined by a manufacturer in a vertical distribution agreement - would no longer be dealt with as a per se restriction on competition but would instead be subject to scrutiny under the rule of reason.

In Europe, RPM has seen another journey through time. The approach towards vertical agreements *in general* has, with the Commission in the driver's seat, evolved from formalistic and interventionist to more 'effects-based'. Yet, under this modernization process the take on RPM has remained rather intact. RPM has constituted a hardcore restriction and been perceived as restrictive of competition by object. Due to this characterization, this restraint has not been liable of benefiting from the exemption mechanism in the Commission's Verticals Regulation. Moreover, this restraint has been subject both to a presumption of illegality under Art 101(1) TFEU and to a refutable presumption of non-justifiability under Art 101(3) TFEU.

Long before the end of May 2010 and the expiry of the current/soon old Verticals Regulation and accompanying Guidelines, the Commission issued a draft version of the new Regulation and accompanying Guidelines on vertical restraints, the official version of which enter into force in June of 2010. Both drafts have been subject to opinions by third parties in the context of a consultation procedure instigated by the Commission. On the 20th of April the Commission proceeded by proclaiming, via a press release, that the new Verticals Regulation has officially been adopted. On the same day, it gave the green light to the English version of the draft Guidelines and added that these Guidelines would officially be adopted in all Union languages after linguistic control.

The European approach towards RPM can *technically* not find its match in the per se approach, which was applied in the US before the *Leegin* judgment. Nonetheless, it has often been claimed that *in reality* RPM in Europe has been treated as a restraint of this sort, i.e. as a restraint which is restrictive of competition in itself or by its very nature. The premise for this

² *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 127 S.Ct. 2705 (2007).

argument has mainly been that the margins for freeing an RPM agreement from the prohibition in Art 101(1) have been very slim, if not virtually inexistent. The turning points both in the US and the EU - i.e. the fundamental change in approach enforced by the *Leegin* judgment respectively the entry into force of a new legal framework for vertical restraints in June of 2010 - have triggered the interest to find out why this drastic change in approach has occurred across the Atlantic and whether this change has influenced the European approach towards this restraint or might do so in future. In other words the thought triggered was the following. *What RPM approach will or might be endorsed in the EU post-Leegin and June 2010, and why?*

1.2 Purpose

The purpose of this thesis is to *prospectively* examine the view on RPM in European competition law. The policy view towards this restraint has been subject to extensive discussion in Europe pending the entry into force of a new Verticals Regulation. The debate essentially originates from the RPM U-turn in the United States, executed in 2007 by the Supreme Court in *Leegin*.

These two elements, combined with developments in economic thinking, pose the inevitable question whether a comparable change in view on RPM *can* be or *should* be anticipated in Europe come June 2010. In order to take a stand on this matter it is necessary:

- to elaborate on the reasons behind the change of direction on RPM by the US Supreme Court in *Leegin*,
- to address the situation post-*Leegin* and discuss the positive and negative implications of a 'rule of reason' analysis on US-level,
- to present an outline of the debate amongst economists regarding the potential competitive harms and efficiencies entailed in RPM,
- and finally, to put the above into an EU-context as a tool for *evaluating*, both from a practical and a policy point of view, the new Verticals Regulation and for *considering* the possibility and desirability of changes in the way RPM is dealt with in future.

1.3 Method and material

A substantial part of this thesis is devoted to *transatlantically* examining the approach towards RPM. There is in other words a *comparative undertone* present throughout the greater part of this thesis, even though the topic discussed is not *technically* subject to a comparative analysis. This thesis takes off from the *de lege lata* sphere and thus encompasses a review of European, American law and case-law relevant to the subject at hand. Guidance and data is also sought in reliable publications in this field, such as legal doctrine and articles. This thesis then gradually moves away from the *de lege lata* sphere and enters a prospective and ultimately a *de lege*

ferenda sphere. In the context of this methodical shift, guidance and data is instead primarily sought in reliable online material such as legal and economic publications. This since traditional material does not address the issues subject to discussion within this sphere. Additional methodical angles present in this thesis are the consumer perspective, the economic perspective and the 'individual company' perspective.

1.4 Delimitations

This thesis will not be devoted to discussing European competition law or American antitrust law in general terms. Instead it is narrowed down to one sole issue within these very broad fields, namely the topic of RPM. The scope of analysis is limited to distribution agreements in a contractually straightforward vertical relationship between a manufacturer (supplier) and a distributor (retailer), thus excluding from its scope horizontal RPM or any other forms of vertical contractual arrangements where RPM may occur. Broadly defined, RPM consists of a family of price-related vertical restraints. This family includes minimum, fixed, maximum and recommended retail prices. This thesis is confined to discussing matters which only revolve around minimum and fixed RPM, since it is only these two price-related vertical restraints which constitute a hardcore restriction under European competition law. Maximum and recommended retail prices will only be addressed if of relevance to the discussion on minimum and fixed RPM. Similarly, non-price related restraints in vertical distribution agreements such as territorial restraints will not be elaborated upon.

1.5 Outline

After this introductory chapter on the topic of RPM, follows *chapter 2* with an overview of the up-to-date legal system governing this restraint under European competition law and of the reasons for the policy-view supporting it. The comparative dimension of this thesis is apparent already in *chapter 3*, where focus is shifted away from Europe and lies instead on discussing the topic of RPM from a US perspective with substantial weight on the *Leegin* judgment and its implications. The consecutive chapter takes a *necessary* detour away from the legal sphere and enters the economic dimension of this topic. All these chapters form a firm basis for returning to the European legal sphere in *chapter 5*, this time so as to discuss RPM in *prospective* and *de lege ferenda* terms. In the final chapter, this prospective analysis is taken one step further so as to discuss the possibility and desirability of a policy change in this field and so as to convey to the reader the most central conclusions drawn throughout the course of the entire thesis.

2 THE LEGAL STATUS QUO IN EU LAW

In order to be able to discuss any possible future developments regarding RPM in European competition law, it is initially necessary to look at how RPM has been legally approached and dealt with up to this date and understand why this is the case.

Minimum and fixed RPM is, under Art 4(a) of the current/soon old Verticals³ Regulation, essentially understood as:

“(…) the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier’s imposing a maximum sale price or recommending 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;”⁴

Before proceeding any further, it is important at this point to take a step back and present the legal background of RPM. The aim of such an exercise is not only to build solid legal ground for further discussion on the subject, but also to try and distinguish the legal trail of thought behind RPM in a pedagogical step-by-step manner.

2.1 Legal background: Art 101 TFEU

The point of departure when discussing the legal context of RPM is Art 101(1) TFEU. This article essentially prohibits restrictions on competition originating from non-unilateral conduct. The main rationale behind the prohibition is to safeguard competition on the European market as a way of increasing consumer welfare and guaranteeing effectiveness in resource allocation.⁵ In general, the question of whether Art 101(1) will or will not apply in a given case boils down to two autonomous and cumulative conditions subsumed from the wording of the article itself; first, the agreement’s capacity to affect cross-border trade within the Union and second, the upset of competition within the European market by object or effect.⁶ A finding that the requirements for a prohibition under Art 101(1) are met will, with reservation for Art 101(3), lead to automatic nullity under

³ Regulation 2790/1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999, L336/21.

⁴ *Ibid.*, Art 4(a)

⁵ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 13.

⁶ Art 101(1) TFEU and J Goyder & A Albers-Llorens, *Goyder’s EC Competition Law* (2009), 101.

Art 101(2) either of the entire agreement or of individual clauses depending on the nature of the provisions subject to prohibition.⁷

2.1.1 The ‘trade requirement’

The rationale behind the first requirement in Art 101(1), here referred to as the ‘trade requirement’, has essentially been to create a threshold for EU competence below which competition law matters are to be dealt with on national level.⁸ Early on, the ECJ clarified that:

“For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.”⁹

This judgment was shortly followed up by the *Consten & Grundig*¹⁰ case where the Court stressed that in making this assessment substantial weight would lay in determining the *capacity* of a given agreement to pose a threat—whether actually or potentially, directly or indirectly—to the freedom of interstate trade, in a way which would undermine the goal of creating the internal market.¹¹ Subsequent cases¹² have elaborated further on the implications of this *jurisdictional* requirement.

These implications and other further developments, such as the criterion of ‘*appreciability*’¹³ and the gradually more generous¹⁴ interpretation of the ‘trade requirement’, are mirrored in the Commission’s current/soon old Guidelines¹⁵ on the matter.¹⁶ These Guidelines were a follow-up to the modernization Regulation 1/2003¹⁷, which put into place a completely decentralized system of application of Art 101. With the new Regulation in place, the above Guidelines were to function as a guidance tool for national courts and competition authorities as regards the meaning of this criterion.¹⁸

⁷ Case 56/65 *Société La Technique Minière v Maschinebau Ulm GmbH* (1966) ECR 234.

⁸ Joined Cases 56 & 58-64 *Etablissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. EC Commission* (1966) ECR 299.

⁹ Case 56/65 *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* (1966) ECR 235.

¹⁰ Joined Cases 56 & 58-64 *Etablissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. EC Commission* (1966) ECR 299.

¹¹ *Ibid.*

¹² See Case 23/67 *Brasserie de Haecht v. Wilkin-Janssens* (1967) ECR 407, Case C-234/89 *Delimitis v. Henninger Bräu* (1991) ECR I-935 and Case 193/83 *Windsurfing International v. Commission* (1986) ECR 611.

¹³ See Case 5/69 *Völk v Vermaecke* (1969) ECR 295, para 7 and Guidelines on the effect on trade concept in Articles 81 and 82 EC (2004) OJ C101/81, para 44.

¹⁴ V Korah, *An Introductory Guide to EC Competition Law and Practice* (2007), 72f.

¹⁵ Guidelines on the effect on trade concept in Articles 81 and 82 EC (2004) OJ C101/81.

¹⁶ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 105.

¹⁷ Council Regulation 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJ L1/1.

¹⁸ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 105.

2.1.2 The ‘competition requirement’

Under the second requirement in Art 101(1), here referred to as the ‘competition requirement’, an assessment on the influence of an agreement on actual and potential competition and on the competitive climate absent the agreement is made.¹⁹ Case-law indicates nonetheless that this assessment will not entail a balancing of the potential pro- and anti-competitive effects of a given agreement. Such a weighing exercise is instead reserved for discussion under Art 101(3).²⁰ This is indicative of the jurisdictional rather than the evaluative nature of the ‘competition requirement’ in Art 101(1), although this distinction has not always been made entirely clear in case-law.²¹

For the ‘competition requirement’ to be fulfilled, an agreement must have as its object *or* effect (either actual or potential) the upset of competition. Upset of competition *by object* implies that the very aim of the agreement is to affect competition negatively. In order to establish whether this is the case, it will be important to look at the actual stipulations in the agreement, at the economic background of the agreement and at the conduct of the parties to the agreement.²² If by making this assessment such an actual or potential object cannot be established, it will instead be examined whether the agreement- irrespective of intent- upsets competition *by effect*.²³

In any case the impact on competition, actually or potentially resulting from the agreement, must be *appreciable* in order for Art 101(1) and not national competition rules to apply.²⁴ To this aim, the 2001 Commission Notice²⁵ on Agreements of Minor Importance (henceforth referred to as the ‘*de minimis*’ Notice) relieves certain agreements from scrutiny under Art 101(1) due to their particularly insignificant impact on competition. This is decided upon on the basis of certain market-share thresholds. Agreements of small scale will nonetheless not benefit from the ‘*de minimis*’ Notice if they include hardcore restrictions.²⁶ Even so, Art 101(1) will not automatically apply to the agreement but it will also be demanded that the agreement is likely to have an *appreciable* impact on both inter-state trade and competition.²⁷

¹⁹ Case T-328/03 *O2 (Germany) GmbH & Co. OHG v Commission* (2006) ECR II-1231.

²⁰ Case T-328/03 *O2 (Germany) GmbH & Co. OHG v Commission* (2006) ECR II-1231 and Case T-112/99 *Metropole Television and Others v Commission* (2001) ECR II-2459.

²¹ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 111 and 113.

²² Cases 29/83 and 30/83 *CRAM and Rheinzink* (1984) ECR 1679.

²³ See Case 56-65 *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* (1966) ECR 249.

²⁴ Case 5/69 *Völk v Vermaecke* (1969) ECR 295.

²⁵ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001 C 368/13.

²⁶ *Ibid*, paras 1-2, 7 and 11.

²⁷ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 16.

2.1.3 An ‘agreement’ between ‘undertakings’

An additional demand for the application of this article is the existence of an *agreement* between *undertakings*. Both notions ‘agreement’ and ‘undertaking’ are broadly construed under Art 101(1).²⁸ What is important to point out when it comes to the former is that legal status (binding or non-binding) or form (written or oral) will not be determinative.²⁹ The main claim is that a provision can, objectively and to an adequate degree, be interpreted as a manifestation of consent between the parties.³⁰ Also, both horizontal and *vertical* agreements fall under the scope of this article as do, besides agreements, decisions and concerted practices.^{31 32}

For an entity to qualify as an ‘undertaking’ within the meaning of Art 101(1) it is required that the entity carries out some form of ‘economic activity’ irrespective of the entity’s status by law, how it is financed or whether the aim of its activity is to generate profit³³. In *Pavlov*, the ECJ defined ‘economic activity’ as: “any activity consisting in offering goods or services on a given market”³⁴. This is indicative of the broadness of the term ‘undertaking’ under Art 101(1). Yet, there are some grey-zones which, according to case-law, must be dealt with by focusing on the character of the entity’s activities rather than on the character of the entity itself. Entities carrying out activities of non-commercial character and entities which do not have a distinct and autonomous financial role on the market will not qualify as ‘undertakings’ within the meaning of Art 101(1). An example of the first scenario might be activities of social nature carried out by a public authority, whereas an example of the second might be activities of an employee on behalf of his employer or of a ‘genuine’ agent on behalf of his principal.³⁵ As mentioned in the delimitations, this thesis rests on the premise that the manufacturer and the distributor in the vertical distribution chain are two independent entities that carry out activities of commercial nature. Thus for the purposes of this paper, there will be no need to discuss the above mentioned borderline scenarios any further.

²⁸ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 74 and 82f.

²⁹ Case 41/69 *Chemiefarma NV v. Commission* (1970) ECR 661 and Case 28/77 *Tepea BV v. EC Commission* (1978) ECR 1391.

³⁰ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 82.

³¹ The term ‘agreement’, used throughout this thesis, also refers to ‘decisions’ and ‘concerted practices’, save when a distinction between the three terms is explicitly made in the text.

³² Joined Cases 56 & 58-64 *Etablissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. EC Commission* (1966) ECR 299 and Art 101(1) TFEU.

³³ Case C-41/90 *Höfner and Elser* (1991) ECR I-1979, Case C-343/95 *Diego Cali & Figli v. Servizio Ecologico Porto di Genova* (1997) ECR I-1547 and Joined Cases C-180/98 to C-184/98 *Pavlov* (2000) ECR I-6451.

³⁴ Joined Cases C-180/98 to C-184/98 *Pavlov* (2000) ECR I-6451 para 75.

³⁵ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 74ff.

2.2 Legal background: Article 101(3) TFEU and the block-exemption mechanism

A finding that the criteria for a prohibition under Art 101(1) are fulfilled does not automatically imply that the agreement or clause in question will be illicit and void under Art 101(2). At this point, the exception mechanism in Art 101(3) comes into play and can, if satisfied in a given case, automatically transform an agreement or clause from prohibited under Art 101(1) to legitimate and directly enforceable.³⁶

The exception mechanism in Art 101(3) has two separate channels of application; *‘individual’* and *‘en bloc’*. *‘Individual’* is the application of the article in an individual case whereas *‘en bloc’* the application of the article to a family of agreements by means of a block exemption Regulation. It is in this context important to clarify that the point of departure in both cases is Art 101(3). The block exemptions are in other words not self-standing acts, but rather elaborations on the interpretation and application of Art 101(3) to specific categories of agreements beneath certain market-share thresholds.³⁷

In the subsections below, the criteria for an *‘individual’* exception³⁸ under Art 101(3) will briefly be presented in order to communicate a basic understanding of the justifications liable of relieving an agreement from the prohibition in Art 101(1). Thereafter, focus will lie on roughly presenting the block-exemption mechanism and more specifically the block-exemption Regulation applicable to vertical agreements.

2.2.1 Individual application of Art 101(3)

It has been mentioned earlier under *chapter 2.1.1.2* that the Art 101(3) assessment consists of a balancing act, where the competitive advantages and disadvantages of a given practice are weighed against each other in order to reach a conclusion on the practice’s legality/illegality under Art 101. Art 2 of Regulation 1/2003³⁹ stipulates that an undertaking seeking the advantage of Art 101(3) will bear the burden of proving that the four criteria in the article are met. If it does not succeed in doing so, the agreement will fall under the scope of Art 101(1) and be subject to automatic nullity under Art 101(2) (either in whole or in part).

³⁶ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 1.

³⁷ *Ibid*, paras 2-3.

³⁸ When discussing the application of Art 101(3) in an individual case, the term *‘exception’* is used and *not* the term *‘exemption’*. This is due to the fact that individual exemptions and notifications no longer exist post Regulation 1/2003, yet in principle not resulting in any changes when it comes to the substance of an assessment under Art 101(3). See J Goyder & A Albors-LLorens, *Goyder’s EC Competition Law* (2009), 146.

³⁹ Council Regulation 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJ L1/1.

The four requirements in Art 101(3) are both cumulative and exhaustive.⁴⁰ In order for Art 101(3) to follow through in an individual case, the first two criteria must be answered affirmatively (positive criteria) and the latter two negatively (negative criteria). As is clear from the very wording of the article, the questions to be answered are:

- Does the agreement contribute in improving the production or distribution of goods or encourage technical or economic development?
- If yes, does the same agreement also grant consumers a fair share of the advantages gained?
- Are the companies concerned subject to restraints under this agreement, which are not indispensable for achieving the goals already mentioned above?
- And finally, does this agreement give these companies a possibility to eliminate competition regarding a considerable share of the relevant products?

All restrictive agreements, regardless of whether they are deemed restrictive by object or effect, can in principle benefit from an individual exception under Art 101(3) given that the object/effect distinction does not apply in the context of this provision. Yet for *any* agreement to earn this benefit, all above criteria must be satisfied.⁴¹

An in-depth analysis on the interpretation and practical application of each of these criteria will not be carried out at present. The extensive guidance on these matters, provided for by Commission in the relevant Guidelines⁴², will nonetheless be of assistance when discussing the individual exception under Art 101(3) at a later stage.

2.2.2 *En bloc* application of Art 101(3)

As mentioned earlier in *chapter 2.1.2* the block-exemptions are an extension of Art 101(3), since they elaborate on the interpretation and application of this article to specific categories of agreements beneath certain market-share thresholds. The *`en bloc'* application of Art 101(3) to certain categories of agreements is based on the premise that block-exemptible agreements presumably also satisfy the four criteria in Art 101(3). Thus, a party seeking the advantage of an exemption for an agreement falling within the sphere of a block-exemption Regulation will *not* need to prove that every one of the individual criteria in Art 101(3) are met. Instead, the party will solely have

⁴⁰ Regarding the cumulative character of these criteria see Case T-528/93 *Métropole Télévision SA v Commission* (1996) ECR II-649, para 86, regarding their exhaustive character see Case T-17/93 *Matra Hachette v Commission* (1994) ECR II-595, para 139 and regarding the practical implications of these two characteristics see Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 42.

⁴¹ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 20.

⁴² Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97.

to show that the agreement in question benefits from the relevant block-exemption.⁴³

One agreement category dealt with by means of a block exemption Regulation⁴⁴ and accompanying Guidelines⁴⁵ is that of vertical agreements. It should be mentioned that the aim of these Guidelines is to provide non-exhaustive, yet substantial and vertical restraints-specific guidance, regarding the interpretation and application of the criteria in Art 101(3).⁴⁶ An exemption under the Verticals Regulation in a given case equals validity and direct enforceability, even if the agreement impedes competition under Art 101(1). This benefit can only be formally withdrawn by the Commission or in some cases a national competition authority. Yet in neither case can this benefit be withdrawn retroactively.⁴⁷

A restraint which does not qualify for an exemption under this Regulation is not presumptively illicit under Art 101(1). In such a case an individual assessment under Art 101 will instead be called for. The Commission will bear the burden of proving that the agreement falls within the prohibition in Art 101(1). Once this burden of proof is successfully discharged, it will up to the undertakings concerned to demonstrate that the agreement produces efficiencies which qualify it for an exception under Art 101(3).⁴⁸

2.3 RPM in the context of Art 101(1) TFEU

In order to put RPM into the context of Art 101(1), it is initially important to note that the Commission perceives vertical distribution agreements in general as practices which often generate economic advantages. Yet according to the Commission these efficiencies are not likely to occur in markets where inter-brand competition is weak.⁴⁹ It should be clarified here that restraints on inter-brand competition are generally expected to raise more competition concerns than restraints on intra-brand competition.⁵⁰ In light of the above, the majority of restraints originating from distribution agreements are subject to economic, effects-based assessments under Art 101.⁵¹

Contrary to this, the approach towards RPM is not based on a premise of pro-competitiveness, as is the case for vertical restraints in general, but

⁴³ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 35.

⁴⁴ Regulation 2790/1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999, L336/21.

⁴⁵ Guidelines on Vertical Restraints (2000) OJ C291/1.

⁴⁶ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 3 and Guidelines on Vertical Restraints (2000) OJ C291/1 paras 1 and 116.

⁴⁷ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, paras 2, and 36 and Guidelines on Vertical Restraints (2000) OJ C291/1 paras 13-14 and 76-77.

⁴⁸ Guidelines on Vertical Restraints (2000) OJ C291/1 para 62.

⁴⁹ Regulation 2790/1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999, L336/21, paras 6-7.

⁵⁰ J Goyder & A Albors-LLorens, *Goyder's EC Competition Law* (2009), 214f.

⁵¹ Guidelines on Vertical Restraints (2000) OJ C291/1, paras 5-7.

rather on a premise that RPM is most likely to be anti-competitive and economically non-beneficial. This premise can partly be traced back to the very wording Art 101(1). The article does not elaborately explain the meaning of competition or what a restriction of it in reality would entail. Rather, it is supplemented by a non-exhaustive list of examples of conduct, which are generally believed to be anti-competitive and thus problematic under Art 101(1).⁵² First in this list are agreements which: “(...) directly or indirectly fix purchase or selling prices or any other trading conditions.”⁵³ Agreeing upon minimum or fixed RPM classifies, per definition, as such a practice and is thus believed to be in clear conflict with Art 101(1) and furthermore to restrict competition by *object*. It is in other words a practice which is presumed to have such anti-competitive capacity that any elaboration on its concrete effects on competition is redundant.⁵⁴

For a vertical RPM agreement to fall under Art 101(1) it is additionally necessary to establish the existence of an agreement (or a decision or a concerted practice) between undertakings and to establish that the agreement may influence inter-state trade to an appreciable degree.⁵⁵ Yet, as mentioned above, the bar for fulfilling both these criteria is set quite low thus not creating any significant barriers for the application of Art 101(1) in an RPM case.

2.4 RPM in the context of Art 101(3) TFEU

Considering the above the methodology of dealing with a vertical restraint such as RPM would ideally be to start off in Art 101(1) and, only if the criteria for a prohibition under that article are met, proceed via Art 101(3) to the Verticals Regulation and accompanying Guidelines in order to examine whether the practice is exempted. If an exemption is out of the question, due to market-share or other reasons, then an individual assessment under Art 101 will be appropriate. Given the abolition of the notification procedure in the modernization Regulation 1/2003⁵⁶, a fair share of responsibility in making these assessments will lie on individual companies.⁵⁷

Under the current/soon old Verticals⁵⁸ Regulation, minimum and fixed RPM constitute one of the ‘black clauses’ in Art 4 which are referred to as

⁵² The very wording of the provision is indicative both of the non-exhaustive character of this list of practices and of the fact that these practices are generally considered particularly questionable under Art 101(1): “(...) and in particular those which (...)”. See also Commission Decision 84/405/EEC, *Zinc producer group* (1984) OJ L 220/27, para 99.

⁵³ Art 101(1) a TFEU.

⁵⁴ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 13. Guidelines on Vertical Restraints (2000) OJ C291/1, paras 21 and 23.

⁵⁵ V Korah, *An Introductory Guide to EC Competition Law and Practice* (2007), 76f.

⁵⁶ Council Regulation 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJ L1/1.

⁵⁷ Council Regulation 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJ L1/1, paras 1-4.

⁵⁸ Regulation 2790/1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999, L336/21.

‘hardcore restrictions’. In para 7 of the Guidelines accompanying this Regulation, the Commission explains that having a hardcore restriction in an agreement is a practice which will restrict competition by *object*, whether this object is achieved directly or indirectly, and hence concludes that assessments on the actual consequences of such a restraint on the market are unnecessary.⁵⁹ In this context it is interesting to note that all hardcore provisions in Art 4, besides being strictly approached, also relate to practices which limit intra-brand competition. Even so, the Commission still clearly states that inter-brand restraints will often be more harmful to competition than intra-brand restraints. Of course, the Commission points out that the protection of both inter- and intra-brand competition will be vital in markets where inter-brand competition is weak.⁶⁰

The definition of minimum or fixed RPM in Art 4(a) mentioned in the very beginning of *chapter 2* clearly suggests that maximum and recommended prices are not subject to the above treatment, save when they indirectly result in minimum or fixed RPM. This may be the case when e.g. a recommended price is accompanied by risk of disciplinary consequences for the distributor who does not align its price with the one proposed by the manufacturer.⁶¹ Clearly, fixed and minimum RPM can be achieved both directly and indirectly. The Guidelines provide examples of types of indirect conduct which might qualify as an agreement on minimum or fixed RPM.⁶²

Including a hardcore restriction, minimum or fixed RPM, in an agreement practically implies that the entire agreement automatically loses the benefit of the ‘safe harbor’ provided for by the Regulation. It also implies that the agreement is generally anticipated, yet not presumed, to fall within the prohibition in Art 101(1) and that there is little chance of it qualifying for an individual exception under Art 101(3).⁶³ This is apparent in the Guidelines on Art 101(3) where the Commission expresses serious doubt as to whether gravely restrictive practices, such as hardcore restrictions and consequently also RPM, will be capable of fulfilling the four conditions in the article. According to the Commission, such restraints will generally not be able to fulfill the two initial criteria in Art 101(3) since they will neither generate objective economic gain nor benefit consumers. They will also generally fall short of the indispensability assessment which means that there will be alternative, less restrictive ways of achieving the possible efficiencies arising from such restraints.⁶⁴ The above indicates that companies seeking the benefit of an individual exception under Art 101(3) are subject to a burden of proof so heavy that it borders to an irreversible presumption of illegality.

⁵⁹ Guidelines on Vertical Restraints (2000) OJ C291/1, paras 7, 47 and 66.

⁶⁰ J Goyder & A Albors-Llorens, *Goyder’s EC Competition Law* (2009), 224 and Guidelines on Vertical Restraints (2000) OJ C291/1, paras 6 and 119.

⁶¹ V Korah, *An Introductory Guide to EC Competition Law and Practice* (2007), 327.

⁶² Guidelines on Vertical Restraints (2000) OJ C291/1, para 47.

⁶³ Guidelines on Vertical Restraints (2000) OJ C291/1, paras 46-47 and 62 and Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C 101, paras 17-27 and 40-47.

⁶⁴ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, paras 20 and 46.

In the following subchapter, focus will exclusively lie in identifying the current/soon old approach towards RPM and in highlighting the underlying reasons for it. For a well-rounded overview of this issue it is necessary to take into account the approach adopted by both the Commission and the European Courts.

2.5 RPM as a hardcore restriction: current/soon old approach and rationale

As explained earlier, the current/soon old approach towards vertical restraints in general is rather tolerant. As of 1999 the application of Art 101 to such restraints would be subject to a more modernized, economic approach which would focus on market impact. Prior to this modernization the Commission's approach had been heavily criticized for being excessively formalistic, interventionist and overly focused on integration concerns.⁶⁵ Under the new system, the vitality of economic analysis in examining the effect of vertical restraints on competition was formally recognized by the Commission.⁶⁶

When it comes to RPM on the other hand, the overall discussion in the previous subchapter shows that this restraint is still treated strictly; being a hardcore restriction it will not be subject to economic analysis. It would be inaccurate to claim that RPM *is* subject to a per se prohibition since technically this is not the case.⁶⁷ Yet, given that the margins for successfully employing RPM under Art 101 are extremely narrow, it would not be entirely inaccurate to claim that RPM is *treated* as if it were subject to a per se prohibition.⁶⁸ The question is: *Why* this approach?

In the Guidelines on Art 101(3), the Commission clarifies that a restriction on competition by *object*, such as RPM, is a high-risk practice when it comes to the risk of anti-competitive market-impact. This has amounted to a presumption of anti-competitiveness under which it will no longer be necessary to examine the practice's actual effects on a given market. Interestingly, the Commission justifies the creation of this presumption by referring to:

⁶⁵ J Goyder & A Albors-Llorens, *Goyder's EC Competition Law* (2009), 213, S Marco Colino, *Vertical Agreements and Competition Law – A Comparative Study of the EU and US Regimes* (2010), 60ff, A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 498 and A Jones and B Sufrin, *EC Competition Law: Text, Cases and Materials* (2007), 702ff.

⁶⁶ S Marco Colino, *Vertical Agreements and Competition Law – A Comparative Study of the EU and US Regimes* (2010), 147.

⁶⁷ See the requirement of appreciability and the possibility of an individual exception under Art 101(3).

⁶⁸ A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 500.

- the *severe nature* of such practices and
- *experience* which according to the Commission indicates that such restrictions are likely to generate anti-competitive effects on the market and are thus also likely to put at risk the realization of the goals underlying European competition policy.⁶⁹

It has been mentioned in *chapter 2.3* that the hardcore restrictions in Art 4 of the Verticals⁷⁰ Regulation are intra-brand restraints. Even though the Guidelines on Vertical Restraints⁷¹ express greater competition concerns when it comes to inter-brand restraints, they also seem to acknowledge the importance of protecting intra-brand competition as a means of shielding integration in the European market. This conclusion can be drawn from para 7 of the Guidelines, where the Commission mentions the goals underlying the European competition policy. The primary aim of this policy is to safeguard competition in order to increase consumer welfare and create efficient resource-allocation. Besides this, the Commission identifies market integration as an additional goal of the European competition policy, directly after pointing out that hardcore restrictions inherently restrict competition.⁷² Thus, the Commission gives the impression that hardcore restrictions threaten the goal of market integration even though this concern seems more pressing when referring to hardcore restrictions of territorial character rather than to RPM. Doctrine suggests that the strict approach towards RPM has been inspired by US law which, during the time of adoption of the Verticals Regulation in Europe, prohibited RPM under the per se rule.⁷³

In the Guidelines on Vertical Restraints, the Commission describes the competition threats that might specifically arise from RPM. Going through these possible threats will help to further clarify the reasons for the Commission's suspicion towards RPM. In para 112 of the Guidelines, the Commission speaks of RPM's two central anti-competitive consequences. The first is the decrease of intra-brand price competition and the second is the increase of price-transparency. The Commission notes that the imposition of RPM on distributors ultimately results in total elimination of price competition within a given brand seeing as the distributors are not capable of competing on price within that brand. Further, the Commission explains that the increase of price-transparency and the accountability for alterations in price might facilitate collusion both horizontal and vertical and particularly in markets with a high level of concentration. Finally, the decrease of intra-brand price competition could indirectly threaten inter-

⁶⁹ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 13. Guidelines on Vertical Restraints (2000) OJ C291/1, paras 21 and 23.

⁷⁰ Regulation 2790/1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999, L336/21.

⁷¹ Guidelines on Vertical Restraints (2000) OJ C291/1.

⁷² *Ibid*, para 7.

⁷³ Regarding integration concerns when it comes to hardcore restrictions see S Marco Colino, *Vertical Agreements and Competition Law – A Comparative Study of the EU and US Regimes* (2010), 147f.

brand competition given that the price for specific products will be subject to a lesser degree of downward pressure.⁷⁴

2.6 RPM: The Commission's enforcement policy and European case-law

The Commission's strict approach towards RPM is evident when looking at decisions such as *Yamaha*⁷⁵, *JCB*⁷⁶ and *Volkswagen*⁷⁷. In the first case, the Commission found *Yamaha* 'guilty of' market-partitioning practices and of fixing the resale prices of some of its products in certain Member States. A fine of €2.56 million was imposed.⁷⁸ Similarly, in *JCB* the Commission found the undertaking accountable for fixing resale prices by means of resale price scales. The (CFI) disagreed with the Commission that *JCB* had imposed these resale prices on its distributors. The Court acknowledged that the scales recommended by *JCB* were strongly suggestive. Even so, it concluded that these scales were not imposed by *JCB*, since they did not bind the distributors.⁷⁹ In *Volkswagen*, the Commission imposed €30.96 million in fines on *Volkswagen* for RPM in Germany. Once again, the decision was overturned by the (CFI) with the motivation that the Commission had not managed to prove that the manufacturer's RPM-policy had been agreed upon by *Volkswagen*'s retailers.⁸⁰ The ECJ followed the same line of reasoning as the (CFI) and held that a prohibition under Art 101(1) demands that the Commission can prove the existence of consensus between the manufacturer and the distributor as regards the provision in question (the 'agreement requirement').⁸¹ Thus if consensus cannot be established, Art 101(1) will in principle not stand in the way of a RPM-policy pursued by a manufacturer. All the above cases indicate that the Commission is subject to a considerable burden of proof when attempting to establish the existence of an actual price-fixing agreement between a manufacturer and a distributor.⁸²

Only by looking at the amount of fines imposed by the Commission in the *Volkswagen* case, it is once again obvious that RPM is approached stringently. Subsequently, companies aware of this strict approach might not be keen to employ RPM in a direct and explicit manner e.g. by means of a clear-cut price-fixing agreement. Would these companies instead attempt to fix resale prices indirectly by e.g. 'imposing' recommended prices, the cases above indicate that the Commission might not succeed in discharging its substantial burden of proof. This might relieve the parties involved from

⁷⁴ Guidelines on Vertical Restraints (2000) OJ C291/1, para 112.

⁷⁵ Case COMP/37.975 PO/*Yamaha*.

⁷⁶ *JCB* (2002) OJ L69/1.

⁷⁷ *Volkswagen* (2001) OJ L162/14.

⁷⁸ *Yamaha* IP/03/1028, 16 July 2003.

⁷⁹ Case T-67/01 *JCB Service v Commission* (2004) ECR II-49, para 130 and see also the ECJ's judgment Case C-167/04 *JCB Service v Commission* (2006) ECR I-8935.

⁸⁰ Case T-208/01 *Volkswagen AG v Commission* (2003) ECR II-5141.

⁸¹ Case C-74/04P *Commission v Volkswagen AG* (2006) ECR I-6585, paras 39-56.

⁸² A Jones and B Sufrin, *EC Competition Law: Text, Cases and Materials* (2007), 718.

responsibility for a practice, whose actual aim might have been to fix resale prices. Such a scenario would ultimately leave the Commission with little chance of actually *implementing* its strict approach towards RPM.

Case-law from the ECJ indicates that the Court supports the Commission's policy-view towards RPM in principle. In the *Metro (No. 1)* case, the ECJ declared that "(...) price competition is so important that it can never be eliminated".⁸³ Similarly, in the *Pronuptia* case the ECJ stated that "provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition".⁸⁴ Finally, in the *Binon* case the ECJ specifically and blatantly stated that "provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article (81(1))".⁸⁵ The *Binon* case, in particular, indicates that the ECJ agrees with the Commission in that RPM is a practice which restricts competition by *object*.

When it comes to Art 101(3) efficiency claims under the current/soon old system, it has already been mentioned that the Commission interprets the margins for a successful claim as particularly narrow.⁸⁶ Yet, the *possibility* of making such a claim cannot be entirely disregarded. This has been confirmed by the European Courts e.g. in *Binon*, which dealt with price-fixing by a publisher regarding the distribution of newspapers and periodicals. In this case the ECJ acknowledged that price-fixing practices could potentially benefit from Art 101(3). To support this it made reference to the particular circumstances present in this case. It stated that:

"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 81(3)."⁸⁷

The ECJ thus recognized that vertical price-fixing *might* benefit from Art 101(3), despite the fact that it did not proceed in determining whether the individual criteria in Art 101(3) had actually been satisfied. Further, in

⁸³ Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v SABA and Commission (No. 1)* (1977) ECR 1875, para 21.

⁸⁴ Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (1986) ECR 353, para 25.

⁸⁵ Case 243/83 *SA Binon & Cie v. SA Agence et messageries de la presse* (1985) ECR 2015, para 44.

⁸⁶ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, paras 20 and 46.

⁸⁷ Case 243/83 *SA Binon & Cie v. SA Agence et messageries de la presse* (1985) ECR 2015, para 46.

*GlaxoSmithKline*⁸⁸ the (CFI) found that the Commission had erred in its assessment as to whether the dual-pricing scheme adopted by the undertaking had met the individual criteria in Art 101(3). More specifically, the (CFI) stated that the points raised by *Glaxo* for supporting its efficiency claim appeared to be “relevant, reliable and credible”.⁸⁹ The Court found that the Commission had not scrutinized and countered the arguments raised by *Glaxo* to a satisfactory degree. Neither in this case did the Court reach a conclusion as to whether the requirements in the article were in fact fulfilled.

Both *Binon* and *Glaxo* indicate that reasonable arguments put forward by parties in the context of an efficiency claim cannot be dismissed straightaway, even if the efficiency claim would involve a hardcore restriction such as RPM. Instead, all such arguments and the evidence supporting them will have to be thoroughly examined and countered by way of substantiated proof. Yet, the *Binon* case also indicates that the bar for an individual exception under Art 101(3) is set high and that exceptional circumstances will be required for an exception to come into question. Moreover, it indicates just how case-by-case oriented the analysis under Art 101(3) is. Of course in the *Matra Hachette* case the (CFI) held that *in principle* any anti-competitive practice, no matter its impact on the relevant market, can benefit from Art 101(3) under the condition that all the criteria in the article are met.⁹⁰ As mentioned in *chapter 2.1.2.1*, Art 101(3) does not distinguish between restrictions of competition by object and restrictions by effect, as does Art 101(1).⁹¹

⁸⁸ Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* (2006) ECR II-2969.

⁸⁹ *Ibid*, para 263.

⁹⁰ Case T-17/93 *Matra Hachette v Commission* (1994) ECR II-595

⁹¹ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 20.

3 GLANCING ACROSS THE ATLANTIC

In this chapter, focus shifts away from RPM in European competition law and lies instead in examining this vertical restraint in the context of US antitrust law. This is a necessary detour for the purposes of this thesis, since the US approach towards RPM has been subject to a change so central in *any* RPM discussion, that it cannot be disregarded when addressing this issue under European competition law. This change in approach came in June of 2007 with the US Supreme Court’s decision in the *Leegin*⁹².

Before diving into the *Leegin* case it is initially important, not only to highlight the legal context in which RPM is dealt with under US antitrust law, but also to draw some attention to how RPM was handled prior to this judgment. Both are key tools in better understanding the change brought on by *Leegin*.

3.1 RPM in US law

As in European competition law, RPM in US antitrust law is understood as a practice whereby a manufacturer, when selling its product to an autonomous distributor for resale, regulates the resale price to be charged by the latter. RPM is a restraint on intra-brand competition which is dealt with under § 1 of the Sherman⁹³ Act.⁹⁴ This Act is the main federal statute dealing with breaches of US antitrust law. Infringements of this Act are penalized. Yet, private action is not excluded.⁹⁵ In § 1 of this statute, it is stipulated that:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”⁹⁶

Literally interpreted, the prohibition in § 1 of the Sherman Act seems to capture “every” restrictive agreement. However, the US Supreme Court has clarified that the aim of this provision is to combat only those competition restraints which are unreasonable.⁹⁷ There have been two separate rules of testing whether a vertical restraint infringes § 1, the *rule of reason* and the

⁹² *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay’s Kloset...Kay’s Shoes*, 551 U.S. 877, 127 S.Ct. 2705 (2007).

⁹³ Sherman Act, 15 U.S.C.A, enacted July 2, 1890.

⁹⁴ H Hovenkamp, *Federal Antitrust Policy - The Law of Competition and its Practice* (2005), 447.

⁹⁵ A Jones and B Sufrin, *EC Competition Law: Text, Cases and Materials* (2007), 1357f.

⁹⁶ Sherman Act, 15 U.S.C.A § 1.

⁹⁷ *State Oil Co. v Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 279 (1997).

per se rule. Under the rule of reason, a conclusion as to whether a practice unreasonably and thus illicitly restricts competition is reached after balancing all relevant facts in an individual case against each other.⁹⁸ Under, the *per se* rule on the other hand, no in-depth analysis regarding the competitive implications of an individual practice needs to be carried out. Instead the practice is seen as illegal in itself (*per se*).⁹⁹ In *Leegin* the Supreme Court clearly refers to the rule of reason as the *established standard* of assessing whether a given practice infringes § 1 of the Sherman Act.¹⁰⁰ The *per se* rule on the other hand has *only* been applied to practices which have been considered so blatantly anti-competitive, that they need not be subject to economic analysis for their unlawfulness to be established. This is clear from e.g. *Texaco*, which was a pre-*Leegin* Supreme Court decision.¹⁰¹

Before 2007 and the *Leegin* decision, RPM was subject to a *per se* prohibition which was founded upon an almost century long precedent, namely the US Supreme Court decision in *Dr. Miles*¹⁰². In this case the plaintiff was a medicines manufacturer, who sold his products solely to distributors who consented to resell them at specified prices. The Supreme Court, by relying on the earlier common law doctrine regarding restraints on alienation, concluded that the plaintiff's control over resale prices constituted an unenforceable practice which was not in line with the policy of the Sherman Act. The Court clarified that this price-fixing mechanism would in terms of profit mainly be advantageous for the distributors rather than for the manufacturer and could not establish why the latter would wish to engage in such a practice. According to the Court, an analogy could be drawn between this price-fixing practice and horizontal collusion between rival retailers, which the law perceived as illegal and void.¹⁰³ In subsequent cases¹⁰⁴ the Court elaborated further on the findings in *Dr. Miles* and clarified that RPM was to be dealt with under the *per se* rule. If the existence of an RPM agreement could be established in an individual case, illegality would kick in no further economic analysis required.¹⁰⁵

In the mid 1970s, the *per se* rule did not only apply to minimum RPM but also covered a number of other vertical intra-brand restraints, both price- and non-price related. However by 1977, the wheels of change were in motion. In *Sylvania*¹⁰⁶, the Supreme Court abandoned the notion of *per se*

⁹⁸ *Continental T. V., Inc. v GTE Sylvania Inc*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557 (1977).

⁹⁹ *Texaco Inc. v Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 1279 (2006).

¹⁰⁰ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset... Kay's Shoes*, 551 U.S. 877, 885, 127 S.Ct. 2705, 2712 (2007).

¹⁰¹ *Texaco Inc. v Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 1279 (2006).

¹⁰² *Dr. Miles Medical Co. v John D. Park & Sons Co*, 220 U.S. 373, 31 S.Ct. 376 (1911).

¹⁰³ *Dr. Miles Medical Co. v John D. Park & Sons Co*, 220 U.S. 373, 404-408, 31 S.Ct. 376, 383-384 (1911) and H Hovenkamp, *Federal Antitrust Policy - The Law of Competition and its Practice* (2005), 471f.

¹⁰⁴ See for example, *United States v Parke, Davis & Co.*, 362 U.S. 29, 47, 80 S.Ct. 503, 513 (1960).

¹⁰⁵ H Hovenkamp, *Federal Antitrust Policy - The Law of Competition and its Practice* (2005), 472f.

¹⁰⁶ *Continental T. V., Inc. v GTE Sylvania Inc*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557 (1977).

illegality for non-price intra-brand restraints in favor for a rule of reason analysis.¹⁰⁷ In *Monsanto*¹⁰⁸ and *Business Electronics*¹⁰⁹, the threshold for substantiating the existence of a vertical RPM agreement was raised.¹¹⁰ Finally, in *Khan*¹¹¹ the Supreme Court overruled the per se unlawfulness of maximum RPM.¹¹² This brings us to the *Leegin* decision where the Court, by overruling the per se rule yet again, completed the process of transforming all intra-brand vertical restraints from per se prohibitions to objects of analysis under the rule of reason.

Before describing the factual background of this decision it should be pointed out that although *Leegin* was the decision which explicitly overturned the *Dr. Miles* rule, the very foundation of the *Dr. Miles* decision had already indirectly been questioned and rejected in cases prior to *Leegin*. The points made by these previous cases are reaffirmed in the *Leegin* decision and address the modern day concerns of relying on a precedent which was based on the common law doctrine regarding restraints on alienation from 1628 and a precedent which treated vertical agreements as practices comparable to horizontal collusion.¹¹³

3.2 The scenario in *Leegin*

In 1997, Leegin Creative Leather Products, Inc., a manufacturer of leather goods and accessories and petitioner in this case, introduced a new policy regarding the pricing and promotion of Leegin's "Brighton" products by retailers. Under this policy, the company would in principle not sell to retailers who marked down the prices for "Brighton" products below recommended prices. When PSKS, Inc., a retailer operating a store called Kay's Kloset and respondent in this case, breached this policy Leegin stopped selling to Kay's Kloset thus leaving PSKS at an alleged economic disadvantage. PSKS sued Leegin in the District Court for the Eastern District of Texas and claimed i.a. that the latter had infringed the Sherman Act by imposing RPM upon its retailers by means of price-fixing agreements. The District Court judged in favor of PSKS by relying on the per se rule and treble damages were imposed against Leegin. On appeal, Leegin did not deny the RPM collaboration but claimed instead that these agreements should have been dealt with under the rule of reason. The Court of Appeals found that the District Court had not erred in its assessments

¹⁰⁷ Hereby overruling *United States v Arnold, Schwinn & Co.*, 338 U.S. 365, 87 S.Ct. 1856 (1967).

¹⁰⁸ *Monsanto Co. v Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464 (1984).

¹⁰⁹ *Business Electronics Corp. v Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988).

¹¹⁰ A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 480f.

¹¹¹ *State Oil Co. v Khan*, 522 U.S. 3, 10, 118 S.Ct. 275 (1997).

¹¹² Overruled: *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 1258 (1968).

¹¹³ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 887-889, 127 S.Ct. 2705, 2713-2715 (2007).

since it was bound by precedent and thus affirmed the latter's judgment.¹¹⁴ The Supreme Court granted certiorari to establish whether the per se illegality of minimum RPM should be maintained.¹¹⁵

3.3 5-to-4: The Majority Opinion – *Rule of reason in, per se out?*

In order to reach a conclusion as to which rule of assessment, the per se rule or the rule of reason, was most appropriate for dealing with minimum RPM the Court had first to address certain central matters. In delivering the majority's opinion, Justice Kennedy¹¹⁶ started off by reflecting on the nature, application and implications of each of these two standards of assessment in light of previous case-law. In this context, the Court noted that the rule of reason was the *established* standard of assessment under § 1 of the Sherman Act. It also noted that the per se rule was only suited for restraints which, in all or most cases, hampered competition and limited output.¹¹⁷ More specifically the Court reaffirmed that:

“(...) the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue (...) and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason (...).”¹¹⁸

The Court then turned to *Dr. Miles*¹¹⁹ only to conclude that the rationales behind this case were no longer capable of defending the per se rule in relation to minimum RPM. The Court was reluctant to rely on a precedent decided upon on the basis of a common law doctrine dating back to 1628. It held that the antitrust rules on vertical restraints were not static and frozen in time but instead dynamic and adaptable. In this context, the doctrine relied upon in *Dr. Miles* was no longer relevant when assessing the implications of the antitrust rules on vertical restraints. Further, the Court reaffirmed earlier case-law when rejecting the *ex analogia* reasoning in *Dr. Miles* between vertical and horizontal agreements. According to this case-law, vertical and horizontal agreements demonstrated substantial differences in economic impact and were thus to be subject to different legal treatment.¹²⁰

¹¹⁴ 171 Fed Appx 464 (2006) and *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 882-885, 127 S.Ct. 2705, 2710-2713 (2007).

¹¹⁵ Regarding grant of certiorari see *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 549 U.S. 1092, 127 S.Ct. 763.

¹¹⁶ Roberts, C.J., and Scalia, Thomas and Alito, JJ., joined in the opinion.

¹¹⁷ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 885-888, 127 S.Ct. 2705, 2712-2714 (2007).

¹¹⁸ *Ibid*, 551 U.S. 877, 886, 127 S.Ct. 2705, 2713 (2007).

¹¹⁹ *Dr. Miles Medical Co. v John D. Park & Sons Co*, 220 U.S. 373, 31 S.Ct. 376 (1911).

¹²⁰ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 887-890, 127 S.Ct. 2705, 2713-2715 (2007).

Nonetheless, the conclusion that *Dr. Miles* was outdated was not enough to support the abandonment of the per se rule. In order to take a stand on the appropriateness of this rule when it comes to minimum RPM, the Court had to extend its reasoning beyond *Dr. Miles* and examine the economic effects of this restraint. By *identifying* the potential pro-and anti-competitive effects of minimum RPM and *evaluating* them in light of the severity demand entailed in the per se rule, the Court would be able to reach a conclusion as to whether minimum RPM should continue to be treated as a blatantly anti-competitive restraint.¹²¹

The Court started by stating that the RPM-debate was rich in arguments on both sides and noted, at the same time, that economic literature presented an abundance of pro-RPM arguments which called into question the appropriateness of the per se rule. The Court pointed out that these arguments resembled the arguments put forward in support of other vertical restraints.¹²² For the purposes of understanding the conclusions in *Leegin*, it is important to *briefly* mention some of the pro- and anti-competitive elements referred to by the Court. Yet, elaborations on economic literature addressing the effects of RPM are reserved for the next chapter of this thesis.

On the pro-side the Court explained that minimum RPM could, by decreasing intra-brand competition, enhance inter-brand competition; distributors competing within the same brand were given an incentive to dedicate efforts to pre-sales services and promotion and hereby empower the manufacturer's brand in relation to competing brands. Also, this restraint could increase competition between rival brands since it made it easier for new companies and brands to enter the market. Further, minimum RPM could prevent the emergence of price-cutting distributors, who free ride on the investments and efforts of retailers competing within the same brand. On the other hand though, minimum RPM could also be an indirect path towards horizontal collusion between manufacturers or retailers. It could also be misused by a manufacturer or a distributor with substantial power within a given market.¹²³

Considering the pro-competitive scenarios described above, the Court was reluctant to accept that minimum RPM would hamper competition and limit output in all or most cases. Instead, it contended that the effects of this restraint could vary and were reliant on the context in which minimum RPM was employed. The Court acknowledged the considerable lack of empirical proof on this matter. Yet, it held that the existent proof did not indicate that the pro-competitive use of RPM was rare or merely theoretical. Under these premises, the Court found that the per se rule was no longer a suitable standard for dealing with minimum RPM.¹²⁴

¹²¹ *Ibid*, 551 U.S. 877, 889, 127 S.Ct. 2705, 2714 (2007).

¹²² *Ibid*, 551 U.S. 877, 889-891, 127 S.Ct. 2705, 2714-2716 (2007).

¹²³ *Ibid*, 551 U.S. 877, 890-895, 127 S.Ct. 2705, 2715-2718 (2007).

¹²⁴ *Ibid*, 551 U.S. 877, 894, 127 S.Ct. 2705, 2717 (2007).

PKSK advocated for withholding the per se rule by referring to administrative concerns. The Court disagreed with the respondent. It stated that the per se rule was possibly ‘cheaper’ than the rule of reason from an administrative point-of-view, but that it could still lead to discrepancies at cost for the overall antitrust system if it were to forbid pro-competitive practices. According to the Court, administrative concerns alone could not justify the maintenance of the per se rule due to the rule’s severity threshold. Another point made by PKSK in defense of the per se prohibition of RPM was that this restraint led to an increase in prices. The Court rejected this argument by referring i.a. to the price benefits resulting from intensified inter-brand competition and to the fact that the rule of reason already governed other vertical restraints that could potentially increase price while also being pro-competitive. In support of this rejection the Court also noted that both the manufacturer and the consumer benefitted from reasonable retail profit margins. If these margins were unreasonably high, the manufacturer’s product would be less competitive on the market and thus less profit-generating and the risk of the consumer switching to a rival brand would be greater. Thus, according to the Court, the manufacturer would have no reason to grant overly generous profit margins to his distributors. Instead, the manufacturer would rely on RPM solely if he was convinced that the promotional efforts and pre-sales services, which he encouraged by relying on RPM, would enhance consumer demand despite the increase in prices.¹²⁵

Nevertheless, the Court stressed once against that RPM could also pose threats on competition. It stressed that if a rule of reason analysis were to be introduced, courts would have to be cautious when attempting to get rid of anti-competitive RPM from the market. The Court took the chance to mention some of the aspects which could be important to look at when making this assessment. If the rule of reason were to prevail, the judiciary would have to gradually develop, with time and experience, a functioning litigation mechanism in order to make sure that the market would be spared from unwanted RPM.¹²⁶

Considering all of the above, the Court found that the rule of reason was the more suitable means of dealing with minimum RPM. Yet, this finding was shadowed by one additional concern which the Court had to look into before reaching its final conclusion, namely the issue of *stare decisis*. Although the *Dr. Miles* rule was flawed, the Court indirectly acknowledged that upholding even potentially flawed precedent, as a means of i.a. safeguarding legal certainty, was the general rule and overruling it the exception. Nonetheless, the Court was of the opinion that the *stare decisis* principle did not hinder it from abandoning the per se rule. It based this finding on the premise that the Sherman Act was treated as a common law statute and, as such, it was not static but adaptable to change. The adaptability familiar to common law was already mirrored in the rule of reason but not in the per se rule. Insisting on an immovable per se rule would lead to a peculiar situation

¹²⁵ *Ibid*, 551 U.S. 877, 894-897, 127 S.Ct. 2705, 2718-2720 (2007).

¹²⁶ *Ibid*, 551 U.S. 877, 897-899, 127 S.Ct. 2705, 2719-2721 (2007).

where the term “restraints of trade” would simultaneously be subject to two different interpretive standards; one flexible and adaptable to change (the rule of reason) and the other one not (the per se rule). In sum, the per se rule was not consistent with the common law approach implemented in the overall legal framework governing vertical restraints.¹²⁷

Before reaching its final conclusion the majority mentioned, once again, that an abundance of economic literature supported the view that RPM had pro-competitive potential. The majority also pointed out that the Court itself had already overruled previous precedents whose rationales had been questioned by case-law. The Court added that it had gradually moved away from the strictness in *Dr. Miles* as regards the treatment of vertical restraints. Finally, it stressed that holding on to *Dr. Miles* would not make much economic sense when examined in light of its jurisprudence relating to other vertical restraints. With regard to the above and to some additional considerations, the majority chose to overrule *Dr. Miles* and held that vertical price restraints were to be subject to the rule of reason. The case was remanded for proceedings in line with this rule.¹²⁸

3.4 The Dissenting Opinion

Justice Breyer¹²⁹, in dissenting, posed i.a. the following two questions:

“But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?”¹³⁰

Essentially Justice Breyer concurred with the majority in that minimum RPM could be harmful for competition in some cases and efficiency enhancing in others.¹³¹ In posing the above two questions though, Justice Breyer expressed uncertainty regarding the possible frequency of harm respectively efficiency and insinuated that it would not be an easy task to distinguish efficiency from harm in a concrete case. He pointed out that if the Court had been called to take a stand on this issue afresh, it would not have been easy to decide which of the two rules - the per se rule or the rule of reason - was the most suitable means of dealing with RPM.¹³²

In order to demonstrate the difficulties entailed in such an assessment, Justice Breyer summed up the main arguments surrounding the RPM-discussion. He found that these arguments partly addressed the practice’s possible pro-competitive effects, partly its possible harms and partly

¹²⁷ *Ibid*, 551 U.S. 877, 899-901, 127 S.Ct. 2705, 2720-2722 (2007).

¹²⁸ *Ibid*, 551 U.S. 877, 900-909, 127 S.Ct. 2705, 2721-2726 (2007).

¹²⁹ With whom Stevens, Souter and Ginsburg J.J. joined.

¹³⁰ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay’s Kloset...Kay’s Shoes*, 551 U.S. 877, 914, 127 S.Ct. 2705, 2729 (2007).

¹³¹ *Ibid*, 551 U.S. 877, 915-917, 127 S.Ct. 2705, 2729-2731 (2007).

¹³² *Ibid*, 551 U.S. 877, 910, 127 S.Ct. 2705, 2726 (2007).

administrative concerns and noted that none of the above pointed in the same direction. When addressing RPM's potential harms, Justice Breyer held that previous experience from this practice provided empirical proof in support of the opinion that RPM led to a substantial raise in retail prices. He added that this effect was generally accepted amongst economists. When addressing RPM's potential efficiencies on the other hand, Justice Breyer could not draw any safe conclusions as to the frequency of or the manner in which such efficiencies, e.g. the prevention of free riders, were capable of occurring. From an administrative point-of-view, he held that the courts would have a tough time identifying those cases where the RPM efficiencies were likely of prevailing over potential harms. The complexity of this economic exercise would, according to Justice Breyer, ultimately increase the risk of erroneous and potentially also costly assessments in courts. In essence, Justice Breyer did not share the majority's view as to the possible frequency of harm respectively efficiency. He seemed concerned that the anti-competitive scenarios might be more recurrent than the pro-competitive ones. He admitted that the overall issue was difficult since it was governed by a substantial lack of certainty, especially from an administrative point-of-view.¹³³

On a different note, Justice Breyer stressed that the reliance on economic literature, for the purposes of deciding whether the per se rule or the rule of reason should apply to RPM but also for the purposes of antitrust law in general, should be of informative and not of decisive nature. In Justice Breyer's words:

“Economic discussion, such as the studies the Court relies upon, can help provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of per se unlawfulness to business practices even when those practices sometimes produce benefits.”¹³⁴

In sum, Justice Breyer was reluctant to take a stand on which of the two rules ought to prevail, since this issue was not on the Court's table for the first time. He stressed that the Court's task in this case was not to decide upon the most appropriate rule, as if it were writing on a clean slate. Instead, the Court's task was to determine whether a clear and straightforward standard of assessment (the per se rule) - founded in an almost century old precedent, backed up by subsequent case-law and frequently relied on by legal practitioners - should be altered. According to Justice Breyer this

¹³³ *Ibid*, 551 U.S. 877, 910-918, 127 S.Ct. 2705, 2726- 2732(2007).

¹³⁴ *Ibid*, 551 U.S. 877, 914-916, 127 S.Ct. 2705, 2729 (2007).

distinction, clean slate versus precedent, made substantial legal difference for the overall assessment in this case. Had a decision on the matter nonetheless been compulsory, Justice Breyer acknowledged that he might have consented to a minor alteration of the per se rule in favor of new entry situations, seeing as these were both simple to identify and were of impermanent character.¹³⁵

Justice Breyer was particularly concerned with the majority's approach towards the principle of *stare decisis*. In his opinion, this case did not satisfy the normal criteria for overruling precedent. To overrule a deep-rooted precedent, such as *Dr. Miles*, a substantial change in conditions was demanded. According to Justice Breyer, such a change in conditions was not present in this case. The small number of economic studies advocating for the pro-competitive potential of RPM, could only support the majority's opinion to a limited extent and could thus not be relied upon to support the abandonment the per se rule. In this context, Justice Breyer addressed a number of considerations which according to previous case-law might speak for and against overruling precedent, such as the nature of the case in question or the sort of rights involved. He concluded that none of these factors were in favor of overruling *Dr. Miles* and hereby strongly questioned the way in which the majority argued so as to defend the abandonment of the per se rule. Before dissenting with respect, Justice Breyer attempted to calculate the possible practical effects of the majority's decision. In his view, the only safe guesses were that the abandonment of the per se rule would lead to an increase in retail prices and give rise to legal instability as lower instances would attempt to formulate well-functioning principles under the rule of reason.¹³⁶

3.5 Post-*Leegin* Fever

The *Leegin* case presented courts with a significant challenge; to develop a well-functioning rule of reason which would enable courts to distinguish efficiency enhancing from harmful RPM. Justice Kennedy, who delivered the majority's opinion, drew attention to some specific aspects which might be vital for courts to look at in the context of such an assessment (e.g. market power). To this aim he encouraged courts to set up a litigation mechanism so as to make sure that the rule of reason would eradicate harmful RPM from the market. This mechanism, which would also offer companies further guidance when faced with such issues, could consist of proof-related rules or even of presumptions. The main rationale behind it would be to spare the market from harmful RPM while also encouraging efficiency enhancing RPM, all in a just and efficient manner.¹³⁷

Exactly how this analytical framework was to be structured was nonetheless not an issue elaborated on by Justice Kennedy. For this reason, the *Leegin*

¹³⁵ *Ibid*, 551 U.S. 877, 910, 917-920, 127 S.Ct. 2705, 2726, 2731-2732 (2007).

¹³⁶ *Ibid*, 551 U.S. 877, 918-929, 127 S.Ct. 2705, 2731-2737 (2007).

¹³⁷ *Ibid*, 551 U.S. 877, 897-900, 127 S.Ct. 2705, 2719-2721 (2007).

decision has been followed up by different suggestions regarding the possible structure of this rule in relation to RPM.¹³⁸ The different approaches referred to below seem to concur that the analytical framework governing RPM should entail some type of burden shifting mechanism. What distinguishes them from one another is that they focus on different factual criteria. Certain approaches focus on the source of the RPM agreement, while others focus on the effects on price resulting from this practice. Moreover, in certain approaches the focal point is on the merits of the product subject to RPM and on free-rider concerns, whereas in other approaches focus lies on applying those aspects deemed relevant by the Court in *Leegin*.¹³⁹ For the purposes of this thesis, it is of interest to take a closer look at some of these proposals. Before proceeding, it must be pointed out the proposals mentioned here are not the only ones dealing with this matter.¹⁴⁰ Also, it should be noted that these proposals have not been spared from criticism.¹⁴¹

The focal point in one of these approaches lies in the source of the RPM agreement and the central question asked is thus: *Who is the instigator of the RPM agreement?* In *Leegin*, the Court acknowledged that, if it could be established that an RPM agreement was instigated by retailers, such an agreement would probably pose a greater threat on competition than an RPM agreement initiated by a manufacturer who had not been influenced to this aim by his retailers. In the former scenario, the risk of horizontal collusion amongst retailers would be greater as would the risk of a dominant, non-efficient retailer strengthening his position on the relevant market.¹⁴² Economists William S. Comanor and Frederic M. Scherer advocated for one approach of this sort in an amicus brief to the Court in *Leegin*.¹⁴³ According to this proposal, courts would start off by briefly establishing the source of the agreement. Proof supporting the existence of a retailer-initiated RPM agreement would lead to its disapproval, save if the defendant could challenge this finding by means of convincing proof. If this assessment would show that the source of the RPM agreement is the manufacturer, the restraint would be subject to “a test of quantitative

¹³⁸ See e.g. Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellant and Reversal, *PSKS, Inc. v Leegin Creative Leather Products, Inc.*, (5th Cir. 2009) (No. 09-40506); Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae Supporting Neither Party, *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480).

¹³⁹ The division of these approaches into four categories is supported by T A Lambert in *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, School of Law, University of Missouri, Legal Studies Research Paper Series, No. 2009-32, available at: <http://ssrn.com/abstract=1496304>.

¹⁴⁰ See e.g. T A Lambert, *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, School of Law, University of Missouri, Legal Studies Research Paper Series, No. 2009-32.

¹⁴¹ *Ibid.*, 29ff.

¹⁴² *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Closet...Kay's Shoes*, 551 U.S. 877, 897-899, 127 S.Ct. 2705, 2719-2721 (2007).

¹⁴³ Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae Supporting Neither Party, *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480).

substantiality”¹⁴⁴.¹⁴⁵ In *McDonough, et al. v. Toys R Us*¹⁴⁶, a federal district court case regarding a motion for class certification, W S Comanor delivered an expert opinion on behalf of the plaintiff, an opinion which was subsequently credited by the federal district court. In his testimony he held i.a. that when it comes to RPM the interests of retailers and manufacturers are not aligned. Contrary to manufacturer interests, retailer interests in relation to RPM are only of anti-competitive character. For this reason, retailer-initiated RPM will not generate any pro-competitive effects.¹⁴⁷ The court’s acknowledgement of these aspects could be interpreted as supportive of this source-oriented approach.

Another approach is consumer price-oriented since it focuses on the effects on price resulting from this practice. The primary question in this context is thus: *Does the RPM agreement increase consumer prices compared to the possible price-levels absent the RPM agreement?* A version of this approach was advocated for by the American Antitrust Institute (AAI) in an amicus brief.¹⁴⁸ The AAI acknowledged that the Court in *Leegin* was reluctant to rely on price-increase arguments as a reason for holding on to *Dr. Miles*. Even so, the AAI explained that in the context of the rule of reason the primary burden of proving the existence of competitive benefits (despite the increase in prices) should reasonably lie on the parties employing RPM.¹⁴⁹ According to the AAI, the establishment of a price increase will equal anti-competitiveness, save if the defendant can show that the practice generates benefits in an indispensable manner.¹⁵⁰ The AAI interestingly also pointed out that:

“If courts are going to give substance to the Supreme Court’s directive to be diligent in eliminating anticompetitive uses of RPM from the market, they need to adopt the presumption of illegality approach used for “inherently suspect” restraints, either as a general matter or at least whenever one of the “Leegin factors” is present.”¹⁵¹

A third type of approach is oriented towards the merits of the product subject to RPM. Focus lies on free-rider concerns which arise in relation to products connected with pre-sales services. In Professor Marina Lao’s view the rule of reason analysis could commence by investigating whether competitive efficiencies, which can convincingly be demonstrated, are generated by the RPM agreement. This could be the case if the practice is

¹⁴⁴ *Ibid*, 9.

¹⁴⁵ *Ibid*, 8-9.

¹⁴⁶ 2009 WL 2055168, 638 F.Supp.2d 461, E.D. Pa. July 15 (2009).

¹⁴⁷ *Ibid*, 487.

¹⁴⁸ Brief for the American Antitrust Institute as Amicus Curiae in Support of Appellant and Reversal, *PSKS, Inc. v Leegin Creative Leather Products, Inc.*, (5th Cir. 2009) (No. 09-40506).

¹⁴⁹ *Ibid*, 8.

¹⁵⁰ *Ibid*, 5.

¹⁵¹ *Ibid*, 23.

adopted in order to combat free-riding or in the context of a new entry situation. A finding that such benefits are not at hand should be enough to support the disapproval of the RPM agreement, without the plaintiff having to proceed to extensive and costly economic assessments.¹⁵² Regarding the overall range of the rule of reason for the purposes of dealing with RPM, Professor Marina Lao interestingly argues that:

“Given the real anticompetitive dangers associated with minimum RPM, however, it would be a mistake to apply the full rule of reason, which usually operates as a de facto legality rule in real world antitrust litigation. Instead, the quick-look rule of reason that is often used in horizontal restraint cases can be applied, which would make it easier for courts to identify and prohibit the anticompetitive uses of minimum RPM. This standard would also be consistent with Leegin’s vision of the rule of reason as a legal standard that will actually separate the “bad” RPM from the “good”.”¹⁵³

Finally, one approach advocates for the application of those elements, which the Court in *Leegin* deemed relevant in the context of such an assessment. In *Leegin*, attention was namely drawn to situations where RPM is employed by manufacturers, who jointly form a substantial part of the relevant market. Attention was also drawn to cases where the RPM agreement is instigated by retailers or where the manufacturer or the retailer has substantial market power.¹⁵⁴ In an Order¹⁵⁵ from 2008 the Federal Trade Commission (FTC) pointed out that relying on these elements would help courts, at an initial stage post-*Leegin*, to identify those RPM instances which ought to be subject to closer examination.¹⁵⁶ In the FTC’s view, RPM agreements should be subject to a presumption of illegality save if the defendant can demonstrate the absence of market power or the absence of retailer-incentive. To rebut the presumption of illegality the defendant would have to show that the practice is beneficial for competition in some manner.¹⁵⁷ In this case the undertaking involved (Nine West) could not factually demonstrate that its RPM practice would generate consumer benefits. Even so, the FTC granted the order partially since it could not establish that the practice was, at that point in time, potentially capable of generating consumer harm. This was mainly due to the fact that the Nine West did not hold extensive power on the relevant market. Interestingly though, the FTC only granted the order provisionally. It underlined that future uses of RPM

¹⁵² M Lao, *Free-Riding: An Overstate, and Unconvincing, Explanation for Resale Price Maintenance*, in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S Antitrust* (R Pitofsky, ed.) 215-6 (2008).

¹⁵³ *Ibid*, 216.

¹⁵⁴ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay’s Kloset...Kay’s Shoes*, 551 U.S. 877, 897-899, 127 S.Ct. 2705, 2719-2721 (2007).

¹⁵⁵ Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, In matter Nine West Group, Inc., No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008), available at: <http://www.ftc.gov/os/caselist/9810386/080506order.pdf> .

¹⁵⁶ *Ibid*, 14.

¹⁵⁷ *Ibid*, 14-16.

were not guaranteed legality since conditions could change and obliged Nine West to hereinafter provide it with reports on the effects of the undertaking's use of RPM.¹⁵⁸

As is indirectly apparent from the above, the *Leegin*-challenge – to create a well-functioning analytical framework for RPM – raised one additional concern: *Should the courts adopt an elaborated or a truncated rule of reason analysis?*¹⁵⁹ This concern was clearly addressed e.g. by the FTC in its Nine West Order. As mentioned earlier the Court in *Leegin* did not elaborate on which version of the rule of reason was best suited for RPM. In the FTC's view there were three possible options to choose from; an elaborated, 'full-scale' rule of reason analysis (like the one proposed in e.g. the *Board of Trade of Chicago*¹⁶⁰ case), a truncated, 'quick-glance' rule of reason analysis (like the one proposed in e.g. the *Polygram Holding*¹⁶¹ case) or some other variation of the 'quick-glance', effects-oriented rule of reason analysis.¹⁶²

In *Polygram Holding*, the DC Circuit embraced a truncated rule of reason analysis. To support this it argued that the Supreme Court had gradually distanced itself from the previous 'black or white' approach under which competitive restraints could only, *either* be subject to a strict per se rule *or* to a 'full-scale' rule of reason. The Supreme Court instead leaned towards a more nuanced approach under which the scope of the assessment was "tailored to the suspect conduct in each particular case."¹⁶³ The core finding in *Polygram Holding* was that conduct which is "inherently suspect"¹⁶⁴ will be expected to generate anti-competitive effects unless it can be justified by the defendant. To justify such a practice the defendant would have to show that the conduct poses little risk of consumer-harm or that it encompasses some pro-competitive element which, with a substantial degree of probability, counterbalances the obvious or expected competitive harm.¹⁶⁵ According to the DC Circuit, what makes a practice "inherently suspect" and thus subject to a rebuttable presumption of illegality is not necessarily some intrinsic element encompassed in the practice itself. Instead, it is the fact that the conduct in question strongly resembles some other type of conduct which has previously been condemned.¹⁶⁶ In its Nine West Order the FTC held that the reasoning of the Court in *Leegin*, which encouraged courts to craft proof-related rules or even presumptions for the purposes of dealing with RPM, could be interpreted as a reasoning advocating for a

¹⁵⁸ *Ibid*, 17-18.

¹⁵⁹ See *infra* fn 149, 151.

¹⁶⁰ *Board of Trade of Chicago et al. v United States*, 246 U.S. 231, 38 S.Ct. 242 (1918).

¹⁶¹ *Polygram Holding, Inc. v Federal Trade Commission*, 416 F. 3d 29 (DC Cir 2005).

¹⁶² Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, In matter Nine West Group, Inc., No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008), 11-12.

¹⁶³ *Polygram Holding, Inc. v Federal Trade Commission*, 416 F. 3d 29, 34 (DC Cir 2005).

¹⁶⁴ *Ibid*, 416 F. 3d 29, 35 (DC Cir 2005).

¹⁶⁵ *Ibid*, 416 F. 3d 29, 35-36 (DC Cir 2005).

¹⁶⁶ *Ibid*, 416 F. 3d 29, 36-37 (DC Cir 2005).

truncated, *Polygram Holding*-style RPM analysis.¹⁶⁷ Yet according to the FTC:

“The question is whether, post-*Leegin*, RPM can be considered in some circumstances as “inherently suspect,” and thus a worthy object for the scrutiny under the presumptions and phased inquiries that the D.C. Circuit approved in *Polygram Holdings* for certain horizontal restraints.”¹⁶⁸

In addressing this issue the FTC held that the Supreme Court might *generally*, yet *not always*, perceive horizontal price-fixing collaboration as inherently more harmful for competition than vertical such. In the FTC’s view, the factors labeled by the Court in *Leegin* as possibly relevant in an RPM-inquiry offered an approach for distinguishing the instances of RPM which ought to be subject of closer examination via some form of truncated analysis.¹⁶⁹

The ‘question’ posed by the FTC (and referred to above) is a valid one. It indicates that the choice between a truncated and plenary rule of reason analysis is far from straightforward. Essentially, the choice of a truncated over a plenary rule of reason, complete with presumptions of illegality and burden shifting mechanisms, rests on the preconception that the risk of competitive harm is greater than the chance of competitive efficiency. *How otherwise could one characterize RPM as e.g. an “inherently suspect” practice?* The approach endorsed by M Lao above indicates precisely this; that a truncated rule of reason analysis would *primarily* have to rest on an anti-competitive premise. Admittedly, M Lao advocates for a truncated rule of reason analysis by referring to RPM’s “real anticompetitive dangers”¹⁷⁰. *But is this premise entirely credible?* On a different note, it has been held that the elaborated, ‘full scale’ version of the rule of reason generally functions as a rule of de facto legality and thus acts in favor of the defendant in most cases.¹⁷¹ Would it be more appropriate to apply *such* a version of the rule of reason to RPM? *Or would such an analytical framework in*

¹⁶⁷ Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, In matter Nine West Group, Inc., No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008), 11-12. On the other hand, it has been held that the case-law from lower courts post-*Leegin* point towards a ‘full-scale’ rather than a truncated rule of reason analysis. It has also been held, contrary to the view of the FTC addressed above, that the majority opinion in the *Leegin* decision gives little support for a truncated approach, *see e.g.* A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 497.

¹⁶⁸ Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, In matter Nine West Group, Inc., No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008), 13.

¹⁶⁹ *Ibid.*, 14.

¹⁷⁰ M Lao, *Free-Riding: An Overstate, and Unconvincing, Explanation for Resale Price Maintenance*, in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S Antitrust* (R Pitofsky, ed.) 216 (2008).

¹⁷¹ J B Kirkwood, *Rethinking Antitrust Policy Toward RPM*, Seattle University School of Law Legal Studies Paper 10:05, 2 (2010), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559377.

practice bring with it the de facto 'legalization' of harmful instances of RPM?

Beyond this, the choice between a truncated or a plenary analysis gives rise to additional concerns. It could namely give rise to concerns relating to e.g. cost or complexity of assessment in litigation procedures or even concerns relating to legal certainty. In 2009, the FTC held a number of public workshops with the aim of investigating *how* to best distinguish the instances of RPM which generate consumer benefit respectively consumer harm. According to the FTC, the focal point of these workshops would be “(...) on legal doctrines and jurisprudence related to RPM, theoretical and empirical economic research, and business and consumer experiences.”¹⁷² This project instigated by the FTC is understandable since gathering credible information from a number of sources active in this field, could be one of the most effective means of triggering a more thorough and multifaceted RPM debate, oriented not only towards theory but also towards empirics.

Before proceeding to the debate amongst economists regarding the possible competitive impact of RPM, it is important to underline that the *Leegin* decision has been subject to a substantial degree of skepticism on state level.¹⁷³ As an example, the State of Maryland amended its Antitrust Act to stipulate (as of October 1 2009) that minimum RPM constitutes an unreasonable restraint on trade. Hereby, the state chose to *codify* a rule of per se illegality for this practice and to actively reject the *Leegin* decision at its very core.¹⁷⁴ Furthermore, on July 13 2009 a bill was introduced in the US Congress proposing the reinstatement and, for the second time since 2007, the codification of the per se prohibition in relation to this restraint.¹⁷⁵ The overall proposal was endorsed by as many as thirty-five state attorneys general by a letter to Congress on May 14 2008.¹⁷⁶

¹⁷² See <http://www.ftc.gov/opp/workshops/rpm/>.

¹⁷³ See e.g. A Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World* (2009), available at <http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf>.

¹⁷⁴ Maryland Commercial Code § 11-204, available on:

<http://www.michie.com/maryland/lpext.dll?f=templates&fn=main-h.htm&2.0>. See also New York State General Business Law § 369-a.

¹⁷⁵ Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007) and Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (2009).

¹⁷⁶ A Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World* (2009), 2.

4 RPM'S POTENTIAL HARMS AND EFFICIENCIES: THE DEBATE AMONGS ECONOMISTS

4.1 Introduction

In a publication of the Swedish Competition Authority (2008), one of the contributors Joanna Goyder attempted i.a. to demarcate the dividing line between competition law and competition economics in terms of their respective function in the overall field of competition. She held that:

“The function of competition law is first and foremost to inform those subject to it what they may and may not do. For this reason it is imperative that its rules be as clear and easy to apply as is reasonably possible (...) Unless the law provides a sufficiently clear framework for companies to conduct their business it does not serve its function, and risks unfair treatment as between different companies (...) Competition economics on the other hand serves essentially to explain the working of markets, whether to assess what has happened in the past or to predict what may happen in the future. It is untroubled by large numbers of variables or unknown facts, as these can be dealt with by postulating certain assumptions.”¹⁷⁷

In the US antitrust law arena, A I Gavil, W E Kovacic and J B Baker have held that the antitrust legislation essentially constitutes a result of the economic (and political) thinking of its era.¹⁷⁸ Be that as it may, the dissenting opinion in *Leegin* has clarified that the reliance on economics in the context of antitrust law should be of informative and not of determinative nature.¹⁷⁹

The purpose of this thesis is not to elaborate on the relationship between law and economics in the field of competition. Nonetheless it is clear from the above that competition economics is, to say the least, relevant in the context of a competition law discussion such as the one carried out in the present thesis. For this reason it is important to take a detour at present and look at a

¹⁷⁷ J Goyder *Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review On Vertical Restraints*, in *The Pros and Cons of Vertical Restraints*, Swedish Competition Authority, 169f (2008).

¹⁷⁸ A I Gavil, W E Kovacic and J B Baker *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, 4, Minnesota, Thompson West (2002).

¹⁷⁹ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 914-916, 127 S.Ct. 2705, 2729 (2007).

fragment of the economic debate addressing the issue of RPM. Focus lies in highlighting *some* of the main potential effects of this practice, both pro- and anti-competitive, as these have been elaborated on by economist or relied on in legal reasoning both in Europe and in the US. The effects presented below have been selectively chosen with consideration to the purpose and delimitations of this thesis. The aim of this exercise is mainly to communicate a more in-depth, yet not a full-scale, understanding of the topic at hand and to build a sturdier foundation for further argumentation on the overall issue of RPM (e.g. take a stand on whether the European approach towards RPM is warranted). There is a plethora of publications in this field and restricted space in the present thesis. For this reason the economic debate is narrowed down to a small number of publications where these potential effects are addressed.

Kenneth G Elzinga and David E Mills touch upon the economics of RPM and explain that:

“When a manufacturer endeavors to establish a minimum retail price, or discourage “discounting” by retailers, two questions come to mind: First, why would the manufacturer seek to raise the retail price for its product? Second, if the manufacturer succeeds in maintaining a higher retail price, what are the consequences for consumer welfare?”¹⁸⁰

In the statement above reference is made to higher retail prices and, from what is said, it appears that this increase in retail prices is causally linked to the adoption of RPM. For the sake of clarity it is important to note here that the aim of RPM *is* essentially to increase retail prices. As J B Kirkwood has explained, each and every hypothesis seeking to justify the use of this restraint relies upon its capability to increase retail prices. In this context, empirical proof has been held to suggest that the increase in retail prices stemming from RPM is far from merely hypothetical.¹⁸¹

According to Barak Orbach, the essence of the RPM debate amongst economists boils down to one of the issues pinpointed by K G Elzinga and D E Mills above, namely: *On the basis of what rationale would a manufacturer wish to defend the markup of distributors given the risk of own loss?*¹⁸² K G Elzinga and D E Mills note that there are a great number of theories addressing this issue, some of which foresee detrimental and some of which beneficial effects on consumer welfare.¹⁸³ According to

¹⁸⁰ K G Elzinga and D E Mills *Leegin and Procompetitive Resale Price Maintenance*, Issues in competition Law and Policy (3-Vol Set), ABA Section of Antitrust Law, 7f (2008).

¹⁸¹ J B Kirkwood *Rethinking Antitrust Policy Toward RPM*, Seattle University School of Law Legal Studies Paper 10:05, 9 (2010).

¹⁸² B Orbach *Antitrust Vertical Myopia: The Allure of High Prices*, Arizona Law Review (Vol 50), 267, (2008).

¹⁸³ K G Elzinga and D E Mills *Leegin and Procompetitive Resale Price Maintenance*, Issues in competition Law and Policy (3-Vol Set), ABA Section of Antitrust Law, 2 (2008).

these authors “(...) an assessment of how a particular manufacturer’s policy affects consumer welfare requires discerning which of these several theories explains the manufacturer’s policy.”¹⁸⁴ As an example, B Orbach identifies *four* ‘classic’ lines of reasoning, which address the possible rationale of the manufacturer in this context. In his view, rationale has been sought in “conspiracy, free-riding, demand-uncertainty, and contract-enforcement mechanisms”¹⁸⁵, theories which nonetheless may overlap in practice.¹⁸⁶

Before proceeding any further it is interesting to first bring up some points made in certain publications, which help shed some light on the *nature* of the *overall* economic debate surrounding this topic. Femi Alese argues as an example that the strict legal approach towards price-related restraints in vertical agreements can, to a certain degree, be traced back to a lack of consensus amongst economists regarding the effects of such restraints (in contrast to the overall positive approach towards vertical restraints which do not relate to price).¹⁸⁷ Moreover, Nikolaos Verras notes that the publications addressing the possible competitive consequences of RPM, albeit plenty on both the pro-and the anti-competitive side, nonetheless lack in consistency.¹⁸⁸ Also, M Motta et al. point out that:

“It is difficult to say a priori whether one should expect pro-competitive effects to outweigh anticompetitive effects. Furthermore, in the economic literature the empirical evidence on the effects of RPM is scarce, and it gives rather mixed conclusions.”¹⁸⁹

The above statements do not give any *definite* answers on the nature of this debate. Yet, they do provide some *hints* in this respect; namely that:

- the economic debate regarding the potential effects of RPM is (and has been) lively,

¹⁸⁴ *Ibid.*, 2f.

¹⁸⁵ B Orbach *Antitrust Vertical Myopia: The Allure of High Prices*, Arizona Law Review (Vol 50), 268, (2008).

¹⁸⁶ *Ibid.*

¹⁸⁷ F Alese *Unmasking the Masquerade of Vertical Price Fixing*, European Competition Law Review, 515 (Vol 28) (2007).

¹⁸⁸ N Verras *Resale Price Maintenance in E.U. Competition Law: Thoughts in Relation to the Vertical Restraints Review Procedure*, The Columbia Journal Of Law Online, 38 (Vol 16) (2009), available at: http://www.cjel.net/online/16_1-verras/.

¹⁸⁹ European Advisory Group on Competition Policy, M Motta et al. *Hardcore Restrictions under the Block Exemption Regulation on vertical agreements: An economic view*, The European Commission’s Public Consultation on Review of the competition rules applicable to vertical restraints, 3 (2009), available at:

http://ec.europa.eu/competition/consultations/2009_vertical_agreements/europeanadvisorygroupcompetitionpolicy_en.pdf; For some empirical studies in the field of RPM see i.a.: T Overstreet *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Washington, D.C.: Federal Trade Commission (1983); P M Ippolito *Resale Price Maintenance: Empirical Evidence From Litigation*, Journal of Law and Economics, (Vol 34, No 2) 263-294(1991).

- there is (and has been) a considerable lack of consensus amongst those engaged in the debate,
- the conclusions drawn by economists regarding RPM’s potential impact on competition have somewhat lacked in uniformity,
- the debate is mainly centered around economic hypotheses or theories, seeing as empirical proof is limited.

With the above in mind and due to the vast amount of publications addressing these issues, the discussion in the subchapters below has to be structured. The methodology chosen is to separate RPM’s potential harms from its potential efficiencies. These potential effects have been spoken of by economists and even by lawyers, who have referred to or discussed RPM-specific economic reasoning in their publications. After presenting an outline of this reasoning, reference is made to certain findings in relevant empirical studies. The issue of empirics is then followed up by some general reflections on the overall debate. The reasons for adopting this methodology are purely pedagogical. It must be underlined that the economic debate below is brought up in very general terms. What is presented is merely an *outline* of the discussion, by reliance on a small number of publications. Thus, the argumentation is by no means exhaustive or as detailed or multifaceted as that found in the relevant economic literature. The author of this thesis concurs to a certain degree with J Goyder in that setting out the arguments on the possible pro-and anti-competitive effects of RPM, is a task better suited for and better handled by an economist rather than by a lawyer, or a lawyer to be in this case.¹⁹⁰

4.2 Potential Harms

In essence, RPM leads to rigidity in retail prices since it hinders distributors from decreasing the price charged for the manufacturer’s product. It has been held that, upon the adoption of RPM by a manufacturer, intra-brand competition on merits of price between RPM-subjected distributors is essentially eliminated. In turn, inter-brand price competition is affected since products subject to price control lack the capacity to compete, on merits of price, with products of rival brands.¹⁹¹ John B Kirkwood declares:

“In short, unlike vertical nonprice restraints, RPM directly interferes with both intrabrand and interbrand price competition, making it the most dangerous vertical intrabrand restraint.”¹⁹²

¹⁹⁰ J Goyder *Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review On Vertical Restraints*, in *The Pros and Cons of Vertical Restraints*, Swedish Competition Authority, 168 (2008).

¹⁹¹ J B Kirkwood *Rethinking Antitrust Policy Toward RPM*, Seattle University School of Law Legal Studies Paper 10:05, 7 (2010), available at: <http://ssrn.com/abstract=1559377>.

¹⁹² *Ibid*, 7.

RPM's influence on retail prices also poses a risk of subsequent increase in consumer prices, which in turn can raise consumer-welfare concerns in certain instances.¹⁹³

A main concern, often raised in the context of RPM, is that this practice might facilitate cartelization, among manufacturers or retailers. The hypothesis that RPM might facilitate down-stream cartelization (amongst retailers) refers to the situation where RPM, albeit 'imposed' by a manufacturer, in reality constitutes a cover-up for retailer collusion on retail prices. According to this hypothesis, the only ones who benefit from the adoption of RPM in such a case are the retailers, i.e. not the manufacturer or the consumers.¹⁹⁴ The scenario is that rival retailers, who wish to engage in the fixing of retail prices, manage to persuade/compel the manufacturer to employ RPM and act in favor of the collusion by monitoring it and putting off price-cutting retailers who diverge from the horizontal price-collaboration.¹⁹⁵ It has been held that this sort of 'retailer-instigated' RPM is particularly dangerous from a consumer welfare point-of-view.¹⁹⁶

Frederik Van Doorn points out that there are some central restrictions in the theory of retailer collusion. For example he is not convinced that a manufacturer will *free-willingly* choose to employ RPM and hereby facilitate collusion amongst his retailers. He clarifies that the reduction of output, per definition entailed in this practice, generally does not act in favor of this manufacturer. Further, this scenario is improbable when the manufacturer is active in a market with considerable inter-brand competition. A manufacturer who consents to retailer collusion in such a market is left at a competitive disadvantage in relation to his rivals and thus runs the risk of being out-marketed. On the other hand, the existence of retailer power might induce the manufacturer to consent to retailer collusion. On grounds of the above and of additional considerations, this theory is thus found to be rather limited in scope; mainly confined to cases of considerable retailer power, cases where inter-brand competition is scant and finally cases where there are substantial hindrances of entry in the relevant market.¹⁹⁷

The hypothesis of upstream cartelization (amongst manufacturers), takes off from the premise that RPM increases price transparency. This element makes it easier for rival manufacturers to uphold collusive behavior, since it assists them in identifying price-cutting manufacturers who diverge from price collaboration. It has been held that this assumption generally rests on

¹⁹³ *Ibid*, 8.

¹⁹⁴ B Orbach *Antitrust Vertical Myopia: The Allure of High Prices*, Arizona Law Review (Vol 50), 268, (2008).

¹⁹⁵ K G Elzinga and D E Mills *Leegin and Procompetitive Resale Price Maintenance*, Issues in competition Law and Policy (3-Vol Set), ABA Section of Antitrust Law, 7f (2008).

¹⁹⁶ L Peepkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal (Vol 4, No 1), 206 (2008).

¹⁹⁷ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 10 (2009), available at: <http://ssrn.com/abstract=1501070>.

the precondition that a concentrated market is at hand, that a fair share of manufacturers on this market relies on RPM, that there are substantial hindrances of entry in this market and that there is some degree of homogeneity between the brands involved.¹⁹⁸ According to Bruno Jullien and Patrick Rey:

“In the absence of RPM, retail prices react to retailers’ information, and deviations from collusive behavior are thus difficult to detect. By eliminating retail price flexibility, RPM facilitates the detection of deviations but reduces profits and thus increases the short-run gains from a deviation. Overall, RPM can facilitate collusion and reduce total welfare when firms adopt it.”¹⁹⁹

This means that without RPM it can in some cases be hard for a manufacturer to identify the source of the decrease in retail prices; whether it is a distributor deciding to decrease his margin of profit, or whether it is a competing manufacturer who diverges from the collusion. By employing RPM in such a case, this difficulty is overcome. The retail price is set by the manufacturer and thus a decrease in retail price can be traced back to him and constitute proof of divergence from collusion. In addition, RPM helps stabilize the collusion since under this practice the manufacturers will be less keen to diverge from it; price-cuts by a manufacturer cannot directly be forwarded on to consumers and the risk of being discovered and subsequently ‘punished’ for diverging by means of e.g. a price war is greater. Under such circumstances the manufacturers will prefer to stay true to the cartel.²⁰⁰ According to B Jullien and P Rey, RPM can constitute an effective monitoring mechanism which can sustain and stabilize the collusive behavior “(...) when imperfect observability of rivals’ prices is the primary obstacle to the detection of deviations”.²⁰¹ This statement indicates that the theory of manufacturer collusion is subject to certain limitations, an issue which has also been addressed by F Van Doorn. He points out that the feasibility that this theory will hold relies upon the presence of a number of features in the relevant market.²⁰²

¹⁹⁸ L Peepkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal (Vol 4, No 1), 206 (2008) and J B Kirkwood *Rethinking Antitrust Policy Toward RPM*, Seattle University School of Law Legal Studies Paper 10:05, 11 (2010).

¹⁹⁹ B Jullien and P Rey *Resale Price Maintenance and Collusion*, Rand Journal of Economics, 983 (Vol 38, No 4) (2007).

²⁰⁰ See European Advisory Group on Competition Policy, M Motta et.al. *Hardcore Restrictions under the Block Exemption Regulation on vertical agreements: An economic view*, The European Commission’s Public Consultation on Review of the competition rules applicable to vertical restraints (2009); J B Kirkwood *Rethinking Antitrust Policy Toward RPM*, Seattle University School of Law Legal Studies Paper 10:05, 10 (2010).

²⁰¹ B Jullien and P Rey *Resale Price Maintenance and Collusion*, Rand Journal of Economics, 997 (Vol 38, No 4) (2007).

²⁰² F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 9 (2009).

Another hypothesis supporting the potential anti-competitiveness of RPM is that distributors with power might be able to `force` a manufacturer to employ RPM with the rationale to hinder innovation on retailer level or even just to safeguard own revenue, hereby posing a potential threat on downstream competition.²⁰³ With regard to innovation in particular, it has also been held that the hindrance of intra-brand price competition amongst retailers by means of RPM might avert new distributors with low prices from entering the market. This might even occur in relation to other retail arrangements which rely on low prices e.g. discount stores.²⁰⁴ As a result, such a scenario “may reduce dynamism and innovation at the distribution level”²⁰⁵ and may thus pose a threat on competition.

Further, it has been argued that RPM might be anti-competitive when employed by a manufacturer with the aim of barring his rivals from the market. The underlying principle here is that, due to the RPM agreement, the distributors will be `awarded` protection of their markup in exchange for loyalty towards the manufacturer who employs this restraint. Since the distributors will benefit from RPM in this sense, they might be less keen to turn to rival manufacturers for products and thus upstream competition might suffer.²⁰⁶

Another concern is that RPM might be used to solve what has been referred to as the “commitment problem”²⁰⁷ in the context of a monopoly. In a manufacturer-monopoly, if the manufacturer can receive some benefit in return he will generally be enticed to decrease the wholesale price charged to a distributor, hereby letting the latter strengthen his market power to the disadvantage of competing distributors. The problem occurs because all distributors expect the manufacturer to act in this expedient manner to their disadvantage and are thus reluctant, from the very beginning, to accept a high price when purchasing the products from the manufacturer through wholesale. As a result, this problem hinders the manufacturer from benefitting from the profits connected to his monopolistic position on the market. By employing RPM, this problem can be overcome and hereby pose a potential threat on competition. Under RPM, the manufacturer and the distributor are not as keen to agree upon a decrease of the wholesale price. Even if the wholesale price is lower, this will not lead to a decrease of the retail price seeing as the latter is either fixed or subject to a price floor. Thus the expedient behavior of the manufacturer is no longer warranted. Supposing that the RPM agreement is known to or covers all distributors,

²⁰³ B Orbach *Antitrust Vertical Myopia: The Allure of High Prices*, Arizona Law Review (Vol 50), 270, (2008).

²⁰⁴ L Peeperkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal (Vol 4 No 1), 208 (2008).

²⁰⁵ *Ibid.*

²⁰⁶ Howard P. Marvel & Stephen McCafferty *The Welfare Effects of Resale Price Maintenance*, Journal of Law and Economics, 366ff (Vol 28, No 2) (1985).

²⁰⁷ European Advisory Group on Competition Policy, M Motta et.al. *Hardcore Restrictions under the Block Exemption Regulation on vertical agreements: An economic view*, The European Commission’s Public Consultation on Review of the competition rules applicable to vertical restraints, 2 (2009).

the monopolist will be able to reinstate the benefits of his monopolistic position on the market to the potential detriment of competition.²⁰⁸ It has been pointed out that this hypothesis relates to markets in which downstream intra-brand competition is scant.²⁰⁹ When it comes to the appropriateness of this price restraint as a means of overcoming the commitment problem, there have been certain question marks. As an example, M Motta et al. have pointed out that this problem might be solved in a more efficient manner by relying on alternative vertical restraints, such as maximum RPM.²¹⁰

In light of the above, RPM's *potential* harms can be summarized as follows.

- Rigidity/increase of retail prices
- Decrease of intra-brand price competition.
- Increase of consumer prices.
- Facilitation of downstream collusion (amongst retailers).
- Facilitation of upstream collusion (amongst manufacturers).
- Decrease of vitality and innovation on retailer level.
- Solidification or enhancement of a powerful, dominant or monopolistic position on the relevant market.

4.3 Potential efficiencies

F Alesse explains that historically the general economic rationale supporting the anti-competitiveness of RPM was that this conduct constituted an indirect path towards collusion; a rationale which nonetheless raised question marks amongst economists early on. The latter sought to approach RPM by moving away from the collusion rationale, upon which this alleged anti-competitiveness was based. In other words the question became: *for what alternative reasons, besides a masked collusion, would a manufacturer wish to impose RPM upon his retailers?*²¹¹ In a publication from 1984, Howard P Marvel and Stephen McCafferty stated that:

“Economists have long expressed hostility toward RPM and have concurred with the position of the courts that RPM was identical in effect to horizontal price-fixing, hence

²⁰⁸ European Advisory Group on Competition Policy, M Motta et al. *Hardcore Restrictions under the Block Exemption Regulation on vertical agreements: An economic view*, in the European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 2 (2009); *See also* L Peepkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal, Vol 4 No 1, 207f (2008).

²⁰⁹ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 8 (2009).

²¹⁰ European Advisory Group on Competition Policy, M Motta et al. *Hardcore Restrictions under the Block Exemption Regulation on vertical agreements: An economic view*, in the European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 2 (2009).

²¹¹ F Alesse *Unmasking the Masquerade of Vertical Price Fixing*, European Competition Law Review, 515 (Vol 28) (2007).

anticompetitive. As popular as this price-fixing analogy is, it falls far short of explaining the characteristics of RPM use.”²¹²

In an attempt to show that this collusion hypothesis was deficient these authors referred, as an example, to the frequent reliance on RPM in the context of new entry situations in competitive markets; a scenario which could not be explained under this collusion hypothesis. Also, they underlined that this hypothesis could not shed light on “(...) why manufacturers would tolerate high retail margins that were apparently inimical to their own interests.”²¹³

In the context of this distancing from the collusion rationale, it interesting to refer to Lester G. Telser’s approach on the matter. His hypothesis rested on the premise that the sale of certain goods, due to their nature or characteristics, might not only be reliant on the actual retail price but also on the services offered together with these goods (*ancillary services*). A manufacturer producing such a product will want to make sure that his distributors *actually do* provide these ancillary services when selling his products. This implies that the manufacturer will somehow have to be able to control the activities of his distributors seeing as, in reality, some distributors will choose not to provide such services to the economic and competitive disadvantage of distributors who actually choose to do so (the *free-rider problem*). According to L G Telser, this is achievable by imposing RPM upon distributors with the main goal being to exclude free-riders from the distribution group. Under RPM, the efforts of service-providing distributors will be economically safeguarded since the manufacturer will be able to put off free-riding distributors. Also, the manufacturer will be able to encourage his distributors to provide the best possible services when selling his products since he will provide them with margins to finance these efforts.²¹⁴ Even though the freedom of distributors to set their own prices will be restricted under this hypothesis, intensification of competition is still expected in the long run on grounds of non-price services, a scenario which will ultimately generate competitive efficiencies.²¹⁵ This theory has been interpreted as rather restricted in scope since it provides an explanation for the reliance on RPM solely in cases where such pre-sales services are of relevance e.g. when it comes to complicated goods.²¹⁶ William S Comanor has also held that:

“Telser’s analysis explains why manufacturers would wish to impose vertical restraints. What it does not do, or claim to do, is answer the question whether dealers’ provision of additional

²¹² H P Marvel and S McCafferty *Resale Price Maintenance and Quality Certification*, The Rand Journal of Economics, 347, (Vol 15, No 3) (1984).

²¹³ *Ibid.*

²¹⁴ L G Telser *Why Should Manufacturers Want Fair Trade?*, Journal of Law and Economics, (Vol 3) 89ff (1960).

²¹⁵ F Alesse *Unmasking the Masquerade of Vertical Price Fixing*, European Competition Law Review, (Vol 28), 516 (2007).

²¹⁶ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 16 (2009).

services is efficient – that is, whether the additional services justify the higher price charged for the product.”²¹⁷

Interestingly it has been pointed out that the general hypothesis that RPM generates welfare gain when it is adopted to stimulate non-price efforts by distributors is problematic in one additional respect. This general hypothesis is namely based on the idea that consumers receive equal gain from the extra effort put in by the distributor, an idea which has been questioned in the following manner. When it comes to such services it cannot be ruled out that in certain cases the interests of the consumers and the interests of the manufacturer will not be aligned. The two might e.g. not concur on the ideal quantity of non-price efforts required in relation to a certain product. Products are not evaluated by all consumers in the same manner and likewise all consumers do not share the same need for extra non-price efforts to be carried out by distributors.²¹⁸

H P Marvel and S McCafferty found that L G Telser’s free-rider hypothesis could probably explain the employment of this restraint in cases where such pre-sales services could be expected to function in a demand-enhancing manner in relation to the supplier’s goods and in cases where these efforts would not have been implemented by the distributors, had the manufacturer not safeguarded their margins by way of higher retail prices. Yet, they pointed out i.a. that the service which L G Telser used to exemplify the type of efforts covered by his hypothesis - namely the service of product demonstration by distributors – had regrettably led to economic discussions, the focal point of which lie in determining whether “tangible services”²¹⁹ were connected to the employment of this restraint. If not, the conduct was considered harmful for competition.²²⁰ This puzzled the authors since in reality RPM had frequently been relied on in markets where it was not entirely easy to point out the services offered by distributors. In light of this fact and in their own words: “one is led to question whether efficiency explanations for RPM apply only to a small subset of the uses of the practice.”²²¹ In other words, these authors saw certain limitations in L G Telser’s free-rider hypothesis.

H P Marvel and S McCafferty advocated for an alternative hypothesis in support of the reliance on RPM, founded upon what they referred to as “quality and style certification”²²². Under their hypothesis, the services referred to above would be irrelevant. Therefore, the scope of RPM

²¹⁷ W S Comanor *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, Harvard Law Review, (Vol 98, No 5), 988 (1985).

²¹⁸ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 16f (2009); See also W S Comanor *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, Harvard Law Review, (Vol 98, No 5), 990f (1985).

²¹⁹ H P Marvel and S McCafferty *Resale Price Maintenance and Quality Certification*, The Rand Journal of Economics, (Vol 15, No 3), 348 (1984).

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*, 349.

instances, which could be perceived as efforts to increase effectiveness on retailer level, would be wider. In their view, the manufacturer just wants to make sure that his goods are handled by distributors, whose *choice* to distribute the former's goods, gives consumers information of value regarding the features of these goods.²²³ This hypothesis was relied on by the majority in the *Leegin* decision, where the general scenario was explained. A customer might choose to purchase a certain product because he has spotted it in e.g. a store (distributor), which is known to deal with goods of high quality. If the customer can subsequently turn to another distributor to purchase the item - a distributor who can offer a lower price because he has not invested in building up a quality status for his goods as the first distributor has - the following might occur. The first distributor will suffer a loss in sales to the advantage of the price-cutting distributor and for this reason the former will have to decrease his efforts in this respect to a degree which the customers might not be satisfied with.²²⁴ H P Marvel's and S McCafferty's general conclusion was that RPM might help overcome this problem and could thus be efficiency enhancing.²²⁵

This hypothesis has not been spared from criticism. For example, Benjamin Klein has held that "quality certification"²²⁶ lacks relevance in the majority of cases where RPM is employed since in most RPM instances the goods "already have well-established brand names"²²⁷. In his view this free-rider hypothesis is irrelevant when it comes to the majority of RPM cases. F Van Doorn has acknowledged that H P Marvel's and S McCafferty's theory is somewhat broader in scope than L G Telser's. Yet, he has also identified certain limitations in the former theory. This theory will mainly be capable of motivating the reliance on RPM in relation to relatively simple products (e.g. clothes), yet whose quality cannot totally be established by consumers prior to their purchase. It is namely in these types of cases that the distributors' promotional efforts will constitute a key moment in enhancing consumer demand.²²⁸

Further, it has been argued that RPM might be warranted in cases where the fear of free-riding might discourage rival retailers from promoting the manufacturer's goods. This promotion-enhancing rationale has nonetheless been questioned. According to L Peeperkorn it cannot be taken for granted that the increase in retail prices, which is meant to offer the retailers spending margins so they can be able to cover the expenses of promotional efforts for the manufacturer's product, will actually be used by the retailers for this aim. He explains that these margins will not induce retailers to

²²³ *Ibid.*

²²⁴ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Closet...Kay's Shoes*, 551 U.S. 877, 891, 127 S.Ct. 2705, 2716 (2007).

²²⁵ H P Marvel and S McCafferty *Resale Price Maintenance and Quality Certification*, The Rand Journal of Economics, (Vol 15, No 3), 358f, (1984).

²²⁶ *Ibid.*, 349.

²²⁷ B Klein *Competitive Resale Price Maintenance in the Absence of Free-Riding*, FTC Hearings on Resale Price Maintenance, 5f (February 17, 2009).

²²⁸ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 16 (2009).

actually implement such efforts. Instead, retailers will continue to free-ride on the possible promotional efforts of other retailers and bag the profit gained by the increase in retail prices (“the dominant strategy”,²²⁹). The retailers will prefer to draw consumers to them by relying on alternative promotional activities which are not susceptible to free-riding. In reality, the margins offered will thus not be used to finance such promotional efforts and the actual free-rider issue will not be solved. In addition L Peeperkorn is not convinced that RPM in itself constitutes an effective means of achieving the relevant promotional benefit. The free-rider issue can, in his view, be overcome by relying on other vertical restraints which, additionally, do not result in an unwarranted raise in prices.²³⁰

According to B Orbach free-rider theories such as the ones referred to above generally tend to seek justification in non-price competition (e.g. pre-sales services). In his words, the opinion of those advocating for these theories is that RPM will be relied upon by a manufacturer solely in cases “(...) where non-price competition among retailers serves his interests better than price competition.”²³¹

On a different note, it has been argued that RPM might be a way for manufacturers to encourage demand enhancing distributor-efforts even absent the risk of free-riding.²³² This given that in practice it will be hard or expensive for the manufacturer to draft agreements with his distributors so as to pinpoint the exact services that the latter must offer in order to enhance consumer demand.²³³ In this context RPM can function both as an encouragement and a monitoring mechanism. T A Lambert explains the relevant scenario. Under RPM the retailers will be given the opportunity, in terms of margins, to invest in promotional efforts without the manufacturer needing to pinpoint these for them in a contract, which in turn would be subject to the difficulties described above. The manufacturer can then follow/monitor the performance of his distributors, e.g. by looking at their sale volumes. If he finds that demand for his product has not increased he can draw the conclusion that the relevant distributor has not made the appropriate investments and thus sanction the latter by e.g. putting an end to their contractual relationship.²³⁴

According to L Peeperkorn this hypothesis has certain deficiencies. He agrees as an example with the dissenting opinion in the *Leegin* decision in that:

²²⁹ L Peeperkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal, (Vol 4 No 1), 209 (2008).

²³⁰ *Ibid.*

²³¹ B Orbach *Antitrust Vertical Myopia: The Allure of High Prices*, Arizona Law Review (Vol 50), 272, (2008).

²³² B Klein and K M Murphy *Vertical Restraints as Contract Enforcement Mechanisms*, Journal of Law and Economics (Vol 31, No 2), 266f (1988).

²³³ *Ibid.*, 294f.

²³⁴ T A Lambert, *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, School of Law, University of Missouri, Legal Studies Research Paper Series, No. 2009-32, 13.

“(...) it is not clear, if there is no free rider problem, why the distributor is not already, on its own initiative, making the (extra) sales effort. If the fruits of this effort stay with the distributor, no extra incentive is needed: making the extra effort will increase its profits.”²³⁵

H P Marvel and S McCafferty have touched upon another efficiency hypothesis, namely that relating to new entry situations.²³⁶ The general outline of this theory can be described as follows. A manufacturer who is a new entrant in a market with well-established brands and who wants to establish his brand therein is dependent, to a substantial degree, upon the promotional efforts of his distributors. The initial distributors taking on such a task need to make some financial investments to this aim. Nonetheless, the distributors might not be inclined to undertake these costs if they fear that their investments might be taken advantage of by subsequent distributors who free-ride on the former's promotional efforts, a fear which will affect the new entrant negatively. In order for this fear to be overcome some sort of safety net is needed. Under RPM, the distributors are granted a sure margin of profit and safeguarded from price-cutting distributors who show up later on. Thus, the reliance on this practice will motivate the initial distributors to take on a novel brand and promote it more dynamically. Success in new entrance will in its own turn intensify inter-brand competition.²³⁷

Certain limitations have nonetheless been identified even when it comes to this hypothesis. It has been pointed out that this theory will not be capable of justifying the adoption of RPM for excessive periods of time. Also, it will generally not be capable of justifying the reliance on RPM in the context of markets which already exist or in the context of already founded brands. There has also been some skepticism as to whether RPM constitutes an effective means of dealing with the possible free-rider issue described above. It has been argued that it might be more effective, from a manufacturer and consumer point-of-view, if the manufacturer were to reward the promotional efforts of the initial retailers; this instead of adopting a practice (RPM) which would reduce price-competition on retailer level. For example, the manufacturer could motivate these initial retailers to support his new entrance on the market by granting them financial compensation or by provisionally offering them a cheaper wholesale price in comparison to other retailers.²³⁸

²³⁵ L Peeperkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal, (Vol 4 No 1), 210 (2008).

²³⁶ H P Marvel and S McCafferty *Resale Price Maintenance and Quality Certification*, The Rand Journal of Economics, (Vol 15, No 3), 349, (1984)

²³⁷ T A Lambert, *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, School of Law, University of Missouri, Legal Studies Research Paper Series, No. 2009-32, 15f.

²³⁸ L Peeperkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal, (Vol 4 No 1), 211f (2008).

Another efficiency argument in economic literature is the hypothesis that the reliance on RPM might induce distributors, via the guarantee of higher retail margins, to keep stocks of the manufacturer's product to a greater extent. In times when customer demand is slack, distributors will in fear of price-dips generally be disinclined to take risks and will thus not be keen to keep stocks to the degree that the manufacturer might consider adequate. By employing RPM in such a scenario though, the manufacturer will be able to hinder the appearance of price-cutting distributors on this market and the lack of certainty in customer demand will instead be shared by the distributor and the manufacturer. The distributor will hereby be induced to keep stocks to a greater extent and the manufacturer will have the possibility to sell his goods via his retailers in periods of uncertain demand.²³⁹

L Peeperkorn takes a closer glance at this hypothesis and finds that it is somewhat problematic. In his view, the fact that the distributors are warranted higher retail margins under the RPM agreement is two-sided. While these higher retail prices might help retailers overcome the fear of price decreases - price decreases which might affect their inventories' value negatively - they will also result in a slower sales pace in relation to the inventories in question and the distributors will have to hold on to the additional stocks for a longer period of time. In light of the latter effect retailers will partially or entirely be reluctant to keep additional inventories and thus RPM will not be capable of serving its inventory-related purpose in periods of financial uncertainty.²⁴⁰

All in all, RPM's *potential* efficiencies can be summarized as follows.

- Stimulation of demand enhancing retailer-efforts through hindrance of free-riding.
- Stimulation of demand enhancing retailer-efforts even absent the risk of free-riding.
- Facilitation of new entry.
- Retailer-encouragement with regard to inventories.

4.4 Empirical evidence

One of the central deficiencies in the overall economic debate appears to be the restricted access to empirical evidence. Access to empirics is undoubtedly important since such evidence enriches the economic debate and gives it a more practical and implementable dimension when discussing policy. Also, a debate with a strong empirical foundation possesses a greater degree of credibility in the eyes of the legislature compared to a debate founded solely upon economic hypotheses. In the words of F Van Doorn:

²³⁹ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 15 (2009).

²⁴⁰ L Peeperkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal, (Vol 4 No 1), 211 (2008).

“(…) it is rather unclear how the hardcore restrictions minimum and fixed RPM affect the consumer. Policy-makers will therefore want to resort to empirics, but will encounter the problem of lack of evidence. This is because minimum and fixed RPM have almost always been forbidden, and because actual effects on consumer welfare are difficult to monitor.”²⁴¹

Of course, lack of empirical evidence in the field of RPM does not imply that such evidence is entirely inexistent. This is evident e.g. in the *Leegin* decision where the majority, albeit acknowledging that empirical proof was scant, nonetheless found that the *existent proof* did not indicate that the pro-competitive use of RPM was rare or merely theoretical. To reach this conclusion, the Court relied i.a. on the empirical studies carried out by T Overstreet (1983) and by P M Ippolito (1991).²⁴² These two empirical studies are not the only ones in the field. As an example, an empirical study on the retail sector in France reported i.a. that minimum RPM led to the elimination or at least to the excessive decrease of intra-brand price competition on retailer level and thus considerably raised retail prices.²⁴³ Also, in 2008 the Office of Fair Trading examined the abolition of RPM in the UK book market in the 1990s. This study reported i.a. that the abolition of RPM was met by the entry and dynamic expansion of novel actors in the relevant market (e.g. online sellers and supermarkets). This since the abolition of RPM opened up for price decreases.²⁴⁴ Another empirical study found that RPM cannot be explained on grounds of one distinct hypothesis but rather on grounds of a number of different theories.²⁴⁵

To sum up, empirics have shown that RPM *can* have pro-competitive effects on the market. For this reason it is inaccurate to label RPM as a purely anti-competitive practice. The frequency of pro-competitiveness is of course another question. Also, empirics have reported that RPM generally decreases price-competition within a single brand, that it increases retail prices and that it can build up entry barriers in the market. Finally, such evidence has shown that determining the impact of RPM on competition is not an easy task; there may be a number of theories liable of explaining one

²⁴¹ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 18 (2009).

²⁴² *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Closet...Kay's Shoes*, 551 U.S. 877, 894, 127 S.Ct. 2705, 2717 (2007); T Overstreet *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Washington, D.C.: Federal Trade Commission (1983); P M Ippolito *Resale Price Maintenance: Empirical Evidence From Litigation*, *Journal of Law and Economics*, (Vol 34, No 2) 263-294(1991).

²⁴³ P Biscourp, X Boutin and T Vergé *The Effects of Retail Regulations on Prices: Evidence from the Loi Galland* (Working Paper) (2008), available at: http://www.insee.fr/fr/publications-et-services/docs_doc_travail/g2008-02.pdf.

²⁴⁴ Office of Fair Trading *An Evaluation of the Impact upon Productivity of Ending Resale Price Maintenance on Books* (2008), available at: http://oft.gov.uk/shared_oft/economic_research/oft981.pdf.

²⁴⁵ T Gilligan *The Competitive Effects of Resale Price Maintenance*, *Rand Journal of Economics*, (Vol 17) 544-556 (1986).

single RPM instance. It is thus not surprising that it has been deemed a complicated task to determine (on the basis of hypotheses or empirics) which potential effects, competitive efficiency or harm, are more significant.²⁴⁶

There have nonetheless been attempts to simplify this task e.g. by focusing on likelihood. The aim appears to be to exclude potentially less problematic instances of RPM from what otherwise appears to be an overall sphere of uncertainty. As an example, it has been held that market share plays a central role when deciding upon the competitive impact of RPM. It has been argued that it is improbable that companies with limited power in the market will generate substantial competitive harm therein by relying on RPM. Further, it has been pointed out that the degree of market power directly affects the degree of efficiency demanded, for pro-competitive effects to be generated from the RPM agreement. The larger the power, the larger the efficiency benefit demanded for such effects to be generated and vice versa. Besides the issue of market power, it has been noted that RPM's capacity to pose a threat on competition also depends on whether it is a secluded, temporary practice e.g. in a new entry situation or whether it is adopted in a more persistent manner or in a more complex context.²⁴⁷

4.5 Reflections

The argumentation in the previous subchapters indicates that the RPM debate is rich in opinions on both sides and that it is rather complex and multifaceted. It does not seem to provide any *safe*, straightforward guidance regarding the *overall* impact of RPM on competition. There appears e.g. to be a lack of consensus regarding the coverage or the scope of the economic hypotheses put forward. The lack of empirical evidence appears to be an additional, important crux in the overall debate. The theories brought up in this thesis may at first sight appear to indicate that RPM can *either* be anti-competitive *or* pro-competitive. On closer scrutiny though, certain question marks arise in this respect. Consider the following:

- *Are RPM's potential harms and efficiencies mutually exclusive?*
- *Or is it possible for an RPM instance to be both potentially pro-and anti-competitive at the same time?*
- *Assuming that this is possible, how are these potential effects to be evaluated in the context competition law, individually and collectively?*
- *On a different note, how frequent or plausible are the potential effects described in different theories?*

²⁴⁶ European Advisory Group on Competition Policy, M Motta et.al. *Hardcore Restrictions under the Block Exemption Regulation on vertical agreements: An economic view*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 4 (2009).

²⁴⁷ *Ibid.*

These issues will not be elaborated on at present. Nonetheless, they indicate that there is a substantial degree of complexity in these economic considerations and in the overall topic of RPM. The interesting question is how and to what degree this complexity affects the policy towards this restraint under European competition law; essentially:

- *What does the European choice to label RPM as a hardcore restriction imply, when considered in light of all the possible pro- and anti-competitive RPM scenarios portrayed in economic reasoning? Is this choice right, wrong or neither?*
- *And what about the US rule of reason approach? Is this better, worse or neither?*

These issues will indirectly be addressed at a subsequent stage. It is nonetheless interesting to pose them at present, since they are directly linked both to the issues discussed in this chapter and to one of the very purposes of this thesis; namely to *evaluate* the European approach towards RPM and prospectively *examine* it.

5 RPM IN EU LAW AS OF JUNE 2010: THE NEW VERTICALS REGULATION

5.1 Some official opinions addressing the *draft Verticals Regulation and Guidelines*

Pending the expiry of the current/soon old Verticals Regulation and accompanying Guidelines on Vertical Restraints in May 2010, the Commission issued a draft of the new Regulation²⁴⁸ and Guidelines²⁴⁹, whose official version enters into force in June 2010.²⁵⁰ In this context the Commission also instigated a consultation procedure and called upon interested parties to come with opinions and remarks, partly on the current/soon old legal framework governing vertical restraints and partly on the *draft* documents and the changes proposed therein. The Commission expressed particular interest in gathering information and remarks on the general performance of the up-to-date rules on vertical restraints. Opinions were also sought regarding the degree to which current changes in the market should influence the range of the legal review. When instigating this consultation procedure the Commission additionally held that the goals governing the soon expired Verticals Regulation remained relevant. These goals were namely “to considerably reduce the regulatory burden on firms, in particular firms with no market power, like SMEs, and to introduce an effects-based approach to the assessment of vertical restraints.”²⁵¹ On the basis of external remarks gathered prior to the initiation of this consultation

²⁴⁸ Now Commission Regulation (EU) No 330/210 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 142, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>; *Draft version* Draft Commission Regulation on the application of Article (81(3)) of the Treaty to categories of vertical agreements and concerted practices, available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/draft_regulation_en.pdf.

²⁴⁹ Now Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, available at: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf; *Draft version* Draft Commission Notice, Guidelines on Vertical Restraints, available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/draft_notice_en.pdf.

²⁵⁰ Note that the new Verticals Regulation has been adopted, see The Commission’s Press Release IP/10/445 (20th April 2010), available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/445>. Note also that the Commission has principally agreed on the content of English version of the draft Guidelines, see <http://ec.europa.eu/competition/antitrust/legislation/vertical.html>.

²⁵¹ See http://ec.europa.eu/competition/consultations/2009_vertical_agreements/.

procedure and on the basis of its own experience with the rules on vertical restraints, the Commission was able to conclude that the legal framework governing these restraints had generally functioned in a satisfactory manner. On grounds of this finding it declared that this legal framework and the stipulations therein should not be principally altered, with the exception of possible changes in light of current developments in the market.²⁵² Neelie Kroes, Competition Commissioner at the time, declared that:

“Competitive and efficient distribution are essential for consumer welfare and for our economy. The review launched today aims to ensure that the assessment of supply and distribution agreements under the competition rules takes account of recent market developments, namely further increased market power at the level of buyers and new forms of distribution including the opportunities brought by the Internet.”²⁵³

The contributions made in this consultation procedure were well over one hundred and came from various sources; public authorities, registered organizations and even private persons.²⁵⁴ Considering the above statement, it is not surprising that a great deal of focus in these contributions lay on commenting the novelties proposed by the Commission (internet selling and the market power of buyers). Yet, when reading a number of these contributions it is apparent that a substantial degree of focus also lay on discussing the issue of RPM and the European approach towards it.

It is of interest here to make reference to some of these contributions, not only because they elaborate on the issue of RPM but also because they highlight central concerns and question marks relating to this restraint and to the European approach towards it. Taken together, these contributions indicate just how controversial the subject of RPM is. But beyond that, they also attempt to interpret the language of the *draft* documents while also comparing them to the current/soon old rules on RPM. Before moving on to discuss the newly adopted Verticals Regulation and newly “adopted” English version of the Guidelines, it is essential to look into these opinions first since they offer valuable *hints* as to what might be expected RPM-wise in June 2010 and even ten years on. Note nonetheless that, technically, these contributions only refer to the *drafts* of the new documents and not to the *new* documents themselves.²⁵⁵

After reading through a number of official opinions, I have hand picked some of them for further discussion, primarily because their proponents are

²⁵² See The Commission’s Press Release IP/09/1197 (28th July 2009), available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1197&format=HTML&age_d=0&language=EN&guiLanguage=en.

²⁵³ *Ibid.*

²⁵⁴ See http://ec.europa.eu/competition/consultations/2009_vertical_agreements/.

²⁵⁵ Note that the discussion in *chapter 5.1* as a whole is centered around the pre-official documents on Vertical Restraints, i.e. the draft Verticals Regulation and draft Guidelines and not the newly adopted Verticals Regulation and newly “adopted” English version of the Guidelines. The latter documents will instead be discussed from chapter 5.2 onward.

credible actors in the field of competition/antitrust law. Also, their proponents (government authorities, statutory bodies, practitioners etc.) practice competition law on various different levels, an element which helps convey a more comprehensive discussion on this topic. Finally, some of the proponents of these opinions are active on US level while others on EU level, an aspect which is in line with the comparative undertone of this thesis and which will later on also benefit the cross-border discussions carried out on this topic.

5.1.1 The French Competition Authority

One of the contributors in this consultation procedure, the French Competition Authority (FCA), finds that the Commission in the *draft* Guidelines attempts to reinstate a balance between the notions of prohibition and exception under Art 101. The FCA perceives this element as a novelty in the legal framework. The balance referred to relates to the relationship between the prohibition of intra-brand restraints under Art 101(1) and the possibility of defending such restraints under Art 101(3) with reliance on efficiency arguments. The FCA finds that the balance sought is essential since it represents the view that *no* vertical restraints can be denied, *a priori*, the advantages of Art 101; a view which they consider to be in line with the stipulations of the Treaty. In the FCA's opinion this modification should not be trivialized but should instead be met with positivity. It refers to this modification as a positive omen and explains that:

“Indeed, it conveys a very positive signal to the marketplace, where many may have come to the conclusion that the case-law developed on hardcore restraints during the last fifty years, in particular at European level, has made any individual exemption of resale price maintenance not only very unlikely, but perhaps also virtually impossible, as if this were a *per se* infringement.”²⁵⁶

The FCA is a proponent of a greater degree of clarity in the wording of the *draft* Guidelines; clarity in that RPM is not illicit *a priori* but that it is *liable* of being justified under Art 101(3). In its opinion, this wording should lead to the finding that the approach towards vertical restraints unambiguously differs from the approach towards collusive behavior by means of a cartel. It holds that henceforth, *only* the latter form of behavior should maintain an indefensible character under the competition rules given its particularly detrimental impact on consumer welfare.

²⁵⁶ French Competition Authority, *Opinion of 28 September 2009 on the review of EC regulation N. 2790/99 and of the guidelines on vertical restraints*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 6 (2009), available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/autoriteconcurrancefrance_en.pdf.

The FCA proceeds by pointing out that the *draft* documents fundamentally retain the same approach towards hardcore restrictions. These continue to be perceived as presumptively restrictive of competition (restrictions by object) and thus excluded from the scope of the Verticals Regulation. The FCA finds that this approach is warranted for the time being, why it does not argue for an effects-based approach to prevail in relation to hardcore restraints. It clarifies that abandoning this approach towards RPM would not be in line with the worldwide consensus on this practice's potential competitive harms and efficiencies. Interestingly, the FCA points out that the vigorous RPM debate post-*Leegin* might well put this consensus to the test sometime in the future but notes that the time for reevaluation is not yet in. On a different note, the *draft* Guidelines clearly mention that the presumption of competitive harm entailed in RPM and other non-exemptible hardcore restrictions (restrictions by object) is refutable under Art 101(3). According to the FCA, this clarification is a step in the right direction and has led the Commission to elaborate on practical aspects involved in the application of Art 101(3). The FCA concludes that:

“Without radically shifting the centre of gravity of the European competition policy followed in relation to vertical restraints, nor unduly complicating its implementation, the architecture designed by the Commission therefore opens the door to a better resort to efficiency gains, on a case-by-case basis.”²⁵⁷

In the FCA's opinion, the importance of stressing that all hardcore restrictions including RPM are justifiable under Art 101(3) lies in that this provides companies with the *incentive* to come up with credible and solid economic arguments in support of such claims. This is beneficial for the administrative system overall since it helps build up routine and experience. The FCA finds that the system constructed by the Commission is not static but instead both controllable and adaptable to change.²⁵⁸

The opinions of this contributor on RPM and on its status in the *draft* verticals regime can be interpreted as follows. Given that no safe conclusions can be drawn yet, regarding to the pro-competitive impact of RPM, it is correct of the Commission to maintain the view that RPM constitutes a hardcore restriction which presumptively harms competition and is non-exemptible under the Verticals Regulation. Yet, it is also correct of the Commission to stress that there is a chance for this presumption to be refuted under Art 101(3). The Commission's approach does not alter the policy towards this restraint, as fundamentally as in the US. Nonetheless it is indicative of a progressive attitude and constitutes a step in the right direction. Via the encouragement of efficiency claims, the system can adapt on the basis of a gradual increase in experience and knowledge as to the effects of this restraint.

²⁵⁷ *Ibid.*, 8.

²⁵⁸ *Ibid.*, 6ff.

5.1.2 The Netherlands Competition Authority

The Netherlands Competition Authority (NCA) recognizes that the Commission, through its *draft* documents, holds on to the view that RPM constitutes a hardcore restriction. The NCA points out that through the years it has been faced with a number of complaints and hints regarding the alleged adoption of RPM on national level. Yet, it has chosen not to give precedence to such instances since it has generally not been capable of ascertaining a hypothesis of harm which would give good reason for advancing with such a case. In all such instances, it could namely *not* be proven that RPM was anti-competitive. Alternatively or additionally, it *could* be proven that intra-brand competition in the relevant market was sufficient. The NCA adds that RPM appears, not seldom, to be relied on by firms as a promotional instrument and thus in a potentially pro-competitive manner.

Further, it finds that the clarification in the *draft* Guidelines - that RPM, being a hardcore restriction, is justifiable under Art 101(3) - does not represent any genuine modification in the up-to-date policy towards this practice. This clarification is also rather superfluous since the possibility to make such claims is not a novelty under this legal framework. The NCA finds that there is restricted empirical proof to support the approach that RPM in all or most cases tends to be anti-competitive. It acknowledges that anti-competitive scenarios *can* occur but it finds that, economically, these scenarios are in themselves not sufficient to defend labeling RPM as a hardcore restraint in all situations.²⁵⁹

5.1.3 The American Antitrust Institute

The American Antitrust Institute (AAI) is convinced that RPM often has significant anti-competitive capacity and *if* it generates any pro-competitive effects, such effects are difficult to prove and can generally be attained with reliance on less restrictive practices. On the basis of this premise, the AAI holds with the Commission's choice to maintain the classification of RPM as a hardcore restraint. The AAI finds that it is both warranted and appropriate to attach a refutable presumption of illegality to RPM due to the practice's nature. In essence, it appears to support a strict approach towards RPM. As an example it has advocated for the statutory reinstatement of the *per se* rule in the US. In addition, it notes that the European presumption of illegality might even be worthy of imitation on US level, particularly if it is fortified. In its opinion, the Commission should further clarify in its texts that this presumption of anti-competitiveness is strong and that pro-competitive claims in this context will be viewed with skepticism. This

²⁵⁹ Netherlands Competition Authority, *Contribution to the public consultation on the review of the competition rules applicable to vertical agreements (28 September 2009)*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 1f (2009), available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/netherlandscompetitionauthority_en.pdf.

modification would, according to the AAI, safeguard the interests of consumers to a greater extent, improve the enforcement of Art 101 and bring this legal framework more in line with the way in which the Commission *in reality* deals with this restraint.²⁶⁰

The AAI takes a closer look at the RPM justifications mentioned by the Commission in the *draft* Guidelines; both those relating to RPM in particular and those relating to vertical restraints in general. It finds that the majority of these pro-competitive explanations are problematic, at least when it comes to RPM. As an example, a common pro-competitive explanation for RPM is that it hinders free-riding. In the AAI's opinion this hypothesis is, in a great number of instances, not capable of justifying the reliance on RPM. The reasons for this could be that there are no services at hand which are susceptible to free-riding, that the free-rider problem itself is restricted and does not undercut other retailers' initiative to offer such services or that this problem can be combated more efficiently and, competition-wise, less restrictively by reliance on other practices. The AAI acknowledges that certain pro-competitive explanations of RPM encompass a considerable degree of probability (e.g. the facilitation of new entry). Nonetheless, it holds that such explanations are of impermanent character and that their pro-competitiveness can in many cases be attained without relying on RPM. In sum, it encourages the Commission to attach a strong presumption of illegality to this restraint and to view the majority of pro-competitive explanations of RPM as questionable.²⁶¹

5.1.4 Two Sections within the American Bar Association

Another contributor, two Sections within the American Bar Association (ABA), represent a view divergent from that of the AAI.²⁶² The Sections note primarily, that the *draft* Guidelines do not bring with them any fundamental change in the Commission's approach towards RPM. The restriction of a buyer's freedom to set its own prices continues to constitute a hardcore restriction under European competition law. Nonetheless, the Sections find that the *draft* Guidelines contain an important novelty. They take a more detailed look at RPM's potential impact on competition, both on the pro- and the anti-competitive side. In particular, they embrace the Commission's recognition that this restraint can potentially be efficiency enhancing under Art 101(3). In their opinion, this recognition strongly

²⁶⁰ American Antitrust Institute, *Comments of The American Antitrust Institute On the European Commission's Proposed Block Exemption Regulation And Guidelines on Vertical Restraints* (27 September, 2009), The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 4f (2009), available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/americanantitrustinstitute_en.pdf.

²⁶¹ *Ibid*, 5f.

²⁶² *Note* that what is put forward represents the joint opinion of two Sections within the ABA (namely the Section of International Law and the Section of Antitrust Law) only and hence does not represent the opinion of the ABA as a whole.

indicates that the Commission ought to reevaluate the presumption of illegality which it currently attaches to RPM.

Further, the Sections perceive the consultation procedure as an opportune opening for debating and reevaluating the current/soon old European approach towards RPM. In their opinion the novelty in the *draft* Guidelines (i.e. the effects-oriented elaborations on RPM's pro- and anti-competitiveness) constitutes a significant and constructive starting point in this respect. They add that elaborations on RPM's pro-competitive potential might also provide useful guidance to companies contemplating to adopt this practice.

In sum, they propose more clarity in the *draft* Guidelines regarding RPM's potential anti-competitive instances. Also, they advocate for the list of pro-competitive RPM examples in the Guidelines to be made bigger, by noting that RPM's pro-competitiveness has support in economic literature.²⁶³

5.1.5 European Competition Lawyers Forum

The European Competition Lawyers Forum (ECLF) stresses that RPM has never been subject to per se prohibition. Yet, it points out that in reality RPM has been perceived by many as a restraint of such nature. In this regard the ECLF identifies a modification in the *draft* Guidelines; namely the clarification that RPM, being a hardcore restriction, is subject to a *refutable* presumption of illegality. The ECLF approaches this modification with positivity. In its opinion, this modification makes the legal framework flexible enough to be able to manage possible developments in US jurisprudence post-*Leegin*, which might be able to enter the EU zone in future subsequent to the alteration in tone apparent in the *draft* Guidelines.

The ECLF takes a closer look at the pro-competitive potential of RPM and to the possibility of bringing efficiency claims under Art 101(3). It notes that while it might be possible for companies to fulfill the efficiency criterion in this article, it might be difficult for them to fulfill the other criteria in this provision and especially that of indispensability. In this context, the ECLF refers i.a. to the new entry situation, which is one of the pro-competitive examples brought up by the Commission in the draft. It finds that this exemplification is overly simplistic and potentially confusing for firms considering of adopting RPM. Since the efficiency in the Commission's example could be attained with reliance on alternative restraints, e.g. maximum price-control, the RPM instance will in reality fail

²⁶³ American Bar Association, *Joint Comments Of The American Bar Association Section of Antitrust Law and Section of International Law on the Proposal of the European Commission for a Revised Block Exemption Regulation and Guidelines on Supply and Distribution Agreements (September 2009)*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 3, 19f (2009), available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/americanbarassociation_en.pdf.

to fulfill the indispensability requirement in Art 101(3). Thus, the ECLF advocates for a greater degree of clarity in the *draft* document on RPM's potentially pro-competitive instances. In its opinion, it should also be made clear that the examples referred to by the Commission do not constitute a safe zone for firms so as to avoid potential confusion. For the same reason, it adds that the Commission should elaborate on what it means when it speaks of the introduction of a novel brand in the relevant market and if this instance differs from the introduction of novel goods or the extension of an already existent sort of goods therein.

The ECLF interestingly points out that the Commission in the *draft* Guidelines explicitly lists pro-competitive examples when it comes RPM, something which it does not do when it discusses other hardcore restrictions. Even so, it seems that efficiency claims in relation to RPM remain dependent on the parties' capacity to refute the presumption of illegality. According to the ECLF, the Commission ought to clarify if this differentiation in the *draft* document between RPM and other hardcore restrictions also signifies a difference in the Commission's view towards these practices.

The ECLF acknowledges that the topic of RPM is multifaceted. Nonetheless, it holds that it might be fitting to reflect on a *`de minimis'* provision for RPM. It is namely uncertain whether it is *so* vital to uphold intra-brand competition between two firms with little market power, that this would justify labeling an RPM agreement between them a hardcore restriction. It suggests further that it might be appropriate to deal with promotional efforts of temporary nature - brought up in the *draft* document as an example of potentially pro-competitive RPM - as a *`de minimis'* practice, given that such a practice will probably not be liable of having an appreciable impact on competition. On a different note, the ECLF encourages the Commission to elucidate its stand on the monitoring of prices amongst distributors.²⁶⁴

5.1.6 Consumer Focus

Consumer Focus (CF), a statutory body acting in protection of consumer interests in the United Kingdom, concurs with the Commission that RPM ought to be dealt with as a hardcore restriction. CF holds that in periods of financial uncertainty, it is all the more vital to safeguard consumers by decisively being opposed to anti-competitive conduct. In its view, the *draft* documents fortunately indicate that the Commission has not been influenced by the RPM U-turn in the US. Nonetheless, CF finds the Commission's elaboration on RPM's pro-competitive potential both astonishing and

²⁶⁴ European Competition Lawyers Forum, *Comments on the Draft Block Exemption Regulation and Guidelines on Vertical Restraints*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 11 (2009), available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/europeancompetiti onlawyersforum_en.pdf.

dissatisfying since it undermines the Commission's own approach on the matter. More specifically CF fails to see why novel goods should be shielded from competition temporarily. In the same context, it finds that certain terms used by the Commission are overly broad, somewhat inaccurate and thus liable to abuse. CF is of the opinion that the term 'new' is a term of this sort. It elaborates on this by explaining that:

“Manufacturers would be able to introduce so-called new products on a frequent basis in order to enjoy the anti-competitive advantage of the exemption. It would encourage manufacturers to segment and price discriminate between European consumers and across European markets by claiming 'newness' and by staggering product launches across different countries.”²⁶⁵

On a different note, CF is of the opinion that free-rider hypotheses are led by a will to limit competition on merits of price, competition which otherwise enhances consumer welfare. Thus, it is not at all persuaded that these hypotheses can justify RPM.²⁶⁶

5.1.7 Some reflections in light of these official opinions

The contributions referred to above do in fact appear to provide *some* hints regarding the new RPM regime.²⁶⁷ First of all, they all note that this new regime will continue to label RPM as a hardcore restriction. The contributions suggest further that the legal mechanism governing RPM up to this date is maintained, meaning that RPM will continue to be non-exemptible under the Verticals Regulation, subject to a presumption of illegality and a *refutable presumption* of non-justifiability under Art 101 (3).

One of the key questions, indirectly addressed by all these contributors, is: *What margins does the new regime leave for efficiency claims under Art 101(3)?* These contributions taken together appear to suggest that the approach towards RPM, albeit modified to some degree, is not modified to its very core under the new regime and at least not at an initial stage. This finding is not entirely unfounded. In a press release from 2009, referred to in the beginning of this chapter, the Commission explicitly points out that the legal framework governing vertical restraints has generally functioned well and should thus not be fundamentally modified. So already at this stage, it appears that a radical, US-style change in approach is out of the question. In

²⁶⁵ Consumer Focus, *Consumer Focus Response to Vertical Restraints Block Exemption Regulation (September 2009)*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 14 (2009), available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/consumerfocus_en.pdf.

²⁶⁶ Ibid.

²⁶⁷ Note that focus here lies on discussing the commentary on the draft documents, and not the documents adopted in April 20th 2010.

light of the above, it also seems that the margins for an efficiency claim will be rather narrow, but perhaps not entirely inexistent. Supposing that a radical change in approach is out of the question, is it also out of the question to argue that the modified approach towards RPM on US *federal* level is slowly but gradually penetrating the EU regime? In other words is it entirely out of the question to claim that we, in Europe, might be witnessing the initial stages towards some form of *Leeginification*? This issue will be discussed in the following subchapter.

Moreover, the contributions indicate that there is an overall lack of consensus and a substantial degree of uncertainty regarding the competitive impact of RPM. This has already been spoken of in *chapter 4*, where an outline of the RPM debate amongst economists has been presented. These elements together with the acknowledgement in the *draft* Guidelines that RPM can potentially be pro-competitive, has caused different reactions amongst these contributors. The basis for each respective reaction appears to some degree to be trust respectively distrust towards RPM's pro-competitive potential. As an example, the FCA is of the opinion that the uncertainty governing RPM's competitive impact justifies, at least for the time being, the Commission's reluctance to let go of the presumption of illegality. Yet, it also finds that this system should not be static but should evolve and adapt as knowledge and experience is gained. This opinion appears to welcome a more progressive RPM regime which has the capacity, if found warranted, to distance itself from the strong skepticism governing this practice up to this date. One could claim that this reaction reflects trust in RPM's pro-competitive potential. On the other hand, CF is explicitly against the Commission's recognition of RPM's pro-competitive potential with the rationale that this recognition in itself might be detrimental for consumer welfare. This reaction appears, in contrast to the former reaction, to be based on distrust towards RPM's pro-competitive potential. Of course, one can easily make out why CF and even the AAI react with such skepticism; the former fights for consumer interests and the latter appears to be a strong proponent of a strict RPM approach in the US.

It is not easy to say which of these reactions is more or less warranted, more right or wrong. On the topic of RPM, law appears to be strongly intertwined with economics. This has been made clear both in the previous chapter but also in the *Leegin* decision. The debate on the competitive impact of RPM is lively both amongst economists and amongst lawyers and, judging from the outcome in *Leegin*, influential. New opinions continue to storm in. Judging from the contributions alone, opinions on RPM tend to shift depending on one's perception or experience of the competitive effects of this restraint. Of course, some seem more certain of their opinion than others; compare e.g. the opinion of the Netherlands Competition Authority with that of the AAI. The central question here is not where these specific contributors stand on the topic of RPM but instead where the Commission stands on this matter. It is namely the Commission's perception which will *primarily* penetrate the legal framework governing this restraint, through the adoption of the new Verticals Regulation and Guidelines and subsequently through its decisions.

To determine what the Commission’s perception might be, one must decide what value one attaches to the Commission’s acknowledgment of RPM’s pro-competitive potential; an issue will be addressed below.

5.2 Has *Leegin* left a transatlantic mark?

The main questions seeking to be answered in this subchapter are whether traces of the *Leegin* decision are identifiable in the *new* Verticals Regulation and accompanying Guidelines.²⁶⁸ If so, a question closely linked to the former is whether we, in Europe, might be witnessing the initial stages towards some form of *Leeginification*. To answer these questions it is initially vital to reflect on the differences and/or the similarities between the US and the EU RPM approaches, so as to further reflect on whether it is *possible* to draw any parallels between these two systems. Any speculations on the transatlantic impact of the *Leegin* decision must namely be read in light of these differences and/or similarities. Also, it is important to compare the text of the *new* documents with the text of the current/soon old Verticals Regulation and Guidelines so as to *independently* (i.e. not solely by relying on the opinions of the contributors above, which notably refer to the draft documents and not the new documents on vertical restraints) take a stand on whether *any* possible changes in attitude towards RPM can be identified and whether they can in any way be linked to the U-turn in the *Leegin* decision.

5.2.1 Per se meets hardcore and hardcore meets rule of reason

In this thesis, the current/soon old European approach towards RPM has been portrayed in a way which might be interpreted to suggest that this approach leans more towards the US per se approach than towards the US rule of reason approach. As mentioned earlier on, it has been claimed that RPM on EU level is *treated* as if it were subject to a per se rule, even if it is not *technically* subject to such a prohibition.²⁶⁹ It is this technical difference which will be looked into at present. For, in order to accurately discuss any possible cross-border implications of the *Leegin* decision and avoid hasty conclusions in this respect, it is important to keep in mind that there are certain transatlantic differences between the US and the EU approaches.

L Peeperkorn describes the central differences between the US per se approach and the EU hardcore approach. He holds that under the former approach “(...) the assessment is based on the form of the agreement alone.”²⁷⁰ The only issue of relevance in this context is thus to identify if the

²⁶⁸ In other words, focus here is shifted away from the drafts of these documents, discussed in *chapter 5.1*, and exclusively lies on discussing the newly adopted Verticals Regulation and the newly “adopted”, English version of the new Guidelines.

²⁶⁹ A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 500.

²⁷⁰ L Peeperkorn *Resale Price Maintenance and Its Alleged Efficiencies*, European Competition Journal (Vol 4 No 1), 203 (2008).

agreement, with regard to its form, involves RPM. If this can be established the RPM ‘investigation’ is complete, no further proof or examination demanded, and the illegality of the practice can directly be established. Contrary to this, under the latter approach the illegality of an RPM agreement cannot be established solely on grounds of its form. Instead, there is a possibility to free the agreement from illegality under Art 101(1), by successfully bringing an efficiency claim under Art 101(3). This means that even if the practice is ‘presumptively’ anti-competitive, possible efficiency arguments cannot simply be disregarded by the authorities as would have been the case under the per se approach. There is nonetheless a responsibility for the party making such an efficiency claim to prove that the criteria in Art 101(3) are fulfilled, a burden which shifts if the party succeeds to do so. At a final stage, a weighing exercise will have to be carried out in order to conclude which of the two, competitive efficiency or harm, prevails in the individual case.²⁷¹

It is apparent that there is an important difference between the two approaches (per se and hardcore). At the same time it is understandable that a simile has been drawn between them, given that the margins of success in efficiency claims under the hardcore approach appear to be particularly narrow.²⁷² Notably, two Sections within the ABA have held that:

“(...) the Sections are not aware of an instance in the last 50 years in which a firm has successfully made efficiency arguments to defend an RPM clause under EC competition law. Since the economic evidence establishes that RPM -- like other vertical restraints -- can plausibly give rise to both positive and negative effects and strongly challenges the assumption that those effects are more likely to be harmful than beneficial, the Sections consider that the better approach to minimum RPM would be to apply a standard effects-based analysis to the assessment of RPM clauses and to remove them from Article 4 of the Draft Regulation as a hardcore restriction.”²⁷³

The above argumentation essentially indicates that the Commission has, in reality, never approved of any justifications of this restraint and has essentially treated the refutable presumption of anti-competitiveness as irrefutable. Nonetheless, even if one were to accept that the hardcore approach *currently* leans more towards the per se approach than towards the rule of reason approach, this does not automatically imply that it will continue to do so *in future*. And what’s more, the parallel drawn between

²⁷¹ *Ibid*, 203f.

²⁷² Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, paras 20 and 46.

²⁷³ American Bar Association, *Joint Comments Of The American Bar Association Section of Antitrust Law and Section of International Law on the Proposal of the European Commission for a Revised Block Exemption Regulation and Guidelines on Supply and Distribution Agreements (September 2009)*, The European Commission’s Public Consultation on Review of the competition rules applicable to vertical restraints, 24 (2009).

the per se and the hardcore approach intrigues one to investigate whether there might also be some form of common denominator between the hardcore approach and the rule of reason approach. This idea has been triggered by a point made by one of the contributors to the Commission's consultation procedure discussed earlier on. The AAI has namely held that the European presumption of anti-competitiveness, i.e. the European hardcore approach, might be worthy of imitation on US level post-*Leegin*, particularly if it were fortified. Note that the AAI appears to be a proponent of a strict approach towards RPM, favorably a per se such.²⁷⁴

The fundamental structure of the rule of reason and the hardcore approach will not be presented here. With regard to this structure, the discussion takes off from what has already been discussed in previous chapters. The post-*Leegin* fever, discussed in *chapter 3.5*, indicates that the future structure of the rule of reason on US level might essentially boil down to a choice between an elaborated and a truncated rule of reason analysis. As already referred to in that chapter, if the elaborated rule of reason analysis relates to an in-depth weighing exercise (where all the potential effects of this restraint are taken into account and weighed against each other in an individual case), the truncated analysis relates to an 'quick look' assessment governed by burden shifting mechanisms, such as presumptions.

If one were to draw a rather daring parallel between the two types of US analyses mentioned above and the analyses carried out on European level for restrictions by object (hardcore restrictions) respectively by effect (non-hardcore restrictions), one could argue that the European hardcore analysis leans more towards a truncated rule of reason analysis and the European non-hardcore analysis more towards an elaborated rule of reason analysis. This since the hardcore analysis is linked to a refutable presumption of non-justifiability under Art 101(3) whereas the non-hardcore analysis is not; even if a distinction between restrictions by object and effect is not technically made under Art 101(3).²⁷⁵ Spontaneously, it also seems like the margins for bringing a successful efficiency claim might be broader under an elaborated rather than under a truncated rule of reason analysis respectively under an effects-based (non-hardcore) rather than under an object-based (hardcore) analysis. When it comes to a truncated analysis or an object-based (hardcore) analysis, the assessment namely takes off from the anti-competitive sphere due to the presence of a presumption or a preconception of anti-competitiveness. For the analysis to be shifted over to the pro-competitive sphere, such a presumption or preconception must first be refuted. The margins of refutability will of course depend on how strong this presumption or preconception is. When it comes to the other types of

²⁷⁴ American Antitrust Institute, *Comments of The American Antitrust Institute On the European Commission's Proposed Block Exemption Regulation And Guidelines on Vertical Restraints* (27 September, 2009), The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 4f (2009).

²⁷⁵ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, paras 20 and 46.

analyses, on the other hand, the assessment is in a neutral sphere from the very beginning, i.e. neither in the pro-competitive nor in the anti-competitive sphere. Thus the latter assessment will not take off from a preconceived notion of what the outcome of an individual case is *most likely* to be (i.e. anti-competitive), but might instead leave greater margins for the outcome to depend on the merits of the individual case.

In light of the above, it could be argued that there might be a simile, not only between the per se approach and the hardcore approach, but also between the hardcore/object-based approach and an *eventual* US truncated rule of reason approach. Nonetheless, it is still unclear exactly how the rule of reason is going to be crafted on *federal* US level. Judging from the opinion of the AAI, it might not even be the US approach which influences the EU approach towards RPM but instead vice versa. All depends on what final form the rule of reason analysis will take in the US and what awaits Europe RPM-wise from June 2010. So, attempting to determine the possible transatlantic implications of the *Leegin* decision is rather daring and speculative. In any case, it is interesting to see where the European hardcore approach might be headed under the new vertical restraints regime in 2010; an exercise which might also help shed more light on the questions posed in the beginning of *chapter 5.2*.

Before proceeding nonetheless, it is important to elaborate on certain additional differences between the US and EU RPM regimes, differences which have been discussed by A Jones. She argues that it is quite unlikely that Europe will witness the abandonment of the current object-based approach in favor of an effects-based such, as has been witnessed in the US with the *Leegin* decision. A primary factor supporting the improbability of this scenario is that:

“(...) in the US the scope for antitrust policy to evolve has been facilitated by the Sherman Act’s link with the common law and by the Supreme Court’s recognition that the goal of the Sherman Act should be a consumer welfare one.”²⁷⁶

According to this author, evolution on European level appears to be hampered by the fact that a shift in *competition policy rationales*, comparative to that in the US, seems unlikely. The European rationales appear namely to have a broader span than in the US, where the focal point instead lies exclusively on inter-brand restraints. Another reason put forth in support of this improbability is the issue of coherency in case-law. Before the *Leegin* decision, an escalating discrepancy could be witnessed in the US; partly between the *Dr. Miles* decision and other developing case-law and partly between this decision and the widespread opinion that the rule of reason ought to be the established standard of assessing whether a given practice infringes § 1 of the Sherman Act. Such a discrepancy has not been witnessed on European level, one of the reasons why there is no equally

²⁷⁶ A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 506.

pressing need to reevaluate the current object-based approach towards RPM. Finally, this author holds that the ECJ is very seldom eager to overrule its previous judgments, even if it is not bound by any form of US-like *stare decisis* principle. In fact, she clarifies that the ECJ seems *more* committed to its previous judgments than the Supreme Court in the US, a factor which also speaks against any possible reevaluation of the current object-based approach.²⁷⁷

5.2.2 The current/soon old RPM regime vs The new RPM regime

The pre-June 2010 Verticals Regulations, both the current/soon old Verticals Regulation and the draft Verticals Regulation, and accompanying Guidelines will not be presented in this subchapter. For information on these topics the reader is instead directed back to *chapters 2.4, 2.5 and 5.1* of this thesis. Here, the focal point lies in discussing the newly adopted post-June 2010 documents. Nonetheless, successful argumentation regarding the possible meaning and future implications of these documents can only be carried out in light of the documents which the former aim to replace, namely the current/soon old Verticals Regulation and Guidelines.

When taking a first glance at the new Verticals Regulation, it is difficult to identify any form of substantial change in approach towards RPM. This restraint still falls within Art 4 a of the relevant Regulation and is maintained under the heading ‘hardcore restrictions’. The wording of the article itself stipulates that the adoption of RPM can in no case lead to an exemption under the Regulation, a wording which is identical to that in the current/soon old Regulation. All in all, the new Regulation does not appear to provide any substantial guidance as to whether the policy view towards RPM might be undergoing some form of change. Thus, any answers in this respect need to be sought in the newly “adopted” English version of the Guidelines accompanying this Regulation.

The first impression, when taking a quick glance at the section in the new Guidelines which specifically addresses the issue of RPM, is that this specific section is longer in these Guidelines than in the correspondent section of the current/soon old Guidelines. This need not be interpreted as anything more than merely an interesting observation. Yet when taking a closer look at these sections, it becomes clear that the new Guidelines are in fact not only longer but also more elaborative than the current/soon old Guidelines on the relevant topic.

Before looking at these two RPM-sections side by side, it is first important to investigate whether the characterization of RPM as a ‘hardcore restriction’ (which is upheld in these new documents), has the same substantial implications there as in the correspondent characterization in the

²⁷⁷ A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 507f.

current/soon old legal framework. On this issue the new Guidelines clearly indicate that the implications of this characterization remain intact. As a restriction of this sort, RPM will continue to be subject to both a presumption of illegality and a presumption of non-justifiability, which remains refutable. Thus if companies can demonstrate that possible efficiencies are generated from containing such a restriction in a contract and that all the criteria in Art 101(3) are satisfied, the Commission will have to efficiently examine whether, and not merely take for granted that, the practice has potential anti-competitive effects prior to deciding upon whether the criteria in the relevant article are satisfied.²⁷⁸

A novelty in this context is the insertion of novel text in the new Guidelines. This text essentially clarifies what is already known and practiced under the current/soon old RPM-regime; namely that efficiency claims can be made in relation to this restraint and that the reliance on RPM is not directly but only presumptively illegal. As mentioned earlier, the NCA finds this clarification superfluous whereas e.g. the ECLF finds that it grants flexibility to the overall legal framework. Of course, had the Commission already in the drafts clarified how strong this presumption is and specified what will be demanded for the presumption to be refuted, the NCA might have been of a different opinion. The fact remains that this new text has been added to the Guidelines and the interesting question is of course why.

As mentioned earlier, the Commission has held that it is quite satisfied with how the up-to-date legal framework on vertical restraints has functioned and that it generally does not aim to make any fundamental alterations therein. On this premise one could argue that the above clarification (regarding the presumption of illegality and the refutability of the presumption of non-justifiability) made by the Commission, merely stands for a need to *stress* what is already known so as to make individual companies more conscious of the direct implications of employing RPM. Undertakings namely hold a substantial degree of individual responsibility when it comes to correctly applying the legal framework on vertical restraints and thus, they need to be clearly *warned* that agreeing upon RPM is a severe practice and that there is little chance of getting away with such an agreement under the competition rules. Such argumentation is nonetheless puzzling since practitioners and companies must already be assumed to be aware of this strict approach towards RPM and of the fact that efficiency claims in this context will seldom or never be successful. Another puzzling element is why the Commission feels the need to make this clarification *now*; its reasoning is equally relevant *now* as it was ten years back. Maybe the Commission aims to convey a *different* message with this clarification. This clarification might for example be linked to the Commission's more elaborative attitude in the RPM-specific section of the new Guidelines. To come to the bottom of this

²⁷⁸ Compare Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C 101, paras 17-27 and 40-47 to Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 47.

issue, the RPM-specific sections in both the current/soon old and the new Guidelines must be looked into.

In its current/soon old Guidelines, the Commission specifically addresses the issue of RPM and describes, in very general terms, the competition threats that might arise when relying on this restraint. It speaks of RPM's two central anti-competitive consequences. The first is the decrease of intra-brand price competition and the second is the increase of price-transparency. It notes that the imposition of RPM on distributors will ultimately result in total elimination of price competition within a single brand seeing as the distributors will not be capable of competing on price within that brand. Further, it explains that the increase of price-transparency and the accountability for alterations in price might facilitate collusion, both horizontal and vertical and particularly so in markets with a high level of concentration. Finally, it points out that the decrease of intra-brand price competition could indirectly also threaten inter-brand competition, given that the price for specific products will be subject to a lesser degree of downward pressure.²⁷⁹ Thus the focus of the Commission in these Guidelines lies entirely on highlighting RPM's anti-competitive potential. The practice's pro-competitive potential is not referred to at all, despite the fact that both economists and lawyers have of long spoken of this potential.

In the new Guidelines, on the other hand, some central modifications are made in this RPM-specific text. The modifications can be summarized as follows. The Commission still talks of RPM's anti-competitive potential but, when doing so, it is more detailed in its descriptions. It lists the potentially harmful RPM scenarios in a more comprehensible manner and explains why and how they might pose a potential threat on competition. Also, the list of such instances is enlarged compared to the current/soon old Guidelines.²⁸⁰ A clearly noticeable modification is that in the new Guidelines the Commission speaks of RPM's pro-competitive potential, what it does not do in the current/soon old Guidelines, where focus exclusively lies on discussing RPM's potential anti-competitiveness.²⁸¹ The pro-competitive potential referred to relates partly to the reliance on RPM as a means of facilitating new entry or facilitating the introduction of a novel brand on the market and partly to the reliance on fixed RPM as a way of organizing temporary low price campaigns in e.g. a franchising system. Also, the Commission refers to the reliance on RPM as a possible means of encouraging pre-sales services by averting free-riders.²⁸² All these potentially pro-competitive RPM instances are perceived as capable of enhancing consumer welfare.

²⁷⁹ Guidelines on Vertical Restraints (2000) OJ C291/1, para 112.

²⁸⁰ *Compare* Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 224 *to* Guidelines on Vertical Restraints (2000) OJ C291/1, para 112.

²⁸¹ *Compare* Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 225 *to* Guidelines on Vertical Restraints (2000) OJ C291/1, para 112.

²⁸² Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 225.

These pro-competitive elaborations in the *new* Guidelines indicate that the Commission has taken the opinion of certain contributors in its consultation procedure on the *drafts* seriously. The Commission in the *new* Guidelines is *even* more elaborative than it is in the draft Guidelines when it comes to discussing the pro-competitive potential of RPM. As an example, it *now* makes reference to the free-rider hypothesis as a possible means of defending the adoption of this restraint under Art 101(3). It also explains, in more practical terms, what kind of proof a company will have to bring forth for this hypothesis to pass the test of Art 101(3); text which is missing from the *draft* document.²⁸³ It must nonetheless be pointed out that, in this pro-competitive context, the Commission has also chosen to remove some text from its *new* Guidelines; text which was present in the *draft*. As an example, the draft referred to the ‘*appreciability*’ criterion in Art 101(1), something which the new Guidelines do not do. Judging from what was said in the *draft* on this matter, it could rather straightforwardly be argued that the ‘*appreciability*’ criterion *might* not be fulfilled and thus that the RPM agreement *might* not even fall under the Art 101(1) prohibition, if RPM were only adopted temporarily and for a rather short period of time.²⁸⁴ Absent this rather explicit acknowledgment in the *new* Guidelines (regarding the *appreciability*-capacity of temporary, short-term RPM), arguing against the fulfillment of the Art 101(1) ‘*appreciability*’ criterion in such a context could be interpreted as not equally welcomed by the Commission.

One of the main questions asked in this chapter is *why* the Commission has chosen to be more elaborative in these new Guidelines than it is in its current/soon old Guidelines and what the *source* of this choice might be. It is more elaborative, not only because it now explicitly refers to RPM’s pro-competitive potential but also because it clearly makes reference to the restraint’s relationship to the exception in Art 101(3). Moreover it discusses, in more detail, the restraint’s anti-competitive potential. An interesting observation is that most of the RPM arguments brought up by the Commission, both on the pro- and anti-competitive side, are familiar to those recurrently put forward in economic literature. This can be validated simply by comparing the arguments brought up by the Commission with those presented in *chapter 4*. Thus, it is not entirely unsubstantiated to claim that the Commission might have been influenced by economic literature when putting these arguments down on paper. The same familiarity can be identified when looking at the pro-and- anti-competitive arguments discussed by the majority in the *Leegin* decision. It is thus not improbable that this decision might also have constituted a potential source of inspiration for the Commission.²⁸⁵ It is in fact rather logical to assume that a decision so debated as the decision in *Leegin* would raise not only eyebrows

²⁸³ Compare Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 225 to Draft Commission Notice, Guidelines on Vertical Restraints, para 221.

²⁸⁴ *Ibid.*

²⁸⁵ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay’s Closet...Kay’s Shoes*, 551 U.S. 877, 890-895, 127 S.Ct. 2705, 2715-2718 (2007).

but also awareness internationally amongst scholars, practitioners and institutions on the topic of RPM.

In light of the above and as a moderate answer to the first question posed in the beginning of this chapter, it does not seem entirely speculative to argue that certain traces of the *Leegin* decision *can* be identified in the Commission's new Guidelines. Of course, this does not necessarily imply that the *Leegin* decision constituted the *direct* source for these modifications and it need definitely not imply that the Commission aims to follow the path tread on by *Leegin*. The Commission's modifications might simply be based on its own experience and knowledge on the topic of RPM, gradually gathered during the ten years passed. It seems reasonable to assume that if the Commission had endorsed a more liberal approach towards RPM, e.g. by substantially loosening up the (refutable) presumption of non-justifiability, it would have been very eager to clarify this in its new documents.

The motive behind these modifications is not entirely obvious and hence leaves room for argumentation and speculation. As mentioned earlier, the Commission's motive might simply be to clarify that it will continue to maintain a strict approach towards RPM and to inform parties considering of engaging in RPM that this practice will continue to be approached with a substantial degree of skepticism. On this premise, it could be claimed that the Commission is actually *actively* distancing itself from *Leegin* by emphasizing that there is little chance of RPM being tolerated under the competition rules. Nonetheless, this reasoning seems somewhat problematic seeing as the Commission, for the *first time* in these new Guidelines, makes *explicit* reference to RPM's pro-competitive potential and to the refutability of the Art 101(3) presumption. On this basis one could instead claim that the approach towards RPM is not static but that it might slowly yet gradually be evolving; *slowly* since, as noted earlier, the Commission has explicitly held that it generally does not aim to make any fundamental alterations in the legal framework governing vertical restraints and *gradually* since the Commission does not provide any clear-cut answers to these issues in the new documents but instead includes novelties therein which can be *interpreted* as hints of what might be expected in June 2010.

In this context it is very interesting to draw a parallel between this restraint and maximum RPM. F Van Doorn elaborates on how the approach towards the latter restraint has evolved through time. He notes that the current/soon old Verticals Regulation and Guidelines treat this restraint more leniently than they treat minimum and fixed RPM, given that the former is not characterized as a hardcore restriction. He points out nonetheless, that maximum RPM has *not always* been approached in this manner. In his words:

“Prior to the Guidelines on Vertical Restraints, the Commission was of the opinion that not only agreeing on minimum and fixed but also on maximum resale prices has as

its object the restriction of competition. This attitude towards maximum RPM and other vertical restraints has been heavily criticised in the literature as a too interventionist approach based on form rather than on economic analysis, i.e. effects. Pursuant to the ‘more economic approach’, however, the Commission issued its Guidelines on Vertical Restraints which created the basis for its current policy in which maximum RPM is no longer an hardcore restriction.”²⁸⁶

The above can be interpreted as proof of that the overall legal framework governing vertical restraints is not static but liable to change, as knowledge and experience is gained and legal and economic reasoning evolves. It is noteworthy in this context that maximum RPM had been subject to a stricter approach in the past, not only in the EU but also in the US. There, this restraint was subject to a per se prohibition until this approach was fundamentally modified with the Supreme Court’s decision in *Khan*²⁸⁷; a decision which interestingly came prior to the adoption of the current/soon old Verticals Regulation and Guidelines in the EU, where a more lenient approach towards maximum RPM was introduced.²⁸⁸ On a different note, the points made by F van Doorn also suggest that when deciding to modify its approach towards maximum RPM, the Commission was influenced by certain factors. These factors seem partly to have been the substantial criticism towards its earlier approach by scholars and partly the Commission’s devotion to a more economic and effects-based approach in relation to vertical restraints overall.

Considering the above, it is not entirely unreasonable to argue that the approach towards minimum and fixed RPM might also be evolving; both in light of the lively debate regarding the competitive impact of this restraint and seeing as the Commission has stressed that it will continue to strive for a more economic and effects-based approach in the overall system of vertical restraints.²⁸⁹ This is a rather reasonable explanation for the Commission’s choice not to be more *even more* elaborative when discussing minimum and fixed RPM in its new Guidelines. The Commission might have realized that there is a substantial degree of risk and uncertainty in radically overturning its up-to-date approach; the economic debate lacks in consistency and RPM, albeit potentially pro-competitive in certain instances, also has considerable anti-competitive potential. For this reason the Commission has chosen to continue to characterize RPM as a hardcore restriction, hereby subjecting it both to a presumption of illegality and to a presumption of non-justifiability under Art 101(3). Yet, due to the Commission’s own experience and knowledge gained under the ten years passed, due to findings in economic and legal doctrine, due to the reasoning

²⁸⁶ F Van Doorn *Resale Price Maintenance in EC Competition Law: The Need for a Standardized Approach*, 6 (2009).

²⁸⁷ *State Oil Co. v Khan*, 522 U.S. 3, 10, 118 S.Ct. 275 (1997) where *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 1258 (1968) was overruled.

²⁸⁸ Guidelines on Vertical Restraints, (2000) OJ C291/1, para 111.

²⁸⁹ See http://ec.europa.eu/competition/consultations/2009_vertical_agreements/

in *Leegin* or in line with its own goal to continue to penetrate the legal framework of vertical restraints with a more economic approach, the Commission might have realized that it must *openly* refine its view towards RPM. To bring this approach in line with any of the above considerations it needs to acknowledge, as it explicitly has done, that RPM *can* have pro-competitive potential and that there is a possibility to *refute* the presumption of non-justifiability under Art 101(3). The Commission seems *willing* to encourage efficiency claims under Art 101(3). For this purpose it might have found important to provide some assistance to firms, e.g. by highlighting what sort of RPM instances might have pro-competitive potential and what would be demanded proof-wise for a successful efficiency claim to be made in a free-rider context. At the same time, the Commission definitely does *not seem willing* to take too many risks.

What is to be expected in future is very difficult to foresee, given that the Commission is not the only player in this field. The European judiciary can also be expected to play a substantial role in interpreting and applying these rules, as well as the national judiciary and the national competition authorities. The discussion in this subchapter nonetheless suggests that the new RPM regime might have opened up the doors to a *more nuanced* approach towards this restraint, an approach which *might itself evolve in future*. Equally, the reasoning in this subchapter indicates that the clarifications in the new Guidelines might induce firms to make more efficiency claims, hereby raising awareness on the market as to how this restraint might actually come to be dealt with under the new legal framework.

So, supposing that some form of change in relation to RPM might be under way on European level, could Europe of June 2010 be witnessing the first stages towards some form of *Leeginification*? Well, as hinted earlier on, the answer depends on what *Leeginification* means. *Does it mean a truncated or a plenary rule of reason analysis?* This remains unclear since the rule of reason analysis for RPM, introduced by the *Leegin* decision, has not yet taken its final form in the US and has since even been rejected in certain States. Moreover, the answer depends on where Europe is headed RPM-wise under the new regime. This is also rather uncertain at present. As has been demonstrated in the last paragraph of *chapter 5.2.1*, discussing the cross-border implications of the *Leegin* decision means always keeping in mind that there are a number of important differences between the US and the EU competition law systems. On these premises, it seems tricky to *even compare* the European with the US RPM approaches, let alone decide on the concrete implications of the *Leegin* decision on EU-level. Not only is it difficult to draw any *safe* conclusions at present, regarding the form that each respective approach might take in future. It is also complex to compare two RPM approaches which are influenced by a number of additional elements (elements which are referred to in the last paragraph of following subchapter), *besides* the actual policy view towards this restraint. This conclusion might appear somewhat hasty at present but will make more sense when read in light of the argumentation in the following subchapters.

5.3 Does the new Verticals Regulation do RPM justice?

It is rather reasonable to claim that the answer to this question will in part depend on how one perceives the competitive potential of RPM. As discussed in the previous subchapter, there do not appear to be any *ground-breaking* changes in the new Verticals Regulation and Guidelines on the topic of RPM. The Commission has not made itself *entirely* clear as to what policy view it intends to adopt in relation to this restraint. For this reason, the alterations made have been *interpreted* as potential, yet cautious modifications in the approach towards this restraint.

It is quite reasonable to claim that he who is convinced that this restraint is most likely to be anti-competitive and highly unlikely to be pro-competitive, will support a strict approach towards RPM. He might criticize the Commission for even acknowledging that RPM could potentially be pro-competitive and interpret the modifications made by the latter as changes which undermine the otherwise warranted strict approach towards this restraint. On the other hand, he who is convinced of RPM's pro-competitive potential *to a greater extent* might be in favor of a more nuanced approach towards this restraint. He might interpret the Commission's modification as an indication that the notion that RPM is purely anti-competitive has been challenged under the ten years passed and that it has been found to no longer be entirely warranted. He who is convinced that RPM might be efficiency enhancing in certain instances need nonetheless not automatically be in favor of radical changes in the current/soon old RPM regime.

The points made above indicate that the *interpretation* and the *evaluation* of the new RPM regime will directly depend on the view of the interpreter, which in turn will be based on those RPM hypotheses which he finds more convincing. This would demand both an examination of the economic theories on both sides of the RPM debate and an assessment on their sustainability and likelihood. This would also demand an examination of the empirical evidence in this field so as to be able to take a stand on whether these theories can find support in competitive reality.

The conclusions drawn in *chapter 4.5* of this thesis show that the economic RPM debate is rich in opinions on both sides and that it is rather complex and multifaceted. It does not seem to provide any *safe*, straightforward guidance regarding the *overall* impact of RPM on competition. Furthermore, there is a lack of empirical evidence which appears to be an important weakness in this economic debate. In light of these weaknesses in economic reasoning - reasoning which judging for the *Leegin* decision *can* have a considerable influence on *legal* reasoning - it is understandable that the Commission is not very elaborative in its new regime and seems rather cautious when discussing the pro-competitive potential of RPM and the restraint's relation to efficiency claims under Art 101(3).

Seeing as competition law is strongly linked with consumer welfare, it may not be warranted to overly criticize the Commission for being cautious. This cautiousness seems even more defensible when considering the aftermath of the *Leegin* decision in the US; the criticism against the argumentation of the majority, the uncertainty brought about by the decision as regards the application of the rule of reason in practice and even the downright rejection of the decision in certain States. What's more, Daniel P O' Brien refers to the plethora economic *hypotheses* addressing the potential competitive impact of vertical restraints and declares that "(...) possibility theorems without more do not provide a good basis for policy".²⁹⁰ Further, the very function of competition economics, described by J Goyder, indicates that the *legal* reliance on economics for more than informative purposes might potentially be more harmful for competition law than it might be beneficial. She holds that:

"Competition economics (...) serves essentially to explain the working of markets, whether to assess what has happened in the past or to predict what may happen in the future. It is untroubled by large numbers of variables or unknown facts, as these can be dealt with by postulating certain assumptions."²⁹¹

In any case, even if the Commission is not very elaborative on these issues, it still leaves some openings for a gradually more nuanced approach towards this restraint; openings which should be welcomed if one were to accept that there is *some* degree of sustainability in at least *some* of the efficiency theories and empirics on the topic. And as has been pointed out earlier on, the Commission is not the only player in the field of RPM. The European judiciary can be expected to play an additional, decisive part in the process of giving meaning to the new RPM regime.²⁹²

In sum, it is currently difficult to take a stand on whether the new RPM regime does this restraint justice. On the other hand it is rather reasonable to claim, in light of the points made above, that the new regime does not do RPM *injustice*, at least not at present. This conclusion can be fortified when taking into account the overall function of competition law. Competition law, in contrast to competition economics whose essential function has been highlighted above, primarily aims to dictate what behavior is acceptable under law and what is not. Thus, for competition law to serve its purpose it is vital that the stipulations within this field are governed by a substantial

²⁹⁰ D P O' Brien *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in *The Pros and Cons of Vertical Restraints*, Swedish Competition Authority, 81 (2008).

²⁹¹ J Goyder *Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review On Vertical Restraints*, in *The Pros and Cons of Vertical Restraints*, Swedish Competition Authority, 169f (2008).

²⁹² Regarding the potential of the new Guidelines to adapt to future changes and the European judiciary's decisive role in the process of giving meaning to the new RPM regime, see e.g. Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 4.

degree of clarity and simplicity in their application.²⁹³ This indicates that competition law is not only concerned with the functioning of markets. It is also concerned with administrative and practical aspects, with legal certainty and predictability, with the protection of weaker parties (e.g. the consumers) and so forth.

5.4 Efficiency claims under Article 101(3) TFEU after June 2010-margins for companies seeking to employ RPM

This subchapter is a natural follow-up to the issues which have already been discussed previously in this chapter and which relate to the status of RPM under the new Verticals Regulation and Guidelines. Here, focus lies exclusively on the individual company and on its margins to rely on RPM under the new regime. This is important to discuss since, in light of the abolition of the notification procedure in Regulation 1/2003²⁹⁴, a fair share of responsibility in assessing the conformity of this restraint with Art 101 still continues to lie on individual companies.²⁹⁵ Thus, the companies themselves will have to be aware of what room for maneuver the new regime grants them. The logical starting point in this discussion is the wording of the new Guidelines. This wording, together with conclusions drawn earlier on in this thesis, will provide substantial assistance when attempting to prospectively examine this issue. The general legal context of RPM will not be looked into in this subchapter. Regarding this legal methodology, which is maintained in the new regime, the reader is directed back to *chapter 2* of this thesis.

Supposing that an individual company is considering of adopting RPM, this company will initially have to estimate whether the particular RPM instance which it is considering to employ has the potential of passing the test of Art 101 or not. Essentially, the company will have to be *aware* of which types of RPM instances have more respectively less potential to pass this test and what chances this company has, in more practical terms e.g. in terms of proof burdens, of succeeding to defend the adoption of this restraint; *knowledge* which the new Guidelines to some degree appear to convey to these companies.

Regarding the types of RPM instances which might have more respectively less potential to pass the test of Art 101, the new Guidelines do not provide any in-depth or detailed guidance. Nonetheless, they do point out that this restraint might be efficiency enhancing if adopted in an attempt to introduce a novel brand into the market, in new entry situations or as a means of

²⁹³ J Goyder *Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review On Vertical Restraints*, in *The Pros and Cons of Vertical Restraints*, Swedish Competition Authority, 169f (2008).

²⁹⁴ Council Regulation 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJ L1/1.

²⁹⁵ *Ibid*, paras 1-4.

encouraging pre-sales services by averting free-riders. Fixed RPM might also generate efficiencies when relied on as a means of organizing temporary low price campaigns in e.g. a franchising system.²⁹⁶ The Commission's reference to this pro-competitive potential is preceded by its equally explicit reference to a number of RPM instances with anti-competitive potential.²⁹⁷ At first sight, it seems possible to draw a clear line between the potentially harmful respectively potentially efficient RPM instances. One could for instance conclude, already at this point, that adopting RPM as a means of facilitating the manufacturer's entry into a new market will most probably pass the test of Art 101. In other words the potentially pro-competitive RPM instances explicitly referred to by the Commission might be interpreted by companies as a safe zone in which Art 101 cannot intervene. Yet when taking a closer look at the new Guidelines, this conclusion proves rather hasty. It reveals that the assessment is much more complicated than so.

An example of this complexity is the overall lack of detail in the potentially pro-competitive examples listed by the Commission. This element was more apparent in the draft Guidelines and had already at that stage attracted the attention of the ECLF. The ECLF argued that the Commission should elaborate on what it meant when it e.g. talked about the introduction of a novel brand in the relevant market and if this differed from the introduction of novel goods or the extension of an already existent sort of goods therein.²⁹⁸ Fortunately, the Commission has made an active effort to correct, *to some degree*, this lack of clarity in the new Guidelines by explaining how pro-competitiveness might occur in the different instances listed.²⁹⁹

Regarding the company's awareness of its chances, in more general terms, to defend the adoption of this restraint the following must be taken into consideration. Firstly how the proof burdens are allocated under Art 101 and secondly what problems the company might stumble upon when attempting to meet the cumulative criteria in Art 101(3).

A fictive RPM agreement will automatically fall outside the sphere of the Verticals Regulation and will be subject partly to a presumption of illegality under Art 101(1) and partly to a presumption that it will fail to meet the criteria in Art 101(3). Yet this chain of effects cannot be put into motion, if the RPM agreement from the very beginning can escape Art 101(1), by not qualifying to pass the article's criteria. This means that companies do not only have Art 101(3) to fall back on when attempting to defend an RPM agreement. To this aim they might instead be able to successfully rely on the criteria in Art 101(1) and avoid the chain of effects described above. Note

²⁹⁶ Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 225.

²⁹⁷ *Ibid.*, para 220.

²⁹⁸ European Competition Lawyers Forum, *Comments on the Draft Block Exemption Regulation and Guidelines on Vertical Restraints*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 11 (2009).

²⁹⁹ Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 225.

nonetheless, that the criteria in Art 101(1) are of jurisdictional character and thus that their fulfillment might not free the agreement from scrutiny on national level.

The Art 101(1) criterion which springs to mind in this context is the criterion of ‘*appreciability*’. This in light of a hint made by the Commission in the *draft* Guidelines, a hint which has regrettably and for unknown reasons been removed from the text of the *new* Guidelines. When referring to the reliance on RPM as means of organizing temporary low price campaigns in the *draft* Guidelines, the Commission interestingly noted that: “In view of the short duration (2 to 6 weeks in most cases) this may not even have any appreciable negative effects.”³⁰⁰ Even though this wording does not find its match in the *new* Guidelines, it nonetheless mirrors what has already been pointed out earlier on, namely that the fulfillment of the Art 101(1) criteria cannot be taken for granted. So, even if this wording has been abandoned in the new Guidelines, there is still reason to argue that the ‘*appreciability*’ criterion in Art 101(1) *might* not be fulfilled if it e.g. can be proven that RPM is relied on *temporarily* and for *a short period of time*. In other words, the exclusion of this text need not make it impossible for companies engaging in this sort of RPM to escape illegality already at the Art 101(1) level. Even so, a clarification in the new Guidelines on this restraint’s relationship to the criteria in Art 101(1) would have been desirable.

Another issue closely related to the ‘*appreciability*’ criterion in Art 101(1) is the size of the company, i.e. its market share. In the new Guidelines the Commission declares that: “As regards hardcore restrictions referred to in the “*de minimis*” notice, Article 101(1) may apply below the 15% threshold, provided that there is an appreciable effect on trade between Member States and on competition.”³⁰¹ This means that even if an agreement of small scale will not benefit from the ‘*de minimis*’ Notice, since it includes a hardcore restriction (e.g. RPM), this agreement will *not* automatically infringe Art 101(1).³⁰² In such a case it will have to be assessed whether the agreement is likely to have an *appreciable* impact on both inter-state trade and on competition.³⁰³ According to the Commission, the applicable jurisprudence of the European judiciary will be of utmost relevance in this context. This undoubtedly creates an opening for small and medium-sized firms to defend their reliance on RPM, particularly if they also have a pro-competitive rationale for doing so. It has nonetheless been pointed out previously that *appreciability* under Art 101(1) is not difficult to meet, an element which will be disadvantageous for the firms in question.

³⁰⁰ Draft Commission Notice, Guidelines on Vertical Restraints, para 221.

³⁰¹ Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 10.

³⁰² Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001 C 368/13 paras 1-2, 7 and 11.

³⁰³ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 10.

Supposing that the fictive RPM agreement cannot escape Art 101(1), the company will have to proceed by substantiating that the criteria in Art 101(3) are fulfilled; this under the presumption that it most probably will not manage to do so. The company at hand will face a number of difficulties when attempting to make such a claim.

The first difficulty is that the criteria in this article are both cumulative and exhaustive. Substantial research might be demanded before the company can draw any safe conclusions as to whether all four criteria in this article are met, research which might prove to be both costly and time consuming. Another difficulty is the plausibility that the presumption of non-justifiability under Art 101(3) will remain strong under the new RPM regime, albeit possibly not as strong as before.

A further crux reveals itself when looking at the general Guidelines on the application of Art 101(3), Guidelines which will *continue* to be in force even post June 2010. In these Guidelines the Commission expresses serious doubt as to whether gravely restrictive practices (such as RPM) will be capable of fulfilling the four conditions in this article. According to the Commission, such restraints will generally not manage to fulfill the two initial criteria in Art 101(3) since they will not generate objective economic gain nor benefit consumers. They will also generally fall short of the indispensability assessment, which means that there is a good chance that there will be alternative less restrictive ways of achieving the possible efficiencies strived for.³⁰⁴ The above demonstrates the strength of the presumption of non-justifiability when it comes to gravely restrictive practices *in general*. Of course, it should be kept in mind that these general Guidelines and the new Guidelines on Vertical Restraints are to be read side by side. This is important to point out since the strength of the two non-justifiability presumptions in these two *different* Guidelines do not seem to correspond *entirely*. To clarify what is meant by this, an example is in place; the Guidelines on Art 101(3) refer to gravely restrictive practices *in general* and *explicitly* say that these practices *will not* be liable of generating consumer benefit, whereas the new Guidelines refer *specifically* to RPM and claim that this restraint *can* in certain instances generate consumer benefits.³⁰⁵ This of course need not imply that there is some form of discrepancy in the system. Nonetheless, it indicates that even if the Commission sees pro-competitive potential in RPM, it is still *strongly* convinced that when it comes to hardcore restrictions *in general* anti-competitiveness *will* prevail.

An additional difficulty, which a company might be faced with in this context, is its responsibility to make sure that its RPM agreement has the capacity to generate objective economic benefits and thus fulfill the first criterion in Art 101(3). It is rather reasonable to assume that in attempting to

³⁰⁴ *Ibid*, paras 20 and 46.

³⁰⁵ Compare Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 46 to Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 225.

do so this company will i.a. seek for parallels between its RPM agreement and economic efficiency theories and/or empirical evidence. The problem here is that economic RPM research lacks in consistency and is very theoretical in nature. Also, as mentioned earlier, even if the Commission provides rather straightforward examples of potentially pro-competitive RPM instances in its new Guidelines, there is still a substantial degree of uncertainty regarding their frequency as well as their *actual* capacity to justify an RPM agreement. Beyond this, having to prove objective economic benefits means having to conduct individual research on the effects or potential effects of the specific RPM agreement so as to identify, not just any economic benefits, but benefits which are objectively credible and verifiable. This exercise might not only be costly and time consuming but also difficult and uncertain, since the benefits spoken of will have to be based on proof which in turn might be based on a fair share of assumptions and predictions.

As regards the company's chances of meeting the indispensability requirement in Art 101(3), the following message can be subsumed from the new Guidelines. In para 109 the Commission stresses that there is a *considerable* degree of substitutability amongst vertical restraints.³⁰⁶ Ultimately, this will be disadvantageous for the individual company attempting to defend its reliance on RPM. In light of the Commission's approach towards vertical restraints in general (both hardcore and non-hardcore restraints) and the degree of risk which it attaches to each of these restraints, it is reasonable to claim that a non-hardcore restriction will always be favored over a hardcore restriction (e.g. RPM). This means that if a less restrictive, equally effective non-hardcore restriction is available, it is plausible that the hardcore restriction (e.g. RPM) will fail to pass the test of indispensability and thus also the test of Art 101(3).

Another factor which does not speak in favor of the individual company is a point made by two Sections within the ABA. These Sections declare that they "(...) are not aware of an instance in the last 50 years in which a firm has successfully made efficiency arguments to defend an RPM clause under EC competition law."³⁰⁷ In light of this statement it might be somewhat naïve to interpret the subtle and careful modifications made by the Commission in the new Guidelines as a sign that these 'success' rates might potentially increase in future. Nonetheless, it cannot be overlooked that changes have in fact been made by the Commission. Albeit not groundbreaking, they do indicate a *slight* change in attitude towards RPM and convey a more multifaceted image of this restraint; elements which might be encouraging for companies considering to rely this restraint. For

³⁰⁶ Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 109.

³⁰⁷ American Bar Association, *Joint Comments Of The American Bar Association Section of Antitrust Law and Section of International Law on the Proposal of the European Commission for a Revised Block Exemption Regulation and Guidelines on Supply and Distribution Agreements (September 2009)*, The European Commission's Public Consultation on Review of the competition rules applicable to vertical restraints, 24 (2009).

this reason, it might not be entirely out to question to expect an increase in efficiency claims and potentially even a *slight* increase in success rates. Yet at an initial stage, these success rates will most probably be confined to rather extraordinary RPM instances.

To conclude, the concern for an individual company will not be to determine its margins of success under the new regime. Its concern will instead be to determine whether it is *at all* willing to rely on RPM. *Is daring to do so worth the risk?* For as has been discussed throughout this chapter, *successfully* adopting RPM means having to overcome a number of hindrances. Taking a risk and failing might result in burdensome financial consequences for the individual company e.g. fines. On the other hand, taking a risk and succeeding might not only benefit the parties involved but also enhance the competitive climate and benefit consumers.

In this chapter (*chapter 5* as whole), the status of RPM on European level has been prospectively examined. Throughout this chapter, the focus of the discussion has primarily been on the new Verticals Regulation and accompanying Guidelines. The discussion has also had a comparative undertone and has encompassed an attempt to seek parallels between the US approach towards RPM post-*Leegin* and the new European RPM regime post June 2010. In the next chapter, focus will be shifted away from the concrete sphere of the new European RPM regime but will still lie on discussing RPM in *future terms*. The questions seeking to be answered are the following:

- Supposing that the Commission were to conclude in future that the approach towards RPM should be *even more* economic and effects-based, how could it re-craft its legal framework so as to adapt to this change?
- What might the cruxes of carrying out such a change be?
- Would such modifications at all be desirable?

The analysis of these issues will constitute the final analytical step in this thesis. Once this task is completed the chapter will be closed with central conclusions and reflections, where the questions encompassed in the purpose of this thesis will be answered.

6 ANALYSIS AND CONCLUSIONS

6.1 REVIEW OR REEVALUATION: ALTERNATIVES AND CRUXES

This analysis takes off from the conclusions already drawn in *chapter 5*, on the possible impact of the new Verticals Regulation and accompanying Guidelines on the future approach towards RPM. To recapitulate, the modifications made by the Commission in the new Guidelines suggest that a *slightly* more nuanced approach towards this restraint might have been endorsed. I have claimed that, for the time being, the cautiousness of the Commission in this respect is not unjustified. In the following chapter, these conclusions will be taken one step further. Supposing that future developments would point towards a need to adopt an *even more* nuanced approach towards RPM, what form might this need for change take and what alternatives are available to this aim *within* the European legal framework? To clarify what is meant by future developments consider the following possibilities. Increased knowledge and experience *proves* that RPM has more pro-competitive potential than it is currently believed to have. Also, economic thinking evolves even further and provides more consistent and highly credible theories on the overall impact of RPM, with stronger support on empirical evidence. On these premises and assuming that a need to reevaluate the approach towards RPM is at hand, it is interesting to examine what possibilities the legal framework on vertical restraints might be able to offer.

6.1.1 Opening up Article 101(1) TFEU to a more “effects-based” approach towards RPM?

The logical starting point in this examination is Art 101(1) and the ‘competition requirement’. As discussed in *chapter 2*, the fulfillment of this requirement demands that an agreement has as its object *or* effect (either actual or potential) the upset of competition. Upset of competition *by object* implies that the very aim of the agreement is to affect competition negatively. Such an anti-competitive object is established on grounds of a number of factors such as the actual stipulations in the agreement, its economic background and the conduct of the parties.³⁰⁸ If such an actual or potential object is not present, it will instead be examined whether the agreement- irrespective of intent- upsets competition *by effect*.³⁰⁹ RPM has time and time again been deemed as restrictive of competition *by object*. It

³⁰⁸ Cases 29/83 and 30/83 *CRAM and Rheinzink* (1984) ECR 1679.

³⁰⁹ See Case 56-65 *Société La Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* (1966) ECR 249.

has namely been deemed to have *such* anti-competitive capacity, that *any* elaboration on its concrete effects on competition has been found to be redundant.³¹⁰ The new Regulation and Guidelines do not suggest, in any way, that the Commission plans to abandon its characterization of RPM as an ‘object restriction’ any time soon.

Interestingly though, if future developments (increase in knowledge, experience, empirical evidence etc.) were to demonstrate that e.g. the pro-competitive spectrum of RPM is broader than it is currently believed to be, this might shake the presumption of anti-competitiveness to its very core. In such a scenario, it might no longer be *as* warranted to maintain the *presumption* that this practice restricts competition in all or most cases; a presumption which is currently based on the characterization of RPM as a hardcore, object restriction. The more pro-competitive capacity attached to RPM, the less reason to keep on characterizing this restraint as a restriction of competition by object. And of course, absent such a characterization, the infringement of Art 101(1) will instead have to depend on whether it can be substantiated that the agreement has as its *effect* (actual or potential) the restriction of competition.

It is apparent that, for the legal framework to come in line with an eventual acknowledgement that RPM is ‘not all that bad’, it will have to be more difficult than it currently is for an RPM agreement to fulfill the competition requirement. In practical terms, the legal framework already provides an efficient tool for implementing such a future change in approach. Once the agreement is freed from the presumption of anti-competitiveness, the Commission will namely bear the burden of proving that the agreement has the actual or potential capacity to affect competition; a burden which it is otherwise liberated from if the notion that RPM is restrictive of competition by object and thus also the presumption of anti-competitiveness is maintained.³¹¹ Nonetheless, the abandonment of the presumption of anti-competitiveness would first and foremost demand that RPM be disconnected from the notion ‘hardcore restriction’, meaning that the Verticals Regulations itself might need to undergo some changes. This need of course not imply that RPM be made fully exemptible under this Regulation. This restraint might simply need be moved within the Regulation but to another group of vertical restraints, e.g. to the group of ‘excluded restrictions’.³¹² A possible crux here is that the Commission’s block exemption mechanism is essentially crafted to function as a safe zone for practices which *most probably will not* cause competition problems. A Jones refers to this element as one possible reason why it is difficult to

³¹⁰ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 13. Guidelines on Vertical Restraints (2000) OJ C291/1, paras 21 and 23.

³¹¹ Guidelines on the application of Article 81(3) of the Treaty (2004) OJ C101/97, para 24.

³¹² Regarding the excluded restrictions’ status under the legal framework for vertical restraints *see e.g.*: Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, paras 61-65.

imagine that the Commission will be convinced to drastically alter its policy by removing RPM from the category of hardcore restrictions.³¹³

Another way of opening up Art 101(1) to a more effects-oriented approach might be to go via the article's 'appreciability' criterion. If future developments were to provide even stronger proof that RPM might not appreciably affect competition if adopted temporarily or by a company with very modest power on the market, the possibility that the 'appreciability' criterion in Art 101(1) will not be satisfied increases. On the topic of market power the Commission has declared that: "As regards hardcore restrictions referred to in the «*de minimis*» notice, Article 81(1) may apply below the 15% threshold, provided that there is an appreciable effect on trade between Member States and on competition."³¹⁴ This means that even if an agreement of small scale will not benefit from the 'de minimis' Notice because it includes a hardcore restriction (e.g. RPM), this agreement will *not automatically* infringe Art 101(1).³¹⁵ In such a case it will have to be assessed whether the agreement is likely to have an *appreciable* impact on both inter-state trade and on competition. According to the Commission, the applicable jurisprudence of the European judiciary will be of *upmost relevance* in this context. This statement is understandable since, technically, the Commission's 'de minimis' Notice does not legally bind the European judiciary.³¹⁶

The capacity of the European judiciary to influence the way in which these, one might claim, 'milder' RPM cases (e.g. cases of insignificant market power) could come to be dealt with in future should not be undermined when discussing possible review or reevaluation alternatives. If future developments were to demand a modified application of the 'appreciability' criterion in Art 101(1) (to the benefit of e.g. RPM agreements relied on by parties with a weak position on the market), this task need not necessarily be taken on by the Commission but could very well be taken on independently by the European judiciary via case-law.³¹⁷ Such a change could occur even if the Commission were to continue characterizing RPM as a hardcore restriction under the Verticals Regulation and were to continue excluding this hardcore restraint from the scope and benefit of the 'de minimis' Notice. Supposing now that the European judiciary would find that it is justified to approach RPM differently, is it reasonable to claim that the former would be willing to go against the Commission in doing so? Seeing as the European

³¹³ A Jones, *Resale Price Maintenance: A Debate About Competition Policy in Europe?* European Competition Journal (2009), 512.

³¹⁴ Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 10.

³¹⁵ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001 C 368/13 paras 1-2, 7 and 11.

³¹⁶ Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, para 10; *see also* Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001 C 368/13 para 6.

³¹⁷ *See e.g.* the reasoning of the ECJ in Case 5/69 *Völk v Vernaëcke* (1969) ECR 295.

Courts are not formally bound by the Commission's Notices (in this case neither the *de minimis* nor the Guidelines on Vertical Restraints), such Notices have *not* been perceived as "(...) rules of law which the administration is always bound to observe (...)"³¹⁸. Even so, the ECJ has declared that Guidelines "(...) nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (...)".³¹⁹ This statement shows that there is a substantial degree of respect towards the Commission and its Notices from the European Courts' part. For this reason, the idea that the European judiciary would singlehandedly undermine the Commission's approach via case-law seems somewhat farfetched yet not entirely out of the question if there would be strong reasons for doing so.

6.1.2 Efficiency claims under Article 101(3) TFEU: reviewing the presumption of non-compliance?

The individual exception in Art 101(3) is essential to take into consideration when discussing review or reevaluation alternatives. In *chapter 5.2.2* of this thesis, I attempted to examine the rationale behind the RPM-specific modifications made by the Commission in its new Guidelines. These modifications consisted i.a. of the explicit acknowledgement that RPM *can* have pro-competitive potential in certain instances and that there is a possibility to *refute* the presumption of non-justifiability under Art 101(3). One of my conclusions in this context was that the Commission now seemed more *willing* to encourage efficiency claims under Art 101(3) but, at the same time, did *not* seem *willing* to take too many risks.

Supposing once again that developments in future were to demonstrate that the pro-competitive spectrum of RPM is broader than it is currently believed to be, the question is how Art 101(3) could help penetrate such developments into the legal RPM regime. European case-law has conveyed the message that reasonable arguments put forward by parties in the context of an Art 101(3) efficiency claim cannot be dismissed straightaway, even if the efficiency claim would involve a hardcore restriction such as RPM. Instead, all such arguments and the evidence supporting them will have to be thoroughly examined and countered by way of substantiated proof.³²⁰ This message is nonetheless currently overshadowed by the presumption of non-justifiability, which RPM is subject to since it is a hardcore restriction and is thus perceived as restrictive of competition by object. Even if the Commission in the new RPM regime seems *willing* to encourage more efficiency claims and also leaves margins to speculate that such a claim might in certain cases *even* be successful, this new regime would not do RPM justice if future developments were to *demand* an *even more* effects-

³¹⁸ Case C-397/03 *Archer Daniels Midland Co. v Commission* (2006) ECR I-4429, para 91.

³¹⁹ Case C-397/03 *Archer Daniels Midland Co. v Commission* (2006) ECR I-4429, para 91.

³²⁰ See *chapter 2.6*.

based approach towards this restraint. In such a case the presumption of non-justifiability would ultimately need to be disconnected from this restraint, most logically by re-categorizing RPM as a restriction of competition by effect instead of by object. Maintaining this presumption would otherwise always leave the claimant at a substantial disadvantage in proceedings, a disadvantage which would not be in line with the demand for an even more nuanced approach towards this restraint.

In para 4 of its new Guidelines, the Commission interestingly points out that this document will not stand in the way of the European judiciary in its interpretation and application of Art 101. This means that, even if the Commission were to insist upon the presumption of non-justifiability in its Guidelines, this would not hinder the European Courts from taking another direction by reconsidering this presumption of non-justifiability (*Leegin*-style). The above must nonetheless be read in light of the point made in the last paragraph of *chapter 6.1.1* and of the following. The European judiciary's role in this process can in no way be interpreted as restrictive of the Commission *own* active and independent role in this field. In para 4 of the same Guidelines the Commission namely stresses that it plans to independently carry on supervising the functioning of the new legal framework and even that it is prepared to make changes in these Guidelines, if this would be found necessary in future. Yet, if case-law from the European Courts were *merely* to suggest that this presumption *might* no longer be justified, it is possible that this might *directly* also influence the national competition authorities and courts in their application of Art 101(1).³²¹ The latter (and even the Commission) might *gradually* start examining efficiency arguments under Art 101(3) with less skepticism and might even be considerably *more* willing to accept - though always in accordance with European case-law - that, in certain instances, RPM might *actually* be liable of satisfying the criteria in Art 101(3). Such a development presupposes nonetheless that companies catch on to this trend and actually insist on making efficiency claims to defend their engaging in RPM.

6.1.3 A more lenient enforcement policy?

An alternative way of penetrating the legal framework governing RPM with a more nuanced, economic approach - provided of course that progress within this field would demand more drastic adjustments in this direction - might be to reconsider the up-to-date enforcement policy towards this restraint. In *chapter 2.6*, reference has been made to certain Commission decisions within the field of RPM. These decisions have provided proof of the Commission's strict enforcement policy towards this restraint. For example in *Volkswagen*³²², the Commission imposed as much as €30.96 million in fines on *Volkswagen* for RPM in Germany.

³²¹ On merits of the decentralized application of Art 101(1). See Council Regulation 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJ L1/1.

³²² *Volkswagen* (2001) OJ L162/14.

One might argue that, in light of the RPM-specific modifications in the new Guidelines, a *slightly* more lenient enforcement policy toward this restraint might already be underway. In any case, if in future the Commission were to be faced with new facts regarding the pro-competitive potential of RPM or were to find that the anti-competitive dangers are more restricted than they are currently believed to be, the Commission might have to seriously consider adopting a more lenient enforcement policy towards this restraint. Otherwise it might end up discouraging companies from engaging in pro-competitive behavior.

First and foremost the Commission might have to consider to what degree it should prioritize vertical intra-brand restraints in general, when enforcing the competition rules. Moreover, it might need to soften up its enforcement policy towards RPM in particular by openly prioritizing certain, 'more dangerous' RPM instances before others. It might also need to consider whether it is justified to impose heavy fines on a company solely because the latter has engaged in RPM, or whether it might be more justified to let the amount of fines depend on and be proportionate to the impact of the specific RPM agreement on competition. Yet, such changes would almost demand that the Commission *decisively* and *radically* alters its approach towards this restraint and that it is on the *safe side* when doing so, i.e. that it does not hereby put consumer welfare at risk.

6.1.4 Reality check: is review or reevaluation plausible or even desirable?

More or less all the potential review or reevaluation alternatives discussed above presuppose first, that substantial developments occur in the field of RPM - both inside (e.g. practical experience with this restraint) and outside (e.g. economic reasoning) the legal framework governing this restraint - and second, that the authorities are prepared to *actively* modify their approach towards this restraint. To clarify, if the economic debate on this topic or the search for relevant empirical evidence would remain static, the likelihood that the Commission might feel enticed to adopt a more economic approach towards RPM in future decreases substantially. The same goes for practical experience. If companies would be disinclined or would not dare to engage in RPM, it would be difficult to ever put the Commission's policy view to the test and even to discuss the justifiability of this view before the European Courts. In other words, the plausibility of review or reevaluation increases respectively decreases depending on developments inside and outside the legal framework of RPM.

The plausibility of review or reevaluation of the European approach towards RPM can also be examined in relation to the modifications made by the Commission in the new legal framework on vertical restraints. In 2007, the approach towards RPM in the US was radically overturned by the *Leegin* judgment. The Supreme Court relied on economic reasoning (and other factors such as the fact that the *Dr. Miles* decision was outdated) when

deciding to abandon the per se rule in favor of a rule of reason. The *Leegin* decision has indirectly also influenced Europeans. This is obvious merely by looking at the number of European publications which, since the *Leegin* decision, have expressed a comparative need to discuss the European approach towards RPM. Moreover, the economic debate on this topic has been and still is intense and economic RPM hypotheses, on both the pro- and anti-competitive side, have demonstrated that economic thinking in this field has developed.

Despite the above, the Commission has proceeded very cautiously when renewing its legal framework on vertical restraints. Judging from the modest, RPM-specific modifications made by the Commission in the new Guidelines and from the fact that no changes have been made in the new Verticals Regulation in relation to RPM, it is apparent that the Commission has not been enticed to *radically* overturn its approach towards this restraint. Seeing as the US U-turn in *Leegin* and the intense economic and legal debate on RPM do not seem to have persuaded the Commission to make more daring modifications in its new RPM regime, one essentially wonders what circumstances *would have been* demanded for the Commission to reconsider its approach towards RPM more fundamentally. Of course, this does not mean that the Commission does not have good reasons for being cautious. It might have been concerned with the lack of empirical evidence in this field or might even have considered any fundamental changes to be too risky, especially since one of its main priorities in the field of competition law is to protect consumers. These concerns are justified. In any case, the fact that the developments in the US and in economic reasoning do not seem to have influenced the Commission particularly much and the fact that the Commission has always approached RPM stringently, makes any *radical* changes in its RPM approach in future seem rather implausible.

As hinted earlier on, the Commission does not seem keen of acting in uncertainty. This is understandable since the goal of introducing a more economic approach in the legal framework for vertical restraints is not an isolated goal. This goal must namely correlate with other important interests and goals in order for the legal framework to function satisfactorily from a legal point-of-view. Some of these additional interests have already been referred to throughout this thesis and are e.g. the protection of consumers, the interest of maintaining legal certainty and predictability within the legal system, administrative interests such as the need for clarity in legal rules and non-complexity in their application. As the dissenting opinion in *Leegin* declared when attempting to guess what might occur after the abandonment of the per se rule in the US, a more lenient approach towards RPM would most probably lead to a general increase of retail prices and cause legal instability as lower instances would attempt to formulate well-functioning principles under the rule of reason.³²³ Even if the US standards of assessment (per se, rule of reason) are not directly comparable to the EU standards of assessment, Justice Breyer's statement nonetheless indicates

³²³ *Leegin Creative Leather Products Inc v PSKS, Inc, DBA Kay's Kloset...Kay's Shoes*, 551 U.S. 877, 918-929, 127 S.Ct. 2705, 2731-2737 (2007).

that there are substantial risks in drastically overturning the approach towards RPM; risks which must be taken into account even when discussing the future of RPM in the EU.

The increase of retail prices resulting from the adoption of RPM finds support in economic reasoning, although it has also been argued that RPM might have pro-competitive potential in such instances.³²⁴ This is definitely a potential effect to be reckoned with seeing as there is a link between the retail price and the final price charged to consumers. Further, if a drastic change in approach were to be adopted in the EU, e.g. by re-categorizing RPM as a practice restrictive of competition by effect instead of by object, one would have to take into consideration the practical implications of such a re-categorization. A purely effects-based approach might be justified some time in future, but it might also lead to more complex, economic assessments and weighing exercises relating to the potential competitive effects of this restraint. At present, lower courts, competition authorities and even individual companies are familiar with the rather straightforward presumptions currently attached to RPM and the overall stringent approach towards this restraint. For this reason, they would need substantial practical guidance before managing to successfully switch and adapt to effects-based, economic RPM assessments. Such practical guidance can nonetheless not be provided for *before* there is sufficient empirical evidence to support the economic hypotheses in this field and *before* safer conclusions can be drawn regarding the frequency of the effects connected to RPM and the practice's overall impact on competition. For all the above reasons and on the basis of the up-to-date data on this topic, a clear-cut, effects-based RPM approach seems rather undesirable.

This need not imply that *a more nuanced* approach towards this restraint is equally undesirable. The fact that RPM *can*, in certain instances, be pro-competitive has even been acknowledged by the Commission itself in the new Guidelines. The openings left by the Commission in these new documents are subtle but indicate that a slightly more nuanced approach towards this restraint *might* be underway. What approach will be endorsed in practice is still rather unclear. In any case my opinion is that a slightly more nuanced approach towards this restraint, e.g. by loosening up the presumption of non-justifiability under Art 101(3), is desirable. Such an approach would not entirely free RPM from considerable scrutiny; an element which is important to hold on to considering the economic hypotheses on RPM's anti-competitive potential and relevant empirics. Nonetheless, such an approach would also leave wider margins for genuinely pro-competitive RPM to come through and pass the test of Art 101(3).

³²⁴ See chapter 4.

6.2 Conclusions

The common denominator or the general goal of all the discussions carried out in the present thesis has been to *prospectively* examine the policy view towards RPM in European competition law. In order to close this thesis in a comprehensible manner it is vital to rationalize the main conclusions drawn by reconnecting them to this common denominator, which also constitutes the very purpose of this thesis. The basis upon which this purpose was formulated was essentially the anticipation of a new Verticals Regulation in Europe in June of 2010, the RPM U-turn in the United States executed in 2007 by the Supreme Court in *Leegin* and developments in economic thinking on this topic. The question arising from the above was ultimately whether a change in approach towards RPM, comparable to that in the US, *could* or *should* be anticipated in Europe come June 2010.

To answer this question I have elaborated on the reasons behind the change of direction on RPM by the US Supreme Court in *Leegin*, addressed the situation post-*Leegin* and discussed the positive and negative implications of a “rule of reason” analysis on US-level. Moreover, I have presented an outline of the debate amongst economists regarding the potential competitive harms and efficiencies entailed in RPM. Finally I have put the above into an EU-context as a tool for *evaluating*, both from a practical and a policy point of view, the new Verticals Regulation and for *considering* the possibility and desirability of changes in the way RPM is dealt with in future.

In this process I have found that the decision to abandon the per se rule in the US was a decision firmly based on elements particular to the US system. The transformation was namely facilitated i.a. by the legal framework’s link to common law and by the fact that the *Dr. Miles* decision was outdated and could not respond to modern needs in this field. There was of course a strong reliance on economic reasoning, an element which has proven to have a supranational dimension. But overall, the majority of elements relied on by the Supreme Court when ruling in favor of the rule of reason referred to developments which had occurred on US grounds. European developments on this restraint have not been of the same character and have definitely not been subject to such drastic change. Here, the policy towards vertical restraints in general might have gradually exited an era of formalism and interventionism and entered an era of modernism. Yet throughout this evolution process, the status of RPM has remained rather intact for reasons particular to the EU system. The approach towards this restraint has gone from strict and intolerant to possibly *somewhat less* strict and intolerant, judging from the subtle modifications made by the Commission in the new Guidelines. These elements or differences between the two systems have substantially *complicated* the comparative exercise carried out in this thesis; i.e. the attempt to discover whether the *Leegin* decision has had or may have an impact on the EU approach towards RPM. This comparative exercise has also been complicated by key differences between the standards of assessment for vertical restraints in the US respectively in the EU.

Despite the above, I have been able to identify certain modifications in the new European RPM regime which suggest that the Commission might very well have been influenced by the *Leegin* decision to some extent, when renewing its legal framework. And while focus in this comparative context has mainly lay on discussing whether developments in the US might influence or might have influenced the EU approach towards this restraint, I have argued that the roles in this relationship might very well shift. It is namely not impossible that the EU approach post June 2010 will be the approach influencing the US post-*Leegin* approach towards this restraint, instead of the opposite. This on the premise that it is currently unclear *exactly* what form the post-*Leegin* rule of reason respectively the hardcore approach under the new Verticals Regulation will take in each respective system.

In the course of this thesis I have also devoted a number of pages to discussing the economic debate on this topic. Judging from the importance granted to economic reasoning in the *Leegin* decision, such reasoning's capacity to influence competition policy should not be undermined. Nonetheless, I have found support for the argument that there is a dividing line between competition law and competition economics which must be kept in mind when discussing policy choices in the context of RPM. I have namely pointed out that the goal of introducing a more economic approach in the legal framework for vertical restraints is not an isolated goal. This goal must namely correlate with other important interests and goals in order for the legal framework to function satisfactorily from a legal point-of-view. Some of these additional interests are the protection of consumers, which constitutes one of the main goals of European competition policy, the interest of maintaining legal certainty and predictability within the legal system and other administrative interests such as the need for clarity in legal rules and non-complexity in their application. If these goals would need to be undermined in order for the legal framework to be made more 'economic', then such a legal framework would cause more harm than benefit to its subjects, to consumers and to competition overall.

After presenting the main economic theories addressing the competitive potential of RPM, both on the pro-and anti-competitive side, I have found that the RPM debate is rich in opinions on both sides and that it is rather complex and multifaceted. I have also found that this economic reasoning does not seem to provide any *safe*, straightforward guidance regarding the *overall* impact of RPM on competition. Most importantly, there appears to be a lack of consensus regarding the coverage or the scope of the economic hypotheses put forward and a lack of empirical evidence to support each of these theories. In my opinion, the safer the answers provided for by economic reasoning e.g. thanks to empirics, the greater the chance of crafting an RPM policy which is strongly linked to economic reality but also meets the interests of competition law as a whole (consumer welfare, predictability within the legal framework etc.). Such a system is also more desirable.

In light of the above, I find the Commission's cautiousness, which is apparent in its new RPM regime, more justified than unjustified. In my opinion, there is no pressing need to abandon the hardcore approach just yet. Instead, there is a greater need to acknowledge that economic thinking in this field has evolved and made new findings on the competitive potential of this restraint. For this reason, I welcome the Commission's elaborations in the new Guidelines regarding the anti-competitive and, for the first time, the pro-competitive potential of this restraint. Nonetheless, no drastic changes in policy should be made before empirics and experience can provide a more sturdy foundation for evaluating the competitive potential of RPM and before these developments can be implemented into the legal framework without putting e.g. consumer welfare at risk.

To sum up, the subtle modifications made by the Commission in the new RPM regime are justified. The changes made bring the legal framework more in tune with developments in economic thinking and appear to leave greater margins for a more nuanced approach towards this restraint. For this reason these elements of change are welcomed. Even though alterations in this direction should not be made drastically, considering the points made in the previous paragraphs, there are still margins for improvement within this legal framework. Since the Commission *has* been willing to acknowledge, for the first time in the new Guidelines, that RPM *can* have pro-competitive potential it is only reasonable to demand that the Commission conveys an *even more* precise and clear message regarding the meaning and implications of the instances named in this pro-competitive list. There is namely a risk that lack of clarity and predictability also leads to confusion amongst those carrying a responsibility to follow this legal framework (individual companies) as to the Commission's policy intentions in this context and its actual view towards these potentially pro-competitive RPM instances. For this reason, the Commission ought to clarify that the pro-competitive examples it refers to do not constitute a safe zone, within which companies relying on RPM will escape scrutiny and the consequences of Art 101(1). Also, the Commission ought to elaborate *further* on the coverage of these pro-competitive hypotheses and on their relationship to the criteria in Art 101(3).

There are also certain margins for gradual and subtle improvement in the Commission's enforcement policy towards this restraint. For the legal framework governing RPM to progress in future, there has to be an increase in experience and knowledge regarding the competitive impact of this restraint. For this experience and knowledge to be gained, the Commission ought to i.a. encourage efficiency claims. Yet, such claims will not be encouraged so long as the Commission maintains a strict and non-nuanced enforcement policy towards RPM e.g. by imposing heavy fines on individual companies merely on grounds of the detection of an RPM agreement. Under such an enforcement policy companies will prefer to stay away from RPM completely, even if their reliance on this restraint might have pro-competitive potential (like that acknowledged in new RPM

regime) and even the capacity to pass the test of Art 101(3). By softening up its enforcement policy and encouraging efficiency claims, the Commission could decrease the risk that knowledge and experience within this legal framework remains static and thus help the system evolve in tune with economic reality. Given that the enforcement policy of the Commission in this context will remain strict, yet not as strict, there is little risk that companies will take advantage of the system to the detriment of competition and consumer welfare. They will instead choose to rely on RPM solely when they are convinced that doing so is worth the risk, i.e. when they are convinced that this practice is liable of generating efficiency gains and liable of passing the test of Art 101(3).

Before closing this thesis it is interesting to take a glance at a topic in this field which in my opinion is most worthy of further research, since it could offer valuable input when discussing future policy choices and directions in Europe when it comes to this restraint. Throughout the last three chapters of this thesis, reference has been made to the lack of empirical evidence regarding the competitive impact of RPM. Given that economic reasoning has been argued to play a central role in crafting the policy view towards this restraint, it is important that such reasoning has substantial support in empirics. Therefore, an issue for further research which could assist the European policy-makers in this context would be to follow up developments in the US post-*Leegin*. It is namely reasonable to expect knowledge and experience on this topic to be gained more quickly in the US than in the EU. This thanks to the abandonment of the per se rule and the introduction of the rule of reason analysis, which can logically be expected to generate more RPM cases. These developments could offer valuable lessons as to the frequency of harm and efficiency and the degree of effects-based analysis demanded for bringing the policy view towards RPM more in line with economic reality.

APPENDIX

Excerpt

Commission Notice, Guidelines on Vertical Restraints, 20th April, Brussels SEC (2010) 411, paras 223-225:

(223) As explained in section III.3, resale price maintenance (RPM), that is agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as a hardcore restriction. Including RPM in an agreement gives rise to the presumption that the agreement restricts competition and thus 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 plead an efficiency defence under Article 101(3) in an individual case. It 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. It 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.

(224) RPM may restrict competition in a number of ways. Firstly, RPM may facilitate collusion between suppliers by enhancing price transparency in the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. RPM also undermines the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales. This negative effect is in particular plausible if the market is prone to collusive outcomes, for instance if the manufacturers form a tight oligopoly, and a significant part of the market is covered by RPM agreements. Secondly, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, i.e. at the distribution level. Strong or well organized distributors may be able to force/convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. This loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers. Thirdly, RPM may more in general soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them. Fourthly, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase. Fifthly, RPM may lower the pressure on the margin of the manufacturer, in

particular where the manufacturer has a commitment problem, i.e. where he has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin. Sixthly, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all. Lastly, RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market and/or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters.

(225) However, RPM may not only restrict competition but may also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3). 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 in 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. Similarly, fixed 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 the consumers. In some situations, the extra margin provided by RPM may allow retailers to provide (additional) presales 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), highservice 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. 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.

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