



Vertical Restraints and Distribution Agreements

Resale Price Maintenance

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# Resale Price Maintenance

- Introduction
- *Leegin Creative Leather Products, Inc. v. PSKS*
- The treatment of resale price maintenance in the draft verticals block exemption regulation and guidelines



Afbeelding 1. In deze tekening wordt het lot van het merkartikel nog niet gekoppeld aan dat van winkeliers of zelfs consumenten, zoals later wel gebeurde. In deze tekening lijkt vooral de fabrikant de dupe van prijsbederf. Bron: De Winkelier (blad van de Algemene Winkeliersvereniging Amsterdam) 25-5-1929.

## Leegin

- In ***Leegin*** the U.S Supreme Court established that individual resale price maintenance should no longer be evaluated under the *per se* standard that applied since 1911, but must be assessed under the “*rule of reason*”.
- U.S. Supreme Court: resale price maintenance requires an assessment of the claimed efficiencies, as well as the negative effects on the affected market in a similar manner as exclusive distribution agreements (*Sylvania – 1977*) and maximum resale prices (*Khan – 1997*)

# Leegin

The *Leegin* judgment is based on the premise that resale price maintenance may produce both positive and negative effects:

- **positive effects:** promotion of interbrand competition by encouraging retailers to invest in promotion; discourage *free-riding* by *discount retailers* en stimulating market entry
- **negative effects:** horizontal collusion at supplier or retailer level, exclusion of more efficient distribution formats and price discounters

**Dissenting opinion:** elevated prices, empirical economic research, maintenance of inefficient distribution methods, uncertainty whether efficiencies will indeed materialise, risk of collusion.

## Leegin

- “[E]conomics literature is replete with procompetitive justifications for a manufacturer’s use of [minimum] resale price maintenance”.
- “With price competition decreased, the manufacturer’s retailers compete among themselves over services”.
- “[T]he antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result”.
- “When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers”.
- “Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand”

## Relevant factors when assessing resale price maintenance

- **Does supplier have market power?**
  - Market power: insufficient interbrand competition to counterbalance the negative effects of resale price maintenance
  - Market power may be used to foreclose competitors
- **Do competing suppliers apply resale price maintenance?**
  - Use of resale price maintenance in concentrated markets may facilitate collusion
  - But: lack of market power suggests efficiency improvements
- **Which party initiates resale price maintenance?**
  - Retailers: may suggest cartel at retail level
  - Supplier: suggests efficiency improvements
- **Facts**
  - Has resale price maintenance indeed resulted in investments in promotion and the like and increased output and demand? And what about prices?

## Status quo

- Article 4 (a) of Regulation 2790/ 1999 treats resale price maintenance as a hardcore restriction of competition. Recital 10 confirms that RPM is a “severely anticompetitive” restraint.
- EC Commission practice, as well as Community Courts confirm illegal nature RPM (except in *Binon*- newspaper distribution).
- BUT: practice in member states differs: see OECD RPM Roundtable October 2008

## The draft regulation and guidelines

- RPM continues to be treated as hardcore restraint under Article 4
- BUT recital 10 suggests somewhat more flexible treatment of hardcore restraints (“*restrictions which are more likely than not to restrict competition and harm consumers*”)
- AND paragraphs 47 and 219 suggest that Commission may not just presume, but must *effectively* assess likely negative effects of RPM.

## Negative effects and efficiencies

- Collusion between suppliers by increased price transparency
- Less incentive to cut prices (in tight oligopoly)
- Collusion between buyers
- Softening of interbrand competition in particular if common distributors and multiple use of RPM
- Price increases at distributor level
- Reduced innovation by preventing market entry of price discounters
- **Question:** how likely are these effects to occur in practice and are courts and agencies unable to evaluate these effects under a rule of reason analysis?

## Efficiencies

- Resale price maintenance may help market entry
- Combat free riding
- Coordinated short-term low price campaign in franchise or “similar” distribution system
- Preventing that product is used as loss leader by large distributors, eventually leading to de-listing and reduced interbrand competition.